



# NGFA

# Newsletter

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## Senate Continues Floor Debate on Financial Regulatory Reform Bill

### ...Action on Food/Feed Safety Bill Delayed; Oil Spill Adds Uncertainty to Climate-Change Bill...

The Senate this week began debate in earnest on its version of the financial regulatory reform bill (S. 3217), approving several of up to 50 different amendments – among more than 95 amendments filed so far – that are scheduled to be considered during what is expected to be two full weeks of floor consideration.

The focus on the financial regulatory bill delayed, yet again, Senate floor consideration of its version of food/feed safety legislation (S. 510), which now is unlikely to see action until shortly before the congressional Memorial Day recess – or more likely, sometime in June or even September. But behind the scenes, staff members from the Senate Health, Education, Labor and Pensions Committee met with Obama administration officials and staff members representing Senate Agriculture Committee Chairman Blanche Lincoln, D-Ark., in an attempt to resolve

further refinements to the food/feed safety bill suggested by the NGFA, National Oilseed Processors Association (NOPA) and other agricultural producer and agribusiness associations.

As the *NGFA Newsletter* went to press, there were promising indications that the NGFA's and NOPA's proposal – championed by Sen. Lincoln and her staff – may be accepted, adding language to the bill requiring the Food and Drug Administration (FDA) to differentiate between the relative risk posed by various hazards and contaminants when present in animal feed versus human food, and specifically recognizing that certain hazards are present in, and cannot be eliminated from, the natural environment in which the animal feed and feeding system operates. In so doing, this change to the bill would recognize that various

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## New USDA, DOT Study Recommends Systems-Based Approach to Transportation Policy

A comprehensive new study issued April 27 by the U.S. Departments of Agriculture and Transportation recommends that Congress and the U.S. government take a systems-based approach to transportation policy that recognizes the interrelationship and cross-cutting issues that affect all modes – rail, truck, barge and vessel – important to shippers of agricultural products.

The 550-plus-page study, which was mandated by Congress under the 2008 farm law and took two years to complete, concluded that U.S. agriculture could benefit from a more comprehensive “supply chain approach” to freight transportation policy, since movements can begin with the rural farm road and end as far away as the other side of the globe. The study emphasized the interconnectedness of U.S. agricultural transportation, and noted that “choke points” caused by inefficiencies in logistics and infrastructure in one mode can reverberate throughout the entire system. It said using a systems-based approach also would result in better targeting of transportation investments to improve the interaction between modes.

The NGFA issued a statement commending the study for

presenting a “balanced and fair review” of policies governing each mode important to agricultural transportation, and for shedding light on the impacts those policies have had on agricultural shippers, receivers and producers. The NGFA emphasized that the need for competitive agricultural transportation service will only continue to increase given projected future demand growth for U.S. agricultural products in domestic and international markets. The study projected that overall freight demand could double by 2035.

The study also reiterated the direct link between freight transportation costs and commodity prices paid to agricultural producers. “As the study notes, agricultural producers ultimately pay most transportation costs, which directly affects their incomes,” said NGFA President Kendell W. Keith in the association's statement. “As pressure continues to mount to trim U.S. government farm program supports because of the federal budget deficit, I fully anticipate national farm and commodity organizations will become even more engaged on transportation policy because of the importance of keeping freight transportation costs reasonable.”

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food-producing animals have a greater tolerance than humans for the presence of certain contaminants, and do not transmit those hazards through food at levels that pose a danger to human health.

Meanwhile, other outstanding issues related to the Senate food/feed safety bill remained under discussion, including: 1) language on product tracing supported by the NGFA that would preserve the ability to commingle agricultural products, commodities (such as grain), feed, pet food and human food (such as flour); 2) language that would require FDA to issue reports to Congress if and when it orders mandatory recalls under new authority granted by the bill; 3) a proposal by Sen. Dianne Feinstein, D-Calif., to ban the use of the chemical Bisphenol A (BPA) in a wide variety of consumer product packaging; and 4) potential amendments from Sen. Jon Tester, D-Mont., that would exempt facilities with an average three-year annual adjusted gross income of less than \$500,000 from the bill's requirements to conduct an analysis of hazards that exist in their operations that adversely could affect human or animal health, as well as to implement controls to reduce such hazards to acceptable levels. [See the April 22 edition of the NGFA Newsletter for additional details on each of these issues concerning the Senate food/feed safety legislation.]

**Senate Financial Regulatory Reform Bill:** The Senate financial regulatory reform bill is a combination of two separate measures previously approved by the Senate Banking Committee and the Senate Agriculture Committee – now consuming more than 1,500 pages. Sen. Chris Dodd, D-Conn., chair of the Senate Banking Committee, has the unenviable task of managing floor debate on the bill. During action on May 5, the Senate by a 95-3 vote approved a key bipartisan agreement reached between Dodd and the committee's ranking member, Sen. Richard Shelby, R-Ala., that creates a process to dissolve failing financial institutions. The Dodd-Shelby amendment deleted from the bill a \$40 billion fund that would have covered the costs of a major financial firm's collapse. Instead, the adopted amendment would make the Federal Deposit Insurance Corp. (FDIC) responsible for liquidating large companies. In such situations, creditors would be required to repay any money they received during a financial failure that exceeded what they would have been awarded through traditional bankruptcy proceedings. However, the FDIC would be authorized to tap a credit line at the U.S. Treasury Department if and when undertaking such liquidations. Meanwhile, the amendment would limit the authority of regulators to rescue financial institutions, enabling the Federal Reserve Board to use its emergency lending powers to assist only solvent financial institutions. Congressional approval would be required before the U.S. government could guarantee the debt of a financial company.

Also adopted by the Senate, by a 96-1 vote, was an amendment by Sen. Barbara Boxer, D-Calif., that would explicitly ban public funding of financial rescues.

Other significant amendments expected to be considered on the Senate floor include:

- ▶ An amendment expected to be offered by Shelby and Sens. Saxby Chambliss, R-Ga., and Judd Gregg, R-N.H., that would modify the Senate Agriculture Committee-passed provisions applying to derivatives. The amendment would remove the current language would ban banks from making derivatives swaps, as well as eliminate the current bill's requirement that requires derivatives transactions to be cleared on public exchanges. The amendment would empower the CFTC and Securities and Exchange Commission to determine which derivatives transactions should be cleared.
- ▶ An amendment expected to be offered by Shelby on behalf of Republican senators that would revise the proposed Consumer Protection Agency by housing it within the FDIC, rather than the Federal Reserve, and giving oversight of the new agency to the FDIC Board. Under Shelby's plan, banking regulators would retain their enforcement and supervisory authority, leaving the new agency largely responsible only for writing regulations.
- ▶ An amendment expected to be offered by Sen. Susan Collins, R-Maine, that would impose a fiduciary responsibility on businesses when dealing with both institutional and retail clients. Under current law, financial advisers are obligated to act in the best interests of clients, but financial brokerages are not. The current version of the Senate bill would mandate a study of the issue, while the House-passed bill (H.R. 4173) would impose a legal obligation on brokers for retail clients, but not for institutional clients like pension funds.

**Issues Important to Grain, Feed Processing Industry:** Prior to Senate floor debate, two important issues for the grain, feed and processing industry were resolved:

- ▶ Contrary to the bill passed by the House last year, the Senate bill does **not** contain a *bona fide* hedge definition. The NGFA argued successfully in the Senate that determining such an important and complex definition is best left to the Commodity Futures Trading Commission (CFTC), which historically has had that authority. When a House-Senate conference committee is formed this summer to resolve differences between the two bills, the NGFA will urge conferees to support the Senate position.
- ▶ Following a meeting with CFTC attorneys involving NGFA representatives, the agency revised a provision included in the original Senate Agriculture Committee bill that would have strengthened the agency's authority regarding insider trading. A key change made by the CFTC and incorporated into the Senate bill clarifies that the agency's intent is to target individuals or entities who knowingly "steal, convert or misappropriate" nonpublic government information and where such individuals act "in reckless disregard of the fact" that the

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information is not public and has not been released by government. The CFTC revisions also clarify that the provision does not preclude entities that have provided information to government from using that information to enter into a futures contract, option or swap.

- ▶ The revised provision was transmitted to the Senate and is included in the Senate bill. No comparable provision is included in the House bill, so the NGFA will work through the conference committee to ensure no backsliding from the current Senate language.

The NGFA's Risk Management Committee also has been reviewing other sections of the Senate bill in preparation for submitting a statement to the Senate soon on behalf of the grain, feed and processing industry concerning financial regulatory reform. Key elements expected to be part of the NGFA statement include the following:

- ▶ When considering financial regulatory reform legislation, Congress should keep in mind the kinds of products and behaviors that caused the financial meltdown, and those that did not (i.e., U.S. agricultural futures markets continued to perform well and were not a cause of the problem).
- ▶ Congress should take great care when considering statutory changes that could increase costs (increased capital requirements, margining concerns, etc.) on legitimate commercial end-users of derivatives who are hedging business risk.
- ▶ Consistent with previous NGFA statements on the bill passed by the House last year, the NGFA supports the legislation's goals of enhanced transparency and increased reporting required of financial organizations.
- ▶ The NGFA is supportive of the bill's exemption for commercial end-users from exchange-trading and exchange-clearing requirements for swaps. This provision does not make any changes to the current regulatory regime for agricultural swaps, but it recognizes the critically important function that some derivatives play in helping firms like commercial grain hedgers manage their business risk.

NGFA members receiving the *NGFA Newsletter* electronically may [click here](#) for section-by-section links to the full text of the bill.

**Senate Climate-Change Bill:** Meanwhile, the "odd-man-out" on the Senate legislative calendar may well be the climate-change legislation, which still is being tweaked and whose legislative text has not been unveiled yet. Sen. Lindsey Graham, R-S.C., who had been partnering with Sens. John Kerry, D-Mass., and Joe Lieberman, I-Conn., to craft the measure, abruptly pulled out of the effort as a protest against Senate Democratic leaders vowing to first focus on immigration reform legislation.

The climate-change legislation has been muddied further by the British Petroleum oil-drilling disaster in the Gulf of Mexico, which threatens provisions that would expand off-shore oil and

gas exploration – one of the key sections designed to garner Republican support. No less than five congressional committees – two in the Senate and three in the House – already have announced hearings, starting May 11, to explore the incident as a precursor to possible legislation that could reorganize the federal agency within the U.S. Interior Department – the Minerals Management Service – responsible for overseeing offshore drilling, as well as to possibly require the use of remote-controlled shutoff switches as a backup to standard emergency shutoff valves on drilling rigs.

Kerry, Lieberman and Graham initially had planned to introduce the legislation on April 26. But the best they could do was to convey an 11-page synopsis of the measure to the Environmental Protection Agency (EPA) and Congressional Budget Office to begin the process of obtaining an economic impact assessment. EPA indicated estimating the economic impact of the bill's outline could take four to six weeks.

Based upon information provided by Senate contacts, it is believed that the Senate climate-change bill, if and when introduced, would include the following elements:

- ▶ It would take effect in 2013 and require reductions in greenhouse gas emissions by 17 percent by 2020 (compared to 2005 levels) and 80 percent by 2050. The greenhouse gas emission reductions would be phased in for different industry sectors, with energy- and trade-sensitive industries given an additional four years before being subjected to such limits. Agricultural crop production practices would be exempt from carbon emission caps.
- ▶ It would contain a mix of carbon dividend and cap-and-trade provisions, likely varying by industry sector. A fixed price limit would be imposed for carbon emission allowances – both a price ceiling and a floor, so as to narrow the trading range. Two-thirds of revenues generated by auctioning allowances to utilities would be returned to consumers through carbon-dividend payments; the remainder would be traded under cap-and-trade approach.
- ▶ Dropped from the bill was the previously considered idea of imposing a direct tax on fuel at pump based on greenhouse gas equivalents. Instead, the measure would subject oil companies to pollution allowances, with income generated from the purchase of such allowances directed to the federal Highway Trust Fund.
- ▶ It would preempt EPA from regulating greenhouse gas emissions, although the agency would be empowered to monitor and enforce compliance. It is unknown whether it would preempt all state and local greenhouse gas laws; California in particular is urging that its tighter standards be grandfathered under the federal bill.
- ▶ It would provide loan guarantees and liability protection for constructing 12 nuclear power plants.



## Katie Schmidt Joins NGFA Staff as Meetings Manager/Executive Assistant

NGFA President Kendell Keith has announced that **Katie Schmidt** has joined the NGFA's staff team as meetings manager/executive assistant.

Her responsibilities include managing the selection of meeting sites and hotels for NGFA conventions, conferences, seminars and committee meetings, as well as coordinating other events. She also provides executive staff support to the NGFA president.

"We're fortunate to have someone of Katie's talents and conscientiousness," Keith said. "She's had an immediate impact in organizing several important meetings of NGFA committees this summer, our fall Board of Directors meeting as well in helping plan the first-ever **Joint Feed and Pet Food Industries Conference** we're conducting with our strategic partner, Pet Food Institute, on Sept. 22-24 in Chicago. Our members will enjoy her friendly personality, positive can-do attitude and strong commitment to member service."

Prior to joining the NGFA's staff, Schmidt was a project specialist for EDG Associates in Rockville, Md., where she was responsible for a wide array of duties for the management consulting and technical services firm. The company is involved extensively in event planning and information management, and its clients include federal, state and local government agencies, private companies and nonprofit organizations.



She is a Pennsylvania native, and a graduate of the University of Pittsburgh at Johnstown, Pa., with a major in communications and public relations.

## Sundlof Resigns as Director of FDA's Center for Food Safety and Applied Nutrition

There were several personnel announcements in key government agencies important to the grain, feed and processing industry in the last week.

On May 3, **Dr. Stephen F. Sundlof** announced his resignation as director of the Food and Drug Administration's Center for Food Safety and Applied Nutrition (CFSAN) to take a two-year assignment with the Virginia-Maryland Regional College of Veterinary Medicine, effective May 10. In his new capacity, Sundlof will be starting a new training and development program in regulatory science in conjunction with the University of Minnesota and the Ohio State University, drawing faculty from all three universities and FDA to design a curriculum for certification and master degrees primarily for government employees. He has served for the past two years as CFSAN director, after serving the previous 14 years as director of the Center for Veterinary Medicine, which oversees the animal feed, pet food and animal drug industries. Sundlof has served with great distinction at FDA after having joined the agency 1994 after 14 years as a faculty member at the University of Florida's College of Veterinary Medicine. He will remain an FDA employee while at the Virginia-Maryland Regional College of Veterinary Medicine.

Sundlof will be succeeded as CFSAN acting director by **Michael Landa**, who has been the agency's deputy director of regulatory affairs since 2004 and has been with FDA since 1978. Tapped as acting deputy directors at CFSAN were **Roberta Wagner**, who has served as director of CFSAN's Office of Compliance since 2008, and **Donald Kraemer**, who has been deputy director of CFSAN's Office of Food Safety since 2007.

In other personnel developments:

- ▶ President Obama nominated **Catherine Woteki** to be undersecretary of agriculture for research, education and economics at the U.S. Department of Agriculture. From 1997-2001, Woteki served as the first undersecretary for food safety at USDA during the Clinton administration, overseeing the Food Safety and Inspection Service and the U.S. government's Office for the Codex Alimentarius Commission. She also coordinated U.S. government food safety policy development and USDA's continuity of operations planning. She also worked for two years at the White House Office of Science and Technology Policy and served as USDA's deputy undersecretary for research, education and economics. From 2002-05, she was dean of agriculture and professor of human nutrition at Iowa State University, where she also was head of its Agriculture Experiment Station. Since 2005, Woteki has served as global director of scientific affairs for Mars Inc., the multinational food, confectionery and pet care company. In this role she has managed the company's scientific policy and research on health, nutrition and food safety issues.
- ▶ **Steven L. Sanders** this week resigned as director of the USDA Farm Service Agency's Kansas City Commodity Office (KCCO) to take a position with the National Information Technology Center, effective May 10. Sanders has served as KCCO director since August 2008. Prior to that, he served five years as director of FSA's Information Technology Services Division. He joined the agency in 1984 as a program specialist responsible for automating its acreage-reporting business practices.





## EPA Issues Question-and-Answer Document on Air Emissions Rule for Feed, Feed Ingredient Manufacturers

The U.S. Environmental Protection Agency (EPA) on April 30 issued a question-and-answer document that provides additional information on several aspects of the agency's regulations governing emissions of chromium and manganese compounds at feed and feed ingredient manufacturing plants.

EPA issued the document in response to questions posed by the NGFA and other organizations that asked for clarification on certain provisions of the agency's rule.

The six-page EPA document provides additional information on the rule's applicability, reporting and recordkeeping requirements, housekeeping provisions, equipment controls and other issues. The following are several important highlights pertaining to the rule's applicability:

► **Q: In the definition of "prepared feed manufacturing facility," it indicates that a facility is primarily engaged in manufacturing animal feed if "the production of animal feed comprises greater than 50 percent of the total production of the facility on an annual basis." How is the 50 percent determined? By sales, by mass, by volume?:**

**A:** EPA's answer states that, in the majority of situations, the most straight-forward method to make this determination is on a mass basis. However, EPA notes that there may be cases where mass-based determinations are inappropriate, and cites as an example a facility that raises cattle, but also has a prepared feed manufacturing operation on-site. In this situation, EPA states that if such a facility uses more than 50 percent by weight of the feed produced to feed the on-site animals, then it would **not** be considered to be a prepared feed manufacturing facility. But if the facility uses less than 50 percent of the feed produced and sells the rest, it **would be** a prepared feed manufacturing facility and subject to the rule (provided that materials containing manganese or chromium are used).

► **Q: In a related question, if a facility has grain elevators and prepared feed production, how would you determine if the facility is a "prepared feeds manufacturing facility?":**

**A:** In this situation, EPA states that the 50 percent criterion again would be used to make this determination. If the grain sold or otherwise transported from the facility comprises more than 50 percent of the total mass produced at the facility (total mass of grain, plus total mass of feed), then the facility would be "primarily engaged" in producing grain, and would **not** be considered to be a prepared feed manufacturing facility under the regulations.

In the EPA document, the agency also states that:

- The regulation is designed to cover facilities that **intentionally** add chromium or manganese to feed products, and is not intended to cover additives or premixes containing only trace levels of chromium or manganese as impurities.
- The regulations' requirement that a device to reduce fugitive emissions by reducing the distance between the loading arm and the truck or railcar at the bulk loadout area where prepared feed products are loaded allows the facility to use "any device, for example (drop filter) socks or enclosed chutes...." EPA also states that the work-practice standard is not an opacity standard, so no opacity limit applies. Instead, "the facility should inspect to ensure that the device being used to minimize dust is attached to the loadout end of the bulk loader and is not in disrepair, and that it is close enough to the top of the prepared feed pile in the truck or railcar to minimize fugitive emissions," the EPA document states.
- Total enclosure of facilities is not required under the regulations. Instead, EPA states, the rule's provision that doors be closed "except during normal ingress and egress..." simply requires that doors not be left open to the outside, and that they are (to be) opened only for normal entry and exit to help minimize the release of (chromium or manganese) dust from the facility." Thus, it does not apply to mixing room/bagging rooms or other internal areas of a facility.

As reported in the April 22 edition of the *NGFA Newsletter*, feed and feed ingredient manufacturers subject to the EPA regulations were to provide an initial notification to the appropriate permitting authority by **May 5**. Importantly, the EPA question-and-answer document does contain an error concerning the initial notification date that EPA told the NGFA it will be correcting. The EPA document mistakenly states that it misreported the notification date in its Federal Register announcement, and that facilities will have until late August or early September to provide such notification. Again, that is in error, and EPA has told the NGFA it will be issuing a correction stating that the initial notification date for existing facilities subject to the regulations was May 5.

Members receiving the *NGFA Newsletter* electronically may access the EPA questions and answers document by [clicking here](#). Members also may access EPA's sample initial notification form by [clicking here](#), and a comprehensive report on the EPA rule published in the Jan. 14 edition of *NGFA Plant Operations Bulletin* by [clicking here](#). Questions about the sample form, or the requirements of EPA's rule, may be directed to NGFA Director of Feed Services David Fairfield at 712-243-4035, or by email at [dfairfield@ngfa.org](mailto:dfairfield@ngfa.org).





## Supreme Court Decides Highly Anticipated Case on Class-Action Arbitration

The U.S. Supreme Court on April 27 issued a highly anticipated decision on whether an arbitration clause in a contract extends to a dispute presented as a “class action” (whereby the named claimants are representative of a broader group with common claims and issues).

In a split 5-3 decision, the High Court ruled that the Federal Arbitration Act (FAA) does **not** impose so-called “class-action arbitration” upon the parties if the agreement-to-arbitrate is “silent” on that question.

The case [*Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*] stemmed from an antitrust class-action lawsuit brought by AnimalFeeds against Stolt-Nielsen and other shipping companies alleging price-fixing. The standard contract between AnimalFeeds and the shipping companies contained an agreement-to-arbitrate. The arbitration agreement itself was silent on whether class-action arbitration was provided for, and the question was submitted to a panel of arbitrators. The arbitrators concluded that class-action arbitration was provided for under the agreement.

However, a U.S. district court reviewed and overturned the arbitrators’ decision, stating that the arbitrators had exceeded their authority. The U.S. Court of Appeals for the Second Circuit then reversed the district court, ruling that that the antitrust claims were indeed arbitrable.

In a majority opinion authored by Justice Samuel Alito – and joined by Chief Justice John Roberts and Justices Antonin Scalia, Anthony Kennedy and Clarence Thomas – the Supreme Court disagreed with the appellate court’s reasoning that under an arbitration agreement, a “default rule” could be interpreted as providing for class-action arbitration even though the arbitration clause was silent on whether class-action arbitration was invoked.

In so doing, the Supreme Court first noted that, “the FAA imposes certain rules of fundamental importance, including the basic precept that arbitration is a matter of consent, not coercion.” The decision stated that an “implicit” agreement to class-action arbitration may **not** be inferred solely based upon the parties’ agreement to arbitrate. In the High Court’s opinion, “this is so because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator.” Therefore, the majority opinion found that to impose class arbitration on parties who had not consented to it would be “fundamen-

tally at war” with the FAA’s basic principles that arbitration is matter of consent.

The three justices who joined in a dissenting opinion – Justices Ruth Bader Ginsburg, John Paul Stevens and Stephen Breyer – concluded that they would have dismissed the petition as not ripe for judicial review and declined to reach a ruling on the merits of the case. Justice Sonia Sotomayor did not participate in the case.

The Supreme Court’s decision widely is anticipated to lead to further battles in state and federal courts concerning class-action arbitration – a hotly contested and controversial subject.

Although it’s not likely that this decision would directly affect cases in the NGFA Arbitration System, the High Court’s ruling remains very pertinent as a strong and continuing support for arbitration in general. In its latest decision:

- ▶ The Supreme Court reaffirmed the longstanding principle that individual parties are bound to arbitrate a dispute when the arbitration agreement expressly provides for it. The High Court’s decision represents another strong endorsement of both the FAA’s primary purpose “to ensure that private agreements to arbitrate are enforced according to their terms” and the basic precept under the FAA that arbitration is a matter of “consent, not coercion.”
- ▶ Although the Supreme Court ultimately agreed with the petitioners’ contention that the decision of the arbitration panel should be vacated, it began its analysis stating that, “in order to obtain that relief, they must clear a high hurdle. It is not enough for petitioners to show that the panel committed an error – or even a serious error...[citations omitted].... It is only when an arbitrator strays from interpretation and application of the agreement and effectively dispenses his own brand of industrial justice that his decision may be unenforceable.”
- ▶ Even the opinion issued by the three dissenting justices stated that – if they were to have addressed the merits of the case, they would have adhered to the “strict limitations” the FAA places on judicial review of arbitral awards, thereby affirming the decision of the Second Circuit, which rejected the request to vacate the arbitration decision.



# Rails, Rivers and Roads

by Randall C. Gordon  
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## ("Transportation Policy" continued from page 1)

The study also faulted several rail practices for reducing competition to the detriment of agricultural shippers and producers. For instance, it was critical of rail carriers for the following actions, some of which are done in conjunction with mergers and acquisitions between railroads:

- ▶ Canceling reciprocal switching agreements with competing railroads and shippers, or increasing switching rates dramatically – in some cases to more than \$500 per carload.
- ▶ Restricting or terminating interchanges and closing gateways to markets.
- ▶ Entering into so-called “paper-barrier” agreements that preclude a successor railroad from competing in markets served by the carrier selling a rail line. “Paper barriers lasting into perpetuity are difficult to defend and the penalties for interchanging with competing carriers are often punitive, serving only to restrict competition,” the USDA-DOT study said. “Many paper barriers are not transparent to shippers, who bear the increased costs of this practice.”
- ▶ Refusing to quote freight rates on newly created so-called “bottleneck” rail segments. Under this practice, railroads only quote a rate for mileage represented by the entire distance of a shipment, rather than just the distance it would take to reach a competing carrier. The study faulted a federal Surface Transportation Board’s (STB) ruling permitting bottleneck rates, which it said has caused a “loss of competition, an increase in rates and a decrease in service.”

Among other recommendations, the USDA-DOT study urged policymakers to reevaluate the current antitrust exemption granted to railroads and ocean carriers, saying that such action could improve competition and reduce transportation costs for agricultural shippers. It also called on the STB to review its so-called “simplified procedures” for challenging the reasonableness of rail rates, noting that agricultural shippers have faulted the existing rules for being prohibitively expensive given the expected economic damages that could be recovered.

The following are among the most important findings in the USDA-DOT study for each of the four transportation modes:

- ▶ **Rail:** The study noted the “significant decrease” in rail-to-rail competition for grains and oilseeds between 1992 and 2007, with nearly 75 percent of agricultural geographic areas losing rail competition and regions in which a rail carrier had a monopoly increasing from 10 to 15 percent. During this 15-year period, the revenue-to-variable-cost ratio (profitability) of rail carriers increased in 83 percent of those agricultural geographic areas, the study found.

The study found freight rail rates for grain and oilseeds were higher than for other commodities, increasing 46 percent between 2003 and 2007 compared to 32 percent for other commodities during the same period. The study noted that rate increases reflected a lack of rail capacity from 2003 through the first half of 2006, as well as the additional investment by carriers in locomotives, freight cars and other infrastructure. It found that 18 percent of revenues generated by railroads between 1980 and 2007 were invested in rail infrastructure improvements. Yet the study noted that despite the economic downturn, grain rail freight rates remained 50 percent higher in the first quarter of 2009 than they were in the third quarter of 2003.

The study also said fuel surcharges imposed by rail carriers were a “profit center,” ranging from 55 percent to 137 percent higher than the actual incremental increase in the cost of fuel. The study said that in September 2008, when rail fuel surcharges peaked, they varied among the different carriers from 46.58 cents to 87 cents per car mile – a nearly 87 percent difference between railroads. It further noted that the average fuel surcharge per grain carload during the fourth quarter of 2007 was \$292.68, while the actual increase in fuel costs to railroads from 2001-2007 was only \$188.54 per carload.

However, the study also pointed out that the constraints of “pervasive economic regulation” prior to enactment of the Staggers Rail Act in 1980 “nearly bankrupted the railroad industry.” Largely as a result of the deregulation ushered in by that law, the number of Class I railroads declined from 40 in 1980 to seven today.

The study also provided an extensive history of railcar ownership patterns, with the percentage of the covered hopper car fleet owned by shippers or lessors – not carriers – increasing to 68 percent by 2007. Further, the study found that achieving the federally mandated renewable fuels standard that calls for the use of 36 billion gallons of biofuels by 2022 will require 40 unit train destinations, up from only 13 currently.

- ▶ **Barge:** The study noted that barges remain the most cost-effective mode for transporting grains and fertilizer, but their share of total movements slowly is declining. It cited the declining balance since 2002 of the Inland Waterways Trust Fund, comprised of revenues generated through barge fuel taxes used to finance 50 percent of the cost of lock and dam renovation on rivers, and said that a “clear path forward” for financing is needed to replenish the fund to rehabilitate the aging infrastructure.
- ▶ **Truck:** The study noted that trucks represent a “highly

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competitive” mode that transports 70 percent of agricultural, food, forest products, alcohol and fertilizer tonnage. Average operating costs represent 95 percent of operating revenues for trucking firms, it found. The study emphasized the importance of retaining the federal exemption for agriculture, first enacted in 1995, that provides a seasonal 100-air-mile-radius exemption from restrictive hours-of-service commercial truck-driving rules for drivers transporting agricultural commodities, feed and farm supplies. The law also provides an exemption from the commercial driver’s license requirement for drivers of farm vehicles used to transport agricultural products or supplies to or from a farm within 150 miles of the owner’s farm.

► **Ocean Vessel:** The study found that more than half of U.S. agricultural exports, by value, are transported in ocean shipping containers – from bulk grains to frozen beef. But the

availability of such containers has been diminished greatly by the economic downturn, since their availability is dependent upon round-trips of imported cargo. This has resulted in “lost sales and unreliable service to overseas buyers,” the study said.

“This in-depth study is a treasure trove of factual information and data on agricultural transportation that will serve as a very useful reference text for many years to come,” the NGFA said.

Members receiving the *NGFA Newsletter* electronically may [click here](#) to access the complete study. [Click here](#) to access the study’s table of contents, from which you can obtain individual chapters.



## Tech Talk

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### OSHA Unveils ‘Severe Violator’ Enforcement Program, Increases Penalties

The Occupational Safety and Health Administration (OSHA) on April 23 announced a new “[Severe Violator Enforcement Program](#)” that the agency said will enhance the effectiveness of its enforcement activities by increasing penalties for employers receiving citations.

Further, the agency distributed a [memorandum to its regional administrators](#) that increases penalties for violations, another indicator of OSHA’s increased emphasis on enforcement.

**Severe Violator Enforcement Program:** OSHA’s Severe Violator Enforcement Program “concentrates resources on inspecting employers who have demonstrated indifference...by willful, repeated, or failure-to-abate violations,” the agency said. Under the program, an inspection of an employer classified as a “severe violator” may result in: 1) enhanced follow-up inspections of the worksite at issue; 2) [nationwide inspections](#) of the same employer’s related worksites; 3) increased “company awareness” of OSHA’s enforcement actions against the company; and 4) enhanced settlement provisions, including possible corporate-wide agreements.

OSHA said the following types of cases will be considered under the Severe Violator Enforcement Program:

► A fatality/catastrophe inspection in which OSHA finds one or more willful or repeated violations or failure-to-abate notices based upon a serious violation related to a death of an employee or three or more hospitalizations.

► An inspection in which OSHA finds **two or more willful or repeated violations or failure-to-abate notices** (or any combination of these violations/notices), based upon high-gravity serious violations related to a “high-emphasis hazard.” OSHA defines a high-emphasis hazard as a high-gravity serious violation of specific standards related to **fall hazards, amputation hazards, combustible dust hazards**, silica hazards, lead hazards, excavation/trenching hazards, shipbreaking hazards and petroleum refinery hazards.

► An inspection in which OSHA finds three or more willful or repeated violations or failure-to-abate notices (or any combination of these violations/notices), based upon high-gravity serious violations related to highly hazardous chemicals, as defined in OSHA’s process safety management standard.

► All egregious enforcement actions.

**Administrative Enhancements to OSHA’s Penalty Policies:** In its memorandum to regional administrators, OSHA stated that its penalties are “too low to have an adequate deterrent effect.” In effect, the memorandum revises OSHA’s penalty classification system, as currently outlined in its Field Operations Manual. Of particular note, OSHA:

► Expanded the time frame for considering an employer’s history of violations (when setting penalties) from three to five years.

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- ▶ Increased penalties by 10 percent for employers that have been cited for any high-gravity serious, willful, repeat or failure-to-abate violations within the previous five years.
- ▶ Increased the minimum proposed penalty for a serious violation to \$500.

- ▶ Calculated final penalties serially, unlike current practice where all of the penalty reductions are added and then the total percentage is multiplied by a gravity-based penalty to arrive at the proposed penalty. (OSHA's example in the memorandum results in an increase of approximately 50 percent in the monetary value of penalties.)

## OSHA Announces Intent to Propose Standard for Identifying, Correcting Hazards

The Occupational Safety and Health Administration (OSHA) on May 4 announced a series of stakeholder meetings that it said would be used to develop a proposed new standard that would require each employer to implement safety-prevention measures tailored to hazards that may exist in the employer's workplace.

Dubbed the injury and illness prevention standard (I2P2), the regulations would require employers to develop and implement a plan for identifying and correcting safety and health hazards. Workers also would participate in the development and implementation of such plans. The agency noted that a similar effort that resulted in an 1998 proposed rule that would have required employers in general industry and maritime workplaces to establish safety and health programs was discontinued in 2002 during the Bush administration.

According to OSHA, the new I2P2 standard would include the following elements: 1) Management duties, including setting goals, establishing policy and allocating resources; 2) employee participation, including employee access to safety and health information; 3) hazard identification and assessment, including hazards that should be identified, inspections and investigations;

4) hazard prevention and control; 5) education and training, including content and relationship to other OSHA requirements; and 6) program evaluation and improvement.

Similar to the combustible dust advanced notice of proposed rulemaking, OSHA has scheduled a series of stakeholder meetings as a precursor to the proposed I2P2 standard. Those meetings will be conducted June 3 in East Brunswick, N.J., June 10 in Dallas, Texas, and June 29 in Washington.

The stakeholder meeting agenda will focus on the following topics: 1) Possible regulatory approaches; 2) scope and application of a proposed rule, including which industries, hazards and employers should be covered, as well as the relationship of the rule to current OSHA standards; 3) how the standard should be organized, including the regulatory text, whether it should include mandatory or voluntary appendices, and whether there are other standards that should be incorporated by reference; 4) the role of consensus standards; and 5) economic impacts.

Members receiving the *NGFA Newsletter* electronically may [click here](#) to access the OSHA announcement.

## OSHA Requires Safety Training to be Offered in Language that Workers Understand

Occupational Safety and Health Administration (OSHA) Administrator David Michaels on April 28 issued an enforcement memorandum directing compliance officers to check and verify that workers are receiving OSHA-required training in a language and vocabulary they can understand.

According to the document, "...if an employee does not speak or comprehend English, instruction must be provided in a language the employee can understand." Further, OSHA said training is required to take into consideration such factors as employees with limited vocabulary or literacy. OSHA said managers directing an employee with a limited vocabulary to read training materials does not satisfy the agency's training requirements. "For example, (compliance officers) should look to

whether workplace instructions regarding job duties are given in a language other than English and determine whether the employer already is transmitting information with comprehensibility in mind," the OSHA memorandum states. "(Compliance officers) should also look beyond any basic paper documentation; i.e., an employer may have training records but employees may not have been able to understand the elements included in the training."

The directive orders compliance officers to issue a serious violation citation if they reasonably determine that an employer did not convey training to an employee in a manner they were capable of understanding. Members receiving the *NGFA Newsletter* electronically may [click here](#) to access the OSHA memorandum.





# Membership Matters

by Todd Kemp  
Director of Marketing/Treasurer

## New Safety, Health & Environmental Quality Conference

### ...Collaboration Between NGFA and Grain Journal...

For the first time, the NGFA and *Grain Journal Magazine* are teaming up to present a major “Safety, Health and Environmental Quality” conference.

Registration now is open – managers and their key employees with responsibility for safety and health issues and environmental compliance responsibilities should register now!

► **When:** Afternoon of July 28 through the morning of July 29

► **Where:** Hilton Omaha, Omaha, Neb.

This new, tailor-made conference will deliver the latest information and practices to help companies comply with federal regulatory requirements, and plan for new regulatory events that may be coming. Speakers will include industry experts and representatives from federal agencies, including the Environmental Protection Agency (EPA) and Occupational Safety and Health Administration (OSHA). This week’s *NGFA Newsletter* Tech Talk column on pages 8-9 provides more than ample motivation on reasons to attend!

**Program:** [Click here](#) to review the program – condensed into two half-day sessions to maximize impact and minimize demands on your time! Headlining the first afternoon session will be **Jonathan Snare**, a former high-level official at OSHA and the U.S. Labor Department who now is a leading legal expert on federal regulatory matters.

**To Register:** [Click here](#) to access a registration form. The early-bird rates are your best value!

**Trade Show:** A limited number of exhibit spaces are available (a maximum of 20 exhibitors can be accommodated). This is an excellent opportunity for companies providing goods and services to the industry, especially in health/safety/environmental areas. [Click Here](#) for exhibit information and pricing – and for sponsorship options.

**Hotel Reservations:** [Click here](#) to reserve your room at the Hilton Omaha. Identify with the NGFA to receive the special group rate of \$135 per night, single or double occupancy. The hotel room block expires on **July 2**, so don’t delay!



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