



# NGFA

# Newsletter

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## House Committee Approves Major Food/Feed Safety Bill

### ...NGFA Works to Secure Important Changes to Protect Grain, Feed Industry...

The House Energy and Commerce Committee on June 17 by a voice vote approved a massive new food/feed safety bill that would expand dramatically the Food and Drug Administration's (FDA) regulatory authority.

Under the bill, all facilities registered under the Bioterrorism Act would be required to conduct a hazard analysis of their operations and implement controls that are effective in "prevent(ing), eliminate(ing) or reduc(ing) to acceptable levels" those hazards that are "reasonably likely to occur. Importantly, this requirement to conduct a hazard analysis and implement preventive controls would encompass all grain elevators, commercial feed mills, grain processing plants and grain export facilities, as well as other types of food and commercial agribusinesses registered with FDA under the Bioterrorism Act. Most facilities also would be required to implement written food safety plans that explain their hazard analysis and preventive controls; procedures for monitoring and verifying the effectiveness of preventive controls, and corrective actions to be undertaken when warranted; product-tracing procedures; procedures for "ensuring" the safety of products received from suppliers; and recordkeeping and recall procedures.

Most of the bill's provisions would take effect within 18 months of enactment, although the user fees envisioned in the bill would take effect in fiscal 2010, which begins Oct. 1, 2009.

Several important improvements were made in the bill compared to the version approved June 10 by the Health Subcommittee of House Energy and Commerce Committee. **One of the most significant is a provision advocated jointly by the NGFA, Pet Food Institute and American Feed Industry Association that would authorize (but not require) FDA to take into account differences between human food and animal feed and pet food when implementing requirements for firms to conduct a hazard analysis, implement preventive controls and develop written food safety plans.** Another significant change is that the bill now allows FDA to exempt or modify the requirements for developing and implementing **written food safety plans** for facilities **solely engaged** in storing raw agricultural commodities for further processing, or manufacturing animal feed or pet food.

## NGFA Meets New CFTC Chairman



*NGFA President Kendell Keith (right) visits with new Commodity Futures Trading Commission Chairman Gary Gensler during an initial meeting on June 18 in Washington. Lack of convergence in the CBOT wheat futures contract, regulatory reform of the U.S. financial system, and the CFTC's concept paper that would limit hedge exemptions for swap dealers were among the issues discussed during the meeting. See pages 6-7 for more information.*

But numerous major objectionable provisions remain in the bill, upon which resolution will attempt to be reached between congressional committee members and stakeholders, including the NGFA, before the bill reached the House floor for a vote.

The NGFA and American Farm Bureau Federation are leading a broad consortium of agricultural producer and agribusiness organizations in analyzing and spearheading a joint response to lawmakers on the legislation. *[See the enclosed NGFA Issues and Actions for a report on a joint letter submitted by 20 national agricultural organizations on the bill prior to House Energy and Commerce Committee consideration.]*

**Improvements in Bill:** In addition to the aforementioned changes providing flexibility for FDA to specify requirements for facilities involved in raw commodity handling and feed manufacturing, the bill approved by the House Energy and Commerce Committee contains the following improvements compared to previous versions:

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## USDA Extends Comment Period on Syngenta's Biotech Ethanol Corn

The deadline for submitting public comments on the petition submitted by Syngenta Seeds Inc. seeking deregulation of its biotechnology-enhanced corn event (Event 3272) that produces a microbial enzyme that facilitates ethanol production yield has been extended to July 6.

But in extending the comment period, the U.S. Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) said it has concluded that the alpha-amylase enzyme present in the corn does not meet the statutory definition of a "plant pest," to which the agency said its regulatory authority is limited. The reason, APHIS said, is that enzymes like alpha-amylase are not "living" and therefore cannot be considered "pests" under the definition of the term in the Plant Protection Act. "[E]nzymes cannot be plant pests because the enzyme 'cannot be regarded as living,'" the agency said. Further, APHIS ruled that it has no legal authority under the Plant Protection Act to consider economic, marketing or commercial ramifications of the biotech ethanol corn trait. However, the agency said it was reopening the public comment period to solicit "additional comment on the issues raised during this process" and on its conclusion that Syngenta's biotech ethanol corn trait does not constitute a plant pest.

APHIS said it received more than 13,000 comments in response to its initial request for comments on Syngenta's petition to deregulate Event 3272, which has been undergoing field testing under an APHIS regulatory permit since 2002. In its initial Nov. 19, 2008 notice, APHIS said it had concluded that the trait did not present a risk of introducing plant pests or being

disseminated further under conditions specified in the permit. The agency said most of the 13,000 comments submitted were form letters from organizations opposed to biotech crops of any kind.

But the agency noted that it also had received comments that raised specific food-safety concerns, such as the potential for the ethanol corn trait to be allergenic. Some of these comments urged APHIS to consider the alpha-amylase enzyme a plant pest because it could interfere with corn-starch processing, and therefore directly or indirectly damage plants or plant products. The agency said other comments, such as those submitted by the NGFA and North American Export Grain Association, expressed concerns regarding economic, manufacturing and commercial problems that would result if the corn seeped into the general commodity stream.

APHIS said 40 comments were submitted in support of deregulating Syngenta's biotech ethanol corn trait, primarily from corn producer and ethanol firms. "...[T]he support from farmers of corn does suggest that individuals with a substantial interest in the health of the national corn crop do not perceive that either plant pest risks or economic/marketing risks will arise if Event 3272 is granted nonregulated status," APHIS said. In addition, the agency said studies had been submitted by advocates of the ethanol corn "suggest(ing) that there will be no impacts on wet distilled grains and improved dried distilled grains, and that...Event 3272 corn is equivalent to currently grown corn lines in other agronomic and nutritional qualities, demonstrated through field and feed studies."

## APHIS Seeks Comments on Biotech Quality Management Audit Standard

The U.S. Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) is requesting comments by Aug. 23 on the draft audit standard being used to evaluate quality-management systems to be used by biotechnology providers to protect against the inadvertent release of unauthorized biotech-enhanced events.

In particular, APHIS is seeking comments on a requirement – designated as requirement 7 within the draft audit standard – that specifies that participants address critical control points in their containment procedures to prevent the unauthorized introduction of regulated biotech commodities. Regulated biotech products are those biotechnology-enhanced events that still are under USDA regulatory oversight, such as those involved in pilot tests. Under the U.S. biotech regulatory framework, APHIS regulates the importation, interstate movement and environmental release of biotech-enhanced organisms that are, or may be, plant pests.

Requirement 7 also stipulates that providers develop procedures or methods for: 1) identifying regulated articles while they are in field locations, in storage, or when

being transported, imported or transferred; 2) planning and monitoring the environmental release of regulated articles; 3) post-harvest handling activities and methods to maintain the identity of regulated products; 4) devalitizing and disposing of regulated products; and 5) submitting regulatory compliance incidents to the appropriate regulatory authority.

APHIS seeks comments on whether the critical control points in requirement 7 of the draft audit standard identify all areas and elements on which biotech providers should focus to meet the agency's regulatory requirements. The agency also seeks information on whether the draft audit standard is consistent with current best practices used by the biotech industry; whether there are incentives USDA could use to encourage participation in the voluntary audit program; and whether there is sufficient flexibility in the draft audit standard.

**Submitting Comments:** Comments may be submitted through the U.S. government's electronic portal by [clicking here](#). Contact NGFA Director of Legislative Affairs Chris Holdgreve at [choldgreve@ngfa.org](mailto:choldgreve@ngfa.org) or at 202-289-0873, ext. 13 if you would like more information on this issue.



## Negotiations Reach Critical Stage on House Climate-Change Bill

Almost daily negotiations continued this week between two key committee chairmen on the controversial House climate-change bill.

The negotiations involve House Energy and Commerce Committee Chairman Henry A. Waxman, D-Calif., whose committee passed the bill (H.R. 2454) on a party-line 33-25 vote on May 21, and House Agricultural Committee Chairman Collin Peterson, D-Minn., who has been outspoken in expressing concerns over the adverse impacts the measure would have on U.S. agriculture.

House Speaker Nancy Pelosi, D-Calif., and other House Democratic leaders are pushing for a deal that would garner support from Peterson and a sufficient number of his Democratic colleagues on the House Agriculture Committee to secure passage of the measure on the House floor next week. A key demand of Peterson and almost every other member of the House Agriculture Committee – Republicans and Democrats alike – involve giving the U.S. Department of Agriculture (and not the Environmental Protection Agency) the authority to regulate offsets generated by agricultural producers that then could be traded under the “cap-and-trade” system that would be established under the bill. Other concerns include the ability for existing carbon-reduction practices to be credited and the amount of allowances (amount of carbon that can be emitted without penalty or purchase of offsets) being given to rural electric utilities.

Pelosi met on June 11 with Peterson and Waxman in an attempt to begin narrowing the impasse, with a goal of reaching a consensus by June 17 – a deadline that was not met. Unless an agreement is reached early during the week of June 22, the House will have a short window of opportunity to review and debate the bill before leaving for its July 4 recess.

The Pelosi-Peterson-Waxman meeting occurred on the same day as a contentious House Agriculture Committee hearing that members used to vent concerns over the bill. Rep. Frank Lucas, R-Okla., ranking member of the House Agriculture Committee, repeatedly bore in on Secretary of Agriculture Tom Vilsack, asking if he supported the bill. Vilsack responded by attempting to allay some concerns, but conceded that “more work is left to be done” on the bill to protect U.S. agriculture’s interests. To the dismay of several congressmen, Vilsack also said USDA has not conducted a cost or economic analysis of the bill’s potential impact on U.S. agriculture. Peterson said the bill unquestionably would adversely affect agricultural production costs. “We’ll end up taking the hit,” Peterson said. “This is going to significantly increase the cost of fuel.... You think food prices aren’t going up?” Peterson continued his demand that USDA be given primary responsibility for implementing any cap-and-trade scheme that applies to agriculture, and renewed criticism of EPA for deciding to calculate indirect land use impacts, such as

potential clearing of rain forests in foreign countries, when computing greenhouse gas emissions resulting from corn-ethanol production.

Meanwhile, a House Agriculture Committee-sponsored survey of agricultural organizations, including the NGFA, resulted in broad consensus that: 1) agriculture should be exempt from the bill’s carbon-emission limits; 2) producers who have adopted carbon-saving production practices should receive credit for those practices; 3) taking more U.S. farmland out of production should not occur; and 4) the market, not government, should set the value of any carbon emission allowances under a cap-and-trade approach.

As approved by the House Energy and Commerce Committee, the bill would allow carbon emitters, such as electric utilities and power plants, to use offsets to acquire up to 2 billion tons of emission credits annually – half of which would be required to come from domestic sources. Additional provisions of the bill were reported in the May 21 edition of the *NGFA Newsletter*.

**Senate Action:** Meanwhile, Sen. Barbara Boxer, D-Calif., who chairs the Senate Environment and Public Works Committee, announced her intent to consider its version of the climate-change bill before Congress begins its August recess – using the bill emerging from the House as a starting point.



## Calendar

- June 25, 2009:** NGFA/GEAPS Joint Grains Grades and Weights Committee  
Renaissance St. Louis Grand & Suites Hotel  
St. Louis, Mo.
- July 28-29, 2009:** NGFA Feed and Animal Agriculture Strategic Issues Committee  
NGFA Conference Room, Washington, D.C.
- July 28-29, 2009:** NGFA/GEAPS Grain-Quality Management Seminar  
Marriott St. Louis Airport Hotel, St. Louis, Mo.
- July 29, 2009:** Joint Agroterrorism/Facility Security Committee  
Marriott St. Louis Airport Hotel, St. Louis, Mo.
- July 30, 2009:** NGFA Feed Legislative and Regulatory Affairs Committee  
Hyatt Regency Capitol Hill, Washington, D.C.
- Aug. 12-13, 2009:** NGFA/GEAPS Joint Safety, Health and Environmental Quality Committee  
NGFA Conference Room, Washington, D.C.
- Sept. 9-11, 2009:** NGFA Board of Directors  
L’Enfant Plaza Hotel, Washington, D.C.



("Food/Feed Safety Bill" continued from page 1)

- ▶ **Livestock, Poultry Exemption:** The bill would exempt from the entire bill (including registration fees) the food, animals and portions of facilities and farms already regulated by the U.S. Department of Agriculture. As currently drafted, this exemption would apply expressly to livestock and poultry regulated by USDA under the Federal Meat Inspection Act, Poultry Products Inspection Act or the Egg Products Inspection Act. Importantly, however, the exemption would **not** extend to on-farm feed manufacturing facilities.
- ▶ **User Fees:** The bill would reduce to \$500 per facility, with an overall cap of \$175,000 per company (regardless of the number of facilities) the annual registration fee that would be required for all domestic and foreign facilities. That's down from the previous discussion draft bill's \$1,000-per-facility user fee, with no cap, and the \$2,000-per-facility fee originally proposed by Rep. John Dingell, D-Mich. The bill also would impose separate additional fees to compensate FDA for: 1) registering importers (\$500), with the fee for customs brokers and filers deleted in this version; 2) reinspecting regulated facilities that fail an FDA inspection; 3) conducting product recall, with the fee assessed against the offending facility or company; and 4) issuing export certificates for FDA-regulated products.
- ▶ **Product-Testing Requirements:** Significantly, the bill now would require the reporting to FDA of laboratory test results only for finished products manufactured by the highest-risk facilities. Further, such a reporting requirement could be imposed only after FDA conducts a feasibility and cost-benefit analysis. It could be inferred from previous versions of the bill that product test results could have been required for raw and processed products, such as mycotoxin tests conducted on grains and analytical tests on feed.
- ▶ **Civil and Criminal Penalties:** The latest version of the bill would reduce the civil penalties contained in the previous draft. For **intentional violations**, the maximum fine would be limited to \$50,000 per violation for individuals and \$500,000 per violation for companies, with an overall cap of \$100,000 for individuals and \$7.5 million for companies in a single proceeding (event). For **unintentional violations**, the maximum fine would be limited to \$20,000 per violation for individuals and \$250,000 per violation for companies, with an overall cap of \$50,000 for individuals and \$1 million for companies in a single proceeding (event). Previously, the bill would have imposed a \$100,000 maximum fine per violation on individuals and a \$500,000 fine for each violation on companies, with no cap for a single proceeding and regardless of whether the violation was intentional or not.

- ▶ **Mandated Frequencies for Facility Inspections:** The bill would continue to require FDA to inspect all facilities – ostensibly including inspections of foreign facilities by FDA-recognized entities – based upon a prescribed risk-based schedule. Facilities deemed by FDA to be “high risk” would be required to be inspected every six months to one year (previously it was every six to 18 months). Facilities designated as “low risk” would be required to be inspected every 18 months to three years. And warehouses that solely store grain, feed, food or ingredients would be required to be inspected every five years. However, new authority was added that would allow FDA to adjust the inspection frequencies for low-risk facilities and warehouses after submitting a report to Congress.

**Major Remaining Objectionable Provisions:** Among the most problematic provisions in the version of the bill approved by the House Energy and Commerce Committee are these:

- ▶ **Authorizing FDA to Mandate Facility-Specific Product-Safety Standards:** The bill still would authorize FDA to establish (by either regulation or guidance) facility-specific preventive controls or elements of a written food safety plan. The latest iteration of the bill does contain a slight change that would allow facilities to propose alternative preventive controls than those mandated by FDA; but facilities would be required to provide data or other information upon demand to FDA demonstrating that the alternative controls are effective.

This section of the bill also remains objectionable because it would allow FDA to regulate through guidance documents – in essence, leapfrogging the notice-and-comment rulemaking process that includes requirements to respond to public comments and conduct economic impact analyses. These provisions are made even more troublesome by the bill's provisions that would delegate the authority to issue such directives to the FDA District Office level; those offices frequently issue and implement inconsistent and varying interpretations of even existing FDA regulations and policies.

In addition, this section of the bill would continue to require that facilities “ensure” their preventive controls will preclude the introduction of adulterated products in interstate commerce. And facilities would be required to “validate” the effectiveness of their preventive controls, leaving open the question of what FDA would deem to be sufficient “validation.”

- ▶ **Standards for Raw Commodities:** The bill would require FDA to implement regulations setting standards for safe growing, harvesting and storage of raw agricultural

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commodities, including on-farm regulation of non-livestock or poultry if required to minimize the risk of serious adverse health consequences or death to humans or animals. It specifically references naturally occurring hazards, such as mycotoxins in corn. The bill's expansive language also specifically cites manure, water quality, employee hygiene, sanitation, animal controls and temperature controls that FDA determines to be "reasonably necessary," and could be misconstrued to apply to environmental safety, which is not the purview of FDA.

- ◆ **FDA Access to Records:** The bill's provisions governing access to records was made worse by the addition of two new provisions that would: 1) allow FDA immediate access to records not originally sought; and 2) require facilities to electronically submit to FDA their written food safety plans and "supporting information" relied upon by the facility to establish its preventive controls, as well as documentation of corrective actions taken. As with the previous version of the bill, the committee-approved measure would expand dramatically FDA's access to facility records and expressly encompasses farms in the records-access requirement. Under the bill, FDA would have the right to access and copy any records "relating to the manufacture, processing, packing, transporting, distribution, receipt, holding (storage) or importation" of food, feed, feed ingredients or other agricultural commodities or processed products. FDA no longer would need to have any indication that a food/feed safety problem may exist as a precondition to accessing or photocopying records. Indeed, the bill would expressly delete the Bioterrorism Act limitation on records access that requires FDA to first have a "reasonable belief" that a product is adulterated and presents a threat of serious adverse health consequences or death to humans or animals.

The bill also would authorize FDA to promulgate regulations mandating the types of records required, as well as allow the agency to require that records be kept in a standardized electronic format and be retained for up to three years. This provision also raises concerns over unauthorized disclosure by FDA of proprietary or confidential business information to which the agency gains access when reviewing the contents of written food/feed safety plans and other records, such as the specifics of a company's food safety or quality assurance plans, manufacturing processes or methods and product formulas, which has occurred in the past.

- ◆ **Suspension of Facility Registration:** The bill would require facilities to register annually with FDA, and update changes in registration information within 30 days, including changes in contact information at the facility. FDA would be empowered to suspend a facility's registration – in essence, shutting down its operations – for violations that could result in serious adverse health consequences or death to humans or animals or if the facility is more than 30 days late in paying the new registration fee imposed under the bill.
- ◆ **Product-Tracing:** The bill would require that FDA implement a product-tracing system capable of identifying, within two business days, each person who grows, produces, manufactures, processes, packs, transports, stores or sells agricultural commodities, food, feed or feed ingredients associated with a product-safety incident. This would far exceed the Bioterrorism Act's requirement that facilities maintain records sufficient within 24 hours to identify the immediate previous source of the agricultural products and ingredients they receive and the next subsequent recipient to which they ship – the so-called "one-step-forward/one-step back" requirement.
- ◆ **FDA Recall, Cease-Distribution and Quarantine Authorities:** The bill would give FDA expansive authority to issue mandatory recall and cease-distribution orders, as well as to impose quarantines over the movement of products for food-safety-related reasons. One improvement made to the bill is that FDA's authority to quarantine the movement of products would be limited to situations in which an "imminent" threat exists to human or animal health.
- ◆ **Country-of-Origin Labeling:** The bill would require all non-processed food products (which would encompass raw agricultural commodities, like grains and oilseeds) to identify the country-of-origin of the product. For processed commodities (like feed, flour, corn and oilseed meals and oils), the country of final processing would be required to be shown on labeling. These labeling requirements also ostensibly would apply to products of U.S. origin.

The NGFA's Country Elevator Committee and three feed-related committees – the Feed Legislative and Regulatory Affairs Committee, Feed Manufacturing and Technology Committee and Feed and Animal Agriculture Strategic Issues Committee – are actively engaged with NGFA's staff in developing policy responses on the bill.





## FDA Further Delays Implementation of Electronic Registry for Reporting Adulterated Products to Sept. 8

The Food and Drug Administration (FDA) has further delayed its implementation of the congressionally mandated Reportable Food Registry – this time to **Sept. 8**.

In a notice published in the June 11 *Federal Register*, the agency also announced the availability of a draft guidance document – presented in a question-and-answer format – providing its views on how the registry will operate once activated.

Congress, when enacting the FDA Amendments Act of 2007, mandated that FDA establish a publicly accessible web-based electronic portal that facilities registered with FDA under the Bioterrorism Act will be required to use to report adulteration incidents for products that have left their control and that meet the threshold of posing a “reasonable probability” of causing “serious adverse health consequences or death to humans or animals.” Importantly, the draft guidance issued by the agency contains no additional parameters concerning the threshold of adulteration present in a product that would trigger reporting. Several industry groups have equated the reporting threshold to the level of contamination that would trigger a Class 1 recall by FDA. This is the FDA recall level applicable to a “*serious emergency situation involving recall of a product that may have an immediate or long-range adverse effect on the life or health of animals or humans.*”

Facilities registered with FDA under the Bioterrorism Act include grain elevators, feed mills, feed ingredient manufacturers, grain processors, export grain elevators and others. By law, such reporting to FDA is to occur no later than 24 hours after it is determined that the product meets the “reasonable probability” threshold.

The agency on May 27, 2008 had announced it was using its regulatory discretion to delay implementation of the Reportable Food Registry “until at least spring 2009” so as to integrate it into its new business enterprise system – known as the MedWatch<sup>Plus</sup> Portal. The law had required FDA to implement the portal by Sept. 27, 2008. However, in its June 11 notice, FDA announced the portal now is expected to be operational on Sept. 8, and that reporting through the portal will be delayed until then. In the interim, as it has said previously, FDA is “strongly encourage(ing)” firms to report adulteration incidents involving FDA-regulated food and feed through existing mechanisms, such as by notifying the FDA district office.

**FDA Draft Guidance:** In its newly issued 11-page draft guidance, which members receiving the *NGFA Newsletter* electronically may access by [clicking here](#), FDA reviews

the major statutory requirements governing when covered facilities are to report adulteration incidents to the Reportable Food Registry.

Information included in the draft guidance covers: 1) who is required to submit the report; 2) the conditions under which reporting is not required; 3) the seven data elements to be included in an initial report to FDA; 4) data that FDA may require be reported to the immediate previous source and/or immediate subsequent recipient of the adulterated product; 5) reporting requirements up-and-down the supply chain; 6) recordkeeping and records-access provisions governing reported incidents; 7) circumstances under which reports are to be amended and updated; and 8) where requests are to be submitted for reconditioning, salvaging or diverting adulterated food safely to animal feed use.

There are two particularly significant provisions in the FDA guidance that are not specifically addressed in the underlying statute:

- ▶ FDA states that once a facility obtains a test result indicating that a product meets the “reasonable probability” threshold of posing “serious adverse health consequences or death to humans or animals,” the responsible party from the facility is to submit a report to the Reportable Food Registry. “[A]bsent other circumstances clearly demonstrating the inaccuracy of the first test result, the first test result upon which the reportable food determination was made should be considered valid,” the FDA guidance states.
- ▶ Filing of a report to the Reportable Food Registry “shall not be considered an admission that the food involved is adulterated or caused or contributed to a death, serious injury or serious illness.” The FDA guidance states that reports to the registry will be considered “safety report(s)” under the “Safety Report Disclaimer” section of the Federal Food, Drug and Cosmetic Act (section 756; 21 U.S.C. 379v). Companies may include with their reports a statement that is to accompany any report released for public disclosure that “denies that the report or notification constitutes an admission that the product involved caused or contributed to a death, serious injury or serious illness.”

The NGFA’s Feed Legislative and Regulatory Affairs Committee will be reviewing the FDA draft guidance, and will submit any necessary comments to the agency by the requested July 27 deadline.





## NGFA Supports Roll-Back of Hedge Exemption for Swap Dealers

### ...CFTC Move Could Help Re-Establish Convergence...

In a June 16 letter to the Commodity Futures Trading Commission (CFTC), the NGFA endorsed a CFTC “concept release” published March 24 that would replace the virtually automatic hedge exemption for which swap dealers are eligible and replace it with a limited risk-management exemption.

The NGFA statement advised that the change could help limit the impact of investment capital on agricultural futures markets and help re-establish convergence, especially in the Chicago Board of Trade (CBOT) wheat contract.

The March 24 notice by the CFTC was published in the form of an “advance notice of proposed rulemaking.” As such, it is a very early step in a potential rulemaking that could roll back the CFTC’s so-called “swaps policy” that has been in place since 1991. Under that policy, swap dealers who engage in over-the-counter (OTC) transactions then can offset their OTC risk with exchange-traded futures – and with no speculative position limits applied. If the concept is to proceed, the agency next would evaluate comments submitted in response to its notice; publish a proposed rule subject to additional public comment; and then, following further evaluation of those comments, publish a final change to the CFTC policy. It is not yet clear how quickly such a process might occur, but it would continue for a number of months.

The new CFTC concept of a limited risk-management exemption first surfaced within the agency in late 2008 following the summer’s run-up in agricultural futures values. In particular, the financial stress experienced by commercial grain hedgers in meeting margining requirements served as a warning signal to the CFTC that the impacts of investment capital should be more closely examined.

The NGFA statement responded to a series of 15 questions posed by the CFTC concerning the possible policy change. In its statement, the NGFA

- ▶ voiced strong support for a limited granting of hedge exemptions, subject to application to and approval by the CFTC.
- ▶ Advocated that hedge exemptions be granted to swap dealers only when their OTC clients can be demonstrated to qualify as commercial participants that otherwise would be eligible for a hedge exemption on an exchange.
- ▶ Recommended that swap dealers and their clients be required to report to the CFTC to demonstrate eligibility for a hedge exemption.

More details on the NGFA statement are reported in the accompanying edition of *NGFA Issues and Actions*.

## Aloha! Make Plans Now for the NGFA’s 114<sup>th</sup> Annual Convention!

As you make your travel plans for the coming year, be sure to reserve March 3-5 for the NGFA’s 114<sup>th</sup> annual convention in beautiful Maui, Hawaii!

It will be the first time since 1992 the NGFA’s premier annual event has convened in Hawaii. Activities will be centered around the beautiful Westin Maui Resort Hotel (<http://westinmaui.com>), which will serve as convention headquarters.

**Register Now!** Early bird registration is \$500 for members and \$1,150 for non-members. Save by signing up now! Registration materials are available on the NGFA web site at [www.ngfa.org](http://www.ngfa.org).

**Hotel Reservations:** Call the Westin Maui at 1-808-921-4651 for room reservations. Identify with “National Grain and Feed Association” to obtain the special room rate of \$290 (+ tax) per night, single/double occupancy. A credit card guarantee is required to hold each reservation. The credit card will be charged for an advance deposit equal to two nights’ room rate. The special hotel group rate is available for the period of Feb. 25 through March 11, 2010.

**Aloha! NGFA Convention Amenities:** All guests in the NGFA room block receive the following complimentary items: a

welcome flower-lei greeting, as well as a 10 percent discount on all spa treatments and admission to Westin WORKOUT™; two (2) bottles of water, replenished daily; free self-parking (based on availability); Westin Maui souvenir shopping bag in guestroom; outdoor portrait sitting and free 4 x 6 color photograph; local and toll-free calls; and free transport via the Westin shuttle to/from historic Lahaina town!

**Airline Reservations:** Plan to fly in to Maui’s main airport, Kahului Airport (airport code OGG) which is serviced by most major airlines. American Airlines is offering a 5 percent discount off the lowest applicable published air fare for NGFA convention attendees. This discount is valid for travel to Maui Feb. 25 through March 11, 2010. Use promotional code A2720AA when making your airline reservations at [www.AA.com](http://www.AA.com). This code also may be used when booking your flight via phone by calling the American Airlines Meeting Services Desk at 1-800-433-1790 (a separate ticketing charge of \$20 applies for tickets purchased via phone).

For more information on the 2010 NGFA convention, visit our website [www.ngfa.org](http://www.ngfa.org). Aloha!



## CFTC Subcommittee on Futures Market Convergence Begins Work

### ...NGFA Stresses Urgency of Situation...

There was a strong consensus during the initial meeting of the Commodity Futures Trading Commission's (CFTC) Subcommittee on Convergence that the Chicago Board of Trade (CBOT) wheat futures contract needs to be amended to enhance its performance and improve convergence between futures and cash prices during the delivery period.

During a June 8 conference call, subcommittee members concurred that the CBOT wheat futures contract is experiencing the most severe convergence problems, and most participants agreed that the participation of index funds and other investment capital was a contributing factor.

Participating as the NGFA's official representative on the subcommittee is NGFA Risk Management Committee Vice Chairman **Matt Bruns**, vice president, exports for Archer Daniels Midland Co., Decatur, Ill. Several other members of the NGFA's Risk Management Committee and representatives of other NGFA-member companies also serve on the subcommittee.

Some concerns were expressed that the pending CBOT wheat contract changes scheduled to take effect in July – consisting of seasonal storage rates, new delivery locations and vomitoxin specifications – may not be sufficient to reestablish convergence. Several potential additional contract changes were discussed by the CFTC subcommittee, including demand certificates, the CME Group's variable storage rate concept, and changing the wheat delivery system to a Gulf-based contract, the latter of which was proposed recently in a study issued by several University of Illinois economists.

David Lehman, director of commodity research and product development at the CME Group and its representative on the subcommittee, outlined the exchange's timeline to evaluate pending contract changes and consider additional action. He

reported that the exchange has received applications from 58 facilities representing 87 million bushels of storage capacity to become regular for delivery, about 85 percent of potential delivery capacity identified by the CME Group in the new delivery territories. He noted that the CME Group would like to observe the effects of the July changes to the wheat contract for some period of time before deciding whether to take additional action. Lehman briefly described the CME Group's variable storage rate concept, which could be the next contract change contemplated if the pending July changes do not achieve desired outcome.

But CFTC staff members participating on the conference call signaled strongly that the agency wants a plan developed by September or making further changes in the CBOT wheat futures contract if the pending July changes to the contract fail to have the desired effects.

During the call, NGFA representative Bruns reviewed how last summer's rapid rise in futures values placed severe financial stress on many elevators to meet margin calls. He expressed concern that lenders may not have the capacity to service a repeat of that situation, and expressed a sense of urgency to reestablish contract convergence. He reminded the group that producers have felt impacts of the changed market situation as elevators have had to reduce or even eliminate traditionally offered cash forward contracts because of risk and financial exposure.

The subcommittee is scheduled to conduct a second conference call in late July to discuss that month's wheat contract expiration, examine whether convergence has improved and begin considering next steps, even though the pending contract changes will not have been fully implemented by that time.

## USDA to Require Warehouses in 23 States to Retain UGRSA Contracts to be Eligible to Offer Marketing Assistance Loans to Producers

The U.S. Department of Agriculture (USDA) late today (June 18) published a notice announcing that it still will require commercial warehouses operating in 23 states to have a Uniform Grain and Rice Storage Agreement (UGRSA) contract if they wish to offer marketing assistance loans to producers under its farm programs.

USDA had announced on April 7 that starting with the 2009 crop year, it generally no longer would require federal- and state-licensed warehouses to obtain a UGRSA contract

with the Commodity Credit Corporation (CCC). USDA made the policy change when issuing a final rule implementing the marketing assistance loan and loan deficiency payment programs for the 2009 crop year. USDA's final rule stated that it no longer would require the execution of a UGRSA contract by warehouses that were either federally or state licensed, so long as the warehouse was able to issue warehouse receipts – an effort to avoid encompassing ethanol plants, feed manufacturers or other facilities that may be state-licensed but typically are not licensed or inspected for their storage obligations. The policy change





# Newsletter

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applied to commodities covered under the UGRSA, including grains, oilseeds, rice and pulses; cotton, peanuts and sugar are excluded.

When issuing the final rule, USDA said it reserved the right to continue to require a CCC storage agreement in instances in which states do not have functioning licensing and examination systems in place. In the notice (Notice LP-2123) issued today, USDA said that based upon its interpretation of current state laws, the following states do **not** have an operating warehouse licensing program, and warehouse operators will continue to be required to have a UGRSA to offer marketing assistance loan program services to producers: Alaska, Arizona, California,

Connecticut, Delaware, Florida, Hawaii, Maine, Maryland, Massachusetts, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Utah, Vermont, Virginia and West Virginia.

In the remaining 27 states, warehouse operators that are federal- or state-licensed no longer will be required to have a UGRSA contract. However, USDA notes that CCC reserves the right to require the execution of a UGRSA contract in those states if deemed necessary to protect its interests.

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



# Rails, Rivers and Roads

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## Appellate Court Leaves STB Rules on Small Rail Rate Cases Intact

In a 26-page decision issued June 9, a federal appeals court upheld the federal Surface Transportation Board's (STB) current rules that apply to small rail rate cases.

In so doing, the court rejected divergent petitions submitted from shipper organizations (including the NGFA) and railroads asking that the STB be directed to reconsider its tiered approach for resolving rate-relief claims of less than \$5 million – revised rules that were issued in 2007. The court, deferring to the agency's revised regulations, ruled that the STB had acted within its statutory authority, and was neither arbitrary nor capricious in setting out its rules.

The central dispute involved in the case related to the 1995 Interstate Commerce Commission Termination Act, which directed the STB to establish a simplified and expedited method to resolve smaller freight rail rate challenges (in which a full stand-alone cost rate case presentation is prohibitively expensive, given the value of the case). But subsequent methods developed by the STB had resulted in very few rail rate challenges.

The NGFA and other shipper organizations brought the joint case after repeated attempts to revise the rules through the STB proceedings process. In their briefs, as well as in oral arguments heard in April, the shipper groups argued that the STB's final rules, even after being modified, still were too restrictive and prevented broad ranges of potential small rail rate disputes from being considered by the agency. Specifically, the groups said the cost to bring a rate challenge for small claims still was not reasonably related to the potential payoff across the majority of rail movements for small shipments. Shippers asked the court to remand the rules back to the STB for reconsideration on these grounds. Rail carriers also challenged the STB's rules, alleging that they provided too much opportunity for shippers to file rate

challenges with the agency.

The three judges on the appellate court panel assigned to the case – Judith W. Rogers, David S. Tatel and Thomas B. Griffith – posed tough questions during the oral argument for the attorneys representing the shippers, railroads and the STB. Receiving most of the attention during the hearing, and again in the court's decision, were shippers' arguments regarding inadequacy of the relief limits provided for small rate case proceedings, and whether the STB had adequately and reasonably addressed concerns that the rate-relief cap for a simplified proceeding was too low to provide effective rate relief for rail movements for small shipments.

**The Court's Decision:** In its decision, the court recognized that, "the shippers bring an intriguing but ultimately unavailing challenge." In the end, the court ruled that the agency sufficiently had addressed the shippers' arguments. The court noted that the STB's analysis was "qualitative" rather than "quantitative," but indicated that such a "qualitative" analysis was appropriate in this case because of the need to balance the competing interests by making a "judgment call" on a matter of policy. The court then discussed in some detail the shippers' arguments concerning the need to forego a significant portion of relief in a range of cases under the STB's chosen relief caps, but again deferred to the agency. In so doing, the court referenced what it called the "obvious ambiguity inherent in this statutory language," which it said requires the court to "uphold the [STB's] interpretation unless it is unreasonable." The court also deferred to the agency in rejecting the shippers' challenge to the STB's simplified stand-alone-cost procedures and the agency's failure to test those procedures.

Similarly, the court rejected all of the railroads' challenges to the STB's rules.



# Membership Matters

by Todd Kemp  
Director of Marketing/Treasurer

## NGFA/GEAPS 2009 Grain Quality Management Seminar; Registration Now Open!

Tuesday-Wednesday, July 28-29, 2009, Marriott St. Louis Airport Hotel

**Early Bird Registration Deadline: June 30; Hotel Deadline: July 6**

Know how to recover from a natural disaster near your facility and protect the value of your stored grain? How can you best track your inventory, monitor shipping and prevent theft? What are the best strategies to prevent contamination by mycotoxins?

Those are just a few of the topics that will be addressed when the NGFA and Grain Elevator and Processing Society host this summer's premier industry professional-development event – the Grain Quality Management Seminar on July 28-29 in St. Louis.

Major sessions will be featured on: 1) how to manage grain contamination and product-safety challenges posed by mycotoxins and other contaminants; 2) best practices for grain handling and storage, such as shrink, binning/blending practices, maintaining quality for grain in emergency (ground piles) or temporary storage; 3) ways to protect against theft and deceptive practices; 4) good sampling, inspection, receiving, shipping and inventory-management practices; 5) addressing grain-quality challenges

posed by natural disasters, such as flood-damaged grain; and 6) innovative equipment, processes or services that can assist in managing grain quality.

Grain-quality management is important to the successful operation and profitability of the grain, feed and processing industry. From elevator to consumer, managing the quality of stored grain affects the selling price, operating costs, company reputation and more. You'll get information you can take back to your job and directly apply to day-to-day operations at your facility to increase profits.

For members receiving the *NGFA Newsletter* electronically, [click here](#) for the complete seminar program. [Click here](#) for more information, including registration and our host hotel – the Marriott St. Louis Airport Hotel. You also can make your hotel reservation by calling the hotel at 1-314-423-9700; identify with “GEAPS/NGFA” to obtain the special \$111-per-night room rate, single or double occupancy.



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