



## **Bush Administration Issues New Plans for Regulating Safety of Imported and Domestic Food and Feed**

The Bush administration on Nov. 6 issued two new plans that would significantly change the federal government's approach to regulating the safety of food, feed and feed ingredients.

The new approaches are embodied in an "*Action Plan*" issued by the presidentially appointed Import Safety Working Group, as well as the Food and Drug Administration's (FDA) "*Food Protection Plan*," which addresses both domestic and imported food and feed.

In officially releasing the two plans at a White House event, President Bush emphasized the significant shift in regulatory philosophy embodied in both plans – toward a more risk-based, preventative approach that focuses on the entire life cycle of food and feed products. For imports, Bush said this means a shift away from an inspection-based approach at U.S. ports toward a risk-prevention approach that "focuses on stopping dangerous products from reaching our border in the first place – for example, by ensuring that food and consumer products meet our standards for safety before they leave their home countries."

As expected, one of the recommendations consistently repeated in both plans is to place increased reliance on governmental and private-sector methods for certifying the safety of both imported and domestic food and feed products, as well as good agricultural practices and "good importer practices." The plans also propose that Congress grant FDA the authority to accredit truly independent third parties to engage in such certification activities. But the plans stress that to be accredited by FDA, third parties will need to be free of any hint of financial or other conflicts of interest.

**U.S. Negotiations with China on Safety of Export Products:** In a related development, the NGFA today participated in a small, invitation-only, private briefing on the status of the U.S. government's negotiations with the People's Republic of China on two distinct Memoranda of Agreement. One memorandum – with China's General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ) will encompass food, feed, feed ingredient, seafood and other agricultural products shipped by China to the United States. A second memorandum

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## **Congress Overrides Presidential Veto of Major Waterways Bill**

Congress took swift and decisive action this week to override President Bush's Nov. 2 veto of the major waterways legislation that, among other things, authorizes \$3.6 billion to construct new locks on the Upper Mississippi and Illinois Waterway.

The Senate today (Nov. 8) voted 79-14 to override the veto of the so-called Water Resources Development Act (H.R. 1495), 17 votes more than the two-thirds majority required. It was the first override of a bill vetoed by Bush during his two-term presidency. Thirty-four Senate Republicans joined 45 Democrats to vote for the override. The House had voted 361-54 on Nov. 6 – 103 votes more than needed to override the veto. By overriding the veto, the bill automatically becomes law without the president's signature. The House previously approved the bill by a 381-40 margin, while the Senate did so by an 81-12 vote.

The NGFA joined a coalition of agricultural organizations in urging Congress to override the veto, calling the legislation "long overdue" and warning that further delays would pose

the risk to U.S. agriculture of having "the world will look elsewhere for a reliable supplier of basic food commodities.

"In the seven years since the Congress passed the last Water Resources Development Act, a significant number of needs have arisen for our nation's inland waterways," the joint letter said. "This...bill addresses many of those issues by authorizing critical projects on the inland waterways, including the modernization of seven locks along the Upper Mississippi and Illinois River, a project that will dramatically improve our ability to deliver crops to the global marketplace."

Importantly, the law authorizes construction of seven new 1,200-foot locks at locks 20, 21, 22, 24 and 25 on the Upper Mississippi River, as well as at the LaGrange and Peoria locks on the Illinois Waterway. Also included are authorizations for switchboats at locks 20 through 25 to expedite barge movements. A large ecosystem restoration on the Upper Mississippi-Illinois Waterway is also authorized in the bill.

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## House Ag Committee Plans to Act on CFTC Reauthorization

### ...NGFA Works to Safeguard Cash-Forward Exemption...

The NGFA has learned that House Agriculture Committee Chairman Collin Peterson, D-Minn., is planning to act on the long-stalled legislation reauthorizing the Commodity Futures Trading Commission (CFTC), perhaps as early as the end of the week of Nov. 12.

It is unclear at this stage whether the bill first would be acted on by the House Agriculture Committee's General Farm Commodities and Risk Management Subcommittee, which has conducted several hearings recently on related issues, or proceed directly to the full committee for consideration.

Legislation authorizing operations of the CFTC expired last year, and efforts to craft a new bill faltered because of differing views on CFTC regulation of off-exchange transactions in the energy and foreign exchange markets. A series of hearings conducted by both the CFTC and the House agriculture subcommittee, along with a recently released report by the U.S. General Accountability Office – the investigatory arm of Congress – now may help congressional authorizing committees coalesce around a common approach. In the meantime, the lack of authorization has had a negligible impact upon the CFTC's operations.

One item of interest and potential concern for NGFA members is an effort to provide the CFTC with additional enforcement authority over "exempt contract markets." As opposed to exchange-traded contracts, these typically are off-exchange, over-the-counter instruments, and the primary concern has focused on alleged abuses and a lack of clear CFTC enforcement authority in foreign exchange and energy markets. Congressional staff members have told the NGFA that there has been some discussion among committee members about extending such a "fix" to other "leveraged transactions," including agricultural transactions, so the "bad actors" don't simply shift, for example, from involvement in foreign exchange markets into agricultural markets.

While no legislative language has been drafted yet, the NGFA actively is communicating its concerns to Congress that any attempt to include agriculture could have the unintended consequence of impinging on the cash-forward exemption from CFTC regulation contained in the Commodity Exchange Act. This exemption is of critical importance to the grain, feed and processing industry, which uses cash-forward contracts extensively.



## On Capitol Hill

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Bush had cited the overall cost of the bill, estimated at more than \$23 billion, and its failure to identify urgently needed priorities as the primary reasons for the veto. However, a bipartisan group of House and Senate leaders, argued that a large backlog in projects had accumulated during the years since the last waterways bill was passed in 2000. They further noted that even though the law authorizes the projects, Congress still must appropriate the specific funding for each project, and will be evaluating priorities during that appropriations process.

Thus, the annual appropriations process takes on even greater importance with the Upper Mississippi-Illinois Waterway project now authorized. In fiscal year 2005, Congress appropriated \$13.5 million in pre-construction, engineering and design (PED) funds for the project, followed by \$10 million in subsequent years. In the current energy and water appropriations bill, the Senate has included a recommendation for \$12 million to continue these efforts. PED funds are important to provide the foundation for eventual construction of the new locks, which the NGFA and other supporters will urge begin as soon as possible.

## House Passes Peru Free Trade Agreement as Other Trade Votes Loom

The House, by a 285-132 vote, today (Nov. 8) passed the first free trade agreement under the new Democratic-controlled Congress.

The Peru free trade agreement was the first trade pact considered following the brokering of an agreement between congressional Democratic leaders and the

Bush administration that include additional commitments on labor and environmental standards. The vote could provide some momentum on the free trade front for the potentially more difficult votes looming on trade accords waiting in the wings with South Korea, Columbia and Panama.

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The FTA would result in immediate duty-free access for more than two-thirds of U.S. agricultural exports to Peru, including wheat, soybeans, soybean meal, crude soybean oil, high-quality beef, cotton and many fruits, vegetables and processed food products. Peruvian tariffs on most remaining U.S. agricultural products, including pork, corn and dairy, would be phased out within 15 years – tariffs for many of those would expire within five years. All tariffs would be eliminated within 17 years. In addition, Peru agreed to eliminate its price band that applies to more than 40 agricultural products, including corn, rice, dairy and sugar. The American Farm Bureau Federation has estimated that the accord would increase U.S. farm exports by \$705 million.

Significantly, the trade accord also resolved several major sanitary, phytosanitary and technical standards issues that are expected to expand U.S. meat exports. These include agreement on a science- and risk-based approach for addressing bovine spongiform encephalopathy in beef and beef products, and avian influenza in poultry and poultry products, as well as pork and pork products, and rice. These actions included Peru's

formalization of its recognition of the equivalence of the U.S. meat and poultry inspection systems, and elimination of a rice quality standard that discriminated against imports of U.S. rice.

Critical to final passage, the accord also is the first to include an enforceable reciprocal obligation for Peru and the United States to adopt and maintain laws and practices reflecting internationally recognized labor rights issued in 1998 by the International Labor Organization, as well as commitments to enforce domestic environmental laws and regulations, as well as seven covered multilateral environmental agreements. A key consideration to passage was the more than 98 percent of Peruvian agricultural products that already enter the United States duty free under most-favored nation tariff rates and various preference programs – this agreement grants reciprocal access to the Peruvian market for U.S. products.

With House passage secured, the measure next moves to the Senate, which is expected to take up the measure following the Thanksgiving congressional recess.

## 2007 Farm Bill Stumbles Out of the Blocks on Senate Floor

Floor consideration of the Senate's version of the 2007 farm bill was delayed this week over a dispute between Democrats and Republicans on the kind and number of amendments that could be offered.

The impasse, which continued today, threatens to delay the start of floor consideration into the week of Nov. 12. And Majority Leader Harry Reid, D-Nev., has said he expects that it may take up to two weeks to debate the measure on the Senate floor once consideration begins.

The delay occurred after Reid asked for unanimous consent that amendments be "limited to those germane to the farm bill." But Republicans objected, insisting on an "open process" to offer whatever amendments a senator wished, recognizing that the farm bill likely represents the last opportunity to attach amendments to a non-appropriations measure before the Senate recesses for the year. Both sides have refused to budge – at least at this stage.

Information continues to trickle out about potentially hundreds of amendments likely to be offered to the Senate Agriculture Committee-passed measure as the process lumbers forward.

One of the first amendments expected to be offered is a proposal by Sens. Byron Dorgan, D-N.D., and Charles Grassley, R-Iowa, that would impose a hard cap of \$250,000 per couple on farm program payments. The Senate Agriculture Committee-passed bill ostensibly would impose a \$200,000-per-couple payment limit, but excludes marketing loan gains or loan deficiency payments from the cap that would be included under the Dorgan/Grassley plan. Further, although the Senate Agriculture Committee's bill would make those earning more

than \$750,000 in adjusted gross income ineligible from receiving commodity payments, that "limit" could be avoided entirely if at least two-thirds of the person's income was derived from agriculture or agricultural-related businesses. The Senate Agriculture Committee's bill would eliminate the so-called three-entity rule that allows producers to obtain payments on up to three separate farming enterprises, and would require direct attribution of payments to named recipients. Dorgan and Grassley believe they have the votes on the Senate floor to pass their payment-limit amendment, citing the 2002 farm bill vote on nearly the same amendment that garnered 66 votes only to be stripped from the bill during joint conference-committee action with the House. But southern senators, led by Senate Agriculture Committee ranking member Saxby Chambliss, R-Miss., and Blanche Lincoln, D-Ark., have raised the specter of using procedural means to slow the bill if payment limit proponents are successful.

Among the potential amendments extremely troubling to the NGFA is one expected to be jointly sponsored by Grassley and Sen. John Thune, R-S.D., that would mandate extremely broad actions within the U.S. Justice Department, Federal Trade Commission and U.S. Department of Agriculture (USDA) to conduct investigations of agricultural competition and change the rules governing agricultural mergers. The amendment would create entities within both the Justice Department and USDA to conduct investigations of "problems" in agricultural competition and agricultural merger transactions. Within the Justice Department, the amendment would create an 18-member "Agriculture Competition Task



# On Capitol Hill

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Force” that includes representatives appointed by state departments of agriculture, state attorneys general and eight individuals representing the interests of “small family farmers, ranchers, independent producers, packers, processors and other components of the agricultural industry,” as well as four academics.

In addition to studying “problems” in agricultural competition, the task force would be required to devise methods for “preserving an independent family farm and ranch sector,” coordinate federal and state efforts against “unfair and deceptive practices and concentration in the agricultural industry,” identify “abusive practices” in the agricultural industry and submit reports and recommendations to Congress, including any “dissenting views.” It also would be required to identify and review the impacts of certain mergers and acquisitions over the previous 10 years. The amendment would authorize spending \$1 million per year during fiscal years 2008, 2009 and 2010. Still more funding – no limit is specified – would be authorized for the Justice Department to add agricultural law and economics experts in the Transportation, Energy and Agriculture Section of its Antitrust Division. The amendment also would create a new position – deputy assistant attorney general for agricultural antitrust matters – within the U.S. Justice Department’s Antitrust Division.

The amendment also would shift to the defendant the burden of proof to demonstrate that an agribusiness merger will not substantially lessen competition or create a monopoly in one or more geographic markets if the plaintiff happens to be the federal or a state government, or if the plaintiff shows that the defendants in a merger control 20 percent or more of the market share. It also would require the Justice Department and Federal Trade Commission (FTC) to develop guidelines to use when reviewing agricultural mergers that “prevent any merger or acquisition... (that) may... substantially lessen competition or tend to create a monopoly.” In addition, the Justice Department and FTC would be required to conduct post-agricultural merger investigations within five years and report the results annually to Congress.

Further, the amendment would create within USDA an Office of Competition and Fair Practices to be headed by a special counsel for competition matters to investigate food and agriculture mergers and prosecute violations of the Packers and Stockyards Act and Agricultural Fair Practices Act. It also would mandate that USDA review and provide input to the Justice Department on agricultural mergers. The NGFA will be working with a host of agricultural producer and livestock and poultry organizations to oppose the amendment.

**Other Amendments:** Other potential amendments of interest include those expected to be offered by:

▶ Sen. Pete Domenici, R-N.M., that would incorporate the 36-billion-gallon renewable fuels mandate contained in the Senate version of the energy bill.

▶ Sen. Richard Durbin, D-Ill., that would sunset all U.S. food safety laws, including the federal Food, Drug and Cosmetic Act, within two years. Durbin’s amendment would be added to a Senate Agriculture Committee-passed provision that would create a Congressional Bipartisan Food Safety Commission to review and make recommendations to “modernize” the U.S. food safety system. The NGFA is working with agricultural producer and agribusiness interests to oppose the amendment, which could undermine the confidence of U.S. and foreign consumers in the U.S. food safety system. Durbin intends the amendment to be a precursor to legislation creating a single food safety agency.

▶ A Durbin amendment that would subject all U.S. Department of Agriculture (USDA)-regulated food products, such as meat and poultry, to reporting to a Reportable Food Registry to be established within USDA. Reporting to the registry would be required if a product was found to pose a “reasonable probability” of causing “serious adverse health consequences or death to humans or animals.” The provision mirrors the legislation enacted by Congress in late September that established such a reporting requirement for Food and Drug Administration-regulated products.

A number of other amendments are expected to be offered, including: 1) a reduction in direct payments to producers, with the savings redirected to conservation, nutrition and renewable fuels spending; 2) a wholesale alternative farm bill to be introduced by Sens. Richard Lugar, R-Ind., and Frank Lautenberg, D-N.J., that would replace current farm program direct and counter-cyclical payments with a taxpayer-funded revenue insurance program for producers, with the more than \$16 billion in estimated savings being redirected to spending on nutrition, emergency food relief, conservation, renewable energy development, research and specialty crop assistance; 3) a ban on farm program payments for grassland and rangeland that is converted to crop production, to be introduced by Sen. Tim Johnson, D-S.D.; 4) a requirement that the president submit corrective legislation if any provision of the farm bill is found to violate the United States’ World Trade Organization commitments, by Sen. Lugar; 5) relaxing the definition of “cash in advance” for sales of agricultural products to Cuba and expanding the eligibility to encompass agricultural machinery and equipment, by Sen. Max Baucus, D-Mont.; 6) deleting the ban on packer ownership of livestock less than 14 days prior to slaughter that was incorporated into the Senate Agriculture Committee-passed bill, to be offered by Sen. Pat Roberts, R-Kan.; and 7) relocating agricultural quarantine and inspection service functions and inspectors from the U.S. Department of Homeland Security’s Customs and Border Protection to USDA’s Animal and Plant Health Inspection Service, to be introduced by Sens. Feinstein, D-Calif., Mel Martinez, R-Fla., Debbie Stabenow, D-Mich., and Robert Casey, D-Pa.





## STB Issues Decision on “Paper Barriers” to Rail Interchanges

The federal Surface Transportation Board (STB) on Oct. 30 issued a decision that would have the *de facto* effect of leaving intact – without any pre-established general regulations – the ability of rail carriers to enter into arrangements that restrict the ability of a purchaser or tenant railroad to interchange traffic with rail carriers other than the seller or landlord railroad.

The decision was issued in the long-pending proceeding initiated by a petition from the Western Coal Traffic League (WCTL) seeking rules of general applicability regarding so-called “paper barriers,” contractual provisions included with a sale or lease of a rail line that limit the incentive or the ability of the purchaser or tenant carrier to interchange traffic with rail carriers other than the seller or lessor railroad [*STB Ex Parte No. 575 (Sub. No. 1) – Review of Rail Access and Competition Issues*].

In support of WCTL’s petition, the NGFA submitted comments and testified at a July 2006 hearing. In its statements, the NGFA recognized that the use of paper barriers may provide some indirect benefits to rail customers, including the inducement to large railroads that they sell branch lines or other properties while those properties are in sufficiently sound physical shape to handle traffic without major rehabilitation expenses, rather than simply allowing them to deteriorate with a goal of abandonment. However, the NGFA urged that even if paper barriers may help to preserve some trackage for continued use, it does not follow that paper barriers imposed as a condition of track sale or lease should be continued in perpetuity. A number of other shippers also filed comments in support of WCTL’s petition and urged that the agency initiate a proceeding to develop general guidelines. The U.S. Department of Agriculture (USDA) also argued that these provisions interfered with the ability of agricultural shippers to obtain the best prices for their products and increased their transportation costs. USDA urged the STB to establish clear guidelines regarding the legality of paper barriers and modification of existing such agreements so as to permit unrestricted interchange.

In its decision, the STB concluded that “the propriety of such interchange commitments is best considered on an individual, case-by-case basis.” [*Note: The STB stated that it would henceforth use “the more neutral term ‘interchange commitment’ suggested by the American Association of Railroads (AAR) rather than ‘paper barriers.’”*] The STB said it would examine such cases if a shipper brings a complaint challenging the arrangement. However, the decision appears to create a rather daunting hurdle that shippers would need to overcome to convince

the STB that the so-called “interchange commitments” are against the public interest given that the agency’s decision credits such arrangements for “*the revitalization of the rail industry and the rebirth of the short line sector.*” In its decision, the STB further stated that, “[g]enerally, interchange commitments have facilitated the creation and growth of short line railroads, which in turn has benefited the public by lowering transportation costs, improving service, and in some cases preserving rail transportation to localities and communities that might otherwise have seen service over their lighter-density deteriorate or be lost altogether.”

Although concurring with the STB’s decision, one of the board’s three members, Commissioner Francis P. Mulvey, in telling separate comments stated that, “I generally view so-called interchange commitments as fundamentally anti-competitive.” He further stated: “I support our statutory charge to ensure that railroads earn adequate revenues, but I do not think that permitting traffic to be locked up in perpetuity is the proper vehicle for doing so. Several sections of our governing statute permit or require that the (STB) preserve competition in the rail industry. [Citations omitted]. In addition, we have the discretion to adopt policies that promote competition. [Citations omitted]. The (STB’s) current position on interchange commitments, however, prevents competition from developing by protecting these arrangements and presuming their propriety.” Commissioner Mulvey further stated: “Our proposed rules should enable shippers who believe that they are aggrieved by interchange commitments to challenge these restrictions in a more direct and expeditious manner. I expect the (STB) to administer these rules in such a way that they offer meaningful, as opposed to elusive, relief.”

In its decision, the STB proposed new disclosure requirements in connection with future proposed line sales or leases to non-carriers and smaller Class II or Class III railroads. The STB also proposed expedited discovery procedures for obtaining a copy of an existing interchange commitment as soon as a regulatory challenge is brought.

The proposed new rules and procedures were published and docketed separately [*STB Ex Parte No. 575 (Sub-No. 1) - Disclosure of Rail Interchange Commitments*]. The notice requests opening comments on the proposed rules and related matters by Jan. 2. and reply comments by Jan. 22.





## USDA To Continue Existing Process in Approving Requests from State-Licensed Grain Warehouses to Become Federally Licensed

In response to a request from the National Association of State Departments of Agriculture (NASDA), the U.S. Department of Agriculture (USDA) has reiterated that it will continue with its current procedures for approving applications from existing state-licensed grain warehouses to become federally licensed under the U.S. Warehouse Act.

NASDA sought the assurances after its failed attempt to have the Senate Agriculture Committee include an amendment in its version of the 2007 farm law that would have precluded USDA from preempting states from regulating all merchandising-related activities at federally licensed grain warehouses. NASDA had asked USDA to confirm states' "understand(ing)" that a "moratorium" was in place on approving applications from state-licensed warehouses to become federally licensed.

In response, USDA said that its current procedures, adopted in 2003, involve consulting with, and obtaining the concurrence of, the affected state licensing authority before granting a new federal license to an existing state-licensed warehouse. The NGFA is aware of a number of state-licensed warehouses that have switched from state to federal licenses utilizing these procedures, so USDA's policy does not

constitute a hard freeze on awarding federal grain warehouse licenses. In its Oct. 26 reply to NASDA's Oct. 15 letter, USDA also requested, "in the spirit of mutual cooperation," that NASDA enter into a reciprocal agreement under which states would pre-notify and consult with USDA before issuing state licenses to grain warehouses currently licensed under the U.S. Warehouse Act. USDA noted that since 2003, a total of 126.3 million bushels of federally licensed grain warehouse storage capacity had switched to state licenses.

In addition, USDA acknowledged in its reply letter to NASDA that it would use the rulemaking process, including publication in the *Federal Register*, if it ever decided to propose regulating the merchandising-related activities of federally licensed grain warehouses. NASDA had expressed concern that USDA might implement such changes through a warehouse licensing agreement, rather than through rulemaking. The NGFA also had urged USDA to utilize the rulemaking process in an official statement submitted to USDA in 2002 when it proposed regulations to implement the U.S. Warehouse Act amendments of 2000. USDA has told the NGFA it has no intention of proposing any such changes in the foreseeable future.

## USDA Exchanges Additional CCC-Owned Wheat under Barter Program

The U.S. Department of Agriculture's Farm Service Agency (FSA) on Nov. 2 announced it had exchanged 852,230.49 bushels of Commodity Credit Corp.-owned wheat for 2.3 million net pounds (64 truckloads) of canned beef, 1.944 million pounds (54 truckloads) of canned beef stew and 144,000 pounds (four truckloads) of canned pork and under its barter-exchange program.

Successful bidders were Tabatchnick Fine Foods Inc., Somerset, N.J., and Lakeside Foods Inc., Manitowoc, Wis.

Unlike previous barter invitations, in which CCC's entire wheat inventory was made available for exchange, FSA for this exchange issued a catalog containing 4.4 million bushels consisting of wheat stored in commercial warehouses with the highest storage rates. Those warehouse locations were located primarily in the Upper and Central Plains states.

Of the CCC-owned wheat exchanged, 339,901 bushels were hard wheat stored in Kansas; 306,375 bushels were hard wheat stored in Oklahoma; 171,853 bushels were hard red spring wheat stored in Montana; and 34,101 bushels were white wheat and hard white wheat stored in Idaho. Members receiving the *NGFA News-*

*letter* electronically may [click here](#) to access USDA's announcement.



### Calendar

- Nov. 29, 2007:** Joint NGFA/GEAPS Grain Grades and Weights Committee  
Westin Tabor Center, Denver, Colo.
- Dec. 9, 2007:** NGFA Leadership Conference for Affiliated State/Regional Associations  
Chicago Marriott Magnificent Mile Hotel, Chicago, Ill.
- Dec. 9, 2007:** NGFA Trade Rules Committee  
Chicago Marriott Magnificent Mile Hotel, Chicago, Ill.
- Dec. 9, 2007:** NGFA Country Elevator Committee  
Chicago Marriott Magnificent Mile Hotel, Chicago, Ill.
- Dec. 9-11, 2007:** NGFA's 36th Annual Country Elevator and 11th Annual Feed Industry Conference  
Chicago Marriott Magnificent Mile Hotel, Chicago, Ill.
- Dec. 10, 2007:** NGFA's Feed Legislative and Regulatory Affairs Committee and Feed Manufacturing Technology Committee  
Chicago Marriott Magnificent Mile Hotel, Chicago, Ill.
- Dec. 11, 2007:** NGFA Marketing and Business Development Committee  
Chicago Marriott Magnificent Mile Hotel, Chicago, Ill.





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– with China's Food and Drug Administration – will cover pharmaceuticals and medical devices. Negotiations on the text of both Memoranda of Agreement were finalized last week, and are scheduled to begin undergoing rigorous final clearance within the U.S. and Chinese governments starting next week. The two governments expect to sign the legally binding documents in December.

FDA officials said during the briefing that China's AQSIQ reluctantly agreed to the U.S. government's insistence on having Chinese manufacturers demonstrate compliance with U.S. food and feed safety requirements through the use of FDA-audited third parties. Such third parties reportedly will be authorized under the Memorandum of Agreement to oversee and certify the safety of Chinese food, feed and agricultural product exports to the United States. Under the agreement, a representative sample of such third-party firms will be audited by FDA to ensure performance. In addition, the food, feed and agriculture Memorandum of Agreement will include an appendix listing higher-risk products that will be subject to such third-party certification. FDA officials also said the final version of the Memorandum of Agreement omits a proposal by China that FDA certify the safety of U.S. agricultural exports to China. FDA officials noted that they told the Chinese the agency has no legal authority to do so.

A bilateral working group will be formed once both Memoranda of Agreement are finalized and signed by the two countries.

**Dr. David Acheson**, architect of the FDA Food Protection Plan in his role as the agency's first assistant commissioner for food protection and the lead FDA negotiator on the Memorandum of Agreement with China on food, feed and agricultural products, will be discussing this new regulatory approach during his featured address on Dec. 11 during the NGFA's Country Elevator/Feed Industry Conference in Chicago, Ill.

## New Food, Feed Safety Approach

The following are some of the major recommendations contained in the two newly released plans that are most relevant to the grain, feed and processing industry:

### Import Safety Action Plan

There are a total of 50 specific recommendations within 14 broad categories in the Presidential Import Safety Working Group's report. The working group identifies both short-term (to be accomplished within one year) and long-term recommendations. Designated as short-term projects are most of the additional legislative authorities requested in the plan, including the authority to accredit and audit third-party certification entities.

The working group also recommends that the federal departments and agencies affected by the recommendations meet within 30 days to develop a strategic approach for implementing the action plan, after which they are to seek broad industry and consumer input.

For the grain, feed and processing industry, some of the most significant recommendations are these:

- ◆ Adopt legislation authorizing FDA to require certification or "other assurances" that an FDA-regulated imported product complies with FDA requirements. The plan says certification would be mandated "based on risk" and generally would apply to products originating from a particular country, region or producer "where safety cannot be adequately ensured." The administration emphasized that such certification approaches would be developed in concert and with the concurrence of the foreign country.
- ◆ Adopt legislation allowing FDA to "accredit" independent third parties "without conflicts of interest," as well as entities that accredit such third parties, to certify compliance of imported food and feed with "U.S. safety and security standards" under **voluntary** certification programs. "This would facilitate trade, while allowing federal departments and agencies to focus their resources on products from non-certified firms or for which information suggests there may be safety or security concerns," the report states. "It may not be necessary to establish certification programs for low-risk products."
- ◆ Create market-based and other incentives for foreign firms to participate in voluntary certification programs and for importers to purchase only from certified firms. Among the incentives identified in the report are expedited entry of certified imports and expedited processing of samples for lab testing.
- ◆ Work with importers to develop "Good Importer Practices," risk-based guidelines that importers could use to evaluate the safety of specific import product categories. Another recommendation calls on government to "partner" with importers to create private-sector voluntary certification programs for importers adhering to such best practices. The same recommendation proposes that the federal government "accredit" such programs. Another recommendation suggests that the government require certification of compliance with such Good Importer Practices for imports of certain "high-risk" products.
- ◆ Adopt legislation granting FDA mandatory recall authority that the agency would be empowered to utilize if its efforts to encourage firms to recall products voluntarily without "undue delay" are unsuccessful. "Although market incentives have made the voluntary recall system generally

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# Feed Facts

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effective, providing mandatory recall authority to FDA when the voluntary system is not successful would ensure that the agency has the ability to compel action in those instances when firms have refused or unduly delayed a voluntary recall of food,” the plan states. As an aside, the U.S. Department of Agriculture said its Food Safety and Inspection Service will **not** request mandatory recall authority for USDA-regulated products, since the agency already has considerable tools at its disposal, including the power to shut plants down by removing inspectors from the facility.

- ◆ Increase the minimum bonding imposed on importers of record to reflect inflation and product risk. The plan notes that the bond has not been increased since 1991, but makes no specific dollar recommendation on how much it should be increased.
- ◆ Authorize FDA to deny entry of imported products if foreign countries or facilities refuse, limit or unduly delay FDA access to foreign factories, warehouses or establishments – or the records, equipment and labeling of such facilities – from which products are shipped to the United States. The plan states that an “important tool” to verify whether a firm complies with U.S. safety standards is to conduct routine inspections and review relevant production and distribution records, and notes that foreign firms “often deny” U.S. officials access without facing adverse consequences. “Having the authority to prevent entry of products from firms that fail to provide FDA access will enable FDA to protect consumers by keeping potentially unsafe products from entering U.S. markets,” the plan states.
- ◆ Make product safety a “guiding principle” when negotiating future cooperative arrangements with foreign governments. Another recommendation calls for expanding U.S. government inspections in foreign countries and “improv(ing) collaborative investigation and enforcement activities” when negotiating such cooperative arrangements. The report specifically references expediting the visa process for U.S. government inspectors as one of the goals to prevent the kind of delays that occurred when FDA sought to enter China to investigate the melamine-contamination incidents.
- ◆ Establish an FDA presence at “key foreign ports” to oversee U.S.-bound shipments.
- ◆ Work with foreign and U.S. industries to encourage the development of voluntary “best practices” for the use of electronic traceability technology systems to link the life cycle of imported products back to the point of origin.

The plan also contains several suggested legislative changes that would authorize FDA to develop additional regulations for food and feed safety, as well as food defense:

- ◆ Clarify whether FDA has the legal authority to develop regulations requiring preventive controls be implemented to address risks that might occur in domestic and foreign-produced food, feed, feed ingredients and other FDA-regulated food products that are associated with “repeated serious adverse health consequences or death from unintentional contamination.” [Emphasis added.]
- ◆ Provide FDA with statutory authority to develop regulations requiring companies to implement food-defense measures at specific points in the food and feed supply chain where the potential for intentional adulteration is greatest. [Emphasis added.]

The plan also calls on FDA to examine the food-safety control systems used by other countries so as to identify “best practices” that would further strengthen FDA’s prevention, intervention and response activities.

## FDA Food Protection Plan

As noted previously, FDA’s Food Protection Plan is integrated with the import safety action plan, but applies to both domestic and imported products. Further, the Food Protection Plan is designed to address both food safety and food defense by protecting against both intentional and accidental contamination incidents.

The agency said the plan “focuses FDA’s efforts on preventing problems first, and then uses risk-based interventions to ensure preventive approaches are effective.” The plan also “calls for a rapid response as soon as contaminated food or feed is detected, or when there is harm to people or animals.”

The plan contains recommendations within three broad “core elements”: 1) prevention, placing more emphasis on preventive measures throughout the food-supply chain; 2) intervention, utilizing a risk-based approach to targeted inspections and testing to verify that preventive controls are working; and 3) response to rapidly react to contaminants that may pose a danger to human or animal health. The plan emphasizes focusing on risks over the entirety of a food or feed product’s life cycle – from production to consumption – which FDA states is a sea change in the agency’s regulatory approach.

- ◆ Under the “prevention” category, FDA’s plan focuses on promoting “increased corporate responsibility” to prevent foodborne illnesses, and seeks legislative authority to: 1) require companies to implement measures to protect against intentional adulteration of food or feed by terrorists or criminals; and 2) issue hazard analysis and critical control point (HACCP) or equivalent-type regulations applicable to specific types of food or feed that have been linked to repeated instances of serious health problems or death to humans or animals. The “prevention” category

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also includes the following recommendations designed to identify food/feed vulnerabilities and assess risks: 1) Use enhanced modeling, scientific data and technology to evaluate and prioritize the relative risks of specific food and animal feed agents that may be harmful (as an aside, FDA's Animal Feed Safety System is based on such a concept); and 2) establish a risk-based process to continuously evaluate which FDA-regulated products cause the greatest risk of foodborne disease.

▶ Under the “intervention” category, the plan focuses on implementing a risk-based regulatory approach to inspection, sampling, surveillance and detection. **It is within this category that FDA’s plan seeks legislative authority to “accredit highly qualified third parties” to evaluate participating firms’ compliance with food and feed safety regulations as a way to “allow FDA to allocate inspection resources more effectively.” But the FDA plan admonishes that private-entity third parties would need to be “without financial conflicts of interest” and would be audited by the agency to ensure FDA’s requirements were “consistently assessed.” Those audits would include a review of inspection reports issued by third parties. The agency also said it would undertake a “public process” (i.e., rulemaking) to determine best practices in the design of such a third-party accrediting program. “Use of accredited third parties may also be taken into consideration by the FDA when setting inspection and surveillance priorities,” the agency said.**

FDA also proposes, as it did in its fiscal year 2008 budget proposal, to require facilities that fail good manufacturing practice regulatory inspections to pay a fee for reinspection. Congress rejected such a reinspection fee when considering FDA’s budget request.

To enhance surveillance, FDA proposes to conduct foreign food and animal feed inspections, targeting “high-risk” firms. It also seeks legislation to authorize the agency

to require electronic import certificates for designated high-risk product shipments, and to impose a new export certification fee on U.S. food and feed exports. Again, FDA proposed such an export certification fee as part of its fiscal year 2008 budget proposal, but the concept was rejected by Congress.

To improve detection, the plan calls for deploying rapid screening tools to identify pathogens and “other contaminants.” It also proposes to create an Early Warning Surveillance and Notification System to identify adulterated pet food products, outbreaks of pet illnesses and to provide notice to veterinarians and consumers during pet food recalls. This recommendation mirrors the requirements of legislation enacted by Congress in September as part of the Food and Drug Administration Amendments Act.

▶ Concerning the “response” component of the plan, FDA again calls for legislation to give it mandatory recall authority that would be utilized if a firm refuses or “unduly delays” implementing a voluntary recall on adulterated products. “This authority would be limited to foods (and feeds) that (FDA) has reason to believe are adulterated and present a threat of serious adverse health consequences or death,” the report states. “It would be imposed only if a firm refuses or unduly delays conducting a voluntary recall. An order to recall food (or feed) could only be issued by the Health and Human Services secretary, deputy secretary or commissioner of food and drugs, and would be accompanied by due-process rights.”

This section of the plan also calls on the agency to work with stakeholders to “develop an action plan for implementing more effective trace-back process improvements and technologies to more rapidly and precisely track the origin and destination of contaminated foods, feed and ingredients.”

## NGFA’s Biofuels Committee to Evaluate DDGS Composition Issues

The NGFA is establishing a task force of representatives from the biofuels and feed industry to evaluate a variety of issues related to the composition of distiller’s grains products that are of interest to both federal and state feed regulatory officials.

The NGFA’s Biofuels Committee decided to form the task force during its inaugural meeting conducted Nov. 1 in Kansas City, Mo. The NGFA created the new committee pursuant to a recommendation made within the NGFA’s 2007 Long Range Plan to address biofuels issues affecting the grain, feed and processing industry, and to advocate policies that will permit continued growth in all sectors of grain-based U.S. agriculture.

The committee currently consists of 16 representatives from all sectors of the biofuels industry. It is chaired by Mike Malecha, ethanol manager for NRG Development Co. Ltd., Minneapolis, Minn.

Distiller’s grains composition issues to be evaluated by the task force include sulfur content, antibiotic residues, mycotoxin binders, processing aids and water quality. The task force’s mission is to obtain factual information on industry practices and the compositional content of distiller’s grains products. The committee will use this information to respond to potential concerns being raised by federal and state feed regulatory officials concerning distiller’s grains products.





## Supreme Court Hears Case on Arbitration Awards

In a session attended by the NGFA, the Supreme Court on Nov. 7 heard oral arguments in a case with potentially significant implications regarding the finality of arbitration awards.

The Supreme Court is reviewing a ruling by the U.S. Court of Appeals for the Ninth Circuit, which determined in this case [*Hall Street Associates v. Mattel Inc. (No. 06-989)*] that the Federal Arbitration Act precludes a federal court from enforcing an agreement by the parties that provides for more expansive judicial review of an arbitration award than the narrow standard of review otherwise provided for in the law. In its decision to grant certiorari to review the Ninth Circuit court's decision, the Supreme Court noted that it conflicted with decisions in several other appellate circuit courts that have permitted parties in arbitration to contractually agree to expanded levels of judicial review.

This case began in February 2000, when the Hall Street real estate firm filed a claim against Mattel for allegedly violating a lease because the toymaker's factory contaminated groundwater with an industrial solvent on rental property in Beaverton, Ore. In their agreement to arbitrate, the two sides agreed in advance that a federal court could review the arbitrator's decision for "substantial errors of evidence or law." The arbitrator issued a judgment in favor of Mattel in January 2002. After several years of litigation, the U.S. Court of Appeals for the Ninth Circuit ultimately reversed the district court's refusal to enforce the arbitration award. While the Ninth Circuit court recognized that the arbitrator's assessment of the merits in the case contained possible errors of law, it ruled that erroneous findings of fact or conclusions of law are not a sufficient basis to overrule an arbitration award. The appellate court described its task as one to review the procedural soundness – not the substantive merit – of the arbitration decision.

The Ninth Circuit court's decision – and consequently the debate before the Supreme Court in this appeal – focused upon

an application of the Federal Arbitration Act to this case. The Federal Arbitration Act provides narrow procedural grounds – involving fraud, corruption, arbitrator misconduct and arbitrators exceeding their powers – for which a court may overturn an arbitration award, notwithstanding whether the parties provide for more expansive judicial review in their agreement to arbitrate. Questions that frequently arise in arbitration-related court cases and legislative initiatives concern when courts should be able to change arbitration awards. This case is unique in that the parties jointly provided for extra-judicial review as part of their agreement to arbitrate. But underlying much of the debate was the well-established principle of federal law that arbitration awards are intended to be final and binding.

It usually is futile to attempt to predict how the Supreme Court will decide a case, or even how individual justices are postured on an issue, based upon questions posed during oral arguments. But on this case, the justices appeared to be divided as the parties debated the role that the courts should play in arbitration. Mattel's attorney argued that the role of the courts was strictly limited under the law and that the arbitration award in its favor should stand. Meanwhile, the attorney for Hall Street argued that the parties' agreement to permit judicial review of the arbitrator's decision should be enforced. Questions by some of the justices, including Chief Justice John Roberts, suggested that expanded judicial review might be appropriate in these circumstances, since the two parties negotiated a contract with court review as one of its provisions. But questions by some of the other justices, including David Souter, Ruth Bader Ginsburg and Antonin Scalia, suggested that the law may not provide the latitude for parties to negotiate expanded judicial review in arbitration cases.

A final decision by the High Court in the case is expected by summer 2008.

## House Judiciary Subcommittee Conducts Hearing on Arbitration Bill

The House Judiciary Committee's Commercial and Administrative Law Subcommittee conducted a hearing on Oct. 25 on legislation (H.R. 3010) that would stipulate that the Federal Arbitration Act applies only to disputes between "commercial entities of generally similar sophistication and bargaining power."

Dubbed the "Arbitration Fairness Act of 2007," the bill was introduced in the House on July 12 by Rep. Henry Johnson, D-Ga., with 36 co-sponsors. The bill references decisions by the U.S. Supreme Court that have applied a standard of high deference and limited review to arbitration proceedings under the Federal Arbitration Act, including in disputes

that the bill's proponents allege involve parties of "disparate economic power." Specifically, the bill would provide that no "predispute arbitration agreement" (defined as "any agreement to arbitrate disputes that had not yet arisen at the time of the making of the agreement") would be valid or enforceable if it requires arbitration of: 1) an employment, consumer or franchise dispute; or 2) "a dispute arising under any statute intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power." As stated by Rep. Chris Cannon, R-Utah, in his opening remarks at the hearing, the potential breadth of the bill's implications on contracts where the parties were arguable of "unequal bargaining power" was troublingly uncertain.

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## From the Bench

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During the hearing, proponents of the bill included a representative from Public Citizen, an organization that long has opposed enforcement of arbitration agreements. Other proponents included a franchisee in a dispute with the franchisor and four practicing attorneys, including a former governor of Georgia and a member of the National Employment Lawyers Association. Proponents cited what they termed egregious examples of arbitration proceedings concerning predatory lending practices and abusive nursing homes, some of which resulted in three years of litigation.

Meanwhile, the bill's opponents included a representative from the American Arbitration Association (one of the largest private arbitration providers) and a professor from The Catholic University of America's Columbus School of Law. The witnesses debated the fairness and affordability of arbitration, referring to varying trends and data. The law professor agreed that arbitration was not perfect, but urged that the so-called imperfections were not unique to arbitration. In fact, he cited data indicating that the

economically-disadvantaged party tended to fare better in arbitration than in court, and that arbitration often may be the only accessible remedy. He also cited significant economic impacts that would result from the nullification of mandatory pre-dispute arbitration agreements.

Of interest is that many of the allegations against arbitration presented during the hearing are irrelevant to the features of the NGFA's Arbitration System. Those allegations included arbitration decisions that are unwritten, not publicly available and "clouded in secrecy," as well as instances of "repeat" arbitrators who earn substantial income from performing the service and seeking to be retained again. By contrast, under the NGFA's Arbitration System, decisions are always written in detail – spelling out the nature of the dispute, the arguments of both parties and the basis on which the decision is made – are signed by the arbitrators, and are made available publicly. Further, NGFA arbitrators are expert industry volunteers who are never paid for their service.



## Tech Talk

by Jess McCluer  
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### NGFA Submits Comments to EPA on Air Emission Factors

The NGFA this week joined with the National Oilseed Processors Association, American Farm Bureau Federation and other organizations in submitting extensive comments to the U.S. Environmental Protection Agency (EPA) on its proposal to revise the way it calculates particulate air emissions under its AP-42 emission factors.

The agency on April 24 released its so-called "*Emissions Factor Uncertainty Assessment*" and appendices for comment. The assessment described the statistical analyses used to characterize the uncertainties for categories of emissions factors and provided a procedure to calculate an estimate of the uncertainty associated with emissions factor use. According to the assessment, uncertainty would be dependent upon the kind of emissions released, the number of tests used to determine the emissions factor, the appropriate decision level (or percentile) within the distribution range, and the number of similar emissions units within a specific area.

The EPA proposal would apply "uncertainty multipliers" to the current AP-42 emission factors based on mathematical uncertainty analysis. The multipliers range from 3 to 13 depending upon the type of substance emitted and the number of data points underlying the

current AP-42 factors. For example, if a current emission factor is 10 pounds per hour, the number EPA would use for the purposes listed above would range from 30 to 130 pounds per hour. This would inflate actual emissions substantially, resulting in inflated permitting fees and new permits that otherwise would not be required, as well as cases in which air emission calculations would exceed ambient standards in areas where actual air quality is well within the standard. Because EPA takes the position that adoption or amendment of the AP-42 factors does not require rulemaking, these documents have not been published in the *Federal Register*.

The comments filed by the NGFA and other organizations emphasized that uncertainty multipliers would make matters worse and should not be used under any circumstances, even if the flaws in the assessment report could somehow be corrected. In addition, the comments urged EPA not to employ the uncertainty analysis approach until it has been thoroughly reviewed by the agency's Science Advisory Board. The industry statement was supported by a report conducted by an expert statistician, who could not independently verify the results of the statistical methodology used in the EPA assessment.



# Membership Matters

by Todd Kemp  
Director of Marketing/Treasurer

## New NGFA Board of Directors Initiative Sets the Pace

### ...All NGFA Members Invited to Follow Suit...

During the September meeting of the NGFA Board of Directors, Marketing and Business Development Committee Chairman Mark Avery, publisher of *Grain Journal*, issued a challenge to each Director: Make just one contact with a priority membership prospect and ask that he or she join the NGFA before next March's annual convention in Scottsdale, Ariz.

In an ensuing strategy session, during which 30 top membership prospects were catalogued and discussed, several NGFA Directors volunteered to make contacts and identified additional "hot" prospects.

Over the next six months, the NGFA staff will be coordinating closely with the NGFA Board on the new membership-recruiting initiative. Contacts and follow-up will be coordinated, and membership materials appropriate to each prospect will be provided to recruiters.

**What You Can Do:** Even if you don't serve on the NGFA Board of Directors, take a page out of these industry leaders' book – set a goal of contacting at least one priority membership prospect for the NGFA. Most recruiters, once they get started, realize they can't stop with just one!

**Who Are These Prospects?** They are drawn from a number of sectors important to NGFA membership, including biofuels, feed manufacturers and feed ingredient suppliers, integrated animal feeding operations, rail shippers/receivers, flour millers and processors and futures commission merchants. For a list of the Top 30 NGFA Prospects, e-mail Todd Kemp at [tkemp@ngfa.org](mailto:tkemp@ngfa.org).

If your prospect is not on the list, send it in and they'll be added. Thanks for joining the NGFA Board of Directors in this new membership-recruiting initiative!



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