



Bush Signs Major Food, Feed Safety Bill into Law

President Bush today (Sept. 27) signed into law legislation (H.R. 3580) approved by Congress last week that includes major new food and feed safety provisions that will affect the food, feed, pet food and grain-handling/processing sectors.

The legislation (H.R. 3580), dubbed the “Food and Drug Administration (FDA) Amendments Act of 2007, reauthorizes a number of FDA programs, including laws that enable the agency to collect user fees to finance its review and approval of prescription human drugs and medical devices.

But for the food, feed and grain industry, the most significant provisions of the 422-page bill are tucked away in a 17-page section, which among other things require FDA to be notified if food or feed contamination incidents occur that pose a “reasonable probability” of causing “serious adverse health consequences or death to humans or animals.” The law also requires that FDA within two years issue new regulations establishing ingredient requirements and definitions, processing requirements and updated labeling requirements for commercial pet food.

The law, which several members of Congress said was the largest expansion of FDA’s regulatory authority in a decade,

was passed by the House on Sept. 19 by a 407-5 margin. The Senate approved it by unanimous consent on Sept. 20.

The food safety and pet food provisions are modeled after – but are a significant improvement over – the original legislation sponsored by Sen. Richard Durbin, D-Ill., that was approved by the Senate in May. The NGFA was involved extensively in working with a number of organizations, led principally by the Grocery Manufacturers of America/Food Products Association, which provided input and suggested alternative legislative language on the food and feed safety provisions – much of which was adopted in the final version approved by Congress. During the week the bill was up for final consideration in Congress, the NGFA also organized a meeting with Durbin’s staff to provide final suggestions on legislative language, and invited representatives of the Pet Food Institute and American Feed Industry Association to also participate.

Food and Feed Safety Provisions: For the grain, feed and processing industry, the most significant provisions surround the requirement that FDA within one year create a “Reportable Food Registry” – a web-based electronic portal – that persons would be required to use to notify the agency if the use of, or

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NGFA Futures Market Performance Task Force Meets in Chicago

The NGFA’s joint task force that is examining convergence and hedging efficiency issues surrounding performance of futures markets met on Sept. 26 in Chicago to continue its work.

The task force, comprised of representatives from the NGFA’s Country Elevator Committee, Risk Management Committee, and other market participant groups, spent the day evaluating various policy alternatives that could enhance the utility of exchange-traded tools for traditional users like NGFA-member companies that utilize futures to hedge cash market transactions. Representatives from the Chicago Board of Trade (CBOT) and the Chicago Mercantile Exchange (CME) also participated in a portion of the meeting.

The NGFA task force’s ultimate goal is to recommend such improvements to the CBOT for analysis and possible implementation. In addition, the task force’s mandate includes recommending any needed educational information to assist

NGFA members in adapting to a changed market environment and market behavior that may not track historical expectations.

The task force’s recommendations, once approved by the group and vetted with the two NGFA committees and NGFA leadership, will be transmitted formally to the CBOT and reported to the NGFA membership. This process is expected to be completed within the next several weeks. Some of the task force’s recommendations may represent relatively minor changes to existing futures contracts. Others may be more substantial and require additional analysis to determine market impacts and to avoid diluting the value of existing contracts. All recommendations will be made with the goal of maintaining and enhancing value to traditional users.

As always, member input to the task force is welcomed. Feedback may be directed to Todd Kemp at tkemp@ngfa.org or by calling him at 202-289-0873, extension 16.



Waterways Bill Clears Congress; Veto Threat Looms

Final passage of the major waterways legislation finally occurred this week, when the Senate approved the measure on Sept. 24 by an 81-12 vote.

But the bill faces a possible veto from President Bush. In a statement issued last month, the administration cited the bill's \$21 billion cost – which exceeds both the \$15 billion House-passed version and the \$14 billion Senate bill – as one of the principal reasons. A bipartisan group of legislators has committed to work for a quick override if a veto occurs. Given that the House previously approved the measure in August by a 381-40 vote, there is a veto-proof majority in both chambers.

Among other things, the legislation would authorize the long-sought \$3.6 billion for reconstruction of locks on the Upper Mississippi and Illinois Waterway, a key policy objective of the NGFA, as well as waterway and agricultural producer groups. The bill would authorize 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 LaGrange lock and Peoria lock on the Illinois Waterway. Additional federal funds would be authorized to construct mooring facilities at locks 12, 14, 18, 20, 22, 24 and LaGrange, as well as to provide switchboats at locks 20 through 25 to expedite barge movements. The \$3.6 billion also includes funding authorizations for ecosystem restoration on the Upper Mississippi-Illinois Waterway.

Other provisions in the bill include \$1.9 billion for Gulf Coast restoration. It also vests in the U.S. Army Corps of Engineers the responsibility to determine how to close the Mississippi River Gulf Outlet (MRGO).

The final measure lost eight supporters from the version approved by the Senate in May, attributable primarily to the joint House-Senate conference committee's efforts to "soften" several of the most burdensome U.S. Army Corps of Engineers' reform proposals included in the original Senate bill. The final version would create an independent peer-review process for the most costly (more than \$45 million) and contentious waterway and port projects. Further, the governor of state(s) affected by a Corps project could request an opportunity for review. The final version also vests in the secretary of the Army the authority to revise the principles and guidelines that provide direction to Corps' decision-making, rather than parceling that authority out to a host of Cabinet agencies without direct experience with Corps projects.

Bush has 10 days after the bill is delivered to either sign or veto it; if he does neither within that time limit, the bill becomes law. If the measure is vetoed, each chamber must reconsider the bill and pass it by a two-thirds majority.

Harkin Still Plans Senate Ag Committee Farm Bill Action in October

Senate Agriculture Committee Chairman Tom Harkin, D-Iowa, has announced plans to schedule committee consideration of the Senate version of the 2007 farm bill prior to the Columbus Day recess (scheduled for Oct. 8-12), and plans to incorporate \$18 billion in additional funding for a variety of programs.

The date for Senate Agriculture Committee consideration has continued to slip throughout the summer and into the fall. But recent progress by Senate Finance Committee Chairman Max Baucus, D-Mont., to identify additional farm bill funding could jump start Agriculture Committee action. Baucus appears to be on track to schedule an Oct. 3 Finance Committee session to consider a bill containing the additional funding. Among the policy options reportedly being considered by the Finance Committee are several related to biofuels, including: 1) a five-cent reduction in the 51-cent-per-gallon tax credit for ethanol that would be instituted the year after produc-

tion reaches 7.5 billion gallons (which would generate \$854 million); 2) a two-year extension of the 54-cent-per-gallon ethanol import tariff (generating \$25 million); and 3) limiting tax credits for biofuels to those produced and consumed domestically (generating \$62 million).

The largest potential revenue raisers in the potential package include removing the exemptions that certain non-citizen visa categories enjoy from social security taxes (\$7.1 billion), and a proposal to disallow future loss claims on foreign tax-exempt use property for leases signed on or before March 12, 2004 (\$3.235 billion). The Finance Committee still is contemplating a number of other ideas to raise additional revenue.

Harkin's proposal would include \$5 billion for a permanent disaster-assistance program, as well as increases of \$500 million for commodity programs, \$900

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million for specialty crops, \$4.2 billion for nutrition, \$4 billion for conservation programs, \$2 billion for energy provisions, \$750 million for rural development, \$500 million for food aid and trade programs, \$200 million for research, \$30 million for credit programs and an additional \$100 million for other programs. To pay for these additional expenditures, Harkin reportedly expects to receive \$8 billion from the Finance Committee, \$5 billion of which would be designated for the permanent disaster-assistance program that Baucus has stated is one of his top priorities. Harkin previously has been reluctant to support any permanent disaster-assistance package. Harkin also is believed to have agreed to reduce spending by \$4.5 billion for direct payments and \$5.7 billion for other programs, similar to cuts previously made in the House version of the bill.

Harkin's proposal comes on the heels of an alternative farm bill approach being shopped with committee members by Budget Committee Chairman Sen. Kent Conrad, D-N.D., reportedly with support from ranking Agriculture Committee member Saxby Chambliss, R-Ga. Conrad's approach reportedly includes funding for a permanent disaster-assistance program with little to no cuts to direct payments, but no increased funding for a number of Harkin's priorities, including research, rural development and credit programs. Meanwhile, other Southern senators have been finalizing a draft of their own version of a farm bill that

they believe could garner sufficient support to pass within the committee and on the Senate floor. The NGFA understands that this alternative measure more closely resembles the House-passed farm bill than the version Harkin has been promoting.

Committee members have met behind the scenes several times this week. While progress has been slow, action by the Finance Committee could help resolve some of the differences. However, the situation remains extremely fluid. And although details of a draft of Harkin's legislation have trickled out, few believe it will resemble the final outcome as negotiations continue among a variety of competing factions.

Continued delays also have raised speculation that Congress will approve a simple one-year reauthorization of the current 2002 farm law. But Democratic leaders are unlikely to resort to that course of action unless it becomes the last option. The House has passed a continuing resolution measure through Nov. 16 that keeps the government running and provides for the continuation of farm programs that would be affected by the Sept. 30, 2007 expiration of the current farm bill. A continuing resolution is an oft-used measure that keeps government programs operating without a new fiscal year appropriation.

FDA Criticized at House Hearing on Safety of Food Imports

The Food and Drug Administration came under criticism during a Sept. 26 House subcommittee hearing on the safety of imported food and ingredients, as well as issues related to imported pharmaceuticals.

The hearing, conducted by the House Energy and Commerce Committee's Subcommittee on Health, focused on wide-ranging legislation (H.R. 3610) introduced by full committee Chairman Rep. John Dingell, D-Mich., as well as the pending recommendations of a Cabinet-level Inter-agency Working Group on Import Safety.

Committee members repeatedly criticized FDA for physically inspecting only about 1 percent of U.S. food imports, and inquired about the level of resources that would be needed to enhance FDA import inspections. House subcommittee members also focused on resources that would be needed to develop a more robust import-screening regime to prevent importation of food and feed products not meeting U.S. standards. In response, Dr. David W.K. Acheson, assistant commissioner for food protection emphasized that physical inspections were only

one tool used to mitigate risks, and stressed the importance of placing significant focus on ensuring safety before products arrive at the border. Acheson outlined in general terms the strategy FDA is developing to enhance food safety and food defense to meet new global food safety issues. That strategy is to provide a risk-based farm-to-table approach that coordinates food safety and food defense efforts, and focuses on prevention, intervention, and response. FDA also is in the process of updating and enhancing its targeting ability through the use of new information-technology resources, he said.

FDA's lead witness, FDA Deputy Commissioner for Policy Dr. Randall Lutter, testified that recent problems involving adulterated imported products "underscore the need to renew our focus on multidisciplinary and integrated product safety strategies." During its testimony, FDA praised the Bioterrorism Act of 2002 that mandated that FDA receive prior notice of food and feed imports. The agency said this authority has enabled FDA to better target its inspection resources on imported

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foods that may pose a health risk. Lutter said the agency reviews an average of 33,400 prior notice submissions each business day. He also said approximately 9,900 Department of Homeland Security Customs and Border Patrol officers have been commissioned by FDA to enhance coverage at ports of entry where FDA does not have a physical presence.

As reported previously by the NGFA, the Cabinet-level Interagency Working Group, chaired by Health and Human Services Secretary Michael O. Leavitt, will conduct a public meeting on import safety issues and strategies on Oct. 1 – the NGFA is among groups scheduled to testify. The interagency group is to present an action plan to the president by mid-November.

When asked to comment on Dingell's bill, Lutter said it still was under review within the administration.

Summary of Dingell Food, Drug Import Bill: Among other things, Dingell's far-reaching bill would: 1) impose new user fees on imported food and drug products; 2) drastically restrict the number of ports-of-entry through which food, feed, feed ingredients and drugs could be imported into the United States; 3) require country-of-origin labeling for all food, feed, feed ingredient, drug and medical device products; and 4) give FDA mandatory recall authority to stop distribution of food, feed, feed ingredients and other FDA-regulated products if the agency has a "reasonable suspicion" that the product would cause "serious adverse health consequences or death" to humans or animals – a threshold similar to that contained in the Bioterrorism Act of 2002 and the legislation (H.R. 3580) enacted by Congress this week (*see related article on page 1*).

The bill also would increase significantly the civil penalties imposed on domestic manufacturers or importers of adulterated food or feed to \$100,000 for individuals, \$500,000 for companies and up to \$1 million per occurrence.

- ◆ For **domestic** products, the bill would require FDA within two years to develop regulations requiring, as part of current good manufacturing practices, that processed food products undergo testing to detect "substances...that may render the food adulterated, including microbial pathogens, toxic chemicals, and such other substances" as FDA finds appropriate.
- ◆ Concerning **imports**, the draft bill would require FDA to impose on imported food, feed, feed ingredients, and other food products under its regulation the same standards that apply to U.S. products, and implement

random sampling, inspections and product testing or on-site inspections of foreign plants to verify compliance. Food and feed that did not appear to meet such standards would not be permitted to enter the United States. In addition, FDA would be required to certify "each" foreign facility or foreign country exporting food, feed or feed ingredients to the United States. In the case of foreign facilities, FDA would be required to attest that the facility maintains a program that uses "reliable analytical methods" to ensure compliance with U.S. food safety standards. In the case of foreign countries, FDA would be required to: 1) determine that the nation has in effect and is enforcing food safety standards at least as protective as U.S. standards for the given product; and 2) that the country is monitoring and enforcing its standards.

In addition, the bill would impose user fees on all imported food, feed, feed ingredient and drug products. The fee would amount to \$50 per line item for each food/feed product, and \$1,000 per line item for drug products. The fees would be adjusted annually for inflation. At least 90 percent of the fees would be required to be used to fund FDA inspections of imports, while no more than 10 percent could be used for research to develop tests to detect adulterants in imports at U.S. ports of entry. The measure also would: 1) require country-of-origin labeling of all imported food, drugs and medical devices within 180 days after enactment; and 2) restrict, within five years, the number of ports of entry for imported food, feed and feed ingredients to metropolitan areas serviced by an FDA diagnostic laboratory. Currently, FDA inspectors are stationed at 90 of the 320 ports-of-entry for food products into the United States. FDA could waive the restriction if importation of the food or feed through an alternative U.S. port-of-entry would not "increase the probability that such food will cause serious, adverse health consequences or death."

Within two years after enactment, FDA would be required to develop food safety guidelines under which U.S. importers of foreign food/feed could obtain expedited movement of such products through the inspection process.

In addition, the draft bill further would delay FDA's already-delayed plan to close seven of its 13 current field testing laboratories and reorganize its 20 district offices until after the Government Accountability Office (GAO) – the investigative arm of Congress – completes a review and issues recommendations.





Feed Facts

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exposure to, a food, feed, feed ingredient or other FDA-regulated product (except infant formula) poses a "reasonable probability" of causing "serious adverse health consequences or death to humans or animals." This threshold is similar, but not identical, to the standard contained in the Bioterrorism Act of 2002 (P.L. 107-188) that authorizes FDA to detain a product.

FDA is required by the new law to develop regulations and guidance implementing the "Reportable Food Registry," presumably including the general circumstances under which a potentially adulterated food or feed reaching this threshold would be required to be reported. In particular, FDA is required within nine months to issue guidance to industry about submitting reports to the registry and providing notifications to other persons in the supply chain about a suspect article of food or feed that reaches the threshold of posing a "reasonable probability" of causing "serious adverse health consequences or death to humans or animals." **But this requirement likely means that grain elevators, feed and feed ingredient manufacturers, food companies and a host of others will need to evaluate contamination incidents (such as mycotoxins or other physical, biological or chemical hazards) to determine whether they rise to the threshold of posing a "reasonable probability" of causing "serious adverse health consequences or death to humans or animals."**

The following are some specific provisions in the law concerning the "Reportable Food Registry" and the reporting requirements:

▶ **Who Will Be Required to Report?** Subject to the reporting requirement is any person required to register a facility under the Bioterrorism Act of 2002, which encompasses grain elevators, feed mills, feed ingredient manufacturers and a wide range of other food-related establishments (except restaurants).

▶ **When and How Soon Will FDA Be Required to Be Notified?** Parties would be responsible for notifying FDA through the electronic portal within 24 hours after making a determination that a food, feed or feed ingredient meets the threshold of posing a "reasonable probability" that the use of, or exposure to, the product would result in "serious adverse health consequences or death to humans or animals." Importantly, this is a significant improvement over Durbin's original bill, which imposed specific timelines for firms to make a determination of whether an adulteration incident met the reporting threshold. The final version imposes no such deadlines for investigating or making such a determination.

Importantly, in a major improvement, **no report** would be required if the party detected the adulteration prior to any transfer of the product to "another person" and either corrected the adulteration incident or destroyed the adulterated product. Durbin's original bill contained no

such provision. But it will be extremely important to see how FDA defines "another person" when issuing regulations implementing this provision. The NGFA had urged Congress to instead use the phrase "another responsible party" to clarify that this language did **not** encompass intra-company transfers of products between facilities or transporters owned or controlled by the same company.

In addition, to provide a modicum of legal-liability protection to parties making such reports, the legislation authorizes them to include a statement that "denies that the report constitutes an admission that the product caused or contributed to a death, serious injury or serious illness" of humans or animals. The legislation also states that reports or notifications "shall not be considered an admission that the article of food involved is adulterated or caused or contributed to a death, serious injury or serious illness."

▶ **What Is the Report to FDA Required to Contain?** Among the information required to be submitted to FDA in such a report in such instances are: 1) the Bioterrorism Act facility registration number of the person notifying FDA; 2) the date on which such a determination was made; 3) a description of the suspect food or feed, as well as the quantity involved; 4) the extent and nature of the adulteration; 5) the results of any investigation (once known) of the adulterated product, if the adulteration originated with that person; 6) the disposition of the suspect article of food or feed (when known); 7) information about the product that typically is found on the label or packaging; and 8) the unique identification number that FDA is required to assign to the reportable incident.

Subsequently, after consultations with FDA, a party submitting a report also may be required to provide contact information for other parties directly linked in the supply chain and any other information required by FDA.

▶ **What Additional Steps is the Industry Party Required to Undertake?** Under the law, the affected party submitting the report to FDA also is required to investigate the cause of the adulteration – **if the incident originated with that person.** After consultations with FDA, the party also may be required by the agency to notify the immediate previous source, and the next subsequent recipient, of the product. These notification requirements mirror the Bioterrorism Act's one-step-forward, one-step-back recordkeeping requirements. Parties submitting such food registry reports to FDA also would be required to **maintain records of the incident for two years**, and to provide access to those records to the agency.

▶ **Who Else Can Submit Reports to the Reportable Food Registry?** The law allows federal, state or local public health officials to also submit reports about incidents they believe rise to the level of being reportable. In

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another major improvement over Durbin's original bill, though, the law does not require FDA to accept and investigate allegations from consumers, consumer organizations or others that are not public health professionals.

► **What is FDA Required to Do Once Receiving Such Reports?** Once receiving a report into the "Reportable Food Registry," the law requires FDA to "promptly" review it. After consulting with the responsible party submitting the report, FDA is authorized – but not required – to instruct the party to amend the report to include contact information for other parties directly linked in the supply chain for the suspect product and, as noted previously, to notify the immediate previous source of the suspect article of food/feed, and the next subsequent recipient of the product – the one-step forward, one-step back traceability envisioned in the Bioterrorism Act. As noted previously, FDA also is required to issue a unique identification number for each incident reported to the registry.

The law also authorizes FDA, based upon information submitted to the registry, to issue an alert or notification to the public regarding a food or feed incident if the agency deems that doing so is necessary to protect public health.

► **What Information is FDA Required to Convey to the Public?** The law requires FDA to post information on recalled human food and pet foods on its website in a single location. The law specifically requires that two separate sections of the website be created – one for human food recalls and one for pet food recalls – and that the database be user-friendly and searchable.

Further, the law directs FDA to ensure efficient and effective communications during a recall by working with affected companies, relevant professional associations and other organizations to collect information pertaining to the recall, and to use existing communications networks to enhance the quality and speed of communication with the public. In addition, the reports submitted to FDA by firms are subject to the Freedom of Information Act.

► **What Penalties Apply?** The law makes it a prohibited act under the Federal Food, Drug and Cosmetic Act to fail to submit a report for products meeting the reporting threshold, or for making a false report or notification.

Pet Food Provisions: The pet food provisions, spurred by the contamination earlier this year of ingredients involving melamine and related compounds that triggered recalls, require that FDA develop regulations within two years governing ingredient standards and definitions, processing standards, and labeling standards that include nutritional and ingredient information. Within one year, FDA is required to establish an "early warning and surveillance system" to identify pet food adulteration incidents and outbreaks of pet food-related illnesses.

Other Provisions: In addition, the law contains provisions designed to foster federal-state cooperation in improving food and feed safety, including authorization for FDA to enter into service agreements with other federal, state or local agencies to use personnel, services or facilities of such groups, as well as to provide food and feed safety training for state employees. It also requires FDA to share information and coordinate regulatory efforts with the U.S. Department of Agriculture and with state and local public health officials. In addition, if FDA believes the food or feed has been deliberately contaminated, it is required to notify and provide such information to the U.S. Department of Homeland Security.

Members receiving the *NGFA Newsletter* electronically may [click here](#) to access a copy of the food/feed safety provisions of the bill.

GIPSA to Grant 60-Day Extension for Distillers Grains Comments

The U.S. Department of Agriculture's Grain Inspection, Packers and Stockyards Administration has notified the NGFA that it will approve its request for a 60-day extension in the comment period – to Nov. 17 – to respond to questions raised by the agency concerning its potential involvement in establishing standards and standardized testing methods for ethanol co-products.

In a formal request to the agency, the NGFA cited several factors justifying an extension: 1) the new NGFA Biofuels Committee will conduct its first meeting on Nov. 1 in Kansas City, and that discussion will be critical to development of the NGFA's response; 2) the NGFA has solicited input from a wide range of NGFA committees and companies potentially affected by GIPSA involvement, and the extension will allow more comprehensive and meaningful input based upon extensive industry feedback; and 3) with NGFA members on the leading edge of the largest corn and soybean harvest in history, the additional time will provide an additional opportunity for input.

The GIPSA notice, originally published July 20, asked for feedback on a range of issues related to distillers' grains standards and testing methods, as well as the extent to which GIPSA should or should not be involved in development of such standards. Members receiving the *NGFA Newsletter* electronically may [click here](#) to view the GIPSA request for comments.

Member-company input on the NGFA response to GIPSA may be directed to Todd Kemp at tkemp@ngfa.org. NGFA-member companies wishing to comment directly to GIPSA may do so by fax to 202-690-2755, or by email to comments.gipsa@usda.gov.





House Committee Conducts Hearing on Rail Competition

The House Transportation and Infrastructure Committee on Sept. 25 conducted a hearing on rail competition and service that focused on both the federal Surface Transportation Board's (STB) ability to balance the needs of shippers and railroads, and the potential impacts of rail competition legislation introduced by the panel's chairman, Rep. James Oberstar, D-Minn.

Oberstar said his bill (H.R. 2125) would "inject much-needed competition into the rail industry....[T]he [STB] is not effectively meeting its responsibilities and so this legislation will ensure that it makes further efforts to improve its rate-relief processes and addresses competition and captivity concerns."

In his testimony, STB Chairman Charles Nottingham responded that the STB "has taken numerous steps this year to proactively monitor the rail industry and reform (its) existing regulations to modernize and improve how we regulate the railroads." Nottingham also announced that the STB recently commissioned "an extensive study on the extent of competition in the railroad industry," with results expected to be published next fall.

Oberstar requested that each STB commissioner submit individual testimony, and Commissioner Douglas Buttrey simply associated himself with Nottingham's comments. Commissioner Frank Mulvey provided his own testimony, and noted that "clearly there are many who believe the (STB) could do more to promote competition, ensure reasonable rates for captive shippers, and improve the reliability and quality of railroad services." Mulvey added that he, too, was "concerned" about the "state of competition overall in the railroad industry."

Oberstar and several other committee members subjected the STB commissioners to two-plus hours of questions that focused on a wide range of actions or inactions undertaken at the STB:

► **Fuel Surcharges:** Nottingham highlighted the STB decision on fuel surcharges as a significant action on behalf of rail shippers that the STB "undertook without a single formal complaint having been filed." He claimed the decision "demonstrates that the Board will use aggressively the authority granted to it by statute to stop unreasonable practices, thereby protecting shippers and advancing the public interest." Several committee members questioned the agency about references in shipper testimony also presented at the hearing that while the Board acted, it did not order refunds for the alleged \$6.4 billion in previous fuel overcharges.

► **Small Rail Rate Case:** The agency's recent decision on small rail rate cases generated substantial discussion. Again, the STB cited its ruling as alleged evidence of its responsiveness to shippers. Committee reaction ranged from question-

ing the actual effectiveness of the ruling, to holding it up as a defense of the agency, to a wait-and-see attitude.

Nottingham indicated the new guidelines will be tested by three recently filed small rate case disputes.

► **Paper Barriers:** Shippers and committee members voiced concerns over the STB's lack of a decision on the paper-barrier issue. Nottingham indicated the agency intends to complete those proceedings soon. Commissioner Mulvey stressed that the paper barriers issue was of particular concern to him, and testified, "I find this practice to be anticompetitive."

► **Rail Revenue Adequacy:** Chairman Oberstar questioned how an industry deemed "revenue inadequate" in the 27 years since passage of the Staggers Rail Act could still "secure capital from Wall Street, earn substantial profits and invest billions of dollars in their systems." He faulted the regulatory method for determining revenue adequacy, and suggested that "for regulatory purposes" it serves the railroads' interests to continue to be deemed revenue inadequate.

► **"Reregulation":** From the hearing's outset, Oberstar adamantly asserted that railroads are currently regulated, and that opponents of his legislation that continue to term it "reregulation" are misguided. The issue as underscored by Oberstar is the need to enhance competition and provide all parties with a fair opportunity for relief before the regulatory agency. At the hearing's close, after extensive debate between Oberstar and Union Pacific Railway Chairman, President and Chief Executive Officer Jim Young, the latter finally conceded that Oberstar's bill may not constitute reregulation. But Young alleged that it would have a profound negative impact on railroads' ability to invest in much-needed capacity and infrastructure improvements.

► **Investment:** The hearing also centered on whether carriers were investing sufficient capital in infrastructure, the impact potential legislation would have on their investment rate and how best to ensure the long-term viability of the nation's freight rail system. Several shippers suggested that increased competition would force more investment by railroads. Meanwhile, Mulvey suggested creation of a federal "Rail Trust Fund," while carriers voiced their support for freight rail infrastructure tax credit legislation.

What's next? Oberstar appears committed to advancing his bill through the committee and to the House floor. However, based upon statements made by members during the hearing, even getting the bill approved by the full committee may be difficult. Further, without a similar commitment by the leadership of the Senate Commerce Committee, the legislation introduced by Dorgan and Sen. John Rockefeller IV, D-W.Va., will face an even tougher battle.



Hearing Scheduled for Oct. 3 on Senate Judiciary Committee-Passed Rail Antitrust Bill

The Senate Judiciary Committee's Antitrust, Competition Policy and Consumer Rights Subcommittee plans to conduct an Oct. 3 hearing on a bill (S. 722) approved last week by the full committee by a voice vote that would remove many of the railroads' antitrust exemptions.

The measure, introduced by Antitrust Subcommittee Chairman Sen. Herb Kohl, D-Wis., would remove the antitrust law exemption for rail carriers concerning mergers, acquisitions, rates and collective ratemaking agreements, vesting such regulatory oversight in the Federal Trade Commission. The bill requires that the federal government consider a ratemaking agreement's impact upon shippers and consumers.

But following approval by the full Judiciary Committee, concerns voiced previously have reemerged – specifically that the bill would provide for dual merger oversight of rail mergers by both the Justice Department and the federal Surface Transportation Board (STB). The STB has indicated to the Senate Judiciary Committee that it has significant concerns over the language in the measure.

The bill also would direct the STB within six months to

review rulings to bring them into compliance with antitrust laws. After that date, a plaintiff with standing could bring an antitrust action in federal district court to enjoin the application of these rulings where the rulings fail to comply with U.S. antitrust laws.

The bill, dubbed the "Railroad Antitrust Enforcement Act," also would authorize the U.S. attorney general to file suit in federal district court to enjoin railroad actions that violate U.S. antitrust laws. Another provision would give the attorney general authority to file suit in federal district court to enjoin those aspects of a merger or acquisition approved by the STB that violate the antitrust laws.

Senate consideration of the bill not ensured, as the Senate floor calendar is fast filling up for the remainder of this session. Prospects also are uncertain because under Senate rules, a single senator can place an indefinite "hold" on a bill.

In the House, Rep. Tammy Baldwin, D-Wis., has introduced a similar bill. But no action has been taken yet.

Rail Carriers File Court Suit Against STB Final Rule on Rail Rate Challenges

Three rail carriers and the Association of American Railroads (AAR) have filed suit in the U.S. Court of Appeals for the District of Columbia Circuit challenging the federal Surface Transportation Board's (STB) decision designed to create a more realistic and cost-effective mechanism for shippers to challenge excessive rail rates.

The AAR and the three carriers – CSX Transportation Inc., Norfolk Southern Railway and the Union Pacific Railway – said they were "aggrieved" by the STB's decision, alleging that it was "contrary to law, clearly erroneous, arbitrary and capricious, an abuse of discretion and not supported by substantial evidence."

The STB's decision would create three methods that shippers could choose from to challenge unreasonable freight rates:

▶ **Three-Benchmark Method**, under which shippers could obtain up to \$1 million of rate relief under the most

simplified rate-challenge process.

▶ **Simplified Stand-Alone Cost Method**, under which shippers could obtain maximum relief of \$5 million over a five-year period. This rate-challenge method, which is significantly more complex, would require shippers to demonstrate that the carrier is abusing its market power by charging more than required to earn a "reasonable" return on the replacement cost of the infrastructure used to serve shipper filing the rate challenge.

▶ **Full Stand-Alone Cost Method**, under which shippers potentially could obtain unlimited rate relief. But the cost and complexity of using this method makes it impractical for all but the largest rate cases.

See the Sept. 13 edition of the *NGFA Newsletter* for more details on the STB decision.





UP Amends Tariff on Cross-Border Movements, Cargo Loss and Damage

In response to concerns expressed by the NGFA, the Union Pacific (UP) Railroad effective Sept. 22 implemented new tariff provisions that significantly alter the terms and conditions for: 1) moving cargo into or out of Mexico; 2) cargo loss-and-damage determinations; 3) Carmack liability; and 4) the filing of lawsuits for freight loss-and-damage claims by shippers.

The previously applicable provisions – UP Tariff 6007-B, Items 121, 122, 123, 124 – presented a number of major concerns for NGFA’s members. Among those were that under the original Items 123, full liability protection under the Carmack Amendment (49 U.S.C. 11706) – the federal law that governs loss-and-damage claims – was purportedly available only if the shipper paid premiums that resulted in thousands of dollars per car (“the usual tariff rate plus 250%”). The language in other portions of the tariff also severely restricted the grounds under which shippers or receivers could file loss-and-damage claims. The NGFA raised additional concerns about provisions in the tariff that would have required shippers to indemnify the UP for certain property loss, third-party injury or death-related claims. In addition, Item 124 of the tariff purported to limit the timeline for filing lawsuits for freight loss-and-damage claims to within 18 months from the date of actual or expected delivery of the shipment. Item 124 also stated that such lawsuits must be filed in federal court in Omaha, Neb. In response to NGFA’s concerns, Item 123 earlier was amended to remove the premium requirements for full Carmack liability protection. But left intact was a provision stating that Carmack liability coverage was not available for shipments originating in Mexico.

Changes: In the new tariff provisions, the UP has

dramatically altered those prior terms and conditions. Under new Item 121-A [*Provisions for Cargo Moving Into or Out of Mexico*], the UP accepts responsibility for all freight loss-or-damage claims pursuant to the Carmack Amendment “provid(ed) the cargo is moving pursuant to a bill of lading issued by a domestic carrier.” As amended, Item 121-A also now provides that “freight loss or damage that occurs while moving under a bill of lading issued in another country will be the responsibility of the foreign carrier, pursuant to the applicable law.”

Under new Item 122-A [*Cargo Loss and Damage Provisions*], the UP has removed a number of the loss-and-damage liability restrictions, as well as the provision that purportedly would have required the shipper to indemnify and hold harmless the rail carrier from certain claims for “loss, damage, personal injuries or death.”

Under the new 123-B [*Carmack Liability*], the UP has cancelled completely the previous provision that stated Carmack liability was not available for shipments originating in Mexico. Similarly, under the new 124-A [*Freight Loss and Damage Lawsuits*], the UP cancelled the previous provisions that purported to restrict the deadlines and place for filing of lawsuits by shippers for loss-and-damage claims. Of particular importance to NGFA members is that certain loss-and-damage claims are subject to arbitration under the NGFA Rail Arbitration Rules.

The NGFA will be conducting a thorough analysis of the new UP tariff provisions to determine whether further issues remain. But the NGFA commends the UP for responding to concerns expressed on behalf of NGFA shipper members.

Energy Transportation Advisory Committee Appointments Announced

The federal Surface Transportation Board (STB) on Sept. 21 announced the appointment of 23 persons to serve on its recently established Rail Energy Transportation Advisory Committee.

The agency also announced that Oct. 24 will be the first meeting of the new advisory committee, which is to serve as a forum for discussing “emerging issues” concerning rail transportation of energy resources, particularly coal, ethanol and other biofuels.

NGFA grain and biofuel-related members appointed to the advisory committee include **Mark Huston**, director, North American Transportation, Louis Dreyfus Commodities,

Kansas City, Mo.; **James Redding**, vice president, external relations, Aventine Renewable Energy Inc., Pekin, Ill.; and **Darrell Wallace**, vice president, transportation commodities group, Bunge North America, St. Louis, Mo. Rail carrier representatives appointed to the advisory committee include: **Stevan Bobb**, group vice president, coal, BNSF Railway, Fort Worth, Texas; **Paul Hammes**, vice president and general manager, agricultural products, Union Pacific Railway, Omaha, Neb.; **Henry Rupert**, assistant vice president, utility north, CSX Transportation Co., Jacksonville, Fla.; **Darin Selby**, assistant vice president, coal sales and marketing, Kansas City Southern Railway, Kansas City, Mo., and **Alan Shaw**, director, coal transportation, Norfolk Southern Railway, Norfolk, Va.





Wenneker Appointed as New NGFA Arbitration Appeals Panel Chair

NGFA Chairman Ron Olson this week announced the appointment of **Donald W. Wenneker**, director of procurement for Tate and Lyle Ingredients Americas Inc., Decatur, Ill., as the new chairman of the NGFA's Arbitration Appeals Panel.

Wenneker succeeds John McClenathan of Archer Daniels Midland, who served with great distinction in this capacity for many years.

The Arbitration Appeals Panel is the NGFA Arbitration System's "Supreme Court," as it is responsible for rendering final decisions if the original arbitration decision is appealed by a party involved in the case. The panel also monitors the administration of the NGFA's Arbitration System, and oversees the Arbitration Rules.



Wenneker currently serves as a member of the Arbitration Appeals Panel. He has worked for Tate and Lyle and its predecessor company, A.E. Staley, since 1990 as manager of corn procurement. As such, he manages the supply chain for the company's corn processing plants, grain transportation, specialty grains and merchandising by its elevator network. Prior to joining the firm, he worked in a variety of merchandising and operations-management roles for The Scoular Co. and the Pillsbury Co.'s grain division. He began his grain industry career at Pillsbury in 1976. An Illinois native, he is a graduate of Western Illinois University.



Calendar

- Nov. 1, 2007:** NGFA Biofuels Committee
Embassy Suites KCI Airport, Kansas City, Mo.
- 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.



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