



NGFA Newsletter

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Historic Rail Arbitration, Mediation Agreement Expanded, Extended

...Takes Effect for Transactions and Disputes Occurring on or After Aug. 12...

The NGFA Board of Directors has approved expanding the scope and extending the duration of the historic rail arbitration and mediation agreement reached in 1998.

As a result of the Board's action, the type of disputes eligible to be resolved through binding arbitration has been expanded. In addition, the Board approved extending the accord to arbitrate specified rail service issues and mediate certain rate issues for an additional year – to Oct. 1, 2001.

The expansion and extension of the agreement was proposed and approved by the NGFA's Rail Arbitration Rules Committee, chaired by Stevan Bobb, group vice president, Agricultural Products Business Unit, Burlington Northern and Santa Fe Railway Co., Ft. Worth, Texas. The committee is comprised of equal representation of rail carriers and rail users. The proposal subsequently was approved by the NGFA's Board of Directors on July 13. The amendment to the NGFA Rail Arbitration Rules take effect for disputes

involving transactions and arbitration proceedings arising on or after Aug. 12, which, as stipulated in the NGFA's Bylaws, is 30 days after approval by the NGFA Board. The amendments are subject to ratification by the membership at the NGFA's annual business meeting during the March 2000 convention.

New Disputes Eligible for Mandatory Arbitration:

The expanded Rail Arbitration Rules provide for arbitration of most claims for actual damages that otherwise would be covered under the "unreasonable practice" jurisdiction of the federal Surface Transportation Board. The practical effect is that rail users now will be able to arbitrate a rail carrier's transportation or service rule (including demurrage) as being unreasonable as either written or applied.

The following types of disputes would not be covered by arbitration: 1) a railroad's rates or charges,

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USDA, Congress Examining Farm Program Payment Limits

With loan deficiency program (LDP) payments for wheat amounting to 90-cents per bushel or more in some areas and hefty LDP payments forecast for fall-harvested crops, the NGFA has learned that some in the U.S. Department of Agriculture and on Capitol Hill have begun to consider whether to modify the payment limit that currently applies to the sum total of marketing loan gains and loan deficiency payments.

Tonight, Rep. Bill Barrett, R-Neb., chairman of the House Agriculture Committee's Subcommittee on General Farm Commodities, Resource Conservation and Credit, introduced legislation that would increase for one year the combined payment limit for marketing loan gains and LDPs to \$150,000 per person. Meanwhile, USDA has begun evaluating options for increasing the payment limit. Any change in the payment limit would require legislative action, since the limit was stipulated by Congress under the 1996 farm law.

Current Payment Limits – How They Work: Here's how the current payment limit rules spelled out in the 1996 farm law work:

▶ The sum total that an "eligible person" can receive in marketing loan gains and LDPs for all eligible crops in a single crop year is \$75,000 for the first farm and \$37,500 for each of the next two farm entities.

For example, a producer who reaches the \$75,000 payment limit on 1998-crop wheat that is harvested in 1999 (and for which LDP payments are received in 1999) still is eligible for up to \$75,000 in additional payments for 1999-crop corn.

The above struck through language had been corrected on Aug. 3. The new language is as follows:

The crop year is determined on the basis of the normal harvest date for the commodity. For example, fall wheat planted in 1998 for harvest in 1999 is considered 1999 crop wheat. Cotton planted in 1999 for harvest in 1999 is also considered 1999 crop cotton, even though harvest may not be completed until 2000. Thus, the \$75,000 payment limitation for LDP's and marketing loan gains applies to the combined total of 1999 crop wheat, corn, soybeans, cotton, and any other eligible crops that would normally be harvested in 1999.

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- ▶ This combined payment limit for marketing loan gains and LDPs is **separate and distinct from the \$40,000 per person payment limit that applies to the fixed AMTA payments** made under the production flexibility contracts under the 1996 farm law.
- ▶ Importantly, producers who choose to obtain a marketing assistance loan and forfeit the commodity to the Commodity Credit Corporation do **not** have the value of the forfeited loan collateral counted against their payment limits. This is contrary to erroneous press and market advisory service reports that were published this week.
- ▶ The marketing loan gain/LDP payment limit **would apply** to any marketing loan principal and interest forgiven by USDA if it utilizes what the NGFA has dubbed its “secret weapon” for avoiding loan forfeitures – the so-called “cost-reduction” option. Under this option – authority for which was retained and expanded

under the 1996 farm law – USDA is authorized to settle non-recourse marketing assistance loans with producers by forgiving part or all of the loan principal and accumulated interest if it is determined that such a reduction in the settlement price of the loan will avoid forfeitures or eliminate storage, handling and carrying charges on the forfeited commodity.

Proposals Under Consideration: One concept believed to be under initial consideration within USDA is to increase the payment limits to \$250,000 per person – the level that was in effect as recently as 1987. This \$250,000 per-person payment limit consisted of separate limits of \$200,000 on marketing loan gains and a \$50,000 limit on deficiency payments.

During a July 13 address at the National Press Club attended by the NGFA, Secretary of Agriculture Dan Glickman said USDA was considering the impact of the current payment limit on producers and whether to propose a change to Congress.

Glickman Articulates Principles for Addressing Ag Biotechnology

In what the U.S. Department of Agriculture billed as a major policy address, Secretary of Agriculture Dan Glickman on July 13 proposed five broad principles that he said should guide U.S. agriculture’s approach to biotechnology for the 21st century.

In a National Press Club speech [available on NGFA’s web site] attended by the NGFA, Glickman called for:

- ▶ **an arm’s length regulatory approval process.** Glickman said U.S. consumers generally have confidence in the food safety efforts of USDA, the Food and Drug Administration and the Environmental Protection Agency, while European consumers lack such trust in their governmental authorities. But Glickman said the U.S. system, while “tried and tested,” is “not perfect and inviolate, and should be improved where and when possible.” He announced that he would request an “independent scientific review” of USDA’s regulatory process for approving genetically enhanced commodities. “The purpose of this review will be to ensure that, as we are faced with increasingly complex issues surrounding biotechnology, that our scientists have the best information and tools to ensure our regulatory capabilities continue to evolve along with advances in new technology,” he said. Glickman also said USDA will propose the establishment of several regional centers at land grant colleges and USDA research centers to “evaluate biotech products over a long period of time and to provide information on an ongoing basis to growers, consumers, researchers and regulators.”
- ▶ **consumer acceptance**, which he said is dependent upon a sound regulatory approach. But he said voluntary informational labeling of products containing genetically

enhanced commodities also could play a constructive role. “There are clearly trade and domestic implications to labeling that need to be considered,” he said. But “[m]any observers, including me, believe some type of informational labeling is likely to happen...I do believe that it is imperative that such labeling...not undermine trade and this promising new technology.”

- ▶ **fairness to farmers**, which he cited as “one of my biggest concerns” over biotechnology. “Consolidation, industrialization and proprietary research...threaten to make (farmers) servants to bigger masters, rather than masters of their own domains,” Glickman said. “We will need to integrate issues like privatization of genetic resources, patent holders’ rights and public research to see if our approach is helping or harming the public good and family farmers.”
- ▶ **corporate citizenship**, which he said included “fair” contracts between seed companies and farmers that do not relegate producers to being “mere serfs on the land...” He also called on biotechnology companies to continue to monitor products after they’ve been approved for marketing, and to voluntarily agree to notify the federal government of any adverse experiences that occur that pose a potential danger to the environment or food safety.
- ▶ **free and open trade.** Glickman reiterated his call for sound science, open trade and consumer involvement to govern the regulatory-approval process for biotechnology. He cited the recent U.S.-French agreement to conduct a pilot project to examine their respective regulatory-approval processes for genetically enhanced commodities, and said he hoped it could be expanded to include other European countries.



Congress Returns to Busy Schedule

Congress returned from its July 4 break with a substantial agenda to be completed before its traditional August recess.

Among numerous appropriations bills still to be considered for fiscal year 2000 (which begins Oct. 1) is the Senate's version of the agriculture spending measure (S. 1233), which has been languishing in that chamber since June 21. Also awaiting action are bills concerning defense readiness, U.S. State Department programs, religious expression, the Republican tax cut plan and, in the Senate, managed health care reform.

On the agenda for the House and Senate Agriculture Committees are hearings on the Conservation Reserve Program and agribusiness concentration, as well as continued discussion on risk management and crop insurance reform.

Here's a preview:

► **CRP Hearing Scheduled:** The House Agriculture Committee's Subcommittee on General Farm Commodities, Resource Conservation and Credit, chaired by Rep. Bill Barrett, R-Neb., will conduct a hearing on July 22 concerning the U.S. Department of Agriculture's administration of the CRP. The NGFA plans to submit testimony for the hearing record. The hearing is part of a larger effort by the House Agriculture Committee to examine options to address low crop and livestock prices. House Agriculture Committee staff members told the NGFA that while neither Committee Chairman Larry Combest, R-Texas, nor Subcommittee Chairman Barrett is committed to an enlargement of the CRP, no policy option had been "taken off of the table."

► **Introduction of Risk-Management Bills Pending:** The chairmen of the House and Senate Agriculture Committees – Rep. Combest, R-Texas, and Sen. Richard Lugar, R-Ind., respectively, have yet to formally introduce their respective versions of risk-management reform bills, but plan to do so in the near future. The centerpiece of Combest legislation would provide for increased government subsidies for producer premiums on federal crop insurance. The Combest bill also would allow producers a one-time-only agricultural production history loss adjustment by permitting those who have 10 years of production history to drop two yields. And it would create a \$55 million pilot program for livestock insurance. Meanwhile, Lugar's bill takes a fundamentally different approach. Rather than specifically focus on crop insurance, Lugar's planned legislation would provide an increased fixed agricultural market transition payment to producers for each of the years between 2000 and 2002. The amount of the bonus would be based upon a percentage of the producer's current payment. To receive the additional funds, producers would have to utilize at least two of eight specified risk-

management practices, one of which would be to utilize agricultural trade options. Those producers who did not sign production-flexibility contracts would receive a 35 percent discount on federal crop insurance premiums. In addition, pilot programs for livestock coverage would be created and 85/100 insurance broadened to areas where feasible. The major provisions of both bills were reported in the July 1 edition of the *NGFA Newsletter*. Once the bills are introduced, it is expected that the two committees will move quickly in considering them.

► **Senate Agriculture Committee to Examine Ag Concentration:** The Senate Agriculture Committee has announced plans to conduct a July 22 hearing on the economic concentration in U.S. agriculture. In particular, the committee said it wants to receive an update from the U.S. Justice Department on its approval of Cargill Inc.'s acquisition of the grain assets of the Continental Grain Co.

21st Century Ag Commission Schedules Public Listening Sessions

Six public listening sessions to obtain stakeholder input on the future of U.S. agricultural policy after 2002 have been announced by the Commission on 21st Century Production Agriculture. The commission is charged under the 1996 farm law with providing recommendations to Congress on the future direction of U.S. agricultural policy.

The sessions are intended to provide the commission, which is chaired by Dr. Barry L. Flinchbaugh of Kansas State University, Manhattan, Kan., with input from all sectors of agriculture. "It is imperative that we, in developing future policy options for agriculture, gather as much input as possible for those who will be affected by those policies," Flinchbaugh said. He said the commission is seeking input on farm policy issues that need to be addressed, as well as views on those current policies that are working and those that are not.

The schedule for the meetings is as follows:

- Aug. 12: Fresno, Calif.
- Aug. 14: Spokane, Wash.
- Aug. 16: Denver, Colo.
- Sept. 21: Chicago, Ill.
- Sept. 23: Montgomery, Ala.
- Sept. 25: Scranton, Pa.

The NGFA plans to testify at the commission's Sept. 21 meeting in Chicago. Those wishing to register for the meetings may do so by visiting the commission's website: <http://www.agcommission.org>. The deadline for signing up for the August public listening sessions is July 29; for the September listening sessions, the deadline for registering is Sept. 3.



("Historic Rail Arbitration" continued from page 1)

including rate levels and rate spreads; 2) whether an industry or location is or should be open or closed to reciprocal switching; 3) a railroad's credit terms; or 4) the reasonableness of a railroad's car-allocation and distribution rules or practices. However, **arbitration on these matters is not precluded, as both parties still could agree to arbitrate them on a case-by-case basis; or they could bring these matters before the STB.** Further, the application of a railroad's car-distribution rules already was subject to arbitration.

Existing Signatories to Rail Arbitration Agreement Automatically Covered: Importantly, the 445 NGFA rail user member companies that have signed the "*Agreement on Predispute Consent to NGFA® Arbitration*" do not need to take any action to be covered by the amended Rail Arbitration Rules.

Further, the agreement retains the right of new NGFA member companies to decide within 60 days after their membership applications are approved whether to enter into the "*Agreement on Predispute Consent to NGFA® Arbitration*," thereby availing themselves of rail arbitration services. The agreement also contains a provision that permits a rail carrier or a rail user to withdraw from the agreement after giving 90 days' written notice. Importantly, however, any party exercising its right to withdraw

from the agreement is obligated to use arbitration/mediation to resolve covered disputes that arise prior to the effective date of its withdrawal.

Background: The historic arbitration and mediation agreements entered into in 1998 by the NGFA and 15 rail carriers (including all eight Class I carriers operating in North America) were set up as two-year agreements scheduled to expire on Oct. 1, 2000. The agreement, which applies to a wide range of grains, oilseeds, feed and feed ingredients, and other grain products, originally took effect for rail transportation disputes arising on or after Oct. 1, 1998.

The "*Agreement on Predispute Consent to NGFA® Arbitration*" signed by NGFA rail users and carriers provides that certain enumerated disputes are subject to arbitration by parties consenting to the agreement. The Class I railroads and certain other railroads also entered into a "*Predispute Agreement to Mediate Certain Rate Issues.*"

The Association of American Railroads, in consultation with the chief executive officers of the Class I railroads, suggested that the agreements should be extended for an additional year, until Oct. 1, 2001. Thus, the AAR proposal was incorporated into the changes considered and approved by the NGFA Rail Arbitration Rules Committee. The committee's explanation and the changes approved by the NGFA Board of Directors appear on page 5.

Norfolk Southern, CSX Cite Efforts to Resolve N.E. Service Problems

During the Conrail Transaction Council meeting on June 23, the Norfolk Southern Railway and the CSX Transportation Co. cited steps they said they are taking to resolve service disruptions in the Northeast.

Norfolk Southern representatives said they were obtaining crews from the Union Pacific Railroad and locomotives from the UP and the Burlington Northern Santa Fe Railway. The Norfolk Southern also said it was attempting to rehire some retired Conrail personnel, and was encouraging southern line workers to relocate to northern sections of the railroad to improve its service performance. Meanwhile, CSX officials said that except for the upper Northeast, its lines and operations were returning to normal quickly. CSX said its Indianapolis gateway from St. Louis, Mo., to the Northeast had experienced congestion and disruptions, and that it was diverting some of the overload traffic to Cincinnati, Ohio.

Shipper Concerns: At the meeting, the NGFA conveyed the feedback received from members in response to the June 17 *NGFA Newsletter*. Concerns expressed included: 1) trucks temporarily were replacing rail deliveries at higher cost and becoming less available; 2) shippers were not receiving cars because of congestion in nearby terminal areas; 3) mis-routed cars, some of which were shipped to locations far from normal marketing areas; and 4) extreme service delays.

Next Meetings: The Conrail Transaction Council's next meetings are scheduled for **July 22** and **Aug. 19**. The July 22 meeting will be devoted primarily to discussions by CSX and NS of progress in solving their integration problems, and reports from shipper representatives on the service they are experiencing. NGFA members are urged to contact David Barrett [(202) 289-0873 or dbarrett@ngfa.org] by **noon on Wednesday, July 21**, with input on rail service (better, worse or the same).

STB Imposes Additional Reporting Requirements on CSX/NS: Meanwhile, the Surface Transportation Board on July 12 imposed additional reporting requirements on the CSX and Norfolk Southern to aid "safety monitoring of the implementation of the Conrail transaction." The STB also recommended to the two railroads that they expand their weekly reporting as part of the Class I reporting through the Association of American Railroads to include additional terminal areas for CSX of Baltimore, Md., and for NS of Kansas City, Mo., St. Louis, Mo., and Cincinnati, Ohio. Previously, the STB announced that it would require additional reporting from both carriers starting on July 7. Among other things, the STB required the two carriers to report data on blocked sidings and mainlines, interchange activity, and the number of, and causes for, train delays.

Explanation of Expansion of NGFA Rail Arbitration Rules

The following is a brief explanation of the effect of the expanded Rail Arbitration Rules:

First, these changes extend the rail arbitration and mediation agreements from an initial two years to three years. Thus, the agreements would remain effective until at least **Oct. 1, 2001**.

The amendment to the Rail Arbitration Rules expands the rail arbitration agreement to arbitration of claims for actual damages that ordinarily fall under the Surface Transportation Board's "unreasonable practice" jurisdiction. Currently, a rail user desiring to challenge a railroad's tariff or rule would file a claim with the Surface Transportation Board alleging that the railroad's tariff or rule is an "unreasonable practice." If the STB agreed, then the contested provisions would be unenforceable.

Adding this provision to the NGFA Rail Arbitration Rules means that rail users can challenge a tariff or rule (other than rates and the other expressly excluded issues)

as being unreasonable as either written or applied. Since NGFA cases are not formal precedent, the decision of an arbitration committee would apply only to the facts before it. This change applies to disputes arising after the adoption of the new provision.

It should be noted that Section 3 of the NGFA Rail Arbitration Rules provides that the "rules do not change substantive law and thus shall not be construed as either creating or limiting the general or specific substantive law applicable to disputes arising between parties to an arbitration case." Likewise, Section 2(e) provides that "[a] party shall not be obligated to arbitrate claims seeking more than \$200,000 per occurrence."

Finally, the arbitration rights and obligations set forth in the NGFA Rail Arbitration Rules are in addition to the rate mediation rights accorded to NGFA-member rail users under the "*Predispute Agreement to Mediate Certain Rate Issues*" entered into by the nation's Class I railroads and certain other railroads in August 1998.

Text of Amendments to NGFA Rail Arbitration Rules

The following are the changes and additions to the text of the Rail Arbitration/Mediation Agreement and NGFA's Rail Arbitration Rules approved by the NGFA's Board of Directors:

- ◆ **Extension of Agreement on Predispute Consent to NGFA Arbitration:** Numbered paragraph 4 of the agreement is amended to read as follows (addition boldfaced and underscored; deletion struck-through):

"4. This agreement shall become effective for disputes arising from rail transportation occurring on or after October 1, 1998. This agreement shall continue in effect until October 1, ~~2000~~ **2001** (Termination), except that any party to the agreement may withdraw from the agreement prior to Termination by giving ninety (90) days notice of such withdrawal (Early Withdrawal) to the NGFA. The Early Withdrawal shall become effective ninety (90) days after receipt by the NGFA. A party exercising its right to Early Withdrawal shall be obligated to arbitrate any covered disputes arising before the effective date of such Early Withdrawal."

- ◆ **Extension of Predispute Agreement to Mediate Certain Rate Issues:** Numbered paragraph 9 of the agreement is amended to read as follows (addition boldfaced and underscored; deletion struck-through):

"9. Term of Agreement: This agreement shall become effective for mediation requests filed on or after October 1, 1998. This agreement shall continue in effect until October 1, ~~2000~~ **2001** (Termination), except that a railroad signatory may withdraw from the

agreement prior to Termination by giving ninety (90) days notice of such withdrawal (Early Withdrawal) to the NGFA. The Early Withdrawal shall become effective ninety (90) days after receipt by the NGFA."

- ◆ **Amendment to NGFA Rail Arbitration Rules:** The following language is added to Section 2(b) of the NGFA Rail Arbitration Rules:

"10(A) Except as provided in (B), specific railroad-rail user disputes involving the reasonableness of a railroad's published rules and practices as applied in the particular circumstances of the dispute on matters related to transportation or service (including demurrage), that otherwise would be subject to the unreasonable practice jurisdiction of the Federal Surface Transportation Board under 49 U.S.C. § 10702(2).

"(B) Disputes involving the following are not subject to arbitration hereunder: (i) a railroad's rates or charges, including rate levels and rate spreads, (ii) whether an industry or station is or should be open or closed to reciprocal switching, (iii) a railroad's credit terms, or (iv) a railroad's car allocation/distribution rules or practices.

"(C) In determining whether the application of a particular rule or practice is reasonable, the arbitrators should consider, among other things, (i) the practical effects on the operation of both the railroad and rail user involved, and (ii) whether the rule or practice, or its absence, has a disparate negative impact on either the rail user or the railroad."

STB Rejects AAR Petition Challenging Market Dominance Ruling

The Surface Transportation Board on July 2 issued a decision rejecting the Association of American Railroads January 1999 petition seeking reconsideration of the agency's decision to eliminate the product and geographic competition tests when making market dominance determinations in maximum rate cases.

The STB also denied the request of Union Pacific Railroad Co. for a ruling that evidence of product and geographic competition could be presented in a pending case in which UP is the defendant. Instead, the agency concluded that the revised standards, adopted in December 1998, are applicable to pending cases.

By law, the STB is not permitted to review the reasonableness of a challenged rail rate unless it first finds that the railroad has "market dominance" over the traffic involved. Market dominance is defined by law as "an absence of effective competition from other rail carriers or modes of transportation for the transportation to which a rate applies." The general market dominance definition is in addition to another statutory provision that stipulates that a railroad's rate cannot be challenged if the rate does not exceed 180 percent of its "variable costs."

The STB previously considered four types of competition in making a market-dominance analysis:

- ▶ competition among railroads (intramodal competition);
- ▶ competition from other transportation modes (intermodal competition);
- ▶ whether the shipper can avoid using the defendant railroad by shipping or receiving a substitute product (product competition); and
- ▶ whether the shipper can avoid using the defendant railroad by obtaining its product from a different source or shipping it to a different destination (geographic competition).

In its rulemaking proceeding responding to shipper and congressional complaints about the four-part regulatory analysis, the STB in December 1998 eliminated the product- and geographic-competition tests from the market dominance standard. In its decision, the agency concluded that the limited impact on the rail industry was far outweighed by the chilling effect that consideration of product and geographic competition could have on the filing of valid rate complaints by captive shippers, as well as on the timely resolution of rate complaints.

Rejection of AAR Petition: In its petition, the AAR argued that the law requires the STB to consider product and geographic competition, and that, in any event, there was not adequate reason for the agency to change its approach.

But in its decision rejecting the AAR petition, the STB cited the inordinate amount of discovery that has been sought (and allowed) on the basis of the potentially far-ranging nature of the product- and geographic-competition inquiry, which can deter shippers – particularly smaller shippers – from filing rate complaints. Among other things, the agency said, "[w]e do not believe that the relatively modest burden placed on the carriers by our revised policy – the burden of litigating a potentially frivolous case – outweighs the substantial burdens on the administrative process of continued consideration of product and geographic competition. Specifically, we are not persuaded that our revised policy will result in railroads having to defend rates where competition is effective and the resulting rate is reasonable. Disaffected shippers are not likely to pursue a rate complaint when faster, less costly and more effective self-help is available in the marketplace. To the contrary, we have observed that, in the years since the regulatory reform of the late 1970s and early 1980s, shippers have adjusted to a primarily unregulated transportation marketplace and have become quite adept at using competitive leverage to obtain the best transportation rates and services.

"We believe that our revised policy should lead to additional rate complaints only where captive shippers have been deterred from challenging rates on market dominant traffic by the prospect of burdensome and protracted antitrust-style litigation," the STB concluded. "[W]hen existing rules create uneven and unfair burdens on the parties that come before us, we have the responsibility to amend the rules to level the playing field."

STB Rejects UP Request Submit Product and Geographic Evidence in Pending Case: In the same decision, the STB also rejected UP's request that it be permitted to present evidence of product and geographic competition in a pending case [*FMC Corp. and FMC Wyoming Corp. v. Union Pac. R.R., Docket No. 42022 (FMC)*] in which the carrier is the defendant. UP argued that the STB legally may not apply the revised policy to FMC, because the complaint there was filed before the policy was changed. But the STB rejected the UP's argument, finding that the market dominance provisions were not intended to shield unreasonable rates; thus, the STB reasoned, the UP's conduct in setting its rates should have been no different, regardless of whether the new or old policy was in effect.

Obtaining a Copy: The STB's decision [*STB Ex Parte No. 627 in the proceeding captioned "Market Dominance Determinations – Product and Geographic Competition, et al."*] is available on the agency's web site at www.stb.dot.gov.



Federal Court Rules CFTC Cannot Force Newsletter Publishers to Register

The U.S. District Court for the District of Columbia Circuit on June 21 ruled that the Commodity Futures Trading Commission could not require newsletter publishers to register as commodity trading advisors under the Commodity Exchange Act's registration requirements.

U.S. District Judge Ricardo M. Urbina concluded that the registration requirement, as applied by the CFTC, imposed a ban on the "publishing of impersonal commodity futures trading advice" which constituted "an impermissible prior restraint upon the exercise of free speech and runs afoul of the First Amendment of the U.S. Constitution."

The plaintiffs in the federal lawsuit were described as companies that "publish books, newsletters, Internet websites, detailed written instruction manuals (known in the industry as 'trading systems') and computer software that provide information, analysis, and advice on commodity futures trading." The court found that the Commodity Exchange Act's provisions [7 U.S.C. §§ 1a(5) and 6m(1)] would have required each of the plaintiffs to register as commodity trading advisors because the furnishing of commodity trading advice was their primary business or profession. The statutory penalties for failing to register

include possible conviction of a felony punishable by fines of up to \$500,000 and/or up to five years in prison.

The CFTC argued that the registration requirement constituted a permissible regulation of a profession, and that the application of the statute and CFTC regulations did not run afoul of the Constitution. Registration as a commodity trading advisor under the CFTC's regulations includes filing an application with the National Futures Association and paying an annual fee. In addition, registrants are required to attend initial and ongoing ethics training, maintain books and records that are subject to CFTC inspection, and to file reports as directed by the CFTC.

Judge Urbina noted that "the plaintiffs here never engage in individual consultations with their customers regarding their standard advice and recommendations and under no circumstances do they make trades for their customers." Consequently, the court found "that the CFTC's application of the (Commodity Exchange Act's) registration requirement to the plaintiffs in this case constitutes an attempt to regulate speech, not a profession." The court's opinion in *Taucher v. Brooksley E. Born, et al.*, can be accessed from the following Internet site: <http://www.ij.org/cftc/>.



FDA Issues Proposed Rule on Veterinary Feed Directive Drugs

The Food and Drug Administration is seeking public comment by Sept. 30 on its proposed rule to implement the veterinary feed directive (VFD) provisions of the Animal Drug Availability Act.

The VFD concept was supported by the NGFA and other industry groups for certain new classes of animal drugs that FDA refused to approve for over-the-counter distribution because of concerns over antibiotic resistance and misuse. FDA worked with the NGFA and other industry and producer groups to devise the VFD as an alternative to relegating such drugs to prescription status, which would have triggered burdensome and costly state pharmacy law requirements.

The federal law requires that VFD drugs be used under a valid veterinary-client-patient relationship where the veterinarian assumes the responsibility for safe and effective use of the VFD and the client agrees to follow the veterinarian's instructions. One VFD drug – tilmicosin, an antimicrobial for use in treating swine respiratory diseases – has been approved by FDA. In issuing a proposed rule in the July 2 *Federal Register*, FDA specifically sought comment on:

- ▶ whether to permit the use of e-mail and telephone dissemination of VFD orders from a veterinarian to a feed mill or other distributor. The proposed rule permits fax transmission but does **not** provide for telephone or e-mail

dissemination, in part because of the lack of a veterinarian's signature and because of the possibility of mix-ups.

- ▶ requiring feed mills and other distributors of VFD drugs to notify FDA within 30 days if they change a business name or address.
- ▶ whether FDA, rather than the veterinarian, should have the authority to determine whether to permit refills or reorders of VFD drugs.
- ▶ whether to allow a distributor to ship medicated feeds containing a VFD drug to a consignee without sending a VFD, but only if the consignee furnishes an "acknowledgment letter" affirming that it will distribute medicated feed bearing or containing a VFD drug to a VFD holder or another distributor who furnishes a similar acknowledgment letter to the ultimate user. [*Note: This feature was designed primarily to address the concerns of feed manufacturers with a dealer network.*]

Submitting Comments: The NGFA's Feed Industry Committee will be reviewing and preparing the NGFA's comments on FDA's proposed rule during its Aug. 2-3 meeting in Omaha, Neb. Members who wish to submit their own comments may do so on or before **Sept. 30** by writing to: Dockets Management Branch (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Room 1061, Rockville, Md., 20852.



MEMBERSHIP MATTERS

by todd kemp
director of marketing

Membership Madness Begins! Fabulous Prize Package Available to all Sponsors!

Membership Madness – the 30-day period during which all NGFA members are asked to focus their attention on recruiting new members – has begun! The Madness will run from July 15-Aug. 15, and a lucrative prize package has been assembled for which all successful recruiters will be eligible.

The Membership Madness prize includes two free nights at any Marriott property, generously sponsored by the **Marriott Corp.**, along with complimentary airfare. The names of all membership sponsors during the Madness will be thrown into a hat at 5 p.m. Eastern Time on Aug. 15. The winner of the random drawing will receive two nights at the Marriott property of his or her choice. Some potential destinations include:

- ◆ Casa Marina, Key West, Fla.
- ◆ Camelback Inn, Scottsdale, Ariz.
- ◆ Desert Springs, Palm Desert, Calif.
- ◆ Nassau Marriott, The Bahamas
- ◆ Aruba Marriott Resort, Aruba
- ◆ Casa Magna, Cancun, or Puerto Vallarta, Mexico
- ◆ Frenchman's Reef, St. Thomas, U.S. Virgin Islands

Who are some prime prospects?

Check your current **NGFA Directory/Yearbook** to see if

the companies with which you do business are listed. If not, they're likely a prospect -- just like the ones listed alongside our frenzied recruiter.

First entry already in! In today's mail, the first new member of Membership Madness '99 was received. **Enderlin Farmers Elevator**, Enderlin N.D. (Keith Brandt, manager), has submitted an application for membership, sponsored by **Steve Strege**, executive vice president of the North Dakota Grain Dealers Association, Fargo, N.D. With this sponsorship, Strege vaults to the top of the Affiliate membership recruiting competition and becomes the first sponsor eligible for the prize package.

Enhance your odds! Each new member sponsored means extra chances for the drawing!

Questions? Need materials? Call Todd Kemp or Rhonda Warren at the NGFA's staff at (202) 289-0873. Watch for a special Membership Madness appeal by Recruiter Network Chair JoAnn Brouillette in the next edition of the **NGFA Newsletter**.

