

Three Seed Companies Provide Responses to NGFA Request to Communicate with Purchasers of EU-Unapproved Corn

The NGFA has received letters from three seed companies so far in response to its request that they reestablish communications and work with growers of varieties of genetically enhanced corn not approved for import by the European Union to minimize the potential for such corn becoming inadvertently intermingled with any shipments.

The NGFA on Aug. 6 transmitted a letter to the major U.S. seed companies urging that they take the following three "immediate actions":

1. Contact their dealerships and seed sales force that sold EU-unapproved genetically enhanced corn events, and direct that they re-contact the producers who purchased and planted such corn to reiterate the producer's responsibility to deliver such corn for approved uses;
2. Strongly encourage the grower to contact his or her potential buyer to establish affirmatively that the buyer is willing and able to accept delivery of such corn. Further, strongly suggest that the seed sales person offer to accompany the grower to the buyer's location to facilitate the exchange of this vitally important information; and

3. Establish a means of written verification to ensure that the seed company's sales force has performed the two aforementioned actions and to follow up in instances where such actions have not been taken.

The NGFA's letter was sent to the following seed companies: Monsanto Co., Pioneer Hi-Bred International, AgrEvo USA Co., Dow AgroScience, Novartis Seeds Inc. and Optimum Quality Grains L.L.C.

Seed Company Responses: The NGFA requested that the seed companies respond by **Aug. 15** concerning the steps they planned to take to initiate each of the three aforementioned actions.

As of press time today (Sept. 9), the NGFA had received responses from three of the six companies – Novartis, Pioneer Hi-Bred International and AgrEvo USA Co. The following is an NGFA-prepared summary of the responses, as well as the date the responses were received:

(Continued on page 4)

U.S. Appellate Court Judge Upholds NGFA Arbitration Decisions

...Rejects Reasoning Used by Iowa Judge who Vacated Arbitration Award...

A circuit court judge for a U.S. appellate court has issued a decision upholding an NGFA Arbitration Decision, and challenging the reasoning of an Iowa federal judge, who on Aug. 2 vacated an NGFA arbitration award.

In an opinion issued on Aug. 23, Judge Frank Easterbrook, a circuit court judge for the U.S. Court of Appeals for the Seventh Circuit, **expressly rejected** the rationale set forth by the Iowa federal judge in a case involving Cargill Inc. and Mark Hoffman. The Iowa federal judge – U.S. District Judge Mark Bennett — had vacated the decision issued by the NGFA arbitrators in *Cargill v. Hoffman* [NGFA Arbitration Case Number 1787] on what he termed "extra-statutory" grounds.

Easterbrook issued his opinion in an Illinois federal district court case involving two other NGFA arbitration decisions, which he upheld. His decision serves to enforce the NGFA arbitration decisions entered in *The DeLong Co.*

v. Phillip Brown and Staley Grain, Inc. v. Wilson Farm, et al. Easterbrook was "sitting by designation" at the district court in the Illinois cases.

In his ruling, Easterbrook noted that "[r]eview under the Federal Arbitration Act is exceptionally narrow." He found, among other things, that:

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**Access the Web Site
by Typing the NGFA's
Web Site Address:
<http://www.ngfa.org>**

Enter the User Name: ngfa

Enter the Password: soybean



CFTC's New Rules for Agricultural Trade Options

The National Grain and Feed Association, through its Risk Management Committee, for more than three years has been encouraging the Commodity Futures Trading Commission (CFTC) to authorize a reasonable pilot program for agricultural trade options.

Why did NGFA pursue trade options for our industry? As farmers attempt to manage with more flexibility under the "Freedom to Farm" law, they need access to additional risk-management tools. Some revenue-assurance products are available through insurance. But our industry cannot legally offer similar competing products without CFTC regulatory approval. In addition, a practical agricultural trade option rule potentially could provide greater clarity on the legal status – from the CFTC's perspective – of cash contracts in general, thus reducing litigation risk for our industry.

In April 1998, the CFTC published a set of regulations to govern agricultural trade options. But in the last 16 months, no companies signed up as agricultural trade option merchants. The CFTC now has published a new proposed rule, with the goal of attracting some interest and participation. The amendments to the rules were reported in the Aug. 26 edition of the *NGFA Newsletter*.

The NGFA on several occasions submitted recommendations to the CFTC on how the agricultural trade option regulations could be made less onerous and more practical. The NGFA specifically asked the CFTC to consider:

- ◆ providing for cash settlement of agricultural trade options (*the agency's new proposal adopts this change*);
- ◆ changing the rules to not require registration with the CFTC (which also entails exposure to CFTC reparations as a dispute-settlement forum and is tantamount to another perceived litigation risk). As an alternative, the NGFA suggested that the CFTC require firms to provide written notification to the agency before writing agricultural trade options. Such notification would permit firms to specify in contracts the dispute-settlement forum agreed to

with the customer (*the new CFTC rule retains registration and reparations requirements*); and

- ◆ reduce the minimum net worth for parties to be exempt from the CFTC's regulations from \$10 million to \$1 million (*the CFTC did not change this requirement*).

The NGFA made other recommendations to reduce paperwork, recordkeeping and reporting burdens. The CFTC responded with some modifications to address these concerns. A specific comparison of the current agricultural trade option rule with the CFTC's proposed revisions is found on pages 6-7. Since most companies in our membership are not currently registered with the CFTC, and thus are not exposed to CFTC reparations for dispute settlement, I asked Paul J. Pantano Jr., a Washington-based attorney with McDermott, Will & Emery, who is experienced in reparations proceedings, to describe the system and what it involves. His analysis is found on page 8.

You are encouraged to take a look at the proposed changes in the agricultural trade option rules, and review the article by Mr. Pantano. You also may wish to review the exact language of the proposed rule, which can be accessed on the web at www.cftc.gov.

Most of all, I encourage you, if you have interest in this issue, to comment directly to the CFTC about the proposed rule by the Sept. 30 deadline. I know the agency is most interested in hearing from individual companies about whether they will have interest in signing up to offer agricultural trade options under the new proposed rules and if not, why not. The agency has attempted to improve the rule. But the bottom line is this: **Are the changes adequate to obtain reasonable participation?** Please send your company reaction and comments **on or before Sept. 30** to: Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st St., N.W., Washington, D.C., 20581. Or you may transmit your comments via e-mail to: secretary@cftc.gov.



Congress Prepares to Consider Emergency Ag Relief, Crop Insurance Bills

Congress returned from its summer recess this week, facing a full plate of agriculture issues to be resolved before the Oct. 29 target adjournment date. Among the topics waiting to be considered are the fiscal year 2000 agriculture appropriations bill, the Senate version of which contains \$7.65 billion in emergency farm relief, and crop insurance reform.

Emergency Farm Relief: The House and Senate will conduct a conference committee meeting – at a time yet to be determined – to resolve differences between their respective versions of the fiscal 2000 appropriations bills. The conference takes on added importance because the House bill (H.R. 1906) does not contain any emergency farm relief. The Senate emergency package contains the following provisions:

- ▶ \$5.54 billion to double the fixed market transition (AMTA) payments to producers for 1999.
- ▶ \$475 million in direct payments to soybean and other oilseed producers for the 1999 crop year.
- ▶ \$400 million in additional crop insurance premium subsidies for the 2000 crop year.
- ▶ \$325 million in payments to livestock and dairy producers.
- ▶ \$134 million for specialty crops.
- ▶ an increase in the producer payment limit for marketing loan gains and loan deficiency payments from \$75,000 to \$150,000 for the 1999 crop year.

It is uncertain exactly what form the final version of the emergency aid package will take. The House conference committee members could simply accept the Senate's position. Or they may decide to contest some provisions, thus delaying final passage of the bill.

In addition, the House Agriculture Committee might weigh in with a proposal of its own. Rep. Jo Ann H. Emerson, R-Mo., has introduced a bill (H.R. 2743) that, while similar to the Senate bill, also contains some different provisions, including a non-binding "sense of the Congress" section that would urge the U.S. Department of Agriculture to increase enrollment in the Conservation Reserve Program to the maximum 36.4 million acres. Meanwhile, ranking member Rep. Charles W. Stenholm, D-Texas, has entered the debate by introducing a bill (H.R. 2792) that would send direct payments to producers should commodity prices drop below an average determined by USDA.

Two other issues – sanctions reform and dairy policy – also await to be resolved. During debate of the Senate bill, Sen. John Ashcroft, R-Mo., inserted an amendment

into the text that would change U.S. sanctions policy to require congressional approval of any unilateral agricultural or medical sanctions. The White House has expressed reservations about the amendment because it may be redundant, given recent changes to sanctions procedures made by the president and because such a policy might infringe upon powers traditionally reserved for the executive branch.

In a further wrinkle, the Clinton administration reportedly is ready to release its emergency spending proposal. For farm aid, the package reportedly will contain basically what is contained in the Senate bill. Over the recess, congressional leaders repeatedly called upon the president to submit a formal disaster relief proposal to Congress. And today, House Agriculture Committee Chairman Larry Combest renewed his call on the Clinton administration to submit its proposals for farm relief. In a tersely worded letter to Secretary of Agriculture Dan Glickman, Combest wrote that "...[A]t a time when even country musicians have ruminated on the problem long enough to have an opinion, the administration is still AWOL."

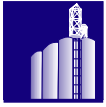
Crop Insurance: Later this month, the House likely will approve the crop insurance reform bill (H.R. 2559) introduced by Combest. The bill, which the House Agriculture Committee passed earlier this summer, would: 1) increase government premium subsidies at all levels to encourage greater participation; 2) provide enhanced coverage for multi-year disasters; and 3) authorize a livestock price insurance pilot program.

In the Senate, debate continues between supporters of the three main bills before the Agriculture Committee – one authored by Sens. Pat Roberts, R-Kan., and Bob Kerrey, D-Neb.; one by Sen. Thad Cochran, R-Miss.; and a third (not introduced yet) by Committee Chairman Sen. Richard Lugar, R-Ind. The outlook for a resolution of this matter remains uncertain.

Earlier this year, Congress set aside in its annual budget \$6 billion over the next five years for crop insurance. Although nothing is certain at this point, changes to the crop insurance program could complete congressional activity in farm policy for this year.

House Agriculture Committee Sets Hearing on Farm Economy

The House Agriculture Committee today announced it will conduct two hearings on the status of the farm economy this month. The first hearing is scheduled for Sept. 15 in Washington, while the second is slated for Sept. 18 at the Kansas State Fair in Hutchinson, Kan.



("EU-Unapproved Corn" continued from page 1)

▶ **Novartis** (Letter dated Aug. 11 and received Aug. 16): In a response authored by Edward C. Resler, vice president, general counsel and secretary, Novartis Seeds Inc. noted that the only genetically enhanced seed corn products produced and sold by the company (*Events 176 and Bt11*) had both been approved for import by the EU. "(Thus), we are not faced with the issues addressed in your (NGFA's) Aug. 6 letter. Resler's letter noted that Novartis is participating with other seed companies in the development of a database of grain purchasers that indicate they will accept EU-unapproved genetically enhanced grains.

▶ **Pioneer Hi-Bred International Inc.** (Original letter dated Aug. 24 and received Sept. 2; followup letter dated and received Sept. 9): In a response authored on Aug. 24 by Industry Relations Manager Scott R. Hedderich, Pioneer Hi-Bred International Inc. noted that the NGFA had raised three key issues: "1) Notify individual customers who have purchased these products; 2) educate producers to ensure they contact their local elevator early with accurate information; and 3) establish a means of written verification."

In response, Pioneer Hi-Bred wrote that "[a]lthough there was no requirement to do so, Pioneer began a communications effort on this issue last year. In addition, we have been working actively with a number of trade associations for well over a year on complementary communications efforts....[P]lease be assured that Pioneer began to undertake the steps outlined in your letter as early as this spring."

Pioneer's letter then referred the NGFA to an attached Aug. 2 letter from the company addressed to the National Corn Growers Association, which stated, in pertinent part: "Pioneer first contacted growers back in September 1998 reminding growers of non-approved status of the hybrids and the need for domestic use of grain. Pioneer again contacted its customers in April of this year to remind them of the European import status and to provide an initial database list, provided by a cooperating registrant, that showed potential domestic use sites in their area.

"For the 1999 growing year, growers who purchase a Pioneer brand hybrid with the YieldGard gene were required to sign an agreement acknowledging their responsibility for an IRM plan. This agreement also contains a separate section for growers who are purchasing the stack products. The section highlights the non-approved status of the hybrids," the Pioneer letter to the corn growers continued.

"In the 1999 and 2000 Pioneer Brand Products Catalog, stack hybrid descriptions carry the following footnote: 'Grain Export Approval Pending – Regulatory approval of grain harvested from this hybrid is pending in some export markets and may not be received before harvest. The grower must be prepared to feed the grain on-farm or sell the grain into domestic and non-restricted export markets only.' This statement will also be carried on Pioneer seed tags for 2000 planting," Pioneer's letter to the corn growers said.

Pioneer's Aug. 24 letter to the NGFA also said that "[a]lthough we have met all the regulatory and legal requirements with respect to these products, Pioneer has encouraged the (seed) industry to take additional steps to help producers and assist the grain handling industry." The letter notes that Pioneer was instrumental in urging the seed industry -- through the American Seed Trade Association -- to develop the database of buyers that indicate they are willing to purchase EU-unapproved corn for approved uses.

In a followup letter to the NGFA received today (Sept. 9), Hedderich wrote: "While it is impossible to assure the marketing proficiency of any group of producers across the U.S., Pioneer has undertaken a number of steps to both educate growers about the EU import status of our products and to assist them by providing marketing information. In that vein, Pioneer has been contacting the purchasers of our stack products for well over a year. We will shortly be sending to them another letter, which again reminds them of their responsibilities and also provides them with some marketing assistance. In addition to our written communications, Pioneer sales representatives have been working with our customers on marketing issues throughout the year and will continue to do so through the harvest.

"As I indicated in my previous correspondence, Pioneer has also been a leader in the development of a database of potential grain purchasers for products not yet approved for import into the EU. This information will be distributed throughout Pioneer so that we may work one-on-one with our customers on these marketing issues.

"Irrespective of product types, we have been and will continue to encourage producers to work with their traditional outlets for grain, whether they be country elevators, feed mills or livestock operations, on the logistics surrounding harvest and delivery. We are strongly encouraging our customers of the stack products to work with their outlets to make arrangements well in advance for delivery. We have been and will continue to advocate straightforward, open and honest communications between growers and the purchasers of grain."

(“EU-Unapproved Corn” continued from page 1)

► **AgrEvo** (Letter dated and received on Sept. 9): In a letter authored by Dr. Sally Van Wert, manager of regulatory affairs-biotechnology, AgrEvo noted that it was not a seed corn company but has worked with its “seed company partners” to ensure that “the actions as requested in (the NGFA’s) letter are carried out.” AgrEvo noted that it had communicated with growers on three separate occasions that the purchase of seed was not approved for import by the EU, and that the grain “must be directed to feed and non-food industrial uses.”

“We have now implemented this promise,” Van Wert wrote, attaching a copy of a letter sent this week to growers who purchased AgrEvo’s StarLink corn hybrids with the Cry9C protein. “With this latest 1999 letter, each grower received a listing of delivery locations derived from the database built in an industry initiative focused through the American Seed Trade Association. AgrEvo contributed to this initiative monetarily and strongly supports this effort. This letter also encourages the grower ‘...to contact your grain elevator ahead of time, in case the elevator asks to schedule a time to deliver your grain.’”

Van Wert noted that the letter sent to growers was co-authored with a “seed company partner. Recent meetings with our partners served as a mechanism for AgrEvo to personally communicate the need for further contact with growers to ensure proper delivery of EU unapproved

genetically enhanced corn,” she concluded.

Seed Companies Not Responding: As of press time today (Sept. 9), the NGFA had not received written responses yet from the following seed companies: Dow AgroScience, Monsanto and Optimum Quality Grains L.L.C. Monsanto has indicated orally that it will be responding imminently.

Copies Available on NGFA Web Site: A copy of the NGFA’s letter to the seed companies, and their responses, are posted on the biotechnology heading of the NGFA’s web site for members only at: <http://www.ngfa.org>. The “user name” is: ngfa. The “password” is: soybean. Type all letters in lower case.

Genetically Enhanced Corn Events Not Approved for Import to European Union

The following transgenic corn gene/traits have not been approved for import by the European Union:

- Roundup-Ready Corn™ – Monsanto Event GA21
- Bt Xtra™ – DeKalb Event DBT 418
- DeKalb GR™ – DeKalb Event DLL 25
- DeKalb Roundup Ready + Bty – Stacked variety of Monsanto Event 810 and Monsanto GA21
- Pioneer YieldGard™ + Liberty Link – Stacked variety of Monsanto Event 810 and AgrEvo T25
- LibertyLink™ T14– AgrEvo Event T-14
- Starlink™ – AgrEvo Event CBH351

USDA Notifies County FSA Offices on Potential Increase in Payment Limit for Marketing Loan Gains, LDPs

The U.S. Department of Agriculture’s Farm Service Agency has issued a notice (LP-1695) to its state and county offices directing that they withhold action on – rather than reject – loan deficiency payment requests from producers who have reached the \$75,000 payment limit on marketing loan gains or LDPs.

In the notice, USDA noted that Congress, as part of the agricultural appropriations bill for fiscal year 2000, is considering an increase in the annual per-person payment limit to \$150,000 for 1999 crops. The Senate has approved such an increase as part of its appropriations measure. In addition, Rep. Bill Barrett, R-Neb., chairman of the House Agriculture Committee’s Subcommittee on Farm Commodities, Resource Conservation and Credit Subcommittee, has introduced legislation that would double the payment limit to \$150,000 for 1999 crops. A joint House-Senate conference committee is expected to meet in September to resolve differences between the Senate- and House-passed bills.

In its notice, FSA directed that its county offices

accept the LDP application (CCC-666 LDP) from producers who have reached the current \$75,000 payment limit, and inform them that no action will be taken on the request until the county office receives further instructions. During this interim period, the county office will neither approve nor disapprove the LDP request from such producers.

Importantly, the notice also stated that producers “who have reached the \$75,000 payment limit and are planning to sell their commodity may request an LDP in the normal manner before beneficial interest is lost.” Thus, even though the FSA county office does not act on the LDP application, this will enable producers to sell the commodity (thereby losing beneficial interest) once the LDP application is made and still be eligible for an LDP if the payment limit is increased. This reflects a procedural change in the LDP program made for 1999 crops, in which the LDP rate for producers using the CCC-666-LDP form is based on the rate in effect on the date the LDP is **requested**, rather than the date on which the LDP rate application is **approved** (FSA Notice LP-1689).

CFTC Agricultural Trade Option (ATO) Rules Comparing New Proposal vs. Current Rules

<u>Current ATO Rules</u>	<u>New Proposed ATO Rules</u>	<u>Current ATO Rules</u>	<u>New Proposed ATO Rules</u>		
<p>I. Registration: Agricultural Trade Option Merchants (ATOMs) <u>must be registered.</u></p>	Same Requirement	<p>IV. Delivery Requirements/Offset/Cash Settlement: "(ATO) cannot be off-set (or cash settled), and if exercised, must result in physical delivery of underlying commodity..." Does provide for substitution of a forward contract for the option prior to expiration.</p>	Requirement deleted; As part of the required Disclosure Statement (see VII. below), the purchaser is advised that ATO contracts should include terms of settlement (physical, cash or offset) and delivery specifications, if delivery is intended as a method of settlement.		
National Futures Association (NFA) processes registrations of ATOMs on behalf of CFTC.	Same Requirement				
ATOMs must maintain \$50,000 net worth (based upon a CPA-audited financial statement to be initially submitted at time of registration).	Same Requirement				
Principals and sales agents (associated persons) of the ATOM must <u>individually certify</u> that they are not disqualified by statute or regulations from engaging in commodity/ATO business.	Applicable to only those principals in the company who control or direct ATO activity and applicable to sales agents (associated persons). (A more narrow range of people.)				
ATOMs must separately certify to CFTC that applications of principals and sales agents are truthful.	Requirement deleted				
Sales agents must complete six hours of training.	Requirement deleted; ATOM decides when training needed.				
ATOM must provide access to CFTC and Department of Justice to "at all times" inspect books/records.	Same Requirement	<p>V. Restriction on advanced option premiums: Advance premiums paid for ATOs can only be used to purchase a covering position in exchange markets, or if not used for such purpose, must be treated as belonging to the customer until ATO exercised or expiration.</p>	Same Requirement		
<p>II. Types of Businesses that can be ATOMs: Prospective ATOMs could be involved in the business as a "producer, processor, or commercial user of, or a merchant handling, the commodity which is the subject of the ... (ATO)...or the products or byproducts thereof."</p>	Business types have been expanded in the new rules to clarify "a merchant selling inputs used in the production of the commodity" or a "bank routinely engaged in the financing of such business" are eligible ATO enterprises.			<p>VI. Requirements for written contracts and specific terms in ATO contracts: Current rule says all ATO contracts must be in writing and contain a specific list of terms (this is an extensive list of contract terms).</p>	New requirements: All ATO contracts must be in writing, or if verbal, must be confirmed in writing (including terms and conditions) and provided to customer within 48 hours. No specific outline of terms required, but disclosure statement (see item VII.) specifies to the customer what ATO contracts "should" contain.
Special restriction on producer ATOMs, prohibiting producer selling put options under all circumstances, and prohibiting the selling of call options, except to the extent that the producer simultaneously buys a put option in the same quantity with same expiration date as the call.	Same Requirement				
<p>III. Types of Businesses to which ATOs may be Legally Sold: "(may be sold to) a producer, processor, commercial user, merchant handling the commodity which is the subject of the...ATO ...or the products or byproducts thereof..."; purchase of ATO must be solely for purposes related to customer's business.</p>	Same Requirement	<p>VII. Disclosure Statement: Current rules require ATOMs to provide customers with a "<u>Summary Disclosure Statement</u>" that must be submitted and signed by the customer before entering the first ATO contract. This statement must contain specific language taken from CFTC regulations, and addresses: appropriateness of contracts; costs and associated fees; required business use of ATOs; and rights of purchaser to dispute resolution through CFTC reparations proceedings.</p> <p>Current rules also require a "<u>Transaction-Specific Disclosure Statement</u>", that covers: procedures for ATO exercise, elements comprised of purchase premium; description of all costs and fees; assessment of worst possible financial outcome of the ATO contract.</p>	New proposed rules only require a " <u>Summary Disclosure Statement</u> ," thus eliminating the transaction-specific statement. The language for this Summary Disclosure Statement is specified in regulations, and covers: 1) appropriateness of ATO contracts; 2) costs and fees associated with the ATO; 3) terms that should be in ATO contract (8 contract items specified); 4) required business use of ATOs; 5) Dispute resolution, informing the customer of rights to CFTC reparations in the case of dispute.		

CFTC Agricultural Trade Option (ATO) Rules Comparing New Proposal vs. Current Rules (Cont'd)

<u>Current ATO Rules</u>	<u>New Proposed ATO Rules</u>	<u>Current ATO Rules</u>	<u>New Proposed ATO Rules</u>
<p>VIII. Dispute Resolution: Current rules specify that ATO customers have the right to CFTC reparations, regardless of contractual language contained in ATO contracts that may specify arbitration or courts to resolve disputes.</p>	<p>Same requirement, except CFTC added regulatory language, stating, an ATOM "may not require a customer to waive the right to seek reparations under section 14 of the Act and part 12 of the regulation by agreement" to submit grievances to a specified settlement procedure (such as arbitration) prior to a grievance arising...(and) ATOM must advise customer in writing of its intent to submit a grievance to arbitration and that customer has 45 days to seek CFTC reparations under the Act after receiving specified notice. (This requirement is the same for all registrants under the Act, including FCMs, floor brokers, etc.)</p>	<p>XI. Reporting to CFTC/NFA: Current rules require ATOMs to file <u>quarterly</u> reports with the National Futures Association (NFA) concerning (by commodity/put/call/and combined options): 1) total new contracts entered in period; 2) total quantity of commodity related to new contracts; 3) total contracts outstanding at end of period; 4) total quantity of commodity in ATOs at end of period; 5) total ATOs exercised during period; and 6) total quantity of commodity underlying exercised ATOs in period.</p> <p>Special Calls: CFTC has right to make "special calls" for information from ATOMs, covering much of the same information requirements in quarterly reports. ATOMs must respond.</p>	<p>Same, except, regular reports are only required <u>annually</u>, rather than quarterly. New proposed rules have the reports being filed directly with CFTC, not NFA.</p> <p style="text-align: center;">Same requirement</p>
<p>IX. Reporting Account Info to Customers: Current requirements very similar to new proposed rules (see at right).</p>	<p>1) Within 2 business day of off-set, cancellation or settlement, or amendment of expiration date, a statement of profit/loss on the account; 2) In response to customer request, current price quotes, all other info related to account, within 1 business day if ATOM responds orally, and within 2 business days if ATOM responds in writing; 3) Written, verbal, or electronic notice of expiration date of each option which will expire within the next calendar month.</p>	<p>XII. Internal Controls: ATOMs must prepare, maintain and preserve information on written policies, procedures or systems to manage market risk, credit risk, etc. created by ATO activities, including monitoring, reviewing, and supervising.</p>	<p style="text-align: center;">Same requirement</p>
<p>X. Recordkeeping: Current rules require ATOMs to keep "full, complete and systematic books and records together with all pertinent data on ATO transactions," including solicitations, covering transactions, and make books available to the CFTC and Department of Justice.</p>	<p style="text-align: center;">Same Requirement</p>	<p>XIII. Annual CPA Audit: Annual CPA audit required and must be submitted to CFTC within 90 days of ATOM fiscal year.</p> <p>ATOM must reconcile books monthly.</p>	<p style="text-align: center;">Same requirement</p> <p style="text-align: center;">Same requirement</p>
		<p>XIV. Exemption from Regulation: None of the above regulations apply if both buyer and seller of the ATO have individual net worth of at least \$10 million, and the parties meet the other terms of the exemption, (e.g., transaction solely for purposes related to its business).</p>	<p style="text-align: center;">Same requirement</p>



The CFTC's Reparations Program – What It Is and What It Costs

By Paul J. Pantano Jr., Attorney, McDermott, Will & Emery, Washington, D.C.

The Commodity Futures Trading Commission provides a reparations program for customers who suffer losses as a result of violations of the Commodity Exchange Act (CEA) or the CFTC's regulations by persons who are registered with the CFTC.

Under the CFTC's proposed revisions to its interim final agricultural trade option (ATO) rules, ATO merchants (ATOMs) must register with the CFTC. Accordingly, producers can file reparation claims against ATOMs for alleged violations of the CEA and the CFTC's regulations. Reparation claims cannot be filed against persons who are not registered with the CFTC even if, by law, they should have been registered.

Reparations complaints must be filed within two years of the date when a customer's cause of action "accrues," which is the date when the customer knew or should have known of the wrongdoing. Claims can be made for unauthorized trading, misrepresentation, nondisclosure, churning, violations of fiduciary duty and misappropriation of funds. The transactions involved can include ATOs, futures contracts and options on futures contracts.

Prior to the CFTC's proposed ATO rules, reparations complaints only could be brought by "customers" who used the services of registered commodity professionals, such as brokers, FCMs and advisors. The proposed ATO rules make the reparations forum available to parties to bilateral, over-the-counter contracts. Unlike ATOMs, **persons who sell non-agricultural trade options are not required to register with the CFTC.** Accordingly, purchasers cannot file reparations complaints against sellers of non-agricultural trade options.

An ATO can include a pre-dispute arbitration agreement. However, such a clause must comply with CFTC regulations, which among other things, require that: 1) signing an arbitration agreement cannot be made a condition for a producer to utilize the services of an ATOM; and 2) the arbitration agreement must give the producer the option to petition the CFTC to institute a reparation proceeding to resolve a dispute within 45 days from receiving notice that the ATOM intends to submit the dispute to arbitration.

In reparation proceedings, customers can only file claims for actual damages. A CFTC administrative law judge or judgment officer cannot award punitive damages in a reparations proceeding. Prevailing customers recover their filing fee from the registrant. The registrant can file a counterclaim against the customer for breach of contract. The parties may represent themselves or be represented by a lawyer.

There are three types of reparations proceedings:

- ▶ **Voluntary Proceedings** require a \$50 filing fee and are the fastest proceedings because they do not involve hearings or appeals. Because the parties waive certain rights, including the right to appeal, all parties must consent before a case can become a voluntary proceeding. The cases are heard by a CFTC judgment officer and decided solely on the basis of the written submissions made by the parties. Evidence must be submitted in the form of affidavits, other sworn statements and business documents (such as ATO contracts, account statements, confirmations, order tickets and customer agreements). A voluntary proceeding results in a non-appealable final decision that does not include factual findings or a discussion of the basis for the decision. There is no dollar limitation applicable to voluntary proceedings.
- ▶ **Summary Proceedings** require a \$125 filing fee and resolve claims for \$30,000 or less. An oral hearing is conducted only if the judgment officer decides it is necessary. Normally, the oral hearing consists of a conference telephone call, but an in-person hearing can be held if both sides request it and the judgment officer grants the request. A summary proceeding results in an appealable "initial decision" that includes factual findings and legal conclusions explaining the basis for the decision. The losing party may appeal, first to the CFTC and then to a federal court of appeals.
- ▶ **Formal Proceedings** require a \$250 filing fee and resolve claims exceeding \$30,000. They are decided by a CFTC administrative law judge, who will hold an in-person oral hearing at a location and time convenient to the parties. A formal proceeding results in an appealable "initial decision" that includes factual findings and legal conclusions. The losing party may appeal, first to the CFTC and then to a federal court of appeals.

NGFA Calendar

- Sept. 14-15: Feed Quality Assurance Workshop,** Mankato, Minn.
- Dec. 4: Leadership Conference,** Regal Riverfront Hotel, St. Louis, Mo.
- Dec. 5-6: Feed Industry Council,** Regal Riverfront Hotel, St. Louis, Mo.
- Dec. 5-6: NGFA Trade Show,** Regal Riverfront Hotel, St. Louis, Mo.
- Dec. 6-7: Country Elevator Council Meeting,** Regal Riverfront Hotel, St. Louis, Mo.



(“NGFA Arbitration” continued from page 1)

- ▶ “All but one of the courts that have examined the question have held that contracts sending HTA (hedge-to-arrive contract) disputes to the National Grain & Feed Association must be enforced [citations omitted]. I find *Hoffman*, the only contrary decision, unpersuasive for reasons given below.”
- ▶ “Plaintiffs ask the court to view arbitration with hostility because it does not use the same procedures as litigation. But that’s the point of arbitration, which can be a time-and-money-saving device precisely *because* it does not use all of litigation’s bells and whistles [citations omitted]. The Arbitration Act ensures that courts no longer disregard arbitration clauses just because arbitration is not as ‘good’ as litigation from the perspective of the contracting party who now rues his bargain.”
- ▶ “Plaintiffs disdained the opportunity to appear before the arbitral panels....They have taken an all-or-nothing gamble: unless they can persuade me that all arbitration of HTA contracts before the Association is invalid in *every* case, they must lose. And they do lose, for the arguments they make would apply equally to all other commercial arbitration and abolish the institution of dispute resolution by merchant bodies.”
- ▶ “Plaintiffs’ other principal objection to arbitration is that the National Grain & Feed Association is biased...and that the Association cannot conduct arbitration impartially. This is functionally the same as arguing that because the United States depends on tax revenues, and has a mammoth bureaucracy (the IRS) devoted to

collecting hundreds of billions of dollars annually, federal judges cannot be impartial in tax cases. **No sensible person uses this definition of partiality, however.** That a particular judge has heard many tax cases, and regularly favors the IRS over the taxpayer, does not call the judge’s impartiality into (objectively reasonable) question, **any more than the fact that most judges convict most criminal defendants means that an accused cocaine dealer can’t get a fair trial.**” [Emphasis added.]

In a related matter also affecting other parties not part of the arbitration cases, Easterbrook found that the flex hedge-to-arrive contracts that were the subject of the Illinois cases were **not** futures contracts. He stated that:

“Recognition that futures markets are characterized by trading ‘in the contract’ leads to an easy answer for cases such as ours. Flex HTA agreements are not fungible; they can’t be settled by buying offsetting positions; the trade is securely ‘in the commodity’ rather than in the ‘contract....’ To put this in statutory terms [under the Commodity Exchange Act], I read ‘contract for future delivery’ with an emphasis on ‘contract,’ and ‘sale of any cash commodity for deferred shipment or delivery’ with an emphasis on ‘sale’; this adequately separates the domains of futures and forward transactions.”

It is the NGFA’s understanding that the losing parties have filed a further appeal of Easterbrook’s decision, which can be accessed electronically at: <http://www.ilnd.uscourts.gov/Opinions/Visitors/nagel2.pdf>

Michigan Federal Court Enforces NGFA Arbitration Award

The U.S. District Court for the Western District of Michigan (Southern Division) on Aug. 9 issued an opinion and order confirming an NGFA arbitration award issued by a three-person NGFA arbitration committee in a case [NGFA Arbitration Case No. 1816] involving The Andersons Inc. and Rex M. Crotser, a Michigan producer.

The court previously had entered an order compelling the parties to submit the dispute to NGFA arbitration pursuant to arbitration clauses contained in the parties’ hedge-to-arrive contracts.

The NGFA arbitrators awarded The Andersons a judgment of \$559,875.09 for actual damages, plus interest and attorney fees of \$45,038.52 against Crotser. While Crotser did not file an appeal of the award with the NGFA Arbitration Appeals Panel, he nevertheless failed to satisfy the award when it became final under the NGFA Arbitration Rules. When The Andersons filed a motion for confirmation of the arbitration award with the federal court, Crotser contended that the court lacked jurisdiction

to confirm the award under the Federal Arbitration Act because the parties “did not agree that judgment would be entered on the arbitration award as required by Section 9 [of the Federal Arbitration Act].”

U.S. District Judge Gordon J. Quist rejected Crotser’s challenge to the NGFA arbitration award and found that “the parties’ agreement [in the underlying HTA contracts] that they would abide by the arbitrators’ decision and that the decision would be ‘final,’ is sufficient to show that the parties intended that the award could be enforced through confirmation. The NGFA [arbitration] rules, which are incorporated into the parties’ agreement, also provide that the arbitrators’ decision ‘shall be final,’ and therefore shows that the parties contemplated enforcement of the arbitration award through judicial means.”

In addition to enforcing all portions of the arbitration award, Judge Quist awarded additional costs and attorney fees to The Andersons related to the court action for confirmation of the award.



Rail Carriers Sign Expanded, Extended Rail Arbitration Agreement

Eleven rail carriers and the Association of American Railroads have executed and returned consent forms agreeing to be bound by the expanded scope and extended duration of the historic NGFA rail arbitration and mediation agreement.

The railroads' actions came in response to the NGFA Board of Directors' approval of an agreement to expand the scope and to extend – to Oct. 1, 2001 – the duration of the historic rail arbitration and mediation agreement. [See *NGFA Newsletter*, July 15, 1999.] The newly expanded NGFA Arbitration Rules took effect for disputes involving transactions and arbitration proceedings arising on or after Aug. 12, 1999. They 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 of these changes is that rail users now are able to arbitrate a rail carrier's transportation or service rule (including demurrage) as being unreasonable as either written or applied.

The amendments are subject to ratification by the NGFA's membership at the annual business meeting during the March 2000 convention.

As of Sept. 1, the following railroads had executed and returned the consent forms. Unless otherwise noted, the consent covered both the arbitration and mediation agreements:

- Association of American Railroads
- Burlington Northern Santa Fe Railway Co.
- Canadian National/Illinois Central (*arbitration only*)
- Canadian Pacific Railway
- CSX Transportation
- Dakota, Minnesota & Eastern Railroad Corp.
- Iowa Interstate Railroad (*arbitration only*)
- Kansas City Southern Railway Co.
- Kyle Railroad
- Norfolk Southern Corp.
- Red River Valley & Western Railroad
- Union Pacific Railroad Co.

AAR, UP Seek Court Overturn of STB Decision on Market Dominance

The Association of American Railroads and the Union Pacific Railroad on Aug. 30 filed petitions with a U.S. appellate court seeking review of the Surface Transportation Board's decision to eliminate the product and geographic competition tests when making market-dominance determinations in maximum rate cases.

The STB on July 2 had issued a decision rejecting the AAR's January 1999 petition seeking reconsideration of the agency's decision on the matter. The STB also denied the UP's request for a ruling that evidence of product and geographic competition could be presented in a pending case in which the UP is the defendant. Instead, the agency concluded that its revised standards – adopted in December 1998 – that eliminated the product and geographic competition tests 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.”

In considering whether the market dominance test is met, the STB now considers whether competition exists among other railroads (intramodal competition) or from other transportation modes, such as trucks or barges (intermodal competition). But it no longer considers whether the shipper can avoid using the defendant railroad by shipping or receiving a substitute product (product competition) or 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).

The NGFA has filed several sets of statements in support of the STB's effort to eliminate product and geographic competition, and plans to intervene in support of the STB's decision in the appellate court case.

EU Threatens WTO Action on Clinton Harbor Tax

The European Union has informed the United States that it will pursue action before the World Trade Organization if the Clinton administration continues to collect the harbor maintenance tax on imports after Jan. 1.

In addition, the EU said it opposes the Clinton administration's proposal to replace the harbor tax with a harbor services user fee, which it said also likely would be challenged by the EU at the WTO.

Sir Leon Brittan, vice president of the European Commission, wrote in an Aug. 20 letter to U.S. Trade Representative Charlene Barshefsky that the Clinton administration's proposed harbor services fee "would not be a true user fee, but a tax. This tax would directly and significantly affect the profit-and-loss account of EC shipping lines, which will be asked to bear a disproportionate burden to finance activities that benefit the entire U.S. economy....The WTO legal difficulties encountered with the [harbor maintenance tax] would not therefore be resolved by the (harbor services fee)."

The Clinton administration proposed the harbor services fee – designed to raise nearly \$1 billion annually – as part of its fiscal year 2000 budget proposal. The fee is designed to replace the harbor maintenance tax, which was declared an unconstitutional tax on exports by the U.S. Supreme Court in March 1998. The harbor maintenance tax continues to be collected on imports and domestic deepwater movements.

But Sir Leon also said in his letter to Barshefsky that continuing to levy the harbor maintenance tax on imports "is not acceptable."

A NGFA-supported bill (H.R. 1260) introduced by Reps. Jim Oberstar, D-Minn., and Robert Borski, D-Pa., would solve the problem for both U.S. exporters and EU parties by repealing the current harbor maintenance tax and fund port dredging through general treasury revenues. This is how harbor dredging was funded until enactment of the harbor maintenance tax in 1986. The bill now has 39 cosponsors.



FEED FACTS

by **randall c. gordon**
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Vitamin Companies Reportedly Agree to \$1.1 Billion Civil Settlement

The Washington Post reported this week that six vitamin companies had agreed to pay more than \$1.1 billion to settle a price-fixing civil lawsuit filed by various claimants, the largest sum ever paid in an antitrust case.

The civil case, filed in Washington, D.C., and reportedly involving nearly 1,000 corporate direct buyers of bulk vitamins, is one of a number of civil antitrust suits filed against several vitamin manufacturers. Firms that purchased vitamins from resellers also may have the right to file separate suits for recovery of damages.

The reported settlement of one of the civil antitrust suits follows the imposition of criminal fines amounting to \$725 million imposed in May by the U.S. Justice Department in an antitrust settlement with three vitamin manufacturers: F. Hoffman-La Roche Ltd. of Switzerland, BASF AG of Germany and Rhone-Poulenc SA of France. The Justice Department accused F. Hoffmann-La Roche Ltd. with "leading a worldwide conspiracy to raise and fix prices, and allocate market shares for certain vitamins sold in the United States and elsewhere. Hoffman-La Roche Ltd. agreed to pay a \$500 million criminal fine as a result of the Justice Department action, while BASF AG pleaded guilty and agreed to pay a \$225 million fine for its role in the same antitrust conspiracy.

Rhone-Poulenc SA, the French pharmaceutical company, cooperated with the Justice Department investigation

under the Antitrust Division's Corporate Leniency Program. Under that program, a company may qualify for protection from criminal prosecution if it voluntarily reports its involvement in a crime and satisfies certain other criteria.

The Justice Department said the conspiracy lasted from January 1990 until February 1999, and affected the vitamins most commonly used as nutritional supplements for humans and animal feed – vitamins A, B2, B5, C, E and Beta Carotene. Vitamin premixes also were affected by the conspiracy, the Justice Department said. The Justice Department alleged the companies agreed to:

- ▶ fix and raise prices on the vitamins, Beta Carotene and vitamin premixes;
- ▶ agreed to allocate the volume of sales and market shares of such vitamins;
- ▶ agreed to divide contracts to supply vitamin premixes to U.S. customers by "rigging the bids for those contracts;" and
- ▶ participated in meetings and conversations to monitor and enforce adherence to the agreed-upon prices and market shares.

The civil action pursued in Washington, D.C., reportedly involves each of the three vitamin manufacturers cited by the Justice Department, plus three Japanese firms – Eisai Co., Daiichi Pharmaceutical Co. and Takeda Chemical Industries Ltd.

In Memoriam

The NGFA was saddened to learn of the death today of NGFA Past President **Madison Clement**, who served at the helm of what was then known as the Grain Dealers National Association from 1957-60. Clement also was a long-time, dedicated member of the NGFA's Feed Industry Committee.

Clement, partner and manager of the Clement Grain Co., Waco, Texas, operated a company founded in 1914 by his uncle, Ben (also a past National president), and father, John. He also served as mayor of Waco.

As chronicled in the book, *A Century of Agricultural Abundance through Free Enterprise* published in 1996 to commemorate the NGFA's centennial, it was Madison Clement who was center stage at one of the most memorable moments in NGFA convention history. It occurred at the 1958 convention in St. Louis, Mo., when President Clement – while at the podium – wrapped one arm around then-Cargill Inc. President John H. MacMillan Jr. and the other around then-Ralston Purina Co. President Donald Danforth and proclaimed, in his gracious Texas drawl: “Mr. MacMillan and Mr. Danforth, this National Association is going to be the kind of organization that Cargill and Purina will be proud of.” His spontaneous action reflected the exuberance of a newly revitalized National Association. Statesmanship, loyalty, leadership, steadfast support and selfless dedication to the betterment of the industry were the hallmarks of his service to the National.

Clement is survived by his wife, Nell Graves Clement, who can be reached at 3509 Austin Ave., Waco, Texas, 76710. Memorials are requested to be made to: Waco Rotary Club Scholarship Fund, P.O. Box 5618, Waco, Texas, 76708; or to the First Presbyterian Church of Waco, 1100 Austin Ave., Waco, Texas.

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