NGFA Urges STB to Eliminate or Modify ‘Safe Harbor’ for Rail Fuel Surcharges

By Randy Gordon, President

The NGFA has urged the federal Surface Transportation Board (STB) to either eliminate or significantly modify a provision of its rules that currently immunizes railroads from being required to refund rail fuel surcharges that exceed their incremental internal fuel cost increases so long as they base their surcharges on a specific fuel-cost index.

In 2007, STB prohibited rate-based rail fuel surcharges as an “unreasonable practice” by railroads. But in doing so, it established a so-called “safe-harbor” provision that carriers could “rely on” to measure changes in fuel costs, which could be reflected in fuel surcharges, as long as such costs were not imbedded already in the underlying freight rate. Known as the highway diesel fuel (HDF) index, it is based on the Energy Information Agency’s calculation of “U.S. No. 2 diesel retail sales by all sellers.”

When issuing its decision, the STB noted that alternative indices could be used by rail carriers to calculate fuel surcharges, but that doing so could expose them to unreasonable-practice rulings on a case-by-case basis.

Subsequently a major shipper of agricultural products challenged rail fuel surcharges imposed by the BNSF Railway, arguing BNSF’s mileage-based fuel surcharge program constituted an unreasonable practice because it extracted “substantial profits” on the affected traffic that far exceeded the actual increased fuel cost.

But in a decision issued on Aug. 12, 2013, the STB ruled that since BNSF had used the HDF index to measure changes in its internal fuel costs for purposes of calculating fuel surcharges, the agency also needed to rely on the same index given the existence of the safe-harbor provision. Thus, even though the STB found that BNSF’s incremental fuel costs, as calculated under the HDF,
exceeded its actual internal incremental fuel costs by $181 million, the agency ruled against the shipper.

In its 2013 decision, the STB said the result in the BNSF case “concerned” the agency, and that it had not “rejected…lightly” the shipper’s allegation that BNSF had used its fuel surcharge program as a “profit center.” At the time, the agency said it and others had not “foreseen a situation where the spread between a rail carrier’s internal fuel costs and the HDF index would diverge” as much as it had in the BNSF case.

The STB also said it was “unclear” whether BNSF’s fuel-cost recovery was a “unique situation” during a period of high fuel-price volatility, or “a more widespread phenomenon” that could give railroads an “unintended advantage” by allowing them to recover “substantially more than (their) incremental internal fuel costs yet still are permissible under the safe harbor.”

In a statement submitted Aug. 4, the NGFA urged the STB to either eliminate the safe-harbor provision or modify it so it no longer immunizes rail carriers when they cannot demonstrate adequately that a “reasonable nexus” exists between their fuel surcharge formulas and their actual internal incremental fuel costs.

“The NGFA’s policy position…is that it is reasonable for a railroad to recover unanticipated increased fuel expenses through a separate ‘fuel surcharge,’ provided the surcharge is reasonably related to the increases in market fuel costs they have incurred, and are over-and-above the fuel costs recovered in the base rate,” the NGFA told the STB.

Pointing to the need for additional fuel-cost data from railroads to make such a determination, the NGFA said if railroads “expect their customers to compensate them for increased fuel costs, they should be willing to provide appropriate documentation to demonstrate they are assessing only those charges that recover actual net fuel costs, and nothing more.”

In its statement, the NGFA did not ask the STB to eliminate use of the HDF Index as a benchmark for measuring fuel costs. Instead, the NGFA strongly recommended that reliance on the HDF Index by granting it “safe-harbor status” should not immunize rail carriers from being challenged for setting fuel surcharges at levels that exceed the net incremental fuel costs actually incurred. As evidence, the NGFA provided the following chart from the Securities and Exchange Commission showing the percentage increase in grain fuel surcharges that exceeded growth in rail fuel costs.
In urging the STB to either eliminate or modify the safe-harbor rules so as not to immunize rail carriers using fuel surcharge formulas that generate revenues exceeding their actual internal incremental fuel costs, the NGFA asked the STB to require railroads to report the following additional information as part of their Quarterly Reports of Rail Fuel Surcharges for each major commodity group (e.g., agricultural products, chemicals, coal, etc.):

1) Total fuel costs already recovered through their respective base-rate structures;
2) The difference between internal fuel costs recovered through base-rate structures and the amount collected through fuel surcharge revenues; and
3) Any other relevant information that would limit, if not circumvent, the need to file a complaint under 49 U.S.C. § 10702(2) in order to ascertain whether a fuel surcharge formula that relies on the HDF Index safe harbor is enabling the carrier to recover no more than its incremental fuel costs.

Further, the NGFA urged the STB to require carriers to delineate by major commodity group the following data that they already submit to the STB:

1) Total fuel cost;
2) Total gallons of fuel used;
3) Total increase or decrease in the cost of fuel;
4) Total revenues from fuel charges; and
5) Revenue from fuel charges on regulated traffic.

“Data provided through Quarterly Reports of Rail Fuel Surcharges should make determining whether and by how much a rail carrier’s fuel surcharge program is over-recovering fuel costs more transparent than it is today,” the NGFA wrote.
Finally, the NGFA urged that any future use of the HDF Index should be subject to the STB’s paramount objective of preventing fuel surcharges from becoming profit centers for railroads or from sanctioning over-recovery of net incremental additional fuel costs actually incurred by carriers. If the latter occurs, the Board should be empowered to direct railroads to promptly refund overcharges to their rail user customers, the NGFA said.

For more information, download the complete statement.

**MIR 162: How Chinese Feed Grain Imports Have Changed Since Trade Disruption**

By Max Fisher, Director of Economics and Government Affairs

In November 2013, China began enforcing a zero-tolerance policy for the presence of Syngenta North America Inc.’s Agrisure Viptera™ MIR 162 biotechnology-enhanced trait in corn imports. When MIR 162 subsequently was reported as being detected in U.S shipments of corn and Dried Distillers Grains with Solubles (DDGS), a series of trade disruptions occurred for shipments of U.S. commodities, including corn, DDGS and soybeans.

Subsequently, U.S. corn shipments were subject to expansive and intensive enforcement, which included testing; delays in vessel discharge; and deferrals, diversion and rejections of cargoes. As a result, U.S. corn has been almost completely shutout of China’s feed grain import market, which previously had largely been supplied by the United States.

Meanwhile, trade of DDGS resumed near the end of 2013 after the initial disruption. However, in June 2014, China began more rigorous testing for MIR 162 in DDGS and stopped issuing import permits. Then, in a communication received on July 23 China’s agency responsible for inspection of imported products – the General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ) – notified the U.S. Department of Agriculture’s Foreign Agricultural Service (FAS) of their findings of the unapproved biotech trait MIR 162 in 963 batches of U.S. DDGS imports, totaling 425,600 tons. AQSIQ further informed FAS of its enforcement actions and intentions, and requested a “GMO test report with official stamp for each and every DDGS shipment destined to China, to certify the shipment is free from MIR162.”
These latest developments have resulted in a new round of adverse trade impacts tied to the presence of MIR 162 in U.S. farm products exported to China.

On April 16 the NGFA and the North American Export Grain Association (NAEGA) published analyses that assessed the economic impact on the corn value chain of China’s rejection of U.S. corn shipments containing MIR 162. Those analyses also measured the potential economic impact of commercialization of Syngenta North America Inc.’s Agrisure Duracade 5307, which Syngenta commercialized in the United States for the 2014 planting season.

The analyses estimated that the total economic damage to U.S. sellers of corn, DDGS and soybeans from Syngenta’s commercialization of Viptera MIR 162 before Chinese import approval — and the trade disruptions that ensued after China detected MIR 162 and rejected shipments under its zero-tolerance policy — ranged from $1 billion to $2.9 billion for the 2013/14 marketing year and would range from $1.2 billion to $3.5 billion for the 2014/15 marketing year if U.S. corn continued to be subject to inspection for the presence of MIR 162 and possibly Duracade 5307. Using a mathematical model that forecasts the national average corn price based on U.S. corn ending stocks, the NGFA/NAEGA analysis estimated that the trade disruption depressed U.S. corn prices by 11 cents per bushel and had a similarly proportional impact on U.S. DDGS and soybean prices.

Recently, NGFA/NAEGA updated the analysis to provide an assessment of China’s feed grain import decisions in the months following the initial rejections of U.S. corn shipments containing MIR 162. Also included in the update is new information related to the recent DDGS trade disruption between the United States and China. Key findings in this update are that:

1) China subsequently did not stop importing feed grains from other countries or U.S. grain sorghum; and
2) The alternative imports sourced by China were more costly than the U.S. corn sales that were canceled, or U.S. shipments that were rejected or diverted.

These findings contradict speculation by some that the Chinese government’s decision to test for MIR 162 and reject U.S. shipments if the trait was detected was spurred by either: 1) the existence of adequate or surplus domestic feed grain supplies; or 2) financial motivation to replace previously negotiated U.S. corn contracts with lower-priced ones. To the contrary, this analysis found that China’s importers have taken costly actions to source alternative feed grains and corn from other suppliers given the lack of Chinese import approval of MIR 162.
Due to testing for MIR 162 that severely restricted access to U.S. corn, China began purchasing large quantities of Australian barley and wheat, U.S. grain sorghum and Canadian barley, as well as feed grains from numerous other suppliers (Figure 1).

During the current U.S. corn marketing year, China’s monthly cumulative feed grain imports – both before and after the import ban of MIR 162 – have ranged from 1 million to 2 million metric tons (Table 1). These monthly quantities of replacement feed grain imports roughly equal the amount of U.S. corn that had been purchased by China before its import ban of corn containing MIR 162. The U.S. corn share of China’s feed grain imports averaged 41 percent from November 2013 through January 2014, and decreased to an average of 2 percent from March through June 2014. During the same time periods, the Chinese feed grain import shares for Australian barley and U.S. grain sorghum climbed from 3 percent and 5 percent, respectively, to 33 percent for each.

### Table 1: China Import Replacements for U.S. Corn: September 2013 - May 2014

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</thead>
<tbody>
<tr>
<td>U.S. Corn</td>
<td>0.8</td>
<td>33.8</td>
<td>787.0</td>
<td>637.0</td>
<td>641.8</td>
<td>205.8</td>
<td>11.9</td>
<td>8.5</td>
<td>64.5</td>
<td>6.5</td>
<td>2,397.8</td>
</tr>
<tr>
<td>Australia Barley</td>
<td>336.6</td>
<td>318.8</td>
<td>52.2</td>
<td>22.0</td>
<td>59.1</td>
<td>339.3</td>
<td>516.1</td>
<td>413.4</td>
<td>523.4</td>
<td>282.7</td>
<td>2,863.8</td>
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<tr>
<td>U.S. Grain Sorghum</td>
<td>2.2</td>
<td>178.9</td>
<td>61.4</td>
<td>73.8</td>
<td>114.9</td>
<td>70.0</td>
<td>304.3</td>
<td>495.9</td>
<td>408.6</td>
<td>543.8</td>
<td>2,253.8</td>
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<tr>
<td>Australia Wheat</td>
<td>10.9</td>
<td>15.1</td>
<td>15.2</td>
<td>38.1</td>
<td>327.1</td>
<td>244.1</td>
<td>325.7</td>
<td>196.5</td>
<td>146.9</td>
<td>12.1</td>
<td>1,331.6</td>
</tr>
<tr>
<td>Canada Barley</td>
<td>0.0</td>
<td>0.0</td>
<td>3.7</td>
<td>128.5</td>
<td>34.5</td>
<td>1.4</td>
<td>24.1</td>
<td>7.0</td>
<td>134.5</td>
<td>40.6</td>
<td>374.4</td>
</tr>
<tr>
<td>All Others</td>
<td>907.0</td>
<td>1,385.7</td>
<td>1,046.7</td>
<td>591.3</td>
<td>419.2</td>
<td>614.1</td>
<td>252.9</td>
<td>324.0</td>
<td>113.7</td>
<td>162.6</td>
<td>5,817.1</td>
</tr>
<tr>
<td>Total</td>
<td>1,257.5</td>
<td>1,932.2</td>
<td>1,966.3</td>
<td>1,490.8</td>
<td>1,596.7</td>
<td>1,474.8</td>
<td>1,435.0</td>
<td>1,445.3</td>
<td>1,391.7</td>
<td>1,048.3</td>
<td>15,038.5</td>
</tr>
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</table>

Source: Chinese Customs as Reported in GTIS.
Further, as displayed in Table 2, China’s most economical feed grain purchases in 2013/14 have been U.S. corn. The average price paid by Chinese importers in 2013/14 for U.S. corn is $279.36 per metric ton. However, the impact of the MIR 162-related disruption on imports of larger quantities of U.S. corn in recent months has resulted in Chinese importers importing more costly alternative feed grains. The costs of the replacement feed grains have ranged from a low of $281.16 per metric ton for U.S. grain sorghum to a high of $341.38 per metric ton for Canadian barley.

As of June 2014, U.S. DDGS had been the primary feed ingredient imported by China for the 2013/14 corn marketing year (Table 3). However, AQSIQ suspended issuing permits for the import of U.S. DDGS as of June 6, 2014 because it said U.S. DDGS shipments frequently contained MIR 162. AQSIQ followed with a July 23 announcement that shipments of U.S. DDGS will require official certification that they do not contain MIR 162. This announcement is anticipated to derail DDGS trade between the United States and China.

In the aftermath of the MIR 162-induced rejections of U.S. corn that began in mid-November 2013, corn trade between the United States and China has almost ground to a halt, while the formerly brisk DDGS trade now also appears to be coming to an end.

As demonstrated by the trade data reported in this analysis, China’s actions since the rejections to replace U.S. feed grains with products from suppliers in other countries – and to do so at higher prices – appear to discredit the view that China was using MIR 162 as an excuse to avoid honoring contracts for U.S. corn so as to rely exclusively on its own corn supplies. Thus, China’s rationale for prohibiting the import of corn and

### Table 2: Amount China Paid per Metric Ton for Feed Grain Imports: September 2013 - May 2014

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</tr>
</thead>
<tbody>
<tr>
<td>U.S. Corn</td>
<td>NA</td>
<td>NA</td>
<td>$281.43</td>
<td>$274.37</td>
<td>$275.38</td>
<td>$283.15</td>
<td>NA</td>
<td>NA</td>
<td>$273.61</td>
<td>NA</td>
<td>$279.36</td>
</tr>
<tr>
<td>Australia Barley</td>
<td>$330.22</td>
<td>$329.59</td>
<td>$306.63</td>
<td>NA</td>
<td>$282.21</td>
<td>$289.97</td>
<td>$289.35</td>
<td>$284.28</td>
<td>$282.74</td>
<td>$292.32</td>
<td>$297.27</td>
</tr>
<tr>
<td>U.S. Grain Sorghum</td>
<td>NA</td>
<td>$293.56</td>
<td>$287.78</td>
<td>$278.04</td>
<td>$284.27</td>
<td>$280.63</td>
<td>$277.59</td>
<td>$275.80</td>
<td>$277.82</td>
<td>$285.17</td>
<td>$281.16</td>
</tr>
<tr>
<td>Australia Wheat</td>
<td>NA</td>
<td>NA</td>
<td>NA</td>
<td>$319.98</td>
<td>$317.57</td>
<td>$319.98</td>
<td>$326.45</td>
<td>$320.77</td>
<td>$347.45</td>
<td>$332.19</td>
<td></td>
</tr>
<tr>
<td>Canada Barley</td>
<td>NA</td>
<td>NA</td>
<td>NA</td>
<td>$363.96</td>
<td>NA</td>
<td>NA</td>
<td>NA</td>
<td>NA</td>
<td>$324.75</td>
<td>NA</td>
<td>$341.38</td>
</tr>
<tr>
<td>All Others</td>
<td>$337.34</td>
<td>$328.94</td>
<td>$323.53</td>
<td>$304.24</td>
<td>$321.89</td>
<td>$297.72</td>
<td>$317.86</td>
<td>$323.46</td>
<td>$327.47</td>
<td>$343.32</td>
<td>$322.55</td>
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<tr>
<td>World</td>
<td>$335.85</td>
<td>$325.43</td>
<td>$305.19</td>
<td>$296.39</td>
<td>$299.00</td>
<td>$296.40</td>
<td>$300.15</td>
<td>$296.82</td>
<td>$292.60</td>
<td>$299.05</td>
<td>$305.08</td>
</tr>
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1/ Price not included for months with fewer than 50,000 metric tons.

Source: Chinese Customs as Reported in GTIS.

### Table 3: U.S. Exports of DDGS to China: September 2013 - June 2014

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</thead>
<tbody>
<tr>
<td>U.S. DDGS</td>
<td>605.0</td>
<td>515.6</td>
<td>538.4</td>
<td>515.7</td>
<td>575.5</td>
<td>379.0</td>
<td>436.5</td>
<td>613.7</td>
<td>645.2</td>
<td>598.1</td>
<td>5,422.6</td>
</tr>
</tbody>
</table>

Source: Chinese Customs as Reported in GTIS.
DDGS containing MIR 162 does not appear to be financially driven, but rather a reflection of China’s AQSIQ proceeding to enforce China’s customs laws that ban the import of unapproved biotech traits.


By Randy Gordon, President

The NGFA has urged the Food and Drug Administration (FDA) to make significant changes in its proposed rules implementing the sanitary food transportation provisions of the Food Safety Modernization Act (FSMA).

FDA’s proposed rules would apply to shippers, carriers and receivers transporting agricultural commodities, food, feed and feed ingredients, and other agricultural products by truck and rail.

The centerpiece of the NGFA’s statement presses that FDA’s regulations not undermine the fundamental responsibility of carriers to comply with their statutory obligation to provide conveyances that are clean, appropriate and in safe condition suitable for the type of human or animal food intended to be shipped.

“This legal obligation is reasonable because the carrier or other provider of the transportation conveyance is in the best position to monitor the use of transportation conveyances and equipment, know the contents of the previous load(s) hauled, and implement prudent and effective clean-out procedures to protect product safety,” the NGFA said.

The NGFA did commend the agency for not applying the proposed rules to barge and vessel transportation, as well as for not prescribing specific sanitation practices for clean-out of rail and truck transportation conveyances and equipment, thereby giving shippers, carriers and receivers the flexibility to continue to utilize appropriate sanitary transportation practices that have evolved over time.

The NGFA also strongly supported FDA’s decision not to restrict access for human and animal food to certain classes or types of rail or truck conveyances or transportation equipment, which it said was particularly important given constrained U.S. transportation capacity and severe rail service disruptions.
The NGFA urged FDA to grant three additional exemptions from the proposed regulations to cover:

- **Transfers of human and animal food between facilities operating under the ownership of the same legal entity, such as the same parent or corporate entity.** The NGFA noted these intra-company transfers typically involve the use of dedicated fleets of trucks and/or rail cars to move agricultural products, animal food and feed ingredients, and other food products between a company’s own facilities, with standard operating procedures implemented for clean-out when necessary.

- **Dedicated rail and truck transportation conveyances and transportation equipment used to haul the same type of human or animal food, including raw agricultural commodities and processed products, on a continual basis.** In making this recommendation, the NGFA said certain types of transportation movements of raw and processed agricultural commodities, as well as feed and feed ingredients, warrant a prima facie exemption to avoid a deluge of waiver petitions being submitted to the agency. As examples, the NGFA cited dedicated unit train shuttle movements dedicated exclusively to hauling grains and oilseeds; tank car fleets dedicated solely to hauling vegoils and other food-grade oils for human consumption; and dedicated trucks used by animal feed and feed ingredient manufacturers to haul large quantities of bulk and bagged products directly to farms and livestock and poultry operations in a continuous fashion.

- **Transportation of live food animals.** The NGFA also supported FDA’s tentative conclusion to exempt transport of live food-producing animals from the sanitary food transportation regulations. Transportation of such live animals already is subject to the jurisdiction of the U.S. Department of Agriculture’s Food Safety and Inspection Service.

In its statement, the NGFA also asked FDA to make numerous other changes to its proposed regulations, including the following:

- Clarify the definition of “shipper” so that the requirement to notify carriers of any special clean-out procedures and to keep records applies to the party that loads a shipment, not to brokers or third-party logistics operators who arrange for the transportation to be provided.

- Modify the proposed requirement that carriers identify the previous three loads hauled in bulk trucks or rail cars. The NGFA said such a
requirement is excessive and unnecessary, and that the goal of safe food transport would be accomplished by carriers providing accurate information on the single immediate previous load hauled, as well as whether and what type of clean-out procedure was utilized for the conveyance.

- Eliminate the proposed recordkeeping requirement that electronic records be kept in a manner that complies with the agency’s onerous and costly Part 11 rules that stipulate extensive computer validation. Such a requirement would necessitate that current electronic recordkeeping systems used by the vast majority of affected shippers, receivers and carriers would need to be recreated and redesigned, thereby imposing “tremendous burdens and costs,” the NGFA said. As an alternative, the NGFA proposed that FDA partner with stakeholders to develop guidance that describes the kinds of practical principles, protocols and systems that may be used to ensure the integrity of electronic records.

- Eliminate the proposal to exempt from the regulations those shippers, carriers and receivers that have less than $500,000 in total annual sales. The NGFA contended, consistent with its comments on other FDA proposed rules implementing FSMA, that size-based exemptions are inappropriate for food safety. Instead, the association recommended that the agency provide small entities with additional time to comply with final regulations before enforcement begins.

- Clarify the definition of “transportation equipment” covered by the proposed regulations to apply only to those items (such as containers, totes and pallets) that actually are loaded onto a truck or railcar, or devices (such as pumps, fittings, hoses and gaskets) that are integral and affixed to the transportation conveyance.

- Delete the proposed requirement that convenient hand-washing facilities be provided for vehicle operators unless human contact with the food poses a hazard of causing the food to become adulterated or unfit for human or animal consumption. FDA proposed that such hand-washing facilities be provided by all receivers of human or animal food unless the products are transported in totally enclosed containers.

Finally, noting that FDA proposed a regulatory exemption for truck transportation of raw agricultural commodities by farms, the NGFA recommended that the agency develop guidance on good transportation practices, as well as user-friendly educational materials, pertaining to the safe transport of such products by farms.
“Such guidance should stress the importance of cleanout procedures in non-dedicated farm transportation conveyances and equipment used to haul raw agricultural commodities and other products, and provide practical, realistic and effective sample clean-out procedures for such conveyances” the NGFA told FDA. “The guidance also could encourage those delivering raw agricultural commodities from farms to inform the first receiver, such as the country elevator, about the previous load hauled in the transportation conveyance used.”

For more information, download the complete NGFA statement.

**NGFA Reiterates Importance of Bona Fide Hedging to CFTC**

By Todd Kemp, Vice President of Marketing, Treasurer

As reported previously in the NGFA Newsletter, the Commodity Futures Trading Commission (CFTC) re-opened its public comment period on the proposed rule that would establish new methodologies for setting speculative position limits on a wide range of futures contracts and swaps, including grain and oilseed contracts.

During the re-opened comment period, which expired Aug. 4, the commission conducted a public roundtable to discuss issues raised in the rulemaking. The NGFA and other market participants presented consistent messages during the roundtable regarding the critical importance of maintaining bona fide hedging status for strategies historically considered as such by the CFTC.

As follow-up to the roundtable, the NGFA on Aug. 4 submitted a second comment letter on the proposed rule urging the CFTC to take extraordinary efforts to fully understand hedging transactions used by agribusiness participants before adopting a final rule. The NGFA’s Risk Management Committee is leading the association’s initiative to ensure CFTC’s understanding, likely including time spent in Washington early in the fall. The Aug. 4 letter referred the commission to a Feb. 10 NGFA comment letter that included an extensive appendix detailing hedging strategies routinely used by the industry that could be put at risk if the new bona fide hedging definition in the proposed rule is adopted.
CME Begins Review of Corn Contract; NGFA Invited to Provide Input

By Todd Kemp, Vice President of Marketing, Treasurer

The CME Group has initiated a review of its Chicago Board of Trade (CBOT) corn contract and will hold conversations with a range of market participants regarding potential revisions. During a conference call with representatives from NGFA's Risk Management Committee, CME personnel explained the review is the latest in a series of routine product reviews. However, a number of factors – including a large projected corn crop and rail transportation challenges – could lend urgency to CME's current review.

During the call, CME representatives outlined the review process. Initially, various customers and customer groups will be interviewed and invited to submit issues and concepts they believe CME should include in its review. A focus group comprised of the diverse constituents who use the contract will be convened to provide reaction to those concepts. Later, the CME will formulate more specific ideas for potential changes that will be vetted with a broader range of customers for reaction. The review will continue through late summer and into the fall. Finally, CME's desired changes will be submitted to the Commodity Futures Trading Commission for regulatory review.

At CME’s invitation, NGFA’s Risk Management Committee is assessing concepts for CME’s review and analysis. All NGFA members are welcome to provide input to the process by sending ideas to Todd Kemp on the NGFA staff at tkemp@ngfa.org.

FDA Announces Fiscal Year 2015 Fee Rates

By Dave Fairfield, Vice President of Feed Services

The Food and Drug Administration (FDA) on July 31 announced its fiscal year 2015 fees for reinspecting domestic and foreign facilities, overseeing mandatory recalls and reinspecting importers.

The Food Safety Modernization Act gave FDA the authority to assess and collect fees to compensate the agency for 100 percent of its costs associated with:

1) Reinspecting facilities that fail an original inspection;
2) Conducting mandatory recalls, when firms fail to conduct a recall voluntarily; and
3) Reinspecting imported products. FDA’s authority to assess and collect fees extends to facilities and importers that handle human food, animal feed and pet food.

For fiscal year 2015 – the time period of Oct. 1 through Sept. 30, 2015 – FDA has set the hourly, per person, rates at $217 an hour if no foreign travel is required and $305 an hour if foreign travel is required. In comparison, the current fiscal year rates are $237 and $302 respectively.

Significantly, in its notice FDA states it does not intend to issue invoices for reinspection or recall order fees until the agency has published a guide to outline the process through which small businesses may request a reduction of fees, because of the potential economic hardship that could be imposed by the fees on such firms. Therefore, although the authority to collect facility reinspection and recall fees currently is in effect, food, feed and pet food companies of all sizes should not expect to receive invoices for reinspections or recalls until such guidance is issued.

In addition, FDA states the agency is in the process of considering various issues associated with the assessment and collection of importer reinspection fees. FDA currently is developing a guidance document that will provide information regarding fees the agency may assess and collect from importers to cover reinspection-related costs. It is anticipated that FDA will not assess importer reinspection fees until its guidance is issued. Within its notice, FDA states that the fee rates set for fiscal year 2015 will be used should any importer reinspection fees be assessed during fiscal year 2015.

New EFP Rules Go Into Effect at CME

By Todd Kemp, Vice President of Marketing, Treasurer

New rules and procedures for exchange-for-physical (EFP) transactions went into effect on Aug. 4 at the CME Group. As reported previously in the NGFA Newsletter, the rules had been a subject of concern to the NGFA due a new requirement that EFPs be reported to CME Clearing within one hour of the "relevant terms" of the transaction being finalized.

During a July 9 NGFA-requested meeting in Chicago, CME’s Market Regulation staff briefed a delegation from NGFA’s Risk Management Committee on the new rules. The meeting was a follow-up to a detailed letter explaining the use of EFPs by the grain, feed and processing industry.
Consistent with NGFA’s recommendation, CME has determined that the so-called “handshake” that starts the clock ticking on the one-hour reporting window occurs when brokers of the parties to the EFP confirm details of the transaction, including basis.

The CME recently conducted an informational webinar to share details of the new EFP rules. For more information, download the presentation.

FDA Announces New Information Sharing System for Regulators and Health Officials

By Dave Fairfield, Vice President of Feed Services

The Food and Drug Administration (FDA) on July 25 announced the launch of a new system for federal and state regulators and health officials to share information about animal feed- and pet food-related illnesses and product safety issues.

The new system – **Animal Feed Network** – is designed to assist regulators and health officials in targeting their investigative and laboratory resources to address adverse health events associated with pet food and animal feed. Information exchanged in the Animal Feed Network is intended only to facilitate communication between officials and does not commit such parties to take enforcement or regulatory action. Further, use of the system is voluntary.

The Animal Feed Network is a secure reporting and notification system, accessible only by officials with regulatory authority and responsibility over animal feed and pet food, and is not available to the public. The system consists of two distinct reporting portals:

- **Pet Event Tracking Network (PETNet):** PETNet originally was launched in August 2011 as a response to the 2007 outbreak associated with melamine in pet food. The FDA Amendments Act of 2007 mandated that the agency establish an early warning and surveillance system to identify adulteration of the pet food supply and outbreaks of illness associated with pet food.

- **LivestockNET:** FDA recently developed LivestockNET to serve as a similar early alert function for feed-related illnesses and issues associated with feed for livestock animals, aquaculture species, and horses.
PETNet and LivestockNET will make use of standardized electronic forms that share common data elements, including:

1) Product details, i.e., name of feed or pet food, lot code, product form and the manufacturer or distributor/packer (if known);
2) Animals affected, i.e., number exposed to the product, number affected and body systems affected;
3) Suspected cause of adverse health events;
4) Date of onset or the date product issue was detected;
5) Location where the incident occurred;
6) Supporting laboratory results, and
7) Contact information for the reporting member.

When previously soliciting comment on the estimated reporting burden associated with the Animal Feed Network, FDA estimated that, at a maximum, each state potentially could report to each of the reporting portals five incidents per year. However, FDA noted that the number of submissions likely would be far less.

DC Court Rules Against Animal Ag in Ongoing Country-of-Origin Labeling Saga

By Charlie Delacruz, Vice President and General Counsel

In the latest development in the long story on regulations requiring disclosure of country-of-origin information for meat products – the federal Court of Appeals for the District of Columbia Circuit on July 29, ruled against the meat industry in a lawsuit challenging the newest of those regulations.

The law, regulations and challenges at issue in the case have a lengthy and twisted history.

In the original 2002 law, Congress required country-of-origin labels on a variety of foods, including some meat products, and tasked the U.S. Department of Agriculture (USDA) with implementing the law. After amendments to the law and various other delays in implementation, USDA promulgated the first rules in 2009. Canada and Mexico then filed a complaint with the World Trade Organization (WTO), and the rule was determined to be in violation of the WTO Agreement. In response to the core issue in the WTO's decision related to "imprecision" in the 2009 rules, the USDA in 2013 promulgated new rules requiring more precise information, which included the
location of each step of the production process (i.e., identification of where each animal in the product was born, raised and slaughtered).

Given the tremendous cost implications and burdensome nature of compliance with the requirements imposed by the new rules, the group of trade associations representing livestock producers, feedlot operators and meat packers challenged the rules as a violation of Free Speech protections under the First Amendment of the U.S. Constitution.

The case was first heard in district court and then by a three-judge panel of the appellate court. The full appellate court subsequently re-heard the case. Although a majority of the eleven judges hearing the case on appeal ultimately ruled against the meat industry, two judges issued concurring opinions that significantly challenged the basis for the majority’s decision and two other judges issued strong dissenting opinions.

The differing views in the appellate court’s decision focused on applying principles from past court decisions to this case. Based upon its discussion and references to prior cases, the majority in this case was clearly swayed by “material differences” and “substantially weaker First Amendment interests” when at stake are “outright” prohibitions or suppression on free speech versus “disclosure requirements” involving “purely factual and uncontroversial information.” In the majority’s view, legal precedent indicated that the plaintiffs’ Constitution-based interest in not providing particular labeling information was minimal and the government’s interest was sufficient, justifiable and reasonable. The concurring and dissenting judges took a different view of how prior case law applied to this case.

Although the court’s decision in this case represents a significant setback and disappointment for the meat industry, it’s not clear that the issues have been resolved given the possibility of further action in court, the WTO, or even by Congress.

**NAEGA Offers Contract Training Program in Vancouver, Wash. Aug. 8**

North American Export Grain Association (NAEGA) will host a Contract Training Program Aug. 8 from 8:30 a.m. to 4:30 p.m. at Hilton Vancouver Washington in Vancouver, Wash.

The program will provide an intensive review of current developments and practices in international grain trade contracts. Space is still available, contact
Kyle Liske at kliske@naega.org to participate. Cost is $200 for NAEGA members and $250 for non-NAEGA members; NAEGA Workbook and Sourcebook included.

Topics covered will include:

- Global grain contract environment;
- NAEGA 2 clause by clause review;
- Alternative dispute resolution – arbitration, mediation and clause 20; and
- Group and individual contracting, execution and dispute resolution exercises.

AAFCO Meeting Focuses on Feed Safety, Enforcement Issues

By Dave Fairfield, Vice President of Feed Services

The meeting of the Association of American Feed Control Officials (AAFCO) on July 25-27 in Sacramento, Calif. focused on industry-specific feed safety and enforcement issues.

During the meeting’s opening session, feed regulatory officials from the Food and Drug Administration (FDA) reviewed the agency’s Operational Strategy for the Food Safety Modernization Act, including how FDA intends to implement its anticipated preventive control regulations that will be established for animal feed and pet food. The officials stated that FDA’s general strategy for ensuring compliance with the new regulations will be to:

1. Use various inspecional approaches to effectively address the larger number and diversity of covered facilities;
2. Seek voluntary compliance first, using administrative and judicial enforcement tools only when necessary;
3. Place more emphasis on data analysis and facility-risk factors to determine inspection priorities; and
4. Add more subject matter experts within the agency to support its oversight activities before, during and after inspections. The officials also said that FDA will actively work to develop and provide educational materials and technical assistance to the regulated industry regarding its compliance obligations.

Meanwhile, during the meeting of the Ingredient Definition Committee, Kent
Kitade, former feed regulatory official for the California Department of Food and Agriculture, reported on the recently completed AAFCO pilot project that explored the potential for developing monographs for products defined through the AAFCO ingredient definition process as being acceptable for use in animal feed and pet food.

Within a regulatory context, the term “monograph” typically is used to describe a standard format by which a food product may be characterized and gain approval or recognition for use. Monographs commonly are used to characterize human food ingredients, with the Food Chemical Codex published by the U.S. Pharmacopeial Convention containing approximately 1,100 monographs for various products.

The AAFCO monograph pilot project was designed to evaluate the potential challenges and benefits associated with developing monographs for three different feed ingredients – magnesium oxide, distillers oil – feed grade, and neohesperidin dihydrochalcone. During the pilot, various physical and chemical information was obtained for the ingredients to complete a proposed monograph template.

During his report, Kitade said among the challenges experienced when developing the ingredient monographs were difficulties in accessing necessary scientific and technical information and gaining consensus on what parameters were appropriate to characterize a given ingredient. Regarding potential benefits, according to Kitade, monographs could assist industry and regulators in properly identifying and authenticating products, and thus help prevent the introduction of adulterated products into the animal feed and pet food supply chain.

The AAFCO Board of Directors is evaluating the results of the monograph pilot project and will determine if further actions will be taken to attempt to develop monographs for other ingredients that have been defined through the AAFCO ingredient definition process.

AAFCO is the professional organization of federal and state feed regulatory officials, with which the NGFA interacts extensively. Among other things, NGFA feed industry members and NGFA staff serve as non-voting advisers to key AAFCO committees, and participated actively in the meeting.

Other Issues: Other significant issues addressed during the AAFCO meeting included the following:

- **Animal Food Safety Preventive Controls Alliance:** The Animal Food Safety Preventive Controls Alliance met to further its work on
developing training and guidance materials to assist firms in complying with the anticipated requirements of FDA’s current good manufacturing practice and preventive controls regulations for animal feed and pet food. The goal of the effort is to make the materials available shortly after FDA publishes its final rule, which is anticipated by Aug. 30, 2015. During the session, NGFA Vice President Dave Fairfield was selected to serve as the Alliance’s chair.

- **Feed Ingredient Definitions and Approvals:** The AAFCO membership voted to publish in the AAFCO Official Publication tentative definitions for: 1) distillers oil - feed grade; and 2) bio-diesel derived glycerin. In addition, the Ingredient Definition Committee considered, but did not proceed, in establishing new tentative definitions for: 1) dehydrated suncured alfalfa meal or pellets and direct dehydrated alfalfa meal or pellets; and 2) deoiled distillers grains.

- **Mineral Guidelines:** The Feed and Feed Ingredient Manufacturing Committee continued its work to update the guidelines for contaminant levels permitted in mineral feed ingredients that are published in the AAFCO Official Publication. It is anticipated that final proposed guidelines will be considered during the committee’s next meeting to be held in January.

- **Feed Inspector’s Manual:** The Inspection and Sampling Committee has completed its work to revise the AAFCO Feed Inspector’s Manual. The manual is designed to provide inspectors with a comprehensive explanation of the regulatory and enforcement functions of a feed inspection program. The manual also serves as an excellent resource for feed industry representatives and may be downloaded from the AAFCO website at no cost.

**Preventing for Changing Regulations a Focus of Recent Safety Conference**

Approximately 220 people and 50 trade show exhibitors recently attended the NGFA and grain industry trade publication *Grain Journal* Safety Conference in Kansas City, Mo. It was the largest of four safety conferences the organizations have co-sponsored.
The conference included sessions on the Food Safety Modernization Act (FSMA), the Federal Grain Inspection Division (FGIS) rolling stock fall protection directive and an update on emerging regulatory issues within OSHA.

Matt Frederking vice president of regulatory affairs and quality assurance from Ralco Nutrition focused on what the industry needs to know to comply with the new requirements, which will impact operations for all U.S. grain and feed industry processors and both food and feed import and export suppliers.

Another session addressed the FGIS rolling stock fall protection directive. Anthony Goodeman, FGIS deputy director, field management division, discussed what lead to the development of a directive that applies to FGIS employees, which provides instruction on how to conduct a fall protection assessment before working on top of a rail car.

Further conference sessions addressed:

- Occupational Safety and Health Administration (OSHA) Grain Handling Standard;
- Hazard analysis;
- Boot pits and other confined spaces;
- Communications, coaching, and goal setting;
- Best practices for incident investigation; and
- Regulatory changes.

Before the conference officially began, more than 85 members of the grain and feed industry attended a Food and Drug Administration Food Defense Awareness Workshop.

Full conference details and links to the presentations can be found at safetycon2014.com.

Next year, NGFA and Grain Journal will host the Elevator Design Conference July 28-30 at the Sheraton Crown Center in Kansas City, Mo. Further details will be released in the coming months at ngfa.org/elevatordesign.