NGFA Urges STB to Propose New Procedures for Ag Shippers to Challenge Unreasonable Rail Rates

NGFA Rail Arbitration Also in Spotlight

By Randy Gordon, President

NGFA has urged the federal Surface Transportation Board (STB) to issue a proposed rulemaking to establish a new process that agricultural commodity shippers could use to challenge freight rates they believe are unreasonable or unlawful under the Staggers Rail Act of 1980.

The NGFA made the recommendation during a day-long public hearing conducted on June 10 by the STB to examine proposals developed by the NGFA and others to create a more accessible, streamlined, cost-effective and workable process for grain shippers to use to challenge unreasonable rates.

NGFA Rail Shipper/Receiver Committee Chairman Kevin Thompson, assistant vice president and transportation lead for Cargill Inc., Minneapolis, Minn., told the agency that its current rate-challenge appeal procedures “are simply inappropriate and unworkable for agricultural commodities” because they are too complex and costly compared to the potential recovery of rate overcharges and the nature and characteristics of rail movements of agricultural commodities, the multiple origins-and-destinations for agricultural shipments and volumes that vary from year-to-year, as well as within a given marketing year, and the nature of railroads’ pricing practices to impose uniformly high rates across-the-board for certain commodities or types of traffic.

“We believe strongly that having a rate-complaint process in place that is viewed by both shippers and railroads as being reasonably ‘accessible’ will have a broad salutary effect in disciplining unreasonable rate behavior by rail carriers, which now operate in what at best is a duopolistic market,” Thompson testified. “We do
not believe that adoption of NGFA’s proposed approach will result in a torrent of rate cases filed at the STB. Instead, by disciplining market behavior, it will change the dynamic under which commercial decisions are made outside of the (STB’s) purview. This is not unlike the beneficial impacts NGFA has experienced from its Rail Arbitration Rules, where the mere existence of mandatory arbitration that works has resulted not in the filing of more cases, but encouraged reasonable business behavior and ongoing communications between railroads and shippers to resolve differences in a balanced manner.”

As part of the STB’s proceeding (Ex Parte 665, Sub-No. 1), NGFA in 2014 developed and proposed a new rate-reasonableness methodology – dubbed the “agricultural commodity maximum rate methodology” – as one approach that the STB could use to change its existing procedures to resolve rail rate challenges involving agricultural products. The NGFA noted that its proposed new approach would meet the tests of being more accessible and inexpensive to administer, including for shippers with smaller claims; provide a meaningful constraint on the ability of carriers through their rate-pricing practices to make certain facilities uncompetitive in shipping by rail, and provide for more expedited and timely decisions. The NGFA maintained that the three existing methods created by the STB for challenging unreasonable rail rates – the stand-alone cost (SAC), simplified SAC and three-benchmark methods – are each too complex, time-consuming and costly to be relevant for shipments of agricultural commodities.

Meanwhile, NGFA Board member Bruce Sutherland, vice president of Michigan
Upcoming NGFA Events

July 28-30  NGFA/Grain Journal Elevator Design Conference
            Kansas City, Mo.
            Sheraton at Crown Center
            [Register]

Aug 4-5     Ag Transportation Summit
            Chicago, Ill.
            Westin O'Hare
            [Register]

Sept 13-14  Board Meeting
            Napa, Calif.
            The Meritage Resort
            [Save the Date]

Sept 29-30  Feed and Pet Food Joint Conference
            Columbus, Ohio
            Hyatt Columbus
            [Register]

Dec 6-8     Country Elevator Conference and Trade Show
            Kansas City, Mo.
            Sheraton at Crown Center
            [Save the Date]

For a full listing of events, go to ngfa.org/events

Agricultural Commodities (MAC), presented real-world examples to the STB of current rate-pricing practices by a major Class I rail carrier that will significantly alter geographical rate spreads in the eastern corn belt, leading to dramatically increased freight rates for major shippers and reducing the prices elevators are able to pay to producer-customers in some parts of the region, while reducing traffic on regional shortlines and making some facilities uncompetitive to serve customers by rail.

“These increases in rail rates are several orders of magnitude greater than typically thin grain-trading margins,” Sutherland testified. “Consequently, if we are to be price-competitive in selling commodities to domestic user and foreign buyers, we inevitably have to try and pass on the cost impacts we can’t absorb back to farmer customers. Seldom are we able to pass such costs forward to the ultimate buyer, as they have alternative sources of supply in the grain market – which is a truly competitive market.”

Tom Crowley, president of L.E. Peabody & Associates, Inc., Alexandria, Va., explained the NGFA’s new rail rate methodology proposal to the STB, while NGFA Transportation Counsel Tom Wilcox, principal of GKG Law P.C., Washington, D.C., discussed legal aspects of the association’s proposal.

Under the NGFA’s proposal, rail rates that could be challenged would be those that exceed 180 percent of a rail carrier’s variable cost of providing the service – the regulatory jurisdictional threshold mandated under the Staggers Rail Act of 1980. Further, the NGFA’s approach only would apply if the rail carrier is deemed to be revenue adequate.

Key Elements of NGFA’s Proposed New Methodology

During the public hearing, the NGFA discussed details of its proposed new rate-challenge methodology, which utilizes both rail revenue-adequacy determinations and the current market for the type of captive traffic whose rate is being challenged to determine a maximum reasonable rate for such shipments. Under the NGFA-proposed methodology:

- The rate being challenged as being unreasonable would be compared against rates assessed for similar types of shipments.

- Comparable shipment groups from other carriers would be derived from all traffic with similar operating characteristics, such as commodity type, distance moved, type of movement (e.g., single-car, multi-car or unit-train), railcar type, whether private or railroad-owned railcars were used, etc. Rates both
higher than and less than the 180 percent of revenue-to-variable cost threshold would be considered as part of the comparable group.

- The NGFA-proposed methodology then would make commodity-specific adjustments to the revenue-to-variable-cost ratios of the comparison group movements by applying a “revenue adequacy adjustment factor” to reflect each Class I carrier’s revenue adequacy.

- To determine if a specific railroad’s rates are unreasonable on a given shipment(s), the NGFA’s proposed concept would compare the revenue-to-variable cost of that shipment against the revenue-to-variable cost of shipments in the comparable traffic group to arrive at a maximum reasonable revenue-to-variable cost figure for the given shipment(s).

- The result of this calculation then would be compared to the Staggers Act’s 180 percent revenue-to-variable cost jurisdictional trigger to determine if the rate could be challenged. If it was subject to challenge, the result of this calculation would determine the maximum reasonable rail rate that could be charged by the carrier for the affected movement for a period of five years, while still maintaining the carrier’s revenue-adequate status.

- To provide for a much simpler and less-costly and time-consuming rate-challenge procedure, the NGFA-proposed methodology would use information obtainable from the STB or available publicly.

- There would be no limit on the amount of rate relief that a challenging shipper could receive if a rate challenge was successful.

- NGFA recommended a procedural schedule under which the STB could issue a final decision in 170 days or less after a rate complaint is filed.

- Finally, NGFA proposed that the new rate-challenge process apply to rail movements of all 68 agricultural commodities and products covered under NGFA’s Rail Arbitration Rules. This includes all grains and oilseeds and products derived therefrom (including corn and soybean meal and oil, corn syrup, flour, distillers grains and most feed ingredients, etc.), as well as
ethanol and biodiesel. NGFA said it preferred to err on the side of being inclusive rather than arbitrarily excluding certain agricultural commodities or products, and noted that the rail carriers had agreed that these products should be subject for inclusion in NGFA’s rail arbitration system.

NGFA Rail Arbitration in Spotlight

Throughout the STB hearing, repeated references were made by various parties about the potential application of NGFA’s widely respected arbitration system as another mechanism that could be used to resolve rail rate complaints involving agricultural commodities. Witnesses testifying for the U.S. Department of Agriculture, BNSF Railway, Alliance for Rail Competition and a private consultant all alluded to NGFA rail arbitration, established in 1998, as a potential dispute-resolution forum in lieu of a new rate-challenge process at the STB.

In his testimony for NGFA, Thompson noted that the STB was aware that NGFA is a “huge proponent” of arbitration as an alternative mechanism for resolving disputes in a knowledgeable, cost-effective and business-like manner. “While the NGFA’s Rail Arbitration System provides for compulsory arbitration of several specific types of disputes between railroads and rail users, we have been unsuccessful thus far in achieving agreement among rail carriers to consider making arbitration of rail rate complaints mandatory, despite a couple of recent attempts to do so,” Thompson said. “The NGFA, of course, remains receptive to future dialogue with rail carriers on this possibility, and recently has been approached by a major Class I carrier to re-initiate such discussions. And there is nothing to preclude a rail carrier from voluntarily agreeing to arbitrate a rate dispute with a shipper now under the NGFA’s existing system.”

But Thompson noted that there nonetheless remains a “real and immediate need” for the STB to establish new rules that are accessible to captive agricultural commodity shippers and producers.

Other Ag Groups Support NGFA in Joint Statement

In a related development, NGFA submitted a joint statement on behalf of 21 other national, regional and state agricultural organizations that similarly urged the STB to initiate a new rulemaking to develop new procedures for agricultural commodity shippers to challenge unreasonable rail rates.

The organizations stated that the current rules are too costly, too unwieldy, too time consuming and provide no opportunity for rate relief to the vast majority of captive rail shippers of agricultural commodities.
Specifically, the signatories wrote that they believe “the new ‘grain’-specific rail rate reasonableness methodology proposal submitted by the NGFA…provides the (agency) with a unique opportunity to adopt a set of rules for agricultural rail rates that would be relatively simple to apply, would permit cases to be processed in a timely manner and at a lower cost than the current rules, and would produce relief to captive agricultural shippers while protecting the revenues of rail carriers necessary to maintaining and enhancing their infrastructure and capacity.”

Signatories included the American Farm Bureau Federation, American Soybean Association, Agricultural Retailers Association, National Council of Farmer Cooperatives, National Pasta Association, National Oilseed Processors Association and U.S. Dry Bean Council, in addition to NGFA state and regional affiliated associations in Indiana, Kansas, Michigan, Nebraska, North Dakota, Ohio, Northeast, South Dakota, Texas and Wisconsin.

House Approves CFTC Reauthorization Bill; NGFA-Led Ag Coalition Supports Passage

By Todd Kemp, Vice President of Marketing and Treasurer

For the second time in as many years, the House has approved a bill (H.R. 2289) that reauthorizes operations of the Commodity Futures Trading Commission (CFTC). Typically, Congress considers such legislation every five years; however, the CFTC now has been operating without authorization for nearly two years. As a practical matter, the lack of reauthorizing legislation has little to no impact on the commission’s operations, but the bill also serves an important function in signaling Congress’ priorities to the CFTC.

NGFA and a broad coalition of 34 additional groups from agribusiness and production agriculture strongly supported this year’s House-passed bill. A NGFA-drafted letter signed by those national and state-level organizations was transmitted on June 8 to all House offices urging support for the bill, with the goal of building bipartisan support and momentum for Senate consideration, where prospects for approval are less clear. However, in the final House tally, only nine Democrats voted in favor of the bill. Many Democrats in Congress and the Obama administration contend that the bill is unnecessary and threatens a rollback of certain Dodd-Frank law provisions.

In the letter, NGFA and its allies argued that the bill accomplishes a number of
important goals for U.S. agriculture, including but not limited to:

- Codification of important customer protections to help prevent another MF Global situation.

- A permanent solution to the residual interest problem that would have put more customer funds at risk – and potentially driven farmers, ranchers and small hedgers out of futures markets – by forcing pre-margining of their hedge accounts.

- Relief from burdensome and technologically infeasible recordkeeping requirements in commodity markets.

- A requirement that the CFTC conduct a study and issue a rule before reducing the de minimis threshold for swap dealer registration in order to make sure that doing so would not harm market liquidity and end-user access to markets.

- Confirmation of the intent of Dodd-Frank that anticipatory hedging is considered bona fide hedging activity.

Action now shifts to the Senate, where the Agriculture Committee already has held one hearing on CFTC reauthorization issues; timing for additional movement currently is uncertain.

NGFA Urges FDA to Modify Burdensome Changes to FSMA Facility Registration Rules

By David Fairfield, Vice President of Feed Services

NGFA on June 8 urged the Food and Drug Administration (FDA) to remove several burdensome requirements the agency proposed be imposed on facilities required to register with the agency under federal law.

FDA’s proposed rule would modify aspects of the food facility registration process first initiated under the Bioterrorism Act, and implement certain additional registration refinements made for food and feed facilities under the Food Safety Modernization Act (FSMA).

“While NGFA appreciates FDA’s attempt to improve the food facility registration
database, we believe several elements proposed in the rule would create an undue burden on facilities," said David Fairfield, NGFA vice president of feed services.

NGFA’s chief concern was FDA’s proposal to require facilities to obtain and include a facility-specific, nine-digit identifier provided by Dun and Bradstreet – referred to as a DUNS number – with their FDA registrations.

While the association “supports FDA’s efforts to maintain an accurate list of registered food facilities and more efficiently conduct its inspection activities,” the NGFA said it opposed the DUNS requirement as impractical because many companies do not have such numbers for individual facilities, while others have “experienced significant difficulties” when attempting to obtain one. “FDA’s proposal to require facilities to submit a DUNS number has the potential to cause major disruptions to the registration process,” NGFA cautioned, noting that any discrepancy between the DUNS number and a firm’s annual animal drug establishment registration – even something as innocuous as abbreviating St. in one but not the other would cause FDA’s system to reject a facility registration.

NGFA said it believes the burden on facilities to submit a DUNS number would be significantly greater than what was estimated by FDA in its proposal, and would create the “potential to cause major disruptions" in the registration process.

The NGFA also opposed the agency’s proposal to require email verification of facility registrations as ineffective in fulfilling FDA’s stated purpose of preventing unauthorized registrations. NGFA said the provision would be largely unworkable, as most companies with multiple facilities have designated persons assigned the task of submitting such registrations. Those persons typically are different from the owner, operator or agent-in-charge of the facility to which the verification acknowledgment would be sent – the latter of whom would not have direct knowledge of the registration action.

Further, NGFA said such a requirement would not effectively prevent unauthorized facility registrations from being sent by those parties wishing to make false submissions, since such activities could be masked by submitting a false email address to which to send the email verification.

In other comments, NGFA:

- Opposed FDA’s proposal to reduce the time limit for management to update or cancel facility registrations from the current 60 to 30 calendar days, saying that the shortened period would not provide demonstrable benefits but would increase the regulatory burden on food facilities by providing less time to submit required information.

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• Opposed FDA’s proposal to require facility registrations to include the types of activities conducted at the facility for each identified food product category, saying that such profiling of facilities would be burdensome, particularly for facilities that store or manufacture a wide variety of products or perform a wide array of activities. “Instead, the NGFA believes it would be of more value to FDA if facilities simply identified the types of activities conducted at the facility, rather than the type of activity by each food product category,” NGFA said.

• Supported FDA’s proposal to allow the U.S. agent of a foreign facility to be able to view information submitted in the foreign facility’s registration, provided the U.S. agent has agreed to serve in that capacity. This would help ensure that U.S. agents are aware they have been so designated, NGFA said.

• Generally supported FDA’s proposal to cancel a facility registration if it: 1) verifies a facility is not required to register; 2) obtains information that the facility’s address was not updated in a timely manner; 3) discovers the registration was submitted by an unauthorized person; or 4) determines that the registration expired because it was not renewed. However, NGFA said it “strongly recommended” that FDA establish appropriate procedures to notify a facility of the agency’s intent to cancel its registration and provide a reasonable time period for such a facility to respond before its registration is cancelled.”

• Supported FDA’s proposal to establish a voluntary identification system for U.S. agents authorized to register foreign facilities to help facilitate the accuracy of U.S. agent information and to enable U.S. agents to independently identify the facility(ies) for which the agent has agreed to serve. NGFA urged FDA to explore further this option with relevant stakeholders.

For additional information, see NGFA’s full comments.

NAS Report Calls for Updating Freight Rail Regulation

By Randy Gordon, President

A significant new report prepared for Congress and issued June 10 by the Transportation Research Board (TRB) of the National Academies of Science’s National Research Council concludes that economic regulation of the freight rail
industry has not kept pace with the structure and profitability of the rail industry itself, and needs to be replaced with "practices better suited for today’s modern freight rail system."

Among other things, the TRB report says that:

- "More appropriate, reliable and usable procedures" are needed for resolving rail rate disputes;
- Better data need to be obtained to assess railroad service quality and whether carriers are fulfilling their common carrier obligation; and
- Certain regulatory functions still vested in the federal Surface Transportation Board (STB) – such as the authority to review future rail mergers – that are remnants of the Staggers Rail Act of 1980 should be reassigned since they no longer are "valid."

The three-year study was conducted in response to a congressional mandate to that the TRB examine and develop recommendations on the future role of the STB in overseeing and regulating rail service and rail rates, particularly in an environment in which the carriers are profitable and have achieved revenue adequacy as defined under the Staggers Act.

The 190-page report was prepared by a seven-member committee consisting of experts in economics, regulatory policy and freight transportation, chaired by Richard Schmalensee of the Massachusetts Institute of Technology, Cambridge, Mass. The NGFA testified before the committee in 2014 to provide its observations on rail regulation, rail service and rail arbitration. (For additional information, see report highlights.)

The study’s major findings and recommendations, most of which would require legislative change by Congress, include the following:

- More appropriate, reliable and usable procedures need to be developed for resolving rail rate disputes involving shippers who operate in markets that lack effective competition and who challenge rates they believe are excessive. The study found that the current formula used by the STB to determine whether a freight rate is unreasonably high – which utilizes a Uniform Railroad Costing System to determine whether a rate exceeds 180 percent of the variable cost of the carrier in providing the service – is both unreliable and economically invalid. This has resulted in “systematic biases” in the traffic qualifying for rate relief and to “nonsensical outcomes,” the study found, “leading to regulatory procedures that systematically deny large numbers of shippers access to the law’s maximum rate protections.” The report said the flaw lies with the Staggers Rail Act’s requirement that regulators estimate the cost of
transporting rail shipments when most railroad costs are shared by traffic and not attributable or traceable to individual movements involved in the rate being contested. The report recommended that Congress repeal the current 180 percent threshold used to determine whether a rate is challengeable, and direct the U.S. Department of Transportation to develop a more reliable tool that compares contested rates to those charged in competitive rail markets, thereby replacing current methods that “make artificial and arbitrary estimates of the cost of rail shipping.”

- Replace the STB’s current procedures for challenging rail rates with arbitration hearings that compel faster, more economical resolutions of rate cases. Arbitrators also should be empowered to impose reciprocal switching as a remedy for rail movements involving rates found to be unreasonable. The report notes that rate complaints can result in millions of dollars in litigation costs and take years to resolve, deterring especially shippers with smaller claims from seeking rate relief. “The system has the effect of safeguarding railroad revenues by making it too costly for most shippers to litigate a case,” the report states. “Shippers are thus denied equal and effective access to the law’s maximum rate protections.”

- Discontinue issuance of annual reports on revenue adequacy of individual railroads, replacing such reports with periodic studies of economic and competitive conditions in the industry. The study found that the Staggers Rail Act’s requirement that STB maintain standards and procedures for making annual determinations of whether the earnings of each Class I railroad is sufficient to attract capital is outdated and should be replaced. “This annual pass/fail appraisal of revenue adequacy has become ritualistic while offering little substantive information for regulators and policymakers in monitoring the industry’s economic and competitive conditions,” the report said. “By sponsoring periodic assessments of economic and competitive conditions in the industry as a whole that used more varied data and analytical techniques, Congress and the STB would obtain a richer set of information to support regulatory decisions and policies.”

- Transfer the authority to review future rail mergers to the antitrust agencies of the U.S. Justice Department and apply customary antitrust principles, rather than the current so-called public interest standard. The report noted that the public interest standard had
been retained, in part, to allow more financially viable railroads to reduce perceived duplicative capacity by acquiring struggling competitors and thereby concentrate traffic and revenues to regain profitability – a rationale that “no longer exists,” given the lack of excess and duplicative capacity. Instead, the report notes that “preserving competition among the remaining railroads will be the priority” for future merger reviews.

- STB should prioritize data needed to oversee railroads’ response to their common carrier service obligation by collecting and analyzing shipment-level data on service quality. The study recommended that the STB be directed to review and improve the accuracy, utility, timeliness and availability of its carload waybill sample data, which is necessary to fulfill the recommended competitive rate benchmarking system also contained in the report, as well as to facilitate research on the rail industry that can better inform policymakers. The report said the STB also should prioritize data needed to fulfill its role in assessing railroads’ fulfillment of their common carrier obligation, including shipment-level data on service quality, since shipment-level tracking is essential to understand trends in service levels and patterns as they shift and vary across time, regions and traffic segments. The report added that the STB should reassess its collection of detailed railroad accounting, financial and operations data to reduce reporting burdens on carriers, given the report’s focus on gathering information needed to conduct periodic economic and competitive studies of the industry.

- “Since passage of the Staggers Rail Act, the rail industry has been transformed and modernized,” the study concluded. “The economic regulations that remain should be suited to the financially sound railroad industry of today, not to the foundering one that required rescue 35 years ago. The (proposed) modernization...would reduce the anachronistic regulatory burdens railroads still bear while giving more shippers real protection against unreasonable rates. It would continue the process begun by the Staggers Rail Act – a process aimed at producing a modern, efficient and competitive railroad industry able to attract capital, maintain and expand its capacity, and serve its customers with a minimum of regulatory oversight.”
NGFA Participates in White House Forum on Antibiotic Stewardship

Veterinary Feed Directive Rule Announced During Event

David Fairfield, NGFA vice president of feed services, on June 2 participated in an invitation-only “White House Forum on Antibiotic Stewardship” hosted by the Obama Administration to bring together key human and animal health constituencies that expressed commitments to make further efforts to address the issue of antibiotic resistance.

“The NGFA and its feed industry member companies will be involved extensively in developing education, communications and outreach efforts to assist the U.S Food and Drug Administration’s (FDA) efforts in informing customers and animal producers about the agency’s antibiotic judicious-use policies. We also will work closely with FDA and the feed industry to implement changes to the Veterinary Feed Directive process that make it a much more workable and effective tool for enhancing veterinary oversight of a broader array of antibiotics used in animal agriculture production,” said Fairfield.

The intent of the forum was to advance executive order 13676 signed by President Obama in September 2014 that prioritized federal efforts addressing antibiotic resistance. Following issuance of the executive order, the administration released in March 2015 the National Action Plan for Combating Antibiotic-Resistant Bacteria, a comprehensive plan that identifies actions for federal departments and agencies to enhance diagnosis and treatment and limit the spread of antibiotic-resistant bacteria.

VFD Rule Announced

In conjunction with the White House forum, FDA on June 2 announced its final rule amending the Veterinary Feed Directive (VFD) regulation. FDA originally issued the VFD regulation on Dec. 8, 2000, to establish that certain animal drugs intended for use in or on animal feed may only be used under the professional supervision of an appropriately licensed veterinarian in the course of the vet’s professional practice, where a valid veterinarian-client-patient relationship exists. FDA developed the VFD regulation as a means to reduce unnecessary use of certain antibiotics in animals and to slow or prevent the potential increase of bacterial resistance to such drugs. Currently only two antibiotics used in or on animal feed are subject to the VFD regulation – tilmicosin and florfenicol.

The June 2 revisions to the VFD regulation are intended to facilitate its expanded use under FDA’s antibiotic resistance policies that apply to drugs used within animal agriculture that are important in human medicine. Under its
policy formalized in April 2012, FDA established that use of such drugs should be limited to those that: 1) are considered necessary for assuring animal health (i.e., medically important antibiotics should not be used to promote animal growth or to improve feed efficiency); and 2) include veterinary oversight or consultation (i.e., medically important antibiotics should not be used in the feed or drinking water of food-producing animals without veterinary oversight or consultation).

A listing of those animal drugs and drug combinations that will become subject to FDA’s antibiotic use policies and the VFD regulation is available on FDA’s website. FDA officials have said that those drugs likely not to be subject to the VFD regulation include: wormers, ionophores, carbadox, bacitracin, bambermycin and tiamulin.

FDA intends to have its antibiotic resistance policies fully implemented by December 2016, which means sponsors of affected drugs are to have eliminated any growth-promotion claims associated with their products by that time. In addition, sponsors are to have transitioned the marketing status of their products so they may be distributed to animal producers only under the requirements established by the VFD regulation. Once the policy implementation is complete, the affected antibiotics no longer will be available to be distributed to animal producers on an over-the-counter basis.

While the VFD final rule contains many of the recommendations made by the NGFA during the rulemaking process, it does not contain all of them. For example, the final rule still requires records associated with VFD orders to be maintained for at least two years, while the NGFA recommended a one-year time period. In addition, the final rule “clarifies” that the expiration date of a VFD order designates the last date the VFD feed may be fed to animals, not the last date that the feed may be distributed to the animal producer. The NGFA will be providing other information about technical aspects of the revised requirements in future communications.

**VFD Draft Guidance**

In addition to the final rule, FDA also published on June 2 a draft VFD guidance document that contains questions and answers about the revised requirements. FDA is accepting comments on its draft guidance through Aug. 3. The NGFA’s Feed Legislative and Regulatory Affairs Committee will be taking the lead in developing NGFA’s comments.

For questions or additional information, contact NGFA Vice President of Feed Services Dave Fairfield at (712) 243-4035.
FDA Announces Draft Guidance to Establish Voluntary Qualified Importer Program

By David Fairfield, Vice President of Feed Services

The U.S. Food and Drug Administration (FDA) on June 5 announced the availability of a draft guidance titled “Draft Guidance for Industry on the Voluntary Qualified Importer Program (VQIP) for Food Importers and Guidelines in Consideration of the Burden of the VQIP Fee Amounts on Small Business.”

The draft guidance is intended to establish a voluntary, fee-based program for the expedited review and importation of foods into the United States from importers with a proven food safety track record.

The Food Safety Modernization Act (FSMA) gives FDA new authorities to ensure that foods imported into the United States meet the same safety standards as those set for domestically produced foods. In addition to establishing mandatory standards for importers of food under the Foreign Supplier Verification Program (FSVP), FSMA also requires FDA to establish VQIP for importers who achieve and maintain a high level of control over the safety and security of their supply chains. This control includes importation of food from foreign facilities that have been certified as following appropriate food safety practices under FDA’s accredited third-party certification regulations, also required by FSMA.

The draft guidance document outlines VQIP provisions and provides information on:

- The benefits VQIP importers can expect to receive;
- Eligibility criteria;
- Instructions for completing a VQIP application;
- Conditions that could result in revocation of VQIP participation; and
- Criteria for VQIP reinstatement following revocation.

In addition, FDA’s Federal Register Notice provides a preliminary estimate of the fee for the program (approximately $16,400 annually per participant, if an equal fee were assessed on 200 participants) and requests comment on whether and how this amount would be a burden for small businesses.

FDA has provided a 75-day public comment period – ending Aug. 19 – on the draft guidance and the guidelines related to the burden of fees on small businesses. After comments are considered and the guidance finalized, the
program is expected to be open for applications in January 2018 to allow enough time for a participating facility to be certified under FDA’s accredited third-party certification program.

For questions or additional information, contact NGFA Vice President of Feed Services Dave Fairfield at (712) 243-4035.

NGFA, CME Discuss on Electronic Trading Issues

By Todd Kemp, Vice President of Marketing and Treasurer

On June 3, as follow-up to action by the NGFA’s Risk Management Committee, a three-person task force met in Chicago with CME Group representatives to discuss electronic and high-frequency trading issues.

Before the meeting, NGFA had posed a list of questions to CME regarding CME technologies and policies. A number of so-called “myths and misconceptions” were addressed to NGFA’s satisfaction, including questions concerning CME’s order-fill algorithm, processing speed/priority, CME’s messaging policy, CME incentives (all published on the CME web site), and margining requirements. At CME’s request, the NGFA representatives agreed to give CME market data for further analysis of some apparent order-fill anomalies not immediately explained given CME’s technology and protocols. The groups will continue to discuss electronic trading issues, with broader reporting soon to the NGFA membership.

In addition, NGFA and CME representatives discussed a joint effort aimed at disseminating the group’s information to a broader audience when finalized – perhaps at NGFA’s Country Elevator Conference in Kansas City in December and/or NGFA’s annual convention in March in San Diego.

NGFA and STC to Host Ag Transportation Summit

NGFA and the Soy Transportation Coalition (STC) on Aug. 4-5 will host the second Ag Transportation Summit: “Transportation Capacity – Overcoming the Challenges.” The event, sponsored in part by the U.S. Department of
Agriculture’s Agricultural Marketing Service, will be held at the Westin O’Hare near Chicago. The inaugural summit occurred in July 2013.

“U.S. farmers continue to demonstrate an ability to feed a growing and hungry planet,” says Scott Gauslow, a soybean farmer from Colfax, N.D., and chairman of the Soy Transportation Coalition. “However, in order to remain profitable, we must not only produce what customers demand but also be able to transport it to them in a cost effective, reliable manner. Many aspects of our transportation system are not positioned to do so. These challenges must be addressed.”

“This year’s summit will focus on strategies and steps being taken to enhance capacity and efficiency within all transportation modes – highway, rail, barge and ports – to meet the continued, growing demand for moving freight to both domestic and export markets,” said NGFA Chairman Gary Beachner, president and chief executive officer of Beachner Grain Co., Parsons, Kan. “The U.S. transportation system remains a key competitive advantage for U.S. agriculture. But retaining that advantage requires a continued commitment and efforts by the leaders and stakeholders who will be part of this conference.”

The goals of the summit are to:

- Raise the awareness of the importance of transportation to the success and profitability of U.S. agriculture;
- Precipitate and motivate further action to promote a transportation infrastructure that better serves the interests of U.S. agriculture;
- Provide a venue for advocates of U.S. agriculture to network and develop collaborations for the purpose of promoting the transportation needs of U.S. agriculture; and
- Build bridges between government and agricultural interests that will result in more effective promotion of agricultural transportation issues.

Confirmed speakers include key executives from all of the U.S. Class I railroads, including BNSF Railway, Union Pacific Railroad, CSX Transportation Co., Canadian National Railway and Canadian Pacific Railway; as well as the acting chairman of the federal Surface Transportation Board, Debra Miller, top officials from the American Trucking Associations and the National Retail Federation and the U.S. Chamber of Commerce. Invitations also have been extended to key members of Congress, the U.S. Department of Agriculture, the grain industry and others to address the summit.

Specific topics and issues to be addressed during the summit include:

- **Inland Waterways:** The status of funding to upgrade locks and dams, and the potential timing of lock rehabilitation projects, as well as the
significance of inland waterways to agriculture.

- **Rail Transportation:** Efforts underway by rail carriers to enhance capacity to serve growing freight demand from agriculture and other sectors. Performance of rail in transporting agricultural products, trends in rail infrastructure investment.

- **Surface Transportation:** Challenges inherent in the current structure for funding improvements and maintenance of the highway system, as well as potential alternative financing arrangements. The status of potential changes to increase semi-truck weight limits, strategies for addressing the shortage of commercial truck drivers and hours-of-service restrictions.

- **Ports:** Productivity and reliability concerns confronting the nation’s ports, needed investments and innovations at foreign ports.

- **Panama Canal Expansion:** An update on the status of the expansion project and its implications for agricultural trade and U.S. ports.

The day-and-a-half event will begin at 8 a.m. on Tuesday, Aug. 4, and conclude at noon on Wednesday, Aug. 5.

Those wishing to participate in the summit can register online. The early bird registration fee is $265 if received no later than July 1. Price goes up to $295 on July 2; on-site registration is $350.

**NGFA Submits Comments on Draft Guidance on Ensuring Safety of Animal Feed Maintained and Fed On-Farm**

*By David Fairfield, Vice President of Feed Services*

The NGFA on June 3 submitted comments in response to the Food and Drug Administration’s (FDA) draft guidance for industry, titled “Ensuring Safety of Animal Feed Maintained and Fed On-Farm.”

“As feed manufacturers and suppliers, our members are committed to producing and distributing safe and wholesome animal feed. However, the continued safety of the feed depends on proper on-farm storage and feeding
practices," wrote NGFA Vice President of Feed Services David Fairfield. “We believe the majority of FDA’s recommendations within its draft guidance represent reasonable practices that animal producers may follow to help ensure the safe use of feed products.”

NGFA’s statement recommended that FDA make several revisions within its draft guidance to address:

1) Safe transportation of feed;
2) Reasonably foreseeable contaminants that may pose a risk to feed safety;
3) Storing feed apart from agricultural chemicals; and
4) Notifying feed suppliers if there is a concern about the safety of a feed product.

Safe Feed Transportation

FDA recommends that animal producers “obtain feed from safe and reliable sources.” According to its comments, the NGFA believes this is a prudent recommendation, since animal producers generally cannot improve the safety of feed once it is received at the farm.

However, NGFA said it would be appropriate for FDA specifically to recommend that animal producers consider the safety aspects associated with the transportation of feed to the farm. “As FDA is aware, the safety of feed products may be influenced by how the product is transported, with the safety of feed arriving at the farm being dependent both on how the product is manufactured and distributed,” the NGFA said.

Reasonably Foreseeable Contaminants

In its guidance, FDA recommends that adequate sampling procedures are necessary to provide useful analytical results and that appropriate sampling procedures are contained in the Association of American Feed Control Officials’ Feed Inspector’s Manual.

The NGFA agreed with FDA’s recommendation concerning the need to use appropriate sampling procedures to achieve accurate analytical results. However, in addition to such a recommendation, the association also recommended that FDA specifically indicate that following appropriate sampling procedures is particularly important if an animal producer desires to sample a product for the potential presence of a microbiological pathogen.
Storing Feed

NGFA also urged FDA to add a specific recommendation pertaining to storing feed apart from other potential contaminants that may be present on the farm. NGFA said it believes that the risk of feed becoming contaminated on-farm with other agricultural chemicals is significant and also warrants being highlighted.

Feed Supplier Notification

In its comments, NGFA said it strongly believes that FDA also needs to recommend that animal producers contact their feed supplier if they have concerns about the safety of the feed.

Further, the association urges FDA to list the recommendation prominently, and believes that animal producers should work closely with their suppliers to address any feed safety concerns."

For additional information, see NGFA’s full comments.

Update from Capitol Hill

By Jared Hill, Director of Legislative Affairs and Public Policy

The Grain Standards Act (GSA) recently passed on the House floor. In addition, the House passed a country-of-origin labeling (COOL) amendment that would repeal requirements for beef, pork and chicken products. Below provides additional information on these recent Capitol Hill activities.

Grain Standards Act Reauthorization

GSA, which reauthorizes the authorities of the federal Grain Inspection Service, moved one step closer to completion with passage on the House floor. The Senate version of the legislation passed the Senate Agriculture Committee and awaits consideration by the full Senate – likely this summer.

NGFA continues to work closely with both the House and Senate Agriculture Committees to make improvements to the grain inspection system through the legislation.

For more information, see previous article.
Country-of-Origin Labeling

The battle over the U.S. COOL law took another twist this week, only this time it was not another decision by the World Trade Organization (WTO). Instead, it was Congress taking a step toward resolving the conflict over COOL. The House passed H.R. 2393, the Country of Origin Labeling Amendments Act of 2015, by a vote of 300-131. The legislation would repeal COOL requirements for beef, pork and chicken products.

COOL law and regulations require meat, poultry and certain other products to be labeled where the product originated. Mexico and Canada have long complained the law is discriminatory toward meat products coming from their respective countries, and both nations have successfully challenged COOL regulations at the WTO. Despite attempts to reform the regulations to comply with an earlier WTO decision, current regulations still have not satisfied WTO decision-makers.

Losing the COOL case at the WTO put U.S. agricultural and manufacturing industries on edge since it will allow Canada and Mexico to implement retaliatory tariffs against U.S. products being exported to those markets. The Canadian government already has released its list of products it would place retaliatory tariffs on. That list includes both corn and high fructose corn syrup, among the many agricultural products facing tariffs. According to some reports, Mexico and Canada may be allowed to implement as much as $3.5 billion in retaliatory tariffs in the first year.

The attention now will turn to the Senate to see if it can pass similar legislation to deal with the COOL dispute. During a recent meeting with agricultural groups, Senate Agriculture Committee Chairman Pat Roberts, R-Kan., acknowledged the need to address the issue to ensure the United States complies with its international trade obligations. However, he did not provide a timetable for when the committee would address the issue.

NGFA continues to stay on top of this issue for its members, and is a part of a coalition to reform COOL, which recently sent a letter to all members of the House before the recent vote.
Reserve a Room by June 29 to Attend Elevator Design Conference

By Heather McElrath, Director of Communications

While the Elevator Design Conference host hotel is sold out, rooms are available at the Westin Kansas City at Crown Center, which is connected by a covered walkway to the Sheraton Crown Center Hotel, which is the conference site. Reservations for discounted rooms ($149 a night) must be made by June 29.

The conference, which addresses “Applying New Technologies and Best Practices for Today’s Facilities,” features nearly a dozen, 45-minute sessions all day Wednesday, July 29 and the morning of Thursday, July 30. Sessions and speakers are:

- **Considerations for Retrofitting**
  - Marshal Alsaker, Build Project Manager, Cargill Inc., Wayzata, Minn.

- **Environmental Permitting**
  - Brian Wanzenried, Director of Environmental, Gavilon Grain LLC, Omaha, Neb.
  - Eric Sturm, Owner, Lead Consultant, Air Regulations Consulting LLC, Lincoln, Neb.

- **Finding Energy Cost Savings**
  - Thomas Mort, Chief Operating Officer, Mission Point Energy, Louisville, Ky.

- **Panel: Finding, Keeping and Training Good Employees**
  - Brett Myers, Director of Human Resources and Development, MKC, Moundridge, Kan.
  - Jessica Johnson, Talent Acquisition Manager, Lansing Trade Group, Overland Park, Kan.
  - Jason Klootwyk, Director Interior Assets, Bunge North America, St. Louis, Mo.

- **Panel: Managing Construction Contractors**
  - Jim Gales, Construction Department Manager, CHS Inc., Greeley, Co.
  - Mark Fedje, Operations Mgr. Minneapolis Elevators, General Mills, Minneapolis, Minn.
  - Ross McEllhiney, Project Manager, Louis Dreyfus Commodities, Kansas City, Mo.

- **Avoiding Workers’ Comp Pitfalls**
  - Peter P. Greaney, M.D., Chief Executive Officer, Work Care Inc., Anaheim, Calif.
- **Truck Scale Automation - Improving The Customer Experience and Streamlining Operations**
  - Todd Wiessing, Build Project Manager, Cargill Inc., Tuscola, Ill.
  - Sean Slowinski, Chief Executive Officer, North Central Grain Coop, Bisbee, N.D.

- **Electrical System Design**

- **Receiving/Reclaim Systems**
  - Marcus Neal, Dir. of Facility Operations, Lansing Trade Group, Overland Park, Kan.

- **Monitoring Systems**
  - Jim Voigt, Executive Vice President, AgriSphere, Mahomet, Ill.

- **Hazard Communication Standard Compliance Update** *(See related article)*
  - Jess McCluer, Director of Safety and Regulatory Affairs, NGFA, Washington, D.C.

For additional information, see the [full agenda](#), [who's registered](#) or follow the event on Twitter #2015edc. The conference will end at 11:30 a.m.

**In Memoriam: Ben Boerner**

The NGFA was deeply saddened to learn of the death of Ben Joseph Boerner, who passed away Tuesday, June 2, 2015, at age 55.

Ben was president of the Texas Grain and Feed Association (TGFA), which he joined in 1986 after receiving his B.S. and M.S. degrees in animal science and nutrition from Texas A&M University. After a five-year stint with Oil-Dri Corporation in Chicago, Ben, in 1993, became the fourth full-time TGFA executive since 1959. In addition, Ben was a member of American Society of Association Executives, Texas Society of Association Executives, Agricultural Association Executives Council, and the Grain Elevator and Processing Society.

As TGFA's leader, Ben often represented the association at NGFA events –
serving as a voice for Texas agriculture.

“We were deeply saddened to learn of Ben’s untimely passing, and join with his many industry friends and state association colleagues in celebrating his life,” said NGFA President Randy Gordon. “Ben was one of those energetic, joyous and thoughtful persons whose personality filled any room he entered. His love of life and family, and respect for those with whom he interacted, were contagious. We’ll miss him and his leadership greatly, and extend our heartfelt and deepest sympathies to his wife, Denise, and wonderful family.”

Ben was born March 1, 1960, at Fort Wolters in Mineral Wells, Texas. His passion for life involved his family, his running, his Harley-Davidson, his devotion to Texas A&M, and his work with the Texas Grain and Feed Association. As a 1982 graduate of Texas A&M, he served as class agent from 1992-2002, and served as a member of the Century Club since 1986. He was a dedicated member of the Texas State Guard as a lieutenant colonel and was a true example of a man committed to God, family and country.

Survivors include his wife of 24 years, Deborah (Denise) Boerner; parents, Col. (Ret.) Dennis and Margaret Boerner; children, Rachel, Ryan and Reagan; sisters, Kelly Kastner and Monica Boerner; many nieces, nephews, cousins and family that he loved dearly.

In lieu of flowers, the family is asking that donations be made in Ben’s name to either or both of the following organizations:

- **Texas A&M Association of Former Students** (For reference, Ben Boerner is class of 1982), or the
- **Alzheimer’s Association**, which was an issue he was passionate about.