CFTC Finalizes ‘Swap-Dealer’ Definition

…Cautious Optimism Pending Regulatory Language Excluding Most Commercial End-Users…

The Commodity Futures Trading Commission (CFTC) on April 18 approved, by a 4-1 vote, regulations designed to exclude from swap-dealer regulation under the Dodd-Frank financial regulatory reform law those commercial end-users that offer risk-management tools to hedge physical commodities.

The action came in the most recent of 26 public meetings convened by the agency to consider various regulations emanating from the Dodd-Frank law. Republican commissioner Scott O’Malia was the only dissenting vote on the CFTC’s so-called “entity-definitions” rule, arguing that it was built upon the framework of a deficient proposed rule. The agency “could have provided equivalent or superior certainty” by construing the law properly, O’Malia said. “By preserving and furthering the statutory misconstructions in the proposal, the…rule may ultimately provide illusory comfort.”

But CFTC Chairman Gary Gensler stated during the meeting that end-users would not be required to register as swap dealers. Among other things, Gensler said the rules provide guidance to market participants on whether their activities make them swap dealers, including by: 1) focusing on entities that “routinely seek to profit by accommodating other market participants’ demand for swaps; 2) focusing on whether a person has an identifiable swap-dealing business; and 3) clarifying that swaps between an agricultural cooperative or cooperative financial institution and its members do not constitute “dealing” in swaps.

Earlier in the day, the Securities and Exchange Commission (SEC) also voted to approve the entity-definitions rule, which was the subject of a joint rulemaking process involving both agencies.

Importantly, the regulations, consistent with the Dodd-Frank law, provide an exemption for entities that “…engage in a de minimis quantity of swap dealing in connection with transactions with or on behalf of its customers.” The approved rule establishes a de minimis level of $8 billion for a five-year transitional period, after which the de minimis level adjusts to $3 billion. Midway through the five-year period, the CFTC said it will conduct an analysis of swap markets and has the authority to set a revised de minimis threshold based upon its review.

Senate Ag Committee Consideration of 2012 Farm Bill to Begin April 25

The NGFA has learned that the Senate Agriculture Committee plans to begin its consideration of the text of the 2012 farm bill on April 25.

The staffs of Chairwoman Debbie Stabenow, D-Mich., and ranking member Sen. Pat Roberts, R-Kan., worked over most of Congress’s two-week spring recess that ended April 16 to draft 2012 farm bill language that they hope will garner strong bipartisan support. In meetings today with Senate staff, the NGFA was informed that a draft of the entire bill may be released as early as April 20. Committee consideration of the bill will begin with the least contentious sections, likely including the credit and research provisions. The “heavier lifts” – such as farm bill sections dealing with farm programs for various commodities, conservation and federal crop insurance, likely will be delayed until last.

Roberts has said that the committee’s goal is to complete consideration of its version of the bill next week. And Stabenow has said she’s striving to win Senate passage before Congress begins its Memorial Day recess or by early summer.

During the past two weeks, the NGFA has met with the members and/or staffs of 10 Senate Agriculture Committee members to reiterate the importance of reforming and downsizing the Conservation Reserve Program (CRP) during the farm bill process. There are strong indications that the Senate version of the farm bill will mirror the bipartisan recommendations made last fall to the deficit-reduction “supercommittee,” which would have reduced the CRP cap from the current 32 million acres to 25 million acres.

House Ag Committee to Continue Farm Bill Hearings:
Meanwhile, the House Agriculture Committee announced April 18 that it will complete field hearings and begin hearings next week in Washington on several key sections of the farm bill.
While the final language of the lengthy rule – which reportedly is approximately 700 pages – will not be available for several days, it appears that several provisions have the practical effect of exempting the vast majority of firms in the grain, feed and grain processing industry.

The CFTC rules also stipulate that entering into a swap transaction for the purpose of hedging a physical position generally does not constitute swap dealing. The rules contain a hedging definition that differs somewhat from the agency’s earlier rulemaking that established parameters for *bona fide* hedging, a matter that led to some concern during the public meeting. This hedging-definition portion of the rule will be published as an interim final rule, during which the CFTC will provide an additional public comment period – presumably 60 days. The rule also excludes swap activity for the purpose of portfolio hedging and anticipatory hedging.

While these provisions of the approved regulations appear to be good news for NGFA member companies and others in the industry, a detailed reading will be needed once the final rule is published in the *Federal Register*.

The rulemaking was of concern to the NGFA, as well as other agribusiness and producer groups, because of the very specific definition of “swap dealer” contained in the Dodd-Frank statute approved in late 2010 by Congress. Read broadly, the definition could have applied to many agribusiness firms, even to country elevators that offer risk-management tools to producers.

The NGFA has worked individually and as a lead member of a coalition with other organizations to urge the CFTC to structure final rules in such a way that firms providing agricultural risk-management tools would be exempted.

**NGFA, Grain Journal to Co-Sponsor **Free** MF Global Webinar on May 16

**...Event to Provide Update on Investigation and Recovery of Customer Funds; Registration Information E-Mailed Soon...**

The NGFA and *Grain Journal* have confirmed plans to conduct a **free** webinar on May 16 to provide an update on the aftermath of the MF Global bankruptcy and the status of customer-segregated funds.

Even firms that were not MF Global customers have much at stake as Congress, the Commodity Futures Trading Commission and various industry organizations debate how to make sure another MF Global-type situation does not recur.

To help NGFA members and other MF Global customers get the most accurate information possible and cut through the noise about potential criminal charges, claims trading and the ongoing investigative process, the NGFA and *Grain Journal* will present the webinar to update participants on current developments and help former customers optimize changes to recover as much of their funds as possible.

**George Angelich**, partner, Arent Fox LLP, will serve as the presenter during the webinar and will be available to respond to questions posed by webinar participants.

Angelich is a partner in Arent Fox’s financial restructuring and bankruptcy group in New York City, where he focuses on corporate reorganization and bankruptcy matters.

He has been working with the NGFA since late last fall to provide accurate, timely information on activities of the bankruptcy court and the SIPA trustee charged with liquidating MF Global’s futures business. He was a featured speaker at both the March convention and December Country Elevator Conference.

Among the topics to be covered are:

- Where the MF Global investigation and liquidation stands today.
- What former MF Global customers should know about the claims process.
- Dealing with claims traders – good idea or not?
- The potential timeline of the investigation and future distributions of funds to MF Global customers.

Watch for information on how to register for the free webinar, which will be sent by *Grain Journal* via e-mail soon!
before it begins drafting later this year or early in 2013. Which option the committee, chaired by Rep. Frank Lucas, D-Okla., chooses will depend mostly on the success the Senate has in completing its version of the bill.

Hearings are scheduled: 1) April 25 on the rural development provisions; 2) April 26 on conservation programs, at which the NGFA has been invited to testify; 3) April 26 on the dairy programs; 4) May 8 on nutrition and specialty crop programs; 5) May 10 on credit programs; 6) May 16-17 on commodity programs and federal crop insurance; and 6) May 18 on energy and forestry programs.

Other Congressional Action: There were these other developments on Capitol Hill of interest to NGFA members:

House Subcommittee Focuses on Inland Waterways System

The importance of preserving the reliability of the inland waterways system was in the spotlight during an April 18 hearing conducted by the House Transportation and Infrastructure Committee’s Water Resources and Environment Subcommittee.

Chaired by Rep. Bob Gibbs, R-Ohio, the subcommittee heard from agricultural, energy and river transport stakeholders on the disastrous economic consequences that could result from catastrophic failure and delays caused by the aging system lock-and-dam system.

Mark Hettel with American Electric Power’s (AEP) River Operations Division testified that three different lock outages occurring since 2010 will cost his firm more than $11.4 million in delays. He cited U.S. Army Corps of Engineers data that projects by the year 2015, the Ohio River will experience outages at eight lock chambers. That number is projected to grow to outages at 14 lock chambers by 2020, and 22 by 2025.

Mark Knoy with American Commercial Lines and Jeffboat of Jeffersonville, Ind., testified that a lack of waterways infrastructure investment sends the wrong signal to shippers who are beginning to question continued investment in waterside facilities. Knoy stated that 56 percent of the waterways infrastructure is beyond its design life, and 34 locks currently are more than 80 years old. He also cited the mismanagement of the Olmsted lock-and-dam renovation project, whose cost ballooned by $1 billion over the past year and threatens to delay completion of any other significant waterways projects for the next decade.

Mike Steenhoek, executive director of the Soy Transportation Coalition, Ankeny, Iowa, testified that if the inland waterways infrastructure becomes ineffective, U.S. agricultural exports could lose the competitive advantage currently enjoyed because of comparatively lower transportation costs. Steenhoek cited USDA data showing that U.S. soybean shipments currently enjoy an 18.18 percent rate for transportation as a percentage of total customer cost for movements between Davenport, Iowa, and Shanghai, China, compared to the 31.5 percent rate for transportation as a percent of total customer cost for shipments from North Mato Grasso, Brazil to Shanghai.

Major General John W. Peabody of the U.S. Army Corps of Engineers testified that a catastrophic failure at a high-volume lock and dam on one of the major waterways “would have significant economic consequences because other transportation modes generally lack the capacity to either quickly or fully accommodate the large volume of cargo moved on the inland waterways.”

Several of those testifying cited the Inland Waterway’s Capital Investment Plan as a way to solve the crumbling system’s current problems. On March 30, Rep. Ed Whitfield, R-Ky., joined by six bipartisan cosponsors, introduced legislation (H.R. 4342) that would implement many aspects of the funding plan, which has been endorsed by the NGFA and many other stakeholders. The bill would increase the barge diesel fuel tax paid by users of the inland waterway system, while still maintaining the 50 percent cost-share from the federal government. The bill also would require prioritization of renovation projects, and implement reforms to keep projects on time and on budget. Members receiving the NGFA Newsletter electronically may click here to access the bill text.
FDA Issues Draft Changes to Veterinary Feed Directive to Provide Enhanced Veterinarian Oversight of Antibiotics in Feed

The Food and Drug Administration (FDA) on April 13 published draft proposed regulations that would change the agency’s current so-called veterinary feed directive (VFD) process to provide for enhanced veterinary oversight over a wider range of certain antibiotics used in foodproducing animals.

The draft proposal reflects many of the changes to the VFD process recommended previously to FDA by the NGFA. The draft changes are a key part of FDA’s overall plan to provide for increased veterinary oversight of the use of antimicrobial drugs used in food-producing animals that also are medically important for treating human illness. The agency long has expressed concern that overuse of antimicrobial drugs in human medicine, as well as alleged injudicious use in food-producing animals, have contributed to the emergence of resistance to such products when used to treat human illness.

The draft VFD proposal, which is open for public comment until June 12, would revise regulations that FDA envisions veterinarians would be required to use to authorize the use of certain animal drugs in feed. FDA stated it is making the draft VFD regulation available as a draft text “because of the complex scientific and regulatory issues involved, and because of the potential impact that changes to the VFD regulations may have on stakeholders.” As such, FDA will offer two opportunities for public comment – first on the draft proposal and second when issuing actual proposed VFD regulations, presumably later this year.

FDA’s draft regulation would alter the current VFD process in several important ways, including: 1) reducing the record-retention period for VFDs and associated documents from the current two years to one year; 2) deleting the requirement that the quantity of feed be specified on the VFD order; 3) eliminating the requirement that the feed distributor receive the original signed VFD within five working days of receipt of the facsimile or other electronic order; 4) removing the reference to the defined valid veterinarian-client-patient relationship that currently is required for a veterinarian to issue a VFD, and replacing it with a more general requirement that the veterinarian provide supervision or oversight of the animals in a manner that is in conformance with the applicable veterinary licensing and practice requirements; and 5) removing the requirement that all VFD drugs automatically be classified by FDA as category II drugs. Click here to access the three-page FDA draft VFD-proposed language.

In conjunction with the draft language on potential changes to the VFD process, FDA also announced the availability of the following two guidance documents concerning the use of medically important antimicrobials in feed or water for food-producing animals:

- A final guidance document that recommends phasing out the growth-promotion use of medically important antimicrobials and phasing in veterinary oversight of therapeutic uses of those drugs. In the guidance, FDA stated that it decided not to make any substantive changes to the draft version of this guidance previously, issued for public comment on June 29, 2010. Instead, the agency said it chose to address specific issues related to implementation by issuing a separate draft guidance document listed below so as to provide additional opportunity for public comment. Click here to access the 26-page final guidance.

- A draft guidance document for industry, with public comment requested by July 12, that advises animal drug companies on how to: 1) voluntarily remove growth-promotion use claims for antibiotics from their FDA-approved product labels; 2) add, where appropriate, scientifically-supported disease-prevention, control and treatment uses; and 3) change the marketing status of such drug products to include veterinary oversight. Once finalized, FDA said it plans to give animal drug companies three years to voluntarily take such actions before considering whether to pursue regulatory action to remove growth-promotion claims from the labels of drug products that have not been changed. Click here to access the 18-page draft guidance.
FDA, AAFCO Extend MOU Until Sept. 1, 2013 on Process Used to Authorize Feed Ingredients

The Food and Drug Administration (FDA) and Association of American Feed Control Officials (AAFCO) have extended for one year – until Sept. 1, 2013 – the collaborative process for authorizing feed ingredients.

In an April 5 letter, FDA Center for Veterinary Medicine Director Bernadette Dunham said FDA and AAFCO had extended their current memorandum of understanding that clarifies the responsibilities of both parties in the current process of authorizing the use of feed ingredients in the United States, which includes a safety assessment by FDA. The MOU – which became effective on Aug. 30, 2007 and had been scheduled to expire on Sept. 1, 2012 – also provides mechanisms for resolving disputes that may arise between FDA and AAFCO on authorizing ingredients. In addition, the MOU provides mechanisms for modifying the ingredient-definition process when required.

The MOU extension was in response to a Dec. 21, 2011 joint letter to FDA and AAFCO from the NGFA, Pet Food Institute, American Feed Industry Association and Enzyme Technical Association. In the joint industry letter, the NGFA and other organizations noted that the MOU extension was needed to ensure there would be no gap in available review mechanisms for ingredients to be approved and/or recognized for use within the feed industry. Currently, AAFCO is considering significant changes to its long-standing AAFCO ingredient-definition process as a result of FDA’s legal interpretation of the ingredient standard provisions of the Food and Drug Administration Amendments Act of 2007 (FDAAA). The extension will allow additional time for the NGFA and other groups to urge adoption of “technical corrections” legislation that would clarify FDAAA to authorize FDA to formally recognize the legality of ingredients approved through the existing AAFCO ingredient-definition process.

However, in its April 5 response to the industry groups, FDA’s Dunham wrote that the agency anticipates that after the extension has expired, FDA “will transition from being the active reviewers of individual ingredient-definition submissions to serving as a liaison and adviser to (AAFCO’s) Ingredient Definitions Committee. Importantly, Dunham also said that because of increasing resources needed to address food-additive petitions and generally recognized as safe (GRAS) notifications, it anticipates that on or about February 2013 it no longer will accept requests to review new ingredient definitions submitted to AAFCO.

Feed, Ingredient Manufacturers Using Chromium, Manganese Reminded of May 4 Deadline for Submitting Compliance Notification

NGFA-member companies with existing feed or feed ingredient manufacturing facilities that handle a certain threshold quantity of materials containing chromium or manganese compounds are reminded that May 4 is the deadline to notify either the U.S. Environmental Protection Agency (EPA) or their state air-permitting authority of their compliance with air emission rules.

EPA on Jan. 5, 2010 issued final regulations under the Clean Air Act pertaining to potential emissions of chromium and manganese compounds from feed and feed ingredient manufacturers (excluding pet food manufacturers and facilities manufacturing feed on-farm or at feedlots). The regulations apply to facilities with a North American Industry Classification System (NAICS) code of 311119,

provided that: 1) such facilities use materials containing 0.1 percent or more chromium or 1 percent or more manganese by weight; and 2) production of animal feed or feed ingredients constitutes more than 50 percent of total annual production at the facility. EPA’s final regulations require that covered facilities comply with specified standards, monitoring, inspection and recordkeeping requirements designed to minimize the potential for chromium and manganese emissions.

Facilities required to submit compliance notifications to EPA or their delegated state air-permitting authority may click here to access a five-page sample notification form developed by the NGFA. The NGFA sample form is derived from an example notification form previously made available by EPA in June 2010, but has been updated to reflect amendments to the rule implemented by EPA on Feb. 21, 2012.

Covered facilities may submit the notice of compliance status information in a different form or format of their choice, so long as it contains such required information as: 1) the facility’s name and address; 2) a statement by a responsible facility official (including the official’s name, (Continued on page 6)
As noted previously, EPA’s regulations require that a “responsible official” complete the notification of compliance status. For a corporation, such an official is required to be: 1) the president, secretary, treasurer or vice president of the corporation in charge of a principal business function; 2) any other person who performs similar policy or decision-making functions for the corporation; or 3) a duly authorized representative of such person if the representative is responsible for the overall operation of one or more manufacturing, production or operating facilities and the facilities employ more than 250 persons or have gross annual sales or expenditures exceeding $25 million (in second quarter 1980 dollars). For a partnership or sole proprietorship, the responsible official is the general partner or proprietor, respectively.

Questions may be directed to NGFA Vice President of Feed Services David Fairfield at dfairfield@ngfa.org or to 712-243-4035.

**FDA Issues Report on FY 2010 Survey of Distillers Products for Antibiotic Residues**

The Food and Drug Administration’s Center for Veterinary Medicine (CVM) on April 12 issued a report that summarized findings from a nationwide survey in which the agency obtained and analyzed samples of distillers grains products derived from the production of fuel ethanol for the presence of antibiotic residues.

CVM’s Division of Animal Feeds conducted the sampling survey during fiscal year 2010, covering the time period of Oct. 1, 2009 through Sept. 30, 2010. As stated in the summary report issued by CVM, the survey was designed to enable the agency to learn more about antibiotic residual levels that may be present in distillers grains that are used as animal feed ingredients.

The fiscal 2010 survey was the second nationwide sampling activity conducted by CVM to evaluate the potential presence of antibiotic residues in distillers grains. CVM’s first survey took place in 2008, when the agency obtained and analyzed 60 samples of such products.

According to the report, a total of 46 samples were collected by FDA personnel during the fiscal 2010 sampling survey. Of those 46 samples, 18 were domestic-import samples (samples of distillers grains that were in domestic commerce when collected, but the country of origin was outside the United States) and 28 U.S.-origin samples that were in domestic commerce when collected.

FDA laboratories analyzed the 46 samples for residues of up to 12 antibiotics (ampicillin, penicillin G, chlorotetracycline, oxytetracycline, tetracycline, clarithromycin, erythromycin, streptomycin, virginiamycin M1, bacitracin A, chloramphenicol, tylosin) and monensin using the method found in Laboratory Information Bulletin (LIB) 4438 entitled, *Analysis of Antibiotics in Distillers Grains Using Liquid Chromatography and Ion Trap Tandem Mass Spectrometry*. The limit of quantification using the LIB 4438 method is 0.1 parts per million (p.p.m.) for virginiamycin M1, 0.5 p.p.m. for erythromycin, and 1 p.p.m. for penicillin.

CVM’s final analysis of the FDA laboratory tests on the collected samples found that:

- Four of the 46 samples were quantifiable in the laboratory for antibiotics. The four positive samples contained a total of five antibiotic residues. Of the four positive samples, three were domestic samples and one was a domestic-import sample.
- The results of the three positive domestic samples were as follows: 1) Virginiamycin M1 was detected at approximately 0.16 p.p.m. on a dry weight basis in one sample; 2) erythromycin was detected at approximately 0.58 p.p.m. on a dry weight basis in another sample; and 3) one positive domestic sample contained virginiamycin M1 at approximately 0.15 p.p.m. on a dry weight basis and penicillin G at approximately 0.24 p.p.m. on a dry weight basis. CVM noted that the quantity of penicillin found in the final sample was lower than the limit of quantification for that drug, but that the laboratory was able to accurately quantify this sample for penicillin below 1 p.p.m.

(Continued on page 7)
The positive domestic import sample, which was from Canada, contained approximately 0.18 p.p.m. of virginiamycin M1 on a dry weight basis.

The report said the sampling assignment results are providing CVM with a better idea of the extent and level of antibiotics present in distillers products, and that the agency will take these data into consideration as it develops a policy for antibiotic residues in distillers products. The report also noted that, since the primary objective of the assignment was to collect data on antibiotic residues in distillers products to support policy development, CVM does not anticipate taking regulatory follow-up actions against firms whose samples tested positive.

The U.S. Department of Agriculture’s Grain Inspection, Packers and Stockyards Administration (GIPSA) announced April 11 that it has approved two moisture meter instruments using new technology.

As reported in the Feb. 16 edition of the NGFA Newsletter, GIPSA announced it plans to transition to new official moisture meter technology – known as “unified grain moisture algorithm” (UGMA) moisture meter – starting in September 2012 for major fall-harvested crops, including corn, soybeans, sorghum, sunflower seed and rough rice. The transition is scheduled to conclude on May 1, 2013 for spring-harvested crops.

The new official moisture meter technology is to replace the GAC 2100 model, although the agency has said it will maintain calibrations of the GAC model for the time being under its type-evaluation process. The new technology operates using 149 MHZ technology that GIPSA said offers several advantages over the current official moisture meter, including that it: 1) aligns more closely with results achieved through the official reference method – the air-oven process. 2) offers an accurate reading at lower temperatures than the current official meter, which will be helpful within certain grain marketing channels during winter months; and 3) is easier to maintain, requiring fewer calibration changes than current moisture meters.

Approved by GIPSA were Dickey-john Corp.’s GAC 2500UGMA and the Perten AM-5200-A. The agency noted it was the first time it had approved more than a single moisture meter for use within the official inspection system. “Permitting multiple manufacturers to design moisture meters using the UGMA technology to improve the accuracy and repeatability of grain moisture meter testing allows for competition within the instrument marketplace for the benefit of moisture meter users,” GIPSA said.

NGFA Approves Two New Moisture Meters as Part of Shift to New Technology Starting in September 2012

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The U.S. Department of Agriculture’s Grain Inspection, Packers and Stockyards Administration (GIPSA) on April 11 proposed to amend the current U.S. official grain standards for wheat to remove red hard winter and hard red spring wheat from the definition of “contrasting classes” in hard white wheat, and to tighten the grade limits for shrunken and broken kernels in U.S. Nos. 1 and 2 wheat.

The proposal is the result of GIPSA’s periodic (five-year) review of each of the U.S. grain standards to determine if changes are warranted to facilitate the marketing of U.S. commodities.

**Shrunken/Broken Kernels:** Concerning shrunken and broken kernels, GIPSA proposed that the grade limit for U.S. No. 1 wheat be reduced from the current 3 percent to 2 percent, while the grade limit for U.S. No. 2 wheat would be reduced from the current 5 percent to 4 percent. Grade limits for shrunken and broken kernels would remain unchanged for U.S. Nos. 3, 4 and 5 wheat.

The agency said it believed the more restrictive grade limits would “more accurately reflect the quality of wheat moving throughout the marketing system.” GIPSA said that based upon its review of more than 100,000 official export and domestic inspection samples for all wheat classes from marketing years 2005-09, the proposed new grade limits would have resulted in a 5 percent reduction in the quantity of U.S. No. 1 wheat that would have continued to grade that way if shrunken and broken kernels were the determining factor. But 100 percent of U.S. No. 2 wheat would continue to grade that way using the new proposed limit, GIPSA said.

**Contrasting Classes:** The other change proposed by GIPSA would amend the definition to remove hard red winter and hard red spring wheat from the definition of “contrasting classes” in hard white wheat. Instead, those two classes of wheat would be considered “wheat of other classes.” The practical effect would be to allow the presence of up to 5 percent hard red winter wheat and/or hard red spring wheat in U.S. No. 2 hard white wheat. Grade limits would remain unchanged. Currently, U.S. No. 2 hard white wheat is not allowed to contain more than 2 percent hard red winter and/or hard red spring wheat. In proposing the change, GIPSA referenced its 2006 rulemaking that found allowing 5 percent hard white wheat in hard red winter or hard red spring wheat would result in “no functional downside” in flour quality because: 1) hard white wheat protein quality is equivalent; 2) polyphenol oxidase is “not an issue”; 3) extraction rates are equivalent; and 4) reduced concentration of bitter compounds in hard white wheat is not problematic for hard red wheat producers. The agency noted that buyers and sellers could continue to specify contractually a maximum 2 percent hard red wheat limit in hard white wheat.

**Suggested Changes Rejected by GIPSA:** In its proposed regulations, GIPSA noted it had rejected comments suggesting that the U.S. wheat standards be amended to: 1) develop a flour yield test that could be incorporated into the official wheat standards; 2) develop a rapid, precise and reliable test for protein quality; 3) develop a rapid alpha amylase test for detecting sprout-damaged kernels; 4) reduce the current limit on insect-damaged kernels; and 5) incorporate mycotoxins as a grade-determining factor and institute a mycotoxin testing check-sample program. Several of the aforementioned comments were deemed by GIPSA to be outside the scope of the wheat standards rulemaking. Concerning the mycotoxin suggestion, GIPSA noted that it is developing a check-sample program similar to those it already has implemented. But it said it planned to continue to offer mycotoxin testing as an official criteria, not as a grade-determining factor.

The agency also rejected several wheat class blending-related proposals that would have: 1) allowed the uniform blending of any U.S. wheat classes, with the classes identified on official grain inspection certificates; 2) developed a “generic approach” to allow blending of any classes of wheat, with the classes identified on the official inspection certificate; and 3) developed appropriate class names for specific class blends. In each case, GIPSA reasoned, buyers already can purchase mixed wheat and the agency can certify the percentage of various wheat classes.

**Submitting Comments:** Comments on the GIPSA-proposed changes to the wheat standards are due June 11. The NGFA’s Grain Grades and Weights Committee is evaluating the proposal, and will submit a statement to the agency.

Members receiving the NGFA Newsletter electronically may click here to access the six-page GIPSA proposal, which includes instructions for submitting comments.
OSHA Regulatory Update – Rail Car Fall Protection

Fall protection has always been one of the Occupational Safety and Health Administration’s (OSHA’s) emphasis areas.

Yet, the existing regulations under its walking-working surfaces and personal-protective equipment (fall-protection systems) standard – also known as Subpart D – do not specifically address or exclude rolling stock (such as rail cars) and motor vehicles from fall-protection standards. OSHA defines “rolling stock” as any locomotive, railcar or vehicle operated exclusively on a rail or rails, or a trolley bus operated by electric power supplied from an overhead wire.

OSHA in 1996 attempted to provide guidance on this uncertainty by issuing an internal memorandum – commonly known as the “Miles Memo” – that directed OSHA inspectors not to issue citations for rolling stock under Subpart D. The memo specifically states, “…falls from rolling stock would not be cited under the fall-protection standard because it was not appropriate to cite exposure to fall hazards from tops of rolling stock unless the stock was inside of or contiguous to a structure where fall protection is feasible.”

But the Obama administration’s increased enforcement stance has resulted in different – but unpublished – interpretations of the fall-protection standard, making it an issue about which grain-handling, feed, grain-processing and export facility managers need to be aware. Indeed, since 2010, several grain-handling facilities have been issued individual “willful” citations with fines totaling between $60,000 to $70,000 involving situations where, according to OSHA, the employer did not, “…furnish a place of employment which was free of recognized hazards of falls when walking/working on top of railroad cars, or rolling stock.”

OSHA Cites FGIS: Another notable citation involves one issued by OSHA to the U.S. Department of Agriculture (USDA)! USDA’s Federal Grain Inspection Service (FGIS) was cited in July 2011 for a lack of fall protection on top of a rail car based on an informal employee interview at a grain facility in Corpus Christi, Texas, where FGIS was performing official grain inspection services. FGIS currently is in the process of appealing the OSHA citation. In addition, OSHA recently cited an FGIS-designated official agency for not having rolling stock fall protection. The eventual outcome of these citations may change the industry’s overall policy.

OSHA Citation Overturned: One promising sign is a decision issued on March 2 by the Occupational Safety and Health Review Commission, an independent federal agency charged with reviewing contested citations or penalties resulting from OSHA inspections. In Secretary of Labor vs. Erickson Air-Crane, Inc. [Docket Number 07-0645], the commission reaffirmed the “Miles Memo,” particularly its determination of where fall protection is feasible (inside or contiguous to a building) and where it is not (away from such areas). The decision also reaffirmed that, for those areas where fall protection is not feasible, administrative controls can be used to protect employees. As a result, the commission vacated the citation.

OSHA Proposal Still Pending: Meanwhile, still pending is an OSHA-proposed rule on fall protection issued on May 24, 2010, in which the agency requested separate comments on whether specific regulations are needed to address falls from rolling stock and commercial motor vehicles. In its proposal, the agency stated that the Miles Memo “…did not result in clear direction to the public or to OSHA’s field staff.”

OSHA’s proposal asked for information on eight specific questions regarding rolling stock, such as: 1) the number of employees that work on rolling stock; 2) the type of fall-protection equipment used; and 3) alternative means that can be used to protect employees in the absence of such fall-protection systems. Since OSHA officially remains in the midst of the rulemaking process, there has been little dialogue with the agency on this topic.

Bottom Line: As for several other OSHA-related matters to be addressed in future columns in the NGFA Newsletter, there is no clear path forward for employers given that OSHA’s rulemaking on fall protection remains in limbo. But the OSHA Safety and Health Review Commission’s decision, in essence upholding the Miles Memo did provide a clear signal that the agency had overreached in that case.

The NGFA will be monitoring closely the outcome of OSHA’s negotiations with FGIS on its citations to determine if it provides additional clarity, and will keep members informed. For more information, contact NGFA Director of Safety and Regulatory Affairs Jess McCluer at 202-289-0873, ext. 23, or by e-mail at jmccluer@ngfa.org.
USDA to Require Licensing of Port, Transloading Facilities Involved in Export Food Aid

The U.S. Department of Agriculture’s Farm Service Agency (FSA) on April 11 announced it will require – effective June 15 – that all port and transloading facilities involved in receiving, storing, handling or shipping export food aid commodities obtain a new federal license (WA-502) provided under the authority of the U.S. Warehouse Act.

FSA recently announced it was making a new export food aid commodities licensing agreement available specifically for warehouse operators who store, handle or ship such commodities as corn soy blend, vegetable oil, and pulses (such as peas, beans and lentils) that frequently are packaged and stored on an identity-preserved basis. The new license will be required for facilities that provide such export food assistance commodities for the U.S. Agency for International Development and USDA Foreign Agricultural Service foreign food assistance programs, which include P.L. 480 Titles II and III, Food for Progress Section 416(b) and the McGovern-Dole International Food for Education and Child Nutrition Programs.

Licensing Agreement: FSA said the licensing agreement was developed in response to concerns of export food aid providers regarding the sanitation and security of agricultural commodities temporarily stored and handled in preparation for export under various USDA food aid programs. The agency said warehouse examinations conducted under the new licensing agreement will include, but not be limited to, reviewing warehouse records, pest management and control, housekeeping, safety and facility security. Warehouse examiners also are to verify commodities are identified and marked properly, and stored in licensed space. Members receiving the NGFA Newsletter electronically may access the 12-page licensing agreement by clicking here.

Fees: On April 4, FSA announced the fee schedules that will apply to the new license. Three types of user fees will be assessed: 1) A $100 fee for the original issuance, reissuance or duplication of each license; 2) an annual user fee of $1,500 to cover the cost of conducting warehouse examinations for one to three locations, plus $300 for each additional location operating under the same license; and 3) an additional inspection fee to conduct an initial examination to determine the suitability of the warehouse for storage of food aid commodities, as well as for examinations triggered by a request to amend an existing license. This latter inspection fee initially will be set at $1,000 for one to three locations, plus $300 for each additional location operating under the same license.

FSA said it may determine in the future that additional fees are needed for additional or special examination services. Click here to access the FSA notice and fee schedule.