



United States
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Room 2648-S, Mail Stop 0268
Washington, D.C. 20250-0268

March 29, 2013

MEMORANDUM TO THE NATIONAL ORGANIC STANDARDS BOARD

FROM: Miles V. McEvoy
Deputy Administrator
National Organic Program (NOP)

A handwritten signature in blue ink, appearing to read "Miles V. McEvoy", with a large, stylized flourish at the end.

SUBJECT: Conflict of Interest Guidelines

This memorandum provides guidelines to National Organic Standards Board (NOSB) members about recognizing and reporting conflicts of interest and appearance concerns.

Background

NOSB members (you) are classified as **representatives** under the Federal Advisory Committee Act (FACA). Each representative is appointed to articulate the viewpoints and interests of a particular interest group. For the NOSB, the Organic Foods Production Act (OFPA) lists what these interest groups are. They include farmers/growers, handlers, certifiers, environmentalists/conservationists, scientists, consumers and public interest groups, and retailers. Representatives are appointed to speak in “we” terms, serving as the voice of the group represented (e.g., “we farmers/growers believe...”). As such, you are not expected to provide independent expert advice, but rather advice based on the interests of the groups served.

The NOSB’s Policies and Procedures Manual includes language about conflicts of interest. In the past year, however, the Board has worked on alternative language to further define conflict of interest and to outline procedures for managing conflicts as they are identified. The Board has not been successful in passing new language. As such, the National Organic Program (NOP) is issuing this memorandum to describe how the USDA views conflict of interest and appearance concerns, and to present the NOP’s expectations for how you are to evaluate and report these conflicts in the future.

Guidelines and Examples

As a member of a Government Board, your commitment in upholding the integrity of the Board’s deliberations and recommendations during and after your Board service ends is important, and will help maintain public confidence in Agricultural Marketing Service decision making, and in the quality of the Board’s work.

Even if there is no financial conflict of interest, your outside relationships (such as your spouse, close family member, or a business partner) may at times raise questions in the public’s mind about how fair you can be while working on a particular board matter. The essential point is to avoid participating in those particular matters in which you could reasonably be viewed by others as engaging in “self-dealing” to benefit yourself or someone close to you. In general, you should be alert for situations when you are asked to work on a Board matter and one of the following persons or entities will be **specifically affected** by your Board’s activities:

- a member of your household;
- a former employer or a prospective employer;



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- a client of yours or your spouse;
- a person or organization with which you have some kind of business or contract relationship; or
- your spouse's employer.

In addition, you should adhere to the following basic "Standards of Conduct" while in Government service:

- Don't accept improper gifts (from those seeking actions from the Board).
- Don't use board appointments for private gain.
- Don't misuse internal non-public Government information.
- Use Government property and time properly.
- Don't accept compensation for teaching, speaking, and writing related to your board duties.
- Don't engage in partisan political activities while performing your board duties or while in a Federal building.
- Alert the NOSB Designated Federal Officer (DFO) (also known as the Advisory Board Specialist) if you or your employer enters into a lawsuit against USDA or its subagencies.

As noted above, you were appointed to the Board to represent the interests of a particular group. As such, many of the interests that you hold are **acceptable interests**. An interest is acceptable if you carry it on behalf of a represented group, and if you receive no disproportionate benefit from expressing the interest. Interests create appearance problems, often referred to as **conflicts of interest**, when an interest: directly and disproportionately benefits you or a person associated with that member; could impair your objectivity in representing your group; or has the potential to create an unfair competitive advantage. Conflict of interest is as much about the appearance of a personal conflict and loss of impartiality as it is about direct financial gain.

Here are examples of the differences between acceptable interests and appearance problems, or conflicts of interest:

- The Board is considering relisting or removing Substance X on the National List as part of a sunset process. An NOSB member works for Company A, which uses Substance X to produce organic foods. Other companies use Substance X too. This would *not* constitute a conflict of interest, because while the NOSB member's company would benefit from the addition of Substance X, other companies would too. As such, there is no disproportionate benefit, nor the potential for an unfair competitive advantage. This is an acceptable interest, where the NOSB member is free to represent the interests of his or her group.
- In considering a petition to add Substance X to the National List, an NOSB member learns that his employer, Company A, holds an exclusive license with Substance X's manufacturer that gives Company A access to Substance X that other companies do not have. This means that the NOSB member's company would receive a disproportionate benefit from the addition of Substance X to the National List. This interest *does* constitute a conflict of interest, because the member's company would disproportionately benefit from the addition of Substance X, creating an unfair competitive advantage.
- An NOSB member is on the leadership team of a non-profit organization. The organization regularly accepts donations from people and organizations that belong to interest groups that the Board member represents. Regular donations given to advance the non-profit's mission would be considered an acceptable interest, as these donations are unlikely to impair the Board member's objectivity, or create an



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unfair financial advantage for the Board member, the non-profit organization, or any individual donor.

- Two months before a Board meeting, this same non-profit organization receives a large (\$5,000+) donation from a special interest group that has expressed a strong position on a topic being considered at the upcoming NOSB meeting. This *would* likely be considered a conflict of interest, as a reasonable person is likely to assume that such a large donation from a specific group could reasonably be seen as a gift given to shape a Board member's decision.

Procedures

Board members are appointed in part because of their interests. As such, you need to actively consider your interests with respect to topics being considered by the Board, and identify whether these interests would create appearance problems. This consideration will happen at two specific points of the Board's work on a particular topic. The first point is at the subcommittee level, when a subcommittee begins working on a workplan item. The second is when a discussion document or proposal advances from the subcommittee to the full Board for consideration.

At the Subcommittee Level

NOSB members represent the diverse interests of a broad stakeholder community, and make recommendations that may have wide-reaching regulatory impacts across all of these interest groups. As such, your actions are carefully scrutinized from the time work starts on a topic, through the time it is voted on. Even if there is no direct financial conflict of interest, your outside relationships may raise questions in the public's mind about how fair you can be while working on a particular subcommittee matter.

Given this, the NOP provides the following guidelines for topics at the subcommittee level:

- You should avoid leading projects for which you could reasonably be viewed by others as having a particular interest that would hinder your ability to objectively and fairly represent broader group interests, and to allow other members to represent theirs. If leading a project would likely lead others to believe you are "self-dealing" to benefit yourself or someone close to you, you should refrain from leading.
- As soon as you identify that you may have an appearance problem or conflict of interest with respect to a topic being worked on, you should inform the NOP Associate Deputy Administrator that a conflict may exist and the nature of that conflict. You should also tell the subcommittee impacted that you have a conflict, sharing as much or as little about the nature of the conflict with other Board members as you wish.¹ Even after this declaration, you may continue to contribute to the discussion on the topic. As long as it is known there is a conflict of interest, the conflict does not preclude the member from contributing his or her input in the subcommittee.

¹ Previous public comments to the NOSB urged members to fully disclose the nature of their conflicts of interest to other NOSB members and the public. While NOSB members may share whatever information they wish with other Board members and the public, this level of disclosure is voluntary. For both legal and ethical reasons, the NOP respects the privacy of its volunteers, and does not require full disclosure of the nature of conflicts of interest to parties outside the NOP.



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- If you are uncertain as to whether an interest constitutes an appearance problem or conflict, then contact the NOP Associate Deputy Administrator to discuss. In this case, the NOP, working with the USDA Office of Ethics as needed, will make the determination about whether a problem exists.²

At the Full Board Level

Once discussion documents and proposals are posted for public comment, each NOSB member is to review the documents across all subcommittees, and research any conflicts of interest due to organizational affiliation or relationships.

The following procedures will take place at the Board level:

1. Approximately 2-4 weeks before the meeting, the NOP's DFO will provide a matrix to all NOSB members in advance of the meeting that lists the documents being voted on at the meeting.
2. If you identify that a conflict of interest exists on any item(s) on the matrix, use the columns on the matrix to disclose having a conflict of interest and to declare a recusal from voting on the item(s).
3. If you are not sure whether an interest is acceptable or poses a problem, or if you are uncertain whether recusal is needed, contact the NOP Associate Deputy Administrator to discuss. In this case, the NOP – working with the USDA Offices of Ethics as needed - will make the determination about whether a conflict of interest exists, and will instruct the member accordingly as to whether to vote or not.
4. Return your completed matrix approximately one week before the Board meeting. The NOP will then use these to compile a list of all recusals for the meeting.
5. At the meeting, at the beginning of each subcommittee session, DFO will state: "The following Board members have a conflict of interest with the following documents, and will not be voting: "Bob has a conflict and will recuse himself from the proposals CleanGreenA and GreatChemB (etcetera)."
6. Once the DFO completes listing the recusals, the NOSB subcommittee chair leading the session may invite additional information from members on a voluntary basis, with a statement such as: "If Board members wish to disclose information about their conflict, or any other information about their interests, they are welcome to do so at this time." This is to be stated as a general and voluntary invitation; no specific NOSB member is to be called on.
7. For any documents deferred to the last day of the meeting, the DFO will repeat the declaration of statement above at the start of the voting session for each subcommittee. When it is time to vote, the NOSB member recusing is to simply state "Recuse" when it is his or her time to vote.

² Previous public comments favored NOSB members as a group making decisions on conflict of interest when there is a question as to whether someone should recuse him or herself. It is, however, the USDA – not Board members - that is at risk if a member votes on something for which he or she has a conflict of interest. As such, the NOP, working with the USDA Office of Ethics, is the arbiter of conflict of interest questions.



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Conclusion

The organic community has voiced great interest in establishing clear definitions and procedures related to conflict of interest, particularly with respect to NOSB operations. Upfront identification of appearance concerns is a critical part of each NOSB member's role. Effective from the date of this memorandum, if an NOSB member fails to disclose having a conflict of interest and votes on the item where a conflict exists, and that conflict of interest is later revealed, it may lead to a reconsideration of the impacted vote by the NOP.³ As such, the NOP strongly encourages NOSB members to adequately assess any potential conflicts, and to discuss scenarios with the NOP as needed.

Thank you for your ongoing support and hard work in advancing organic integrity.

³ This policy will not be applied retroactively to undo deliberations and/or votes taken before this memorandum is published.