

**National Organic Standards Board
Policy Development Subcommittee
Proposal: Conflict of Interest/Ethics
July 9, 2012**

I. Introduction

The National Organic Standards Board (NOSB) Policy Development Subcommittee (PDS) proposes revising the Conflict of Interest (COI) and Ethics sections of December 2, 2011 NOSB's Policy and Procedures Manual (PPM). The proposed changes are due to an on-going dialogue with the organic community, the general public, NOSB members, and the National Organic Program (NOP).

PDS further affirms that the proposed changes have evolved and been vetted through the public process, NOSB, and NOP on several occasions over the last year. The proposed recommendation proposal includes (1) COI definitions, (2) ethics revisions, and (3) outlined procedures for declaring, evaluating, and acting upon a COI.

PDS presented recommendations at the November, 2011 NOSB meeting in Savannah, Georgia. The need for further information and dialogue by some NOSB members resulted in the PDS chair deferring the recommendation at the spring 2012 meeting in Albuquerque, New Mexico. The tabling of the COI document has allowed for additional modifications to the COI document. Nevertheless, the proposed additions should provide greater transparency and expectations related to NOSB members' work on behalf of the organic community.

II. Background

The NOSB operates under the authority of Organic Foods Production Act (OFPA) and the Federal Advisory Committee Act (FACA). The NOSB recognizes that members have been specifically appointed to the NOSB to provide advice and counsel to the Secretary of Agriculture concerning policies related to the development of organic standards and the creation of amendments to the National Organic Program's National List. NOSB members have been appointed because they represent various interests involved in the organic community, thus enabling them to advise the Secretary of Agriculture on the implementation of the OFPA.

The statutory composition of the NOSB is 15 members. OFPA describes the required composition of the Board as follows: (1) four members who own or operate an organic farming operation, (2) three members with expertise in areas of environmental protection and resource conservation, (3) three members who represent the public interest or consumer interest groups, (4) two members who own or operate an organic handling operation, (5) one member who owns or operates a retail establishment with significant trade in organic products, (6) one member with expertise in the fields of toxicology, ecology, or biochemistry; and (7) one certifying agent. Thus, NOSB members are appointed to represent the interests of the organic community.

NOSB members – like most federal advisory board members – are chosen specifically because of their professional expertise within a given area. Since NOSB members represent sectors of the industry directly impacted by the Board's decisions, it is necessary to maintain a clear and detailed COI and Ethics policy. Therefore, PDS affirms that we seek to update the Board's policy and procedures on COI and Ethics.

III. Relevant Areas of the Rule

The OFPA establishes the NOSB at § 2119 (7 U.S.C. 6518) (a). It reads, "The Secretary shall establish a NOSB in accordance with the Federal Advisory Committee Act (5 U.S.C. App. 2 et seq.) (hereafter referred to in this section as the "Board") to assist in the development of standards for substances to be used in organic production and to advise the Secretary on any other aspects of the implementation of this title." The 2011 NOSB Revised Policy and Procedures Manual (PPM), dated December 2, 2011, on pages 5-11 sets forth the current NOSB's PPM.

IV. Discussion

COI and Ethics has been an issue since the beginning of humankind. It will probably continue in the foreseeable future. As it relates to the organic community, a periodical review and revision of NOSB's PPM helps to provide greater clarity, transparency, and confidence in the NOSB decisions.

An alternative approach for the PDS would be to keep the current COI and Ethics policy. However, an enhanced COI policy should help the Board, NOP, and USDA/Agricultural Marketing Service (AMS) in their continued responsiveness to the organic community's feedback and address a number of opportunities for enhanced clarity, particularly with regard to the specific procedures to be followed in declaring, evaluating, and acting upon COI and Ethics matters.

According to *41 CFR §102-3.105(a-j)*, federal advisory committees' agency heads are responsible for assuring that the interests and affiliations of advisory committee members are reviewed for conformance with applicable COI statutes, and regulations issued by the U.S. Office of Government Ethics (OGE), including any supplemental agency requirements, and other Federal ethics rules. For the NOSB, the agency is the AMS and the NOP.

The USDA Office of Ethics' AMS Representative has recently provided the opinion that representative members on the NOSB are specifically appointed to provide the points of views of non-governmental entities or of a recognizable group of persons (1) who own or operate an organic farming operation, (2) with expertise in areas of environmental protection and resource conservation, (3) who represent the public interest or consumer interest groups, (4) who own or operate an organic handling operation, (5) who owns or operates a retail establishment with significant trade in organic products, (6) with expertise in the fields of toxicology, ecology, or biochemistry; and (7) from the certifiers sector. These representative members have interests in the subject matter under NOSB charge. Representatives serve as the voice of groups or entities with a financial or other stake in a particular matter before an advisory committee or board.

Representative members are not covered by the “Standards of Ethical Conduct for Employees of the Executive Branch” or many of the Federal ethics laws and regulations that other Board member types are (i.e., Special Government Employees - SGE’s).

However, this exemption for NOSB representatives does not mean that COI and Ethics should not be addressed. The Ethics Representative opinion specifically referenced § 102–3.105(h), stating that, “Therefore, AMS, and NOP managers have the authority to address potential conflicts of interest of representative members of the NOSB.” (E-mail communication from Mary Royster, May 17, 2012).

Criteria for Effective COI Definitions and Procedures

The organic community has voiced great interest in transparency, clear COI definitions, and procedures for NOSB members in disclosing a COI or potential COI in order to continue the strong public support and confidence in the Board. The challenge is that Board members are appointed in part *because* of their interests. As such, the difference between an *acceptable* interest and a COI must be defined in a way that can be practically applied when Board members are faced with specific proposals at Board meetings. The NOSB’s PDS has suggested that the goal for any COI policy is to: prevent overt advocacy for direct financial gain and the appearance of self-interest or the appearance of wrongful activity. An important part of this is acknowledging that COI is as much about the *appearance* of a personal conflict and loss of impartiality as it is about actual direct interest. Given this, a key criterion for an effective COI definition is that it delineates the interests carried by NOSB members *in the interest of a represented group*, from interests that will *directly and disproportionately benefit the NOSB member personally*.

A second criterion for an effective COI definition is that it must be clearly understood by Board members in a way that can be applied in considering specific proposals facing the Board and is easily understood by the public. In addition to these criteria, the procedural steps must be clear, easy to follow, and give both the Board members and NOP sufficient time to consider the presence of COI, and to determine the path forward should a COI be declared. Given this background, the NOP accepts responsibility for, in collaboration with the NOSB, reviewing, updating the definitions, outlining procedures related to COI and Ethics for the possible inclusion into the NOSB’s PPM.

V. Recommendations

The proposed recommendations to NOSB’s Policy and PPM dated December 2, 2011 are:

Recommendation #1

Page 2 (Table of Contents)

Change page numbers and captions based on approved changes.

Recommendation #2

Page 5(NOSB Mission Statement)

Revise the NOSB Mission Statement to read:

- a. *To provide effective and constructive advice, clarification, and guidance to the Secretary of Agriculture concerning the NOP and any other aspects of the implementation of the OFPA of 1990.*
- b. Add the word proposed before inclusion on line six (6) of NOSB Mission Statement thus it reads proposed inclusion.

Recommendation #3

Page 7 (Under Duty and Loyalty)

Add

Balance personal perspectives and interests - Personal perspectives and interests are a vital source of knowledge to bring to the Board's deliberative process. These perspectives and interests must, however, be balanced with the perspectives and interests of the entire community/industry. Board recommendations should be based upon what is best for the entire community/industry. Recommendations should not be based on personal interests, or special interests of specific organizations, states or regions.

Exhibit commitment – Board members should represent the interests of all people served by this organization and not favor any individual's or group's particular special interest. Approach all Board issues with an open mind and be prepared to make the best decisions for everyone involved. Focus efforts on the mission of the community served and not on personal or organization's goals. Being first and foremost a voice for the community, and ensure that the Board is operating well and in the best interests of the community we serve.

Recommendation #4

Page 7 (Duty and Loyalty)

Move this section after "Maintaining Professional and Ethical Standards"

Recommendation #5

Page 8 (Duty and Loyalty)

- a. Change the section title entitled "Recognize corporate opportunity" to "Disclosure of financial opportunity"
- b. Thus, the section should read

Disclosure of financial opportunity - Before a Board member vote upon an issue in which they have a direct financial interest, said Board member must disclose the transaction to the NOP in sufficient detail and adequate time to enable the NOP to determine whether said Board member can discuss or vote on that particular matter.

Recommendation #6

Page 8 (Professional Conduct)

Revised line nine (9) under Professional Conduct to read

NOSB members shall act impartially and not give preferential treatment to any organization or individual. The impartiality includes representing their own organizations at Board meetings. If a Board member voices support for comments published by their own organization/employer, or an organization she/he is closely affiliated with (e.g., on the Board of Directors, conduct significant consulting for), she/he is to state that affiliation when making comments.

Recommendation #7

Page 9 (Conflict of Interest)

Revised line 14 to read

..... NOP will determine whether it is appropriate for the member to vote RATHER than the Board may determine if it is appropriate for the member to vote.

Recommendation #8

Page 9

The definitions are proposed for page 9 of PPM.

Conflict of Interest -The term “conflict of interest” is defined as a situation in which there is an actual or potential direct financial interest of a Board member, or person or entity associated with a Board member, which could impair the individual's objectivity or which has the potential to create an unfair competitive advantage. Persons or entities associated with a Board member include: spouse; minor child; general partner; an organization or entity which the Board member serves as officer, director, trustee, general partner or employee; and a person with whom the Board member is negotiating for or has an arrangement concerning prospective employment. A financial interest by such an associated person or entity can disqualify a Board member to the same extent as if they were the Board member's own interests.

Potential Conflict of Interest - A “potential conflict of interest” is defined as the appearance of a loss of impartiality based on the relationship outlined in the proposed definition of a conflict of interest.

Recommendation #9

Delete the term “direct financial gain” since it is covered in the definition of COI when it states “direct financial interest.”

Recommendation #10

We recommend the added section below.

Procedures for Declaring and Evaluating a COI

Level #1 (Subcommittee)

1. At the subcommittee level, as topics are added to the subcommittee's work plan, each Board member is to evaluate possible COI or potential COI related to the topic. If the Board member has a COI or potential COI, the member should disclose the COI to said subcommittee and NOP. After a determination is made by NOP regarding the participation of said Board member. NOP final decision on all COI will be clearly recorded in the minutes.
2. It is primarily the Board member's responsibility to self-assess whether conflicts or potential conflicts exist. If one Board member believes that another Board member has a conflict, she/he should raise that one-on-one with the Board member involved or to the NOP's Designated Federal Officer (DFO). In this case, the NOP will work with said Board member to determine whether a COI exists and if recusal is warranted; the Board member raising the issue against another Board member will not be involved in the determination of a COI or a potential COI.
3. As soon as the final agenda and list of proposals for the Board's public meeting has been set, all Board members will re-assess possible COI because of their personal interests or organizational affiliation or relationships.

In general, COI's can lead to a recusal from the discussion and vote associated with the conflict. In the case of a *potential* COI, as defined above, the potential conflict may not be deemed significant enough to warrant recusal. If a Board member believes that she/he may have conflict(s) based on the definition above, she/he contact the DFO as soon as possible (within three working days) stating

- a. the conflict(s) or potential conflict(s) that could exists and
- b. the proposal (s) it relates to.

In the communication, said Board member is to state whether the she/he wants to recuse herself or himself without discussion, or, if the Board member wants the NOP's opinion on the need for recusal based on the nature of the potential COI. (Note: If said Board member chooses to recuse her/him, NOP will accept that without explanation. If the member is unsure, the NOP may ask for additional information about the conflict(s) to make a determination.

If an NOP opinion is needed, NOP will make the determination and communicate the decision back to the Board member expeditiously (generally within three working days) after consulting with the DFO and/or USDA Office of Ethics, if needed.

Level 2 (Biannual Meetings)

1. At the biannual meeting, in opening the discussion of each proposal or issue, the Subcommittee Chair will ask Board members to declare any recusal decisions related to the proposal(s) or issue(s). At this time, Board members shall share the determination made before the meeting. Immediately before the vote, the Board Chair will repeat the names of people who will not be voting on the motion(s); this will be captured in the voting record and minutes. The Board member is not required to share the nature of the COI at the meeting; it is sufficient to state that a conflict exists, and that she/he is recusing herself/himself. The only time a Board member needs to share the nature of the conflict is if she/he is seeking NOP input on whether recusal is appropriate or needed based on the nature of the conflict.
2. If a Board member fails to disclose a COI that is later revealed (anyone), it may lead to the reconsideration of the vote (depending on the closeness of the vote), so it is vital that Board members are aware of conflicts and disclose them at the meeting(s).
3. COI requirements do not extend to members of the public that come to the meeting and/or provide written views and opinions, unless they are expert witness(es) or consultant(s). As per public comment processes, all commenters are asked to state their affiliations at the start of their comments.
4. NOP final decisions should be included in the minutes.

Recommendation #11

On page 11 of the PPM, revise lines 8-12 to read,
Fully disclose any conflict of interest positions – Members having any commercial or immediate family interest that poses a potential or perceived conflict of interest must disclose that conflict to the subcommittee, Board, and NOP and abide by any decision of the NOP in dealing with the situation.

VI. Summary

NOSB members with diverse backgrounds are recruited to provide balance to the NOSB. While individual NOSB members represent the segments of the population from which they were selected, they also represent the greater good of the population as a whole. The revised COI and Ethics Policy are an attempt to address stakeholders, NOP, NOSB, and the public request for updating the Board's COI policy and provide for a greater level of transparency in the deliberation, discussion, and voting on matters pertaining to the Board authority for the benefit of the organic community.

VII. Subcommittee Vote:

Moved: C. Reuben Walker Second: Jean Richardson
Yes: 7 No: 0 Abstain: 0 Absent: 1 Recuse 0