



September 30, 2013

Ms. Michelle Arsenault
National Organic Standards Board
USDA-AMS-NOP
1400 Independence Avenue, SW
Room 2648-So., Ag Stop 0268
Washington, DC 20250-0268

Docket: AMS-NOP-13-0049

RE: Policy Development Subcommittee – Disclosure of Interest for a Determination of a Conflict of Interest Proposal

Dear Ms. Arsenault:

Thank you very much for this opportunity to provide comment on the National Organic Standards Board (NOSB) Policy Development Subcommittee's Disclosure of Interest for a Determination of a Conflict of Interest (COI) proposal. This recommendation would revise the Policy and Procedures Manual to flesh out the Board's current COI policy by providing additional definitions and procedural steps for determining a COI.

The Organic Trade Association (OTA) is the membership-based business association for organic agriculture and products in North America. OTA is the leading voice for the organic trade in the United States, representing organic businesses across 49 states. Its members include growers, shippers, processors, certifiers, farmers' associations, distributors, importers, exporters, consultants, retailers and others. OTA's Board of Directors is democratically elected by its members. OTA's mission is to promote and protect the growth of organic trade to benefit the environment, farmers, the public and the economy.

OTA supports Recommendations 6, 9 and 11. However, we cannot support the remaining Recommendations (1, 2, 3, 4, 5, 7, 8 and 10), and respectfully request that the Committee consider our comments and make revisions before bringing any proposal to a vote.

General Overview

OTA thanks the Policy Subcommittee for its time on this proposal, and we appreciate the consideration given to our comments submitted on the Fall 2011, Spring 2012 and Fall 2012 proposals. In particular, we are pleased to see acknowledgement in the *Background* section that NOSB members are chosen to represent the interests of the seat they inhabit as they advise the Secretary of Agriculture. [NOSB Policy Development Subcommittee Proposal: Disclosure of Interest for a Determination of a Conflict of Interest (Proposal), August 29, 2013, at 1.]

Consistent with our comments to the Fall 2011, Spring 2012 and Fall 2013 proposals, OTA applauds the Committee's commitment to high ethical standards and its efforts to be responsive to stakeholder input, but we cannot support all of the proposed changes to the Board's current COI policy. We continue to support a COI policy that addresses conflicts of interest that might improperly influence a Board member's participation in particular Board proceedings, while allowing members to serve their intended function as representatives of various segments of the organic community.

We understand the Committee's desire to add guidance on what procedural steps must be followed in declaring and acting upon a conflict of interest. We support the utility these procedural steps may have, and we support Recommendations 6, 9 and 11. However, we cannot support the remaining recommendations, and respectfully request that the Committee consider our comments and make revisions before bringing any proposal to a vote. We address each of our concerns in turn.

Proposed Changes to COI Policy

Recommendation #1

If an NOSB member fails to disclose having a COI and votes on the item where a conflict exists, and COI is later revealed, it may lead to a reconsideration of the vote by the NOP. It could lead to a revote on said matter, if deemed so by NOP, at some point in the future.

We caution that any change in policy should not be applied retroactively to past NOSB deliberations or votes. This proposal allows for reconsideration of a vote if a conflict is later revealed. OTA suggests that section be clarified to show that any new COI policy would apply only to deliberations and votes taken after adoption of the policy, and could not be applied retroactively to undo deliberations and/or votes taken before the policy was adopted. Applying the policy retroactively could lead to manipulation to undo votes that a member of the Board or the public disagrees with; and moreover, would be unlawful due to generally accepted rules of statutory interpretation that disallow retroactivity.

Recommendation #2

Use COI as a general term rather than defining the terms of (1) perceived COI and (2) potential COI.

The term "conflict of interest" is defined as a situation in which there is an actual or potential COI of a Board member, which could impair the individual's objectivity or which has the potential to create an unfair competitive advantage. The following persons or entities specifically affected are, (1) a member of your household, (2) a former employer or a prospective employer, (3) a client of yours or your spouse or partner, (4) a person or organization with which you have some kind of business or contract relationship, (5) your spouse or partner, or (6) a close family member.

The Committee's proposed definition of "conflict of interest" is vague and overbroad. It continues to lend itself to problems of ambiguity and subjectivity that current COI policy avoids by strictly limiting prohibited conflicts of interest to those situations in which a Board member would derive "direct financial gain" from a Board action. The reference in the proposed definition to "potential" to create an unfair competitive advantage is vague, overbroad and uncertain – and may not even arise. A Board member should be required to refrain from voting only when a direct financial gain actually exists. Any more stringent requirements could chill participation in the process.

In addition, the term “potential conflict of interest” is inappropriate because it would require that representative members of the Board exhibit the kind of objectivity and impartiality expected of federal employees – but not required or expected of representative members of NOSB. It contradicts the Office of Ethics’ opinion that NOSB members serve in a representative capacity, and are not subject to the COI requirements that govern federal employees. Such a requirement would prevent Board members from representing the particular interests that they were appointed to represent, and would thwart the purpose of their service.

Finally, the proposed definition section is problematic because it extends COI analysis to a variety of persons or entities, many of which are undefined and may be overbroad. OTA believes this places an unnecessary burden on Board members and their families by requiring investigation of family members’ financial interests that do not necessarily have any bearing on the financial interests of the Board member. To the extent the financial interests of family members or associated entities do affect a Board member’s own financial situation, they are already covered by the prohibition on actions that result in a direct financial gain to the Board member. Extending the scope of the COI policy to persons or entities associated with the Board member intrudes into private matters, and is likely to discourage qualified individuals from serving as members on this advisory board.

Recommendation #3

The Duty of Loyalty requires Board members to exercise their power in the interest of the group she/he represents (e.g., “we farmers/growers believe”). As such, each NOSB members are not expected to provide independent expert advice, BUT rather advice based on the interests of the group serves.

OTA is pleased to see the Subcommittee’s work to clarify that Board members serve in a representative capacity, based on the seat they each occupy. However, this language is imprecise, and OTA would recommend the following modifications:

The Duty of Loyalty requires each Board member to exercise his or her power in the interest of the group he or she represents (e.g., “we farmers/growers believe...”), and not in his or her individual interest of the interest of another entity or person. As such, each NOSB member is expected to provide advice based on the interests of the group he or she represents.

Recommendation #4

Sub-Committee Level

As soon as a Board member discloses that she/he may have a COI with respect to a topic being worked on, she/he should inform the NOP. Said Board member may voluntarily share with or answer question(s) about the nature of the conflict from other subcommittee members. The NOP, working with the USDA Office of Ethics as needed, will validate whether a said disclosure is a COI and determine the level of said Board member participation (discussion and/or vote) on said matter wherein the disclosure is noted.

OTA is pleased to see the Subcommittee’s work to clarify that it is the role of NOP (in conjunction with the USDA Office of Ethics), and not NOSB itself, to review conflict of interest disclosures and determine whether recusal is appropriate. However, language regarding the permissibility of informing other Board members is unnecessary and may inadvertently place pressure on Board members to disclose information to other Board members – which would be inappropriate. Moreover, this language is imprecise. Therefore, OTA would recommend the following modifications:

As soon as a Board member determines that he or she may have a COI with respect to a topic being worked on, he or she must inform NOP. NOP, working with the USDA Office of Ethics as needed, will determine whether the disclosed interest is a COI and determine whether the Board member must recuse himself or herself from discussion and/or voting on the matter for which a COI exists.

Recommendation #5

Full Board Meetings

Approximately 2-4 weeks before the meeting, NOP's DFO will provide a matrix of all NOSB members in advance of the meeting that lists the documents being voted on at the meeting. If a Board member identifies that a COI exists on any item(s) on the matrix, she/he must use the columns on the matrix to disclose having the COI and declare a recusal from voting on the item(s).

If a Board member is not sure whether a DOI interest is acceptable or poses problem, or is uncertain whether recusal is needed, then she/he must contact the NOP Associate Deputy Administrator to fully disclose the possible problem; NOP will provide feedback verbally and via e-mail to the member. The NOP determination is final. See NOP memo entitled, "Conflict of Interest Guidelines" dated March 29, 2013, for greater details. All DOI and COI must be recorded in the meeting minutes.

OTA is pleased to see the Subcommittee's work to clarify that it is the role of NOP, and not NOSB itself, to review conflict of interest disclosures and determine whether recusal is appropriate. However, OTA believes the process for identifying COI at the full Board level should mirror that at the subcommittee level. In addition, the specifics of the NOP determination on COI must be confidential – although the determination that a COI exists need not be confidential. Therefore, OTA would recommend the following modifications:

No later than two weeks before a NOSB meeting, NOP's DFO must provide a list of all documents being discussed and/or voted on at the meeting. If a Board member believes he or she has a COI with respect to any of the items being discussed and/or voted on at the meeting, he or she must either (a) recuse himself or herself from discussion and/or voting, or (b) contact the NOP Associate Deputy Administrator for guidance on whether recusal is needed. NOP will provide confidential feedback to the member. NOP's determination is final. All recusals from discussion and/or voting must be recorded in the meeting minutes.

Recommendation #7

Address conflicts of interest – Board members are expected to disclose interests that do not raise the level of being in conflict for the purpose of full disclosure for the public.

Respectfully, OTA must object to this recommendation in its entirety. It goes beyond the concept of "potential conflict of interest," to which we strenuously objected in past comments as being vague and overbroad. This requires Board members to disclose any interests – even if they do not create COIs. This would require full disclosure of all interests – with no concern for whether they are relevant to the issues at hand. This goes far beyond what is required of representative members of a FACA board like NOSB – and would require a full disclosure of all financial and other interests. This contradicts the

Office of Ethics' opinion that NOSB members serve in a representative capacity, and are not subject to the COI requirements that govern federal employees.

Moreover, it requires disclosure "for the public" – rather than what the law actually requires, which is disclosure to NOP for the purpose of identifying conflicts. This means that it would make public all Board members' financial and other interests. This goes beyond what the law requires (disclosure to NOP for the purpose of identifying conflicts), and would also chill potential Board members from choosing to serve. This recommendation both sets the wrong level of disclosure, and wrong entity to which that disclosure must be made.

Recommendation #8

Mandatory and Voluntary Disclosure of COI – A Board member must disclose any COI according to NOP guidelines and procedures. Failure to do so could result in a revote on a matter, shortly or long after the initial vote was taken. A Board member must mandatorily disclose his/her COI to NOP in sufficient detail in writing and allow adequate time to enable the NOP to act – or decline to act – in regard to such matter. Said Board member may voluntarily share her/his COI with NOSB.

We caution that any change in policy should not be applied retroactively to past NOSB deliberations or votes. This proposal allows for reconsideration of a vote if a conflict is later revealed. OTA suggests that section be clarified to show that any new COI policy would apply only to deliberations and votes taken after adoption of the policy, and could not be applied retroactively to undo deliberations and/or votes taken before the policy was adopted. Applying the policy retroactively could lead to manipulation to undo votes that a member of the Board or the public disagrees with. Moreover, it would be unlawful due to generally accepted rules of statutory interpretation that disallow retroactivity.

In addition, language regarding the permissibility of informing other Board members is unnecessary and may inadvertently place pressure on Board members to disclose information to other Board members – which would be inappropriate.

Finally, we caution against requiring that interests be disclosed in writing – and suggest allowing NOP to put in place confidentiality protections regarding such disclosures. Again, it would be inappropriate for all interests of a Board member to be fully disclosed to the public – that would place a heavier burden on NOSB members than is legally required, and would also chill participation as a Board member going forward. At the stage of disclosing interests to NOP to make a COI determination, confidentiality must be protected.

OTA would therefore recommend the following modifications:

Mandatory and Voluntary Disclosure of COI – A Board member must disclose any COI according to NOP guidelines and procedures. A Board member must disclose her or her interest to NOP in sufficient detail and allow adequate time to enable NOP to act, or decline to act, in regard to the matter.

Recommendation #10

Disclosure of and interest – Members that provide a COI may voluntarily disclose to NOSB and mandatorily disclose to NOP and abide by the final decision of NOP in said matter.

Language regarding the permissibility of informing other Board members is unnecessary, and may inadvertently place pressure on Board members to disclose information to other Board members – which would be inappropriate. Therefore, OTA would recommend the following modifications:

Disclosure of interest – Members must disclose any conflict of interest to NOP and abide by the determination of NOP with respect to recusal from discussion and/or vote.

Conclusion

The input of the various groups represented by Board members is critical to ensuring that Board actions reflect the concerns of the entire organic industry. This is true for Board members who represent consumer interests, just as it is for industry representatives such as organic farmers, handlers and certifiers. Congress established the Board to ensure that these sometimes different points of view within the organic community would each have a voice as the Board works together on the common goal of supporting and improving the organic community as a whole.

The current COI policy properly allows Board members to participate in Board activities even when they have an indirect or non-financial interest in an issue. NOSB could not serve its intended purpose if this were not the case. The current policy limits a member's participation in Board activity only when the member stands to receive a direct financial gain as a result of Board action. This balances the desire to avoid direct conflicts of interest with the need for Board members to serve in a representative capacity as Congress intended.

We do understand the Committee's desire to add guidance on the procedural steps to be followed in declaring and acting upon a conflict of interest. We support the utility the procedural steps may have. To that end, we believe that the Committee's proposal requires additional work, based on our comment and the comments of others, before it can receive an up-or-down vote. The appropriate COI policy will protect against conflicts of interest while allowing Board members to participate in Board activities in a representative capacity as Congress intended.

Again, on behalf of our members across the supply chain and the country, OTA thanks the National Organic Standards Board for the opportunity to comment.

Respectfully submitted,

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Organic Trade Association (OTA)