

National Organic Standards Board
Policy Development Subcommittee
Proposed Recommendation
Disclosure of an Interest (DOI) for a Determination of a Conflict of Interest (COI)
August 28, 2013

I. Introduction

The current policy and practice in force for the disclosure of an interest (DOI) for a determination of a conflict of interest (COI) for the National Organic Standards Board (NOSB) are contained in a National Organic Program (NOP) memo entitled "Conflict of Interest Guidelines" dated March 29, 2013. The NOP issued these guidelines as NOSB policy based on its authority under section FACA §102-3.105. The NOP memo gives this reason for issuing its guidelines:

The NOSB's Policy 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.

The NOSB over the years has passed policy on COI, which is contained in the Policy and Procedures Manual (PPM). Nevertheless, this DOI proposal recommendation by the NOSB's Policy Development Subcommittee (PDS) is intended to correct the deficiencies mentioned above and align the NOSB's PPM with NOP guidelines on COI.

II. Background

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 NOP's National List. NOSB members have been appointed because they represent various interests involved in the organic community, enabling them to advise the Secretary of Agriculture on the implementation of the Organic Foods Production Act (OFPA).

NOP document entitled, "Conflict of Interest Guidelines," dated March 29, 2013, states "Representatives are appointed to speak in "we" terms, serving as the voice of the group she/he represent (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 served. Therefore, the farmers/growers representatives must articulate the viewpoints and interests farmers/growers; the handlers representatives must articulate the viewpoints and interests of handlers; the certifier representative must articulate the viewpoints and interest of certifiers; the scientist representative must articulate the viewpoints and interests of scientists; the environmentalists/conservationists must articulate the viewpoints and interests of environmentalists/conservationists; the scientist representative must articulate the viewpoints and interest of scientists; the consumers/public interest representatives must articulate the viewpoints and interest of consumers/public stakeholders; and the retailer must articulate the viewpoints and interest of retailers." The statutory composition of NOSB is composed of 15 members. OFPA describes the composition of the NOSB as follows:

- four (4) members who own or operate an organic farming operation;
- three (3) members with expertise in areas of environmental protection and resource conservation;
- three (3) members who represent the public interest or consumer interest groups;
- two (2) members who own or operate an organic handling operation;
- one (1) member who owns or operates a retail establishment with significant trade in organic products;
- one (1) member with expertise in the fields of toxicology, ecology, or biochemistry; and
- one (1) member who is a certifying agent.

NOSB members – like most federal advisory board members - are chosen specifically because of their professional expertise within a given area. Especially since NOSB members represent sectors of the industry directly impacted by the board's decisions, it is necessary to maintain a clear and detailed NOSB COI policy. To prevent overt advocacy for direct financial gain and the appearance of self-interest or the appearance of wrongful activity, the NOSB has adopted a COI policy (NOSB, Policy & Procedures Manual 2011, pgs. 6-9). At this time, the PDS of the NOSB seeks to update the Board's policy and procedures on COI to align with NOP's policy and practice guidelines for dealing with a DOI and COI by NOSB.

The PDS considered three primary options in developing this proposal. The first option, called Option A, had a number of recommendations, including referencing the NOP Conflict of Interest Guidelines and placing it in the PPM as an appendix; inserting definitions and updating within the PPM; adding language related to Technical Report authorship disclosures; and outlining procedures for COI management that included the NOSB (in addition to the NOP) having a role in deciding whether another Board member's interest warrants recusal.

Option A included many of the same recommendations as in the proposal voted on called Option B; the critical difference related to the procedure. Option A gave decision authority to the NOSB, whereas the voted-upon Option B acknowledges NOP as the sole decision-maker. Those who supported Option A felt that it provided clearer guidance to the COI process and left determinations less to the discretion of the NOP. They also supported a procedure that required disclosure of interests to the full board and the public, rather than only the NOP, in the belief that decision making of a board of representatives requires input from all perspectives, but also the recognition by other Board members of the perspectives from which differing opinions come. Option C had only one recommendation, which included a reference to the NOP Guidelines and a definition of conflict of interest.

Vetting of the options (A, B & C) resulted in the conclusion that the majority of PDS members preferred Option A, in complete form. There was one individual's mention that a subsection of Option A would suffice. Nonetheless, it was determined that since the NOP noted that the PDS would be precluded from putting forth option A for public consideration and NOSB determination (because of its conflict with the NOP memo) and since Option C was seen as much too simplistic for the PPM context, that Option B would be the considered option for moving ahead.

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.) 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 2012 NOSB Revised Policy and Procedures Manual (PPM) dated April 11, 2012 on page 9 sets forth the current NOSB’s COI policy uses the terms potential or perceived COI without a clear definition. On page 7 of the PPM, the ability for NOSB to hear and make a determination on various types of COI is recognized beyond a direct financial gain. On page 11 of the PPM, perceived COI is included in the concern. The wording “immediate family interests” is included on page 11 of the PPM.

The relevant statute is FACA § 102–3.105 “What are the responsibilities of an agency head? (h) Assure that the interests and affiliations of advisory committee members are reviewed for conformance with applicable conflict of interest statutes, regulations issued by the U.S. Office of Government Ethics (OGE) including any supplemental agency requirements....” The NOP memo on COI, dated March 29, 2013 is guided by the USDA Office of Ethics ruling that fits within the “supplemental agency requirements” clause.

IV. Discussion

The benefits of the proposed recommendations include providing definition of COI and providing procedural steps for a DOI for a determination of a COI in the course of the NOSB’s business that align with NOP guidelines on COI policy and procedures for NOSB. The updated COI policy upon a DOI should provide greater transparency and confidence in Board decisions by the organic community.

The salient fact is that NOP guidelines are the current approach being used. As NOSB seeks to revise the PPM, the COI language needs to be updated to address current NOP policy and approach for managing a DOI for a determination of a COI. Presently, the PPM has at least eight (8) instances in three (3) sections that reference COI matters. Therefore, the alignment of the PPM with the current policy of the NOP and NOSB is vital and necessary. Despite current Board member concerns that may linger on whether NOSB or NOP should be the arbiter of DOI for a determination of a COI and the extent to which a DOI will be public, the fact remains that NOP guidelines on COI are presently and actively in force.

V. Recommendation

The Board references the NOP memo (Conflict of Interest Guidelines, Miles McEvoy, March 29, 2013) on conflict of interest (see appendix X) based on NOP’s position, citing NOP discretionary policy under the Federal Advisory Committee Act (FACA), that it is has the sole authority to define and manage the COI process.

NOP notes that 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.

Therefore, in an attempt to align NOSB’s COI policy and practices with the NOP guidelines on COI, the following recommendations are shown below.

Recommendation #1

If a 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.

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.

Recommendation #3

Existing PPM Language

The Duty of Loyalty requires Board members to exercise their power in the interest of the public and not in their own interest or the interest of another entity or person. A Board member's loyalty is to the organic community and the public at large.

Proposed Language Change

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.

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.

Recommendation #5

Full Board Meetings

Approximately 2-4 weeks before the meeting, the 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; the NOP will provide feedback verbally and via email 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.

Recommendation #6

Technical Reviewers

All technical reviews should disclose the names and address of all authors on the first page of the TR below the TR title.

Recommendation #7

Existing PPM Language, pg. 7

Address conflicts of interest — Board members bring to the NOSB particular areas of expertise based upon their personal and business interests in organic production and marketing. Board members may have interests in conflict with those of the public interests. Board members must be conscious of the potential for such conflicts and act with candor and care in dealing with such situations. Board members must abide by the NOSB conflict of interest policy.

Suggested Language Change

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.

Recommendation #8

Existing PPM Language, pg. 8

Recognize corporate opportunity — Before a Board member votes upon an issue in which they have a direct financial interest, that Board member must disclose the transaction to the Board in sufficient detail and adequate time to enable the Board to act — or decline to act — in regard to such transaction.

Suggested Language Change

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 her/his DOI 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 DOI with NOSB.

Recommendation #9

Existing PPM Language, pg. 9

Conflict of Interest

The NOSB recognizes that members have been specifically appointed to the Board to provide advice and counsel to the Secretary concerning policies related to the development of organic standards and the creation and amendment of the National List. NOSB members have been appointed because they have professional expertise, which enables them to advise the Secretary. This professional expertise may, at times, present an inherent perceived conflict of interest. To prevent overt advocacy for direct financial gain and the appearance of self-interest or the appearance of wrongful activity, the NOSB has adopted the following conflict of interest policy.

Be it resolved by the National Organic Standards Board:

Members of the Board shall refrain from taking any official Board action from which that Board member is or would derive direct financial gain. Board members shall disclose their interest to the Board and the public, when they or their affiliated business stand to gain from a vote, which they cast in the course of Board business. Under certain circumstances, the Board may determine whether it is appropriate for the member to vote.

That members of the Board shall refrain from promoting for consideration any material, process or practice

for which the member is or would derive direct financial gain arising out of such Board action. The act of promoting such material, process or practice shall include private discussion with members of the Board advocating the value of the material, public discussion and/or written advocacy.

A "direct financial gain" is defined as monetary consideration, contractual benefit or the expectation of future monetary gain to a Board member, including but not limited to, financial gain from a party who manufacture distributes or holds exclusive title to a formula for a material or product, process or practice

Suggested Language Change

Delete this language since the NOP's March 29, 2013 COI guidelines broaden COI beyond a direct financial gain.

Recommendation #10

Existing PPM Language, pg. 11

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 Board and abide by any decision of the Board in dealing with the situation.

Suggested Language Change

Disclosure of and Interest — Members that provide a DOI may voluntarily disclose to NOSB and mandatorily disclose to NOP and abide by the final decision of NOP in said matter.

Recommendation #11

Existing PPM Language, pg. 38

2. If the committee does not have the expertise or resources (e.g., time), the Committee chair should make a request to the Chair of the Materials Committee for a third party expert specifying:
 - a. the third party expert's required background and level of expertise
 - b. Existence of potential sources of conflict that could result in biased reviews.

Suggested Language Change

None

VI. Summary

NOSB members with diverse backgrounds are recruited to provide balance to the NOSB. The recommendations put forth in this document are responsive to a number of requests by stakeholders and the NOP recent guidelines framework. The proposed recommendations help provide the essence of providing greater transparency of and expectations around NOSB members' work and technical reviewers on behalf of the organic community and the general public.

The current policy and practices in force for a DOI for a determination of a COI for the NOSB are entitled "Conflict of Interest Guidelines" dated March 29, 2013. The guidelines centers on recognizing and reporting COI and appearance concerns. The DOI proposal herein by the NOSB's PDS is intended to align with NOP guidelines on COI.

VII. Committee Vote:

Moved: C. Reuben Walker

Second: Jay Feldman

Yes: 5 No: 0 Abstain: 0 Absent: 1