



BEYOND PESTICIDES

701 E Street, SE ■ Washington DC 20003
202-543-5450 phone ■ 202-543-4791 fax
info@beyondpesticides.org ■ www.beyondpesticides.org

September 10, 2012

National Organic Standards Board
Fall 2012 Meeting
Providence, RI

Re. PDS: Conflict of Interest

These comments are submitted on behalf of Beyond Pesticides. Beyond Pesticides, founded in 1981 as a national, grassroots, membership organization that represents community-based organizations and a range of people seeking to bridge the interests of consumers, farmers and farmworkers, advances improved protections from pesticides and alternative pest management strategies that reduce or eliminate a reliance on pesticides. Our membership and network span the 50 states and groups around the world.

General Comments

We agree with the intention of this proposal, “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.” We supported the proposal presented to the board at its Spring 2012 meeting in Albuquerque. However, we do not believe that the current proposal is more transparent. In fact, it adds layers of opacity and often appears to lack clear criteria necessary to meet the intent of NOSB’s operation as a stakeholder board subject to standards of transparency and public disclosure.

A basic tenet of democracy is that decisions are made in an open fashion, based on rules known to all. This contrasts dramatically with dictatorial forms of government all over the world that have thrived on enforcement of rules known only to the enforcers. In that respect, this proposal seems to establish a system that enforces rules without clearly stated criteria and does so out of the public’s eye.

We agree that the NOSB, being a Federal Advisory Committee established under Federal Advisory Committee Act (though with additional authority) and composed of “representatives” is not subject to the same legal requirements to that would apply to a board composed of government employees or special government employees. And we agree that the fact that the NOSB is not subject to those rules does not mean that no rules apply to them. We accept that there are “applicable COI statutes and regulations”¹ that apply to the board. But we believe it is

arbitrary and capricious for the NOP to act on the authority of statutes and regulations that are presumed and not specifically stated and referenced. Secondly, we support the efforts of the NOSB to write policies governing conflict of interest of its members, but those policies should remain the board's policies and not become the NOP's policies. Thirdly, the board should not abdicate responsibility for the enforcement of any policies that it establishes for itself in this area. It is very important that the NOSB operate, as it was intended by Congress, with independent authority in this and other areas as it collaborates with the NOP. At the same time, we recognize that NOP may seek to adopt policies that it believes is under its legal authority and should do that with complete clarity and complete citation of applicable laws.

So, there are (or may be —since we have not been presented with the “applicable laws and regulations”) two sets of COI rules applicable to the NOSB —those created by Congress and agencies of the federal government in statutes and regulations, and those created by the NOSB and codified as policies in the Policy and Procedures Manual. The NOP is responsible for enforcing the first, and the NOSB is responsible for enforcing the second. Insofar as this proposal seeks to establish procedures for enforcing applicable COI statutes and regulations, it totally fails to be transparent because the applicable statutes and regulations are never named. With regard to the establishment of NOSB policies and procedures, the proposal lacks transparency because conflicts are not disclosed to the public, and may not be disclosed to the full board itself.

Specific Comments

We agree with recommendations #1-4.

Recommendation #5 requires board members to disclose possible conflicts to the NOP. There may be applicable statutes and regulations that require this step, but if so, we have not been presented with them. As presented, this proposal is part of the NOSB's policy, and the disclosure should be to the NOSB. In the interest of public transparency, the disclosure should also be public.

We agree with recommendation #6.

Recommendation #7 says that the NOP will decide whether it is appropriate for the member to vote. The NOP should decide whether it is appropriate for the member to vote according to (stated) applicable statutes and regulations; the NOSB should decide whether it is appropriate according to NOSB policies.

¹ The proposal cites § 102–3.105(h), which says, that the agency must “[a]ssure 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, and other Federal ethics rules.”

The definition of COI in recommendation #8 appears to be so broad that most NOSB members probably have a COI most of the time. On the public interest side, for example, if a board member or a board member's spouse works for an environmental organization that receives corporate donations from a any number of companies with an interest in a board decision, that would appear to disqualify the member. At the same time, under the proposed language, the members of the board who are employees of commercial organic interests could have conflicts on a pending board decision given their employers' choice of production methods, ingredients, or inputs. Note that in both cases we are talking about board members who are salaried employees of entities that have an "interest" in the outcome of a board decision.

"Potential conflict of interest," defined in terms of the "appearance of a loss of impartiality" is so vague as to be meaningless, and hence opens the door for arbitrary and capricious decisions by the NOP. For example, if an organization launched a PR campaign over a board member's presumed conflict (whether true or not), it would be difficult to deny the *appearance* of a loss of impartiality.

We suggest substituting the language suggested in the Spring 2012 proposal:

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 which could impair the individual's objectivity or which has the potential to create an unfair competitive advantage for said Board member, board member's immediate family member, or Board member's organization or affiliated business.

An "immediate family member" includes a Board member's relative by blood or marriage who may be a spouse or partner, children or step children, parents or step-parents, brother or sister.

A "direct financial gain" is defined as a 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.

With regard to enforcement of this policy, it is imperative to respect the statutorily created independence and stakeholder nature of the board to ensure that the assessment of compliance with this standard, created by the NOSB, is left with the NOSB and not transferred to the NOP. The board should enforce policies that it creates.

Recommendation #9 would delete the definition of "direct financial gain" since it is covered in the definition of COI when it states "direct financial interest." However, the new term "direct financial interest" now needs a definition.

Recommendation #10 establishes procedures for declaring and evaluating a COI. These procedures are inadequate for reasons mentioned above. To the extent that they are designed to enforce “applicable statutes and regulations,” those must be stated. To the extent that they are designed to enforce board-established policies, as stated above, the procedure should involve a determination by the NOSB, not the NOP. In the interest of transparency, conflicts of interest or potential conflicts of interest should be disclosed to the full board and the public.

Recommendation #11 requires members with a possible conflict of interest to disclose it to the “subcommittee, Board, and NOP, and abide by any decision of the NOP...” It is not clear that the procedures laid out in recommendation #10 always result in disclosure to the full Board. In any case, the conflict should be disclosed to the public as well. As stated above, the decision should be only partly made by the NOP, and only after they announce the legal basis for their decision.

In conclusion, we recommend that the board send this proposal back to the Policy Development Subcommittee. It presented a sound proposal at its Spring 2012 meeting in Albuquerque. If the subcommittee wants to include NOP enforcement of “applicable statutes and regulations,” we suggest that the committee find out from the NOP what exactly those are and request that the NOP design separate standards that it believes are required to meet the standards of law associated with advisory boards composed of “representatives.”

Thank you for your consideration of these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Terry Shistar". The signature is fluid and cursive, with a long horizontal stroke at the end.

Terry Shistar, Ph.D.
Board of Directors