



March 19, 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

**RE: Materials Subcommittee – Confidential Business Information in Petitions Discussion Document**

Dear Ms. Arsenault:

Thank you very much for this opportunity to provide comment on the National Organic Standards Board (NOSB) Materials Subcommittee's Discussion Document on Confidential Business Information in Petitions (CBI). The Organic Trade Association (OTA) supports the work of the Materials Subcommittee on this complex topic.

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.

The process by which materials are petitioned for inclusion on the National List must protect two interests. First, it must give NOSB necessary information with which to make a determination on a material; and second, it must adequately protect a petitioner's confidential business information, such that petitioners feel comfortable participating in the process without concern that a competitor might have access to its confidential business information. These interests are at odds with each other, but both must be maintained in order to create a system that works well, and has the trust of participants.

**NOSB Must Have Necessary Information**

OTA agrees that NOSB members must have access to the information needed to be able to classify a petitioned material as synthetic or non-synthetic, or to understand formulation challenges. However, that information is generally not protected by trade secret laws or confidentiality requirements. It is generic, and not specific to a particular company's business practices.

The Board has access to information such as environmental and health effects of chemicals, emissions and other data that is publicly-reported, publicly available articles, fertilizer ingredients, food ingredients, and information about a manufacturing process that can be found in a patent. Both the Trade Secrets Act and relevant parts of the Rule and NOSB Policies and Procedures Manual protect

information only if it is secret from competitors, the owner of the information has taken steps to maintain its secrecy, and a competitor could gain advantage from knowing the information.

Protecting the confidentiality of such information will not impact NOSB's access to the information it needs to make a National List determination. The Board should have no need to review confidential business information in order to make a National List determination. Such determinations are generic, and are not (and must not be) based on company-specific proprietary information. Thus, maintaining lawful protections for confidential business information should have no negative impact on the Board's ability to exercise its authority.

### **Petitioners' Confidentiality Must Be Adequately Protected**

The Subcommittee quoted President Obama's January 21, 2009, memorandum regarding transparency and disclosure, purportedly as evidence that NOSB should consider additional transparency with regard to confidential business information shared by petitioners. However, the opposite is true.

The Federal Advisory Committee Act (FACA), which governs the Board, requires that advice be objective and accessible to the public, and committee meetings be open to the public. NOSB deliberations and meetings are public and publicly noticed, so there is sunlight and transparency on deliberations. The transparency of the Board indicates a need for *stronger* protections for petitioners' confidential business information – not weaker.

OTA, of course, supports transparency of government processes, including within NOSB. However, it is in part because "NOSB operates in a transparent environment and all its documents are either publicly posted or can be shared under the Freedom of Information Act" that protections for petitioners' confidential business information must be in place. It would be a breach of confidentiality to force a petitioner to publicize its confidential business information in order to participate in the process.

We do not even need to get to the point of general public transparency to see the inherent confidentiality problem – Board members are "members of the public", who may be competitors of petitioners. Petitioners should not be forced to share confidential business information with their competitors in order to participate in the National List process.

Not only would it be a breach of trade secrets law to require sharing such information, but it would also chill participation in the National List process. Companies that would fully participate in the petition process, if they are assured their confidential information would be kept confidential, might leave the system if they have concerns about the misuse of their information. Failing to protect confidential business information could raise the cost of participation in the process such that companies might opt out. This could lead to a lack of faith and trust in the entire process going forward.

### **Procedures Must Be Followed**

The discussion document raised a concern that petitioners often do not follow the CBI procedures spelled out in the Petition Guidelines. This results in petitions being sent back to petitioners – creating increased paperwork and delay for petitioners and the Board alike.

This is a valid concern, and OTA believes that any CBI procedures or guidelines that are adopted must be adhered to. OTA supports the proposition that a petition that fails to meet the requirements spelled out in the Guidelines must be sent back for completion and re-petition.

### **Potential Solution**

A potential solution to this problem could be found in the Technical Review process. A robust and accredited Technical Review process would allow for appropriate review while protecting confidentiality interests. Technical Review contractors do have access to CBI – and working in concert with NOP, they can engage in the needed analysis. Technical Review contractors can work with petitioners to fully understand their process, and get any additional questions answered, without confidentiality concerns. Then, they can pass along to NOSB members their generic analysis, ensuring that NOSB members have the needed information to make their determinations, while maintaining no breach of petitioners' confidentiality. Of course, this depends on the expertise of the contracted organization, and OTA strongly supports accreditation or some other method of verifying that expertise. This would improve the quality and consistency of the Technical Review, as well as improve the industry's faith in the entire materials review process.

### **Answers to Discussion Questions**

**1. Should Confidential Business Information be allowed in petitions? Please explain your answer.**

As discussed above, confidential business information must be protected in order for the system to work. The Board does not need access to information covered by trade secrets law to make its National List determinations, and without appropriate protections, participation will be chilled.

**2. If CBI is allowed, should it be limited so that it does not involve ingredients or manufacturing processes?**

Trade secrets law does not cover ingredients, so they should not be covered by a confidential business information policy.

However, trade secrets law does cover manufacturing processes that cannot be found in a patent and the identity of suppliers of materials. Thus, petitioners must not be required to disclose their confidential manufacturing processes or the identities of suppliers of materials to the Board.

**3. Do the provisions in Possible Recommendation 2 make sense, and are there others that the Board should consider?**

OTA supports the general concept behind Possible Recommendation 2, but has a few concerns regarding particular provisions.

(E) – OTA is concerned that urging petitioners to keep CBI “to the absolute minimum” may inappropriately encourage petitioners to disclose information that the law protects as confidential. Petitioners should have the right to maintain confidentiality to the extent of the law, and should not be urged by the Board to cede some of those rights. OTA suggests that provision (E) read “Petitioners are highly urged to provide complete information in their petitions.”

(H) – This provision causes concern for similar reasons. It pressures petitioners to give up their confidentiality protections. Instead, NOSB should create a workable procedure by which it reviews petitions that include confidential business information, perhaps by seeking out more publicly available information. OTA suggests that provision (H) read “Petitioners should include publicly available information, including manufacturing information found in a patent, which may assist NOSB in making a determination. NOSB may send back a petition as incomplete if there is not enough information to make a decision.”

(L) – Petitions must not be rejected “because of CBI.” They may be rejected for lack of sufficient information to allow the Board to make an informed decision, but rejecting a petition for exercising the confidentiality protections granted under the law is inappropriate. OTA suggests that provision (L) read “If a petition is rejected for lack of sufficient information for NOSB to make an informed decision, the petitioner may re-petition with additional information. NOSB will treat this at a lower priority level with other re-petitioned substances.”

Finally, OTA suggests that any new CBI policy clearly apply only to petitions filed after adoption of the policy, and is not applied retroactively to petitions filed before the policy was adopted.

**4. Provision I in Possible Recommendation 2 is about using an affidavit to supplement a CBI petition. Comment on whether this is valuable.**

OTA is not opposed to the idea of allowing a petitioner to affirm, via affidavit, that the information it is withholding as confidential business information does not materially impact the review process. However, this would likely be of minimal value, as it would have no binding authority. Moreover, final review and classification determinations should be left to Technical Review contractors and NOSB.

**5. Should procedures, such as a Confidentiality Agreement, be developed that would allow the NOSB, but not the public, to see any CBI?**

As discussed above, this would not meet the protections afforded by trade secrets law. Board members are members of the public, and may, in fact, be competitors of petitioners. It would be inappropriate to share confidential business information with them.

Even if an ironclad confidentiality agreement were drafted, OTA would still have concerns about Board members maintaining the confidentiality of such information. Board members publicly debate the merits of petitions, and deliberate via emails that may be subject to FOIA, and it would be nearly impossible to ensure that confidential information was not inadvertently disclosed.

**Conclusion**

OTA appreciates the time and effort put in by the Materials Subcommittee on this important and complex topic. A confidential business information policy must align with trade secrets law and protect the NOSB’s ability to review information necessary to make a determination, as well as protect the rights of petitioners to keep proprietary business information confidential. We hope the Board will consider our comments as it moves forward on this issue.

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,

Marni B. Karlin  
Associate Director of Legislative and Legal Affairs  
Organic Trade Association (OTA)

CC: Laura Batcha  
Executive Vice President  
Organic Trade Association (OTA)

Gwendolyn Wyard  
Regulatory Director of Organic Standards and Food Safety  
Organic Trade Association