**ADVISORY COMMITTEE ON BIOTECHNOLOGY AND**

**21ST CENTURY AGRICULTURE**

***Potential Compensation Mechanisms Working Group Conference call—November 22, 2011***

*Conference Call Summary*

A two hour conference call was held, with Working Group (WG) members Douglas Goehring, Marty Matlock, Barry Bushue, Laura Batcha, Jerry Slocum, Brian Endres, Jessica Adelman, and Michael Sligh participating, along with AC21 Chair Russell Redding and ex officio member Jack Bobo. Michael Schechtman, Executive Secretary, AC21, facilitated the conversation. Four AC21 members who were not members of the working group, Angela Olsen, David Johnson, Leon Corzine, and Greg Jaffe, also listened in on the conversation. Dr. Kent Lanclos, Risk Management Agency (RMA) participated as a USDA resource person for the discussions. The goals of call were to introduce working group members and others, to discuss how to complete the plan of work for the WG (attached as Appendix I) over several WG meetings, to begin information sharing/discussion on the first substantive topic on the plan of work, and to identify an AC21 member rapporteur to report back to the full committee.

The call started with Dr. Schechtman reviewing the charge to the AC21 and the work of the Committee at the first plenary session on August 30-31, 2011, which led to the establishment of WGs. Committee members were reminded of the role of WGs to gather and organize information for the full committee to consider, not to make recommendations.

The WG turned to the plan of work and how to complete it. Support for the overall plan of work was expressed, and the working group’s efforts were described as an iterative one, brainstorming options for potential compensation mechanisms, then discussing pluses and minuses of each, much like developing a balance sheet. The view was expressed that the group needs to get a better understanding of what is already being done to mitigate risk in order to better understand potential compensation alternatives.

One member asked, in reference to existing risk mitigation tools, why RMA has never developed an insurance product based on adjusted gross revenue (AGR) that would address unintended GE presence or contamination by other materials. USDA responded that based on advice of counsel, “GE contamination” is not an ordinary cause of loss (i.e., a proximate cause) because it is a foreseeable event and not a natural cause of loss. Accordingly USDA does not have the authority to provide compensation in those situations. It was noted that some compensable situations (e.g., the arrival of diseases like late blight) are also foreseeable. There was further clarification of one additional distinction between compensable and non-compensable losses: under crop insurance, human-caused events are not typically compensable. Compensation applies to events like drought, hurricanes, etc.

Timing of delivery of the WG’s work product was discussed and it was agreed that if possible, the WG should strive to complete its work by the third plenary session, to be held around March 2012. There was also brief discussion of the need for transparency regarding compensation proposals coming from WG members (or provided by AC21 members but derived from outside sources), and that consequently such proposals would be posted on the AC21 website and made available to the public. One such proposal was a document provided to the AC21 by AC21 member Douglas Goehring regarding the development of a risk retention group to address compensation—essentially a self-insurance mechanism.

Another tool that was offered to help address the need for compensation (if not a compensation mechanism itself) was enhanced dispute resolution through State agricultural mediation services. Thirty-four out of the fifty States already have such programs, which are typically used for mediation around fruit or vegetable crop issues. The mediation services can cover disputes between eligible farmers and others, addressing essentially any issues that may arise. The process does not lead to binding results, but, according to one WG member, has proven to be 97-98% effective. These mediation services do sometimes need to bring in outside experts to address some disputes in which they lack expertise. One WG member questioned whether relying on the tort system for addressing compensation was the most appropriate path to take, versus EPA’s penalty-based approach under the Resource Conservation and Recovery Act (RCRA) or its tax-based approach under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

Working group members agreed that the basic types of compensation mechanisms to be considered, in addition to the agricultural mediation approach, were insurance instruments, risk retention groups and some type of compensation/indemnification fund, paid into by entities yet to be identified (and yet to be discussed by another working group), and drawn out of to address compensable losses. The question arose as to whether precedents exist for establishing such a compensation fund for unintended GE presence. It was noted that such funds do exist in some countries (e.g. Denmark) in the EU. However, it was noted that GE crops are grown on minuscule acreages in Europe, so that European models of coexistence may not be appropriate. Other examples of similar schemes related to animal identification or mining reclamation may be relevant as well, and there will be a need for WG members to research these other mechanisms and come back to the WG with additional information.

One member noted the need for care in recommending particular mechanisms because of the possibility that recommendations could set precedents for other unrelated industries where such mechanisms may not yet exist. Due diligence will be required before the AC21 makes its recommendations, and due diligence will also be appropriate in information-gathering by the WG. Another member noted the Secretary’s exhortation to the committee not to be limited in its thinking by what currently exists. A member contrasted the situation of animal disease indemnification with the GE crops issue, noting that the animal disease indemnification program was established because of potential public health risks, and does not provide full compensation in all cases. It was noted, however, that certain costs beside the loss of the potentially infected animals, are covered in the animal program. If a compensation fund were to be established for unintended GE presence, one member suggested that it could be funded by users who “trespass”; for any mechanism, however, the key elements to be resolved would be who pays and what is the burden distribution.

Working group members agreed that short paragraphs should be developed to succinctly describe each type of option in general, and that a compilation of such paragraphs would serve as a common start to the WG’s in-depth deliberations. It was noted that more often other countries are establishing rules governing liability rather than establishing compensation mechanisms. Some members expressed the view that a baseline is needed from which any mechanism would operate, and that a desired baseline needs to be set.

Members noted that dispute resolution tool presupposes a tort mechanism. One member noted that any new mechanism would at minimum require some rules around liability. Another member expressed the view that any recommendation would need to be made taking into account management strategies that agricultural producers already have in place to mitigate/manage risk. He noted the importance of conveying the information to the broader community, and the importance of emphasizing that producers already minimize much of the risk. It was noted that one criterion to compare the various potential mechanisms could be how well they promote stewardship. It was recognized that this is already contained within the metrics outlined for evaluating the various proposed mechanisms under item #6 in the Plan of Work (See Appendix I), which offers a broad range of criteria for comparisons among mechanisms.

One member raised the question as to whether among economic losses to be considered under the Secretary’s charge were those resulting from secondary effects of a compensation mechanism on the rate of technological innovation and adoption, and thereby on rural development, etc. Another member offered the view that such considerations would be clearly outside the charge given by the Secretary. Members requested clarification from the Secretary as to whether such losses are included in the charge. Dr. Schechtman offered the view that, while such losses might be outside the charge given to the Committee, evaluating such impacts was included in the analysis of the pros and cons of each potential compensation mechanism under the plan of work. One member offered the examples of RCRA and CERCLA, under which the threat of lawsuits has been diminished, and there has been a presumption that chemical companies would continue to move forward with innovation. Another member raised the distinction that those two laws were designed to address chemicals with proven dangers.

One member inquired why some other members found the idea of establishing a compensation fund for covered losses problematic. Another member pointed out potential problems in defining market loss. Would it apply to an inability to produce value-added products or to produce higher yield? Would economic losses be treated holistically? Another member questioned whether there are documented examples of farmers being unable to plant particular crops. Another member noted that there is a great deal of interest in potential impacts of compensation mechanisms on innovation, but noted that compensation would ideally cover any premium that’s been lost as a result of unintended GE presence.

One member highlighted one important difference among potential insurance mechanisms—whether they are based on self-insurance or on insurance contributed to by others as well. Self insurance, she indicated, would institutionalize the burden on those who are trespassed upon and would not foster shared responsibility. Another member echoed the importance of clarifying who would pay for insurance. He noted that in the South, there is very little production of either organic or identity-preserved non-GE crops, but under some insurance mechanisms, farmers in the South could be compelled to bear the costs of insurance. Another member emphasized that any mechanisms recommended should not pit farmers against farmers. A key consideration would be establishing working mechanisms that are tied to actual benefits and losses.

Members agreed that they would “do homework” on existing compensation mechanisms in other arenas prior to the next WG meeting. They also agreed that a few members (Douglas Goehring for risk retention groups and for agricultural mediation; Laura Batcha on a compensation/indemnification fund, and Kent Lanclos on a general insurance tool) would provide short descriptive paragraphs on particular mechanisms under consideration, on or before COB Monday, November 28, 2011. Dr. Schechtman agreed to develop a matrix for evaluating each of the mechanisms based on this information and send it to all members by COB Wednesday, November 30.

Jerry Slocum agreed to be rapporteur for this working group at the upcoming plenary meeting on December 6-7, 2011. Members agreed that they would next meet via conference call on December 20, 2011 from 2-4 pm.

**APPENDIX I**

**Plan of work for the Potential Compensation Mechanisms Working Group**

Address the following:

1. What types of mechanisms can be envisioned?
2. What type and scale of risk would the mechanism be most appropriate to address?
3. Who would be responsible for implementing each mechanism?
4. Is there any existing authority for instituting each mechanism?
5. Are there examples of other activities employing similar mechanisms? If so, how well do they work?
6. What are the pluses and minuses, in terms of avoided conflict, costs/benefits to consumers, costs/benefits to developers, costs/benefits to farmers, potential impacts on litigation and potential litigants, incentives for development of upstream technologies to prevent risk, impacts on trade relations, and rate of technology development and use?