**ADVISORY COMMITTEE ON BIOTECHNOLOGY AND**

 **21ST CENTURY AGRICULTURE**

***Potential Compensation Mechanisms Working Group Conference call—January 31, 2012***

*Conference Call Summary*

A two-hour conference call was held, with Working Group (WG) members Marty Matlock, Barry Bushue, Laura Batcha, Jerry Slocum, Brian Endres, and Jessica Adelman participating. Michael Schechtman, Executive Secretary, AC21, facilitated the conversation. Two AC21 members who were not members of the working group, Angela Olsen and Keith Kisling, also listened in on the conversation. Dr. Kent Lanclos, Risk Management Agency (RMA) participated as a USDA resource person for the discussions. The goal of call was to continue reviewing and discussing information provided by WG members evaluating characteristics of potential compensation mechanisms which had been compiled from them by Dr. Schechtman.

At the outset of the call, Dr. Schechtman, in recalling the previous WG call, cautioned members against falling into the trap of discussing the WG 4 question, i.e., “who pays?” He suggested that WG 2 members need to put that question aside and asked WG members’ permission to reiterate this theme if it became necessary in the discussion. Noting the difficulty of previous discussions, he remarked that the earlier idea that the WG would finish its discussions prior to the third AC21 plenary session may have been an optimistic one. In discussing impacts, he suggested this group could productively examine the different impacts on one group if there were various payers, but should not dwell on the “which payer should it be?” part. WG members generally supported this approach, with some caveats. One member noted that the WGs are not intended to make recommendations and it is not necessary that all members come to full agreement about all elements of their evaluations. Another member noted that if the WG is able to narrow the field of ideas under consideration, it would help in eventual recommendations made by the full committee.

The WG then turned its attention to closer examination of cost and benefits of the three types of compensation mechanisms on developers and on farmers. For the crop insurance model, a distinction was drawn as to whether or not insurance would be based on protecting one’s one property or protecting a grower from liability, each of which would need to operate under authorities different from current crop insurance. (The WG had received an explanatory paper from Dr. Lanclos on the characteristics of the two different insurance models, which is included as an appendix.) WG members discussed the possibility that both might be in place. A property –type insurance instrument would be of value to identity-preserved producers and would have no costs to developers. Whether having a liability insurance instrument in place would be attractive to farmers and developers was discussed. Some felt that having a compensation scheme created independent of developers could even be seen as a net benefit to them. As for the liability-type insurance instrument, most WG members felt that producers would still be responsible for much of the costs but that additional liability could ultimately be passed along to developers. Whether farmers would want to buy such liability insurance was discussed. Merely putting such an instrument in place would be a tacit acknowledgment that there could be liability claims for unintended GE presence, and that insurance providers could indeed launch suits of their own to recover losses they might incur in paying out claims. That situation might be more likely to occur if there were actual requirements in place on farmers to engage in particular stewardship practices for their GE crops. Then the purchase of liability insurance would be a defensive measure, protecting not only against liability, but against the costs of defending against liability claims. It was suggested that since there have been few if any legal actions by non-GE or organic producers related to specific unintended GE presence incidents, liability insurance might not be expensive. Additionally, even if a particular producer were not inclined to purchase such insurance (perhaps because there were few non-GE or organic producers in his/her area), he might receive strong encouragement from his bank to buy such a policy. However, most of the producers on the WG were not themselves enthusiastic about purchasing such a policy were one available. Others thought that having a mechanism of sharing responsibility such as this one would be needed to make coexistence function properly. It was recognized that the issue of whether a farmer should be liable for the effects of pollen drift if he planted a legal GE event and used widely accepted best management practices for his crop has not been fully resolved by the courts, and can’t be addressed by the WG.

In terms of actual costs and benefits to producers, WG members felt that a property insurance-type instrument would likely have low to moderate costs to producers and would certainly be helpful in helping to compensate for losses in a given season. One WG member felt, however, that these would be only short-term benefits because, absent any additional measures, the instrument would provide no incentives to prevent such losses from recurring. Liability Insurance, on the other hand, was seen to offer a rare, but significant benefit to producers. One member pointed out that most farmers currently have general liability insurance for their operations, often through their Farm Bureaus, but while that insurance typically covers negligence, it probably wouldn’t cover unintended GE presence on a neighbor’s crop. He indicated that he would seek further clarification on this point from insurance providers. Another WG member noted that after the StarLink situation, insurance companies eliminated pollen drift coverage from general farm liability policies. Another member noted that coverage for stored grain in elevators also no longer covers unintended commingling of GE products. Dr. Langlos noted that a liability policy would typically need to have a relevant “named peril” (in this case, related to pollen drift) and it would need to be associated to a negligence-type tort. It was noted that USDA has no involvement in liability-type insurance products.

The WG then turned to impacts of a potential compensation fund on developers and farmers. There was discussion of whether such a compensation fund would be funded by technology providers or by taxpayers. WG members generally felt that if technology providers were to fund such a mechanism, at least a substantial portion of the cost incurred would be passed along to farmers. If farmers were explicitly included in helping to pay for the fund, they would in essence be asked to pay twice. One WG member expressed the view that if technology providers were made to fund the compensation fund, the per farmer cost would be lower, and longer-term benefits would accrue because the companies would have incentive to lower incidents of pay-out, which would in turn provide incentives for them to implement and enforce stewardship requirements. Another member offered the view that technology providers’ focus is on intellectual property protection, and that they would pass along their increased costs to purchasers of both GE and non-GE seed. In his view, changes to stewardship requirements would result only if the technology providers were not able to pass all their costs on to producers.

In his view, this approach would have higher cost than a crop insurance approach, because crop insurance is heavily subsidized by the government, and a compensation fund would not be. Another member offered the view that the ability of technology providers to pass all their new costs to producers would depend on competition in the marketplace. As patents for GE traits expire, it may be harder to pass the relevant costs along. In response, it was argued that it was inconceivable that if technology providers were paying in to a fund, there wouldn’t be some incentives to promote stewardship, given that there is a significant percentage of non-compliance now among producers. In her view, the evaluation should not primarily concern itself with whom costs are passed along to: such an approach would effectively take the technology providers off the hook under all circumstances. The decisions of the technology providers as to what to do to address the new costs are business decisions. Another member likened placing the costs on technology providers to a “single-payer system,” an idea to which he had philosophical objections. Another member suggested that the relevant costs are now being passed along to different “single payers.” Philosophical differences were acknowledged, and this discussion concluded with the conjecture that it might be possible that technology providers would consider passing along increased costs to farmers via increased seed prices only in areas where the risk of liability was greatest, i.e., where GE production and non-GE or organic production are in close proximity.

There was a brief discussion of the costs and benefits of creation of a risk retention group (RRG) on technology developers and farmers. Members agreed that the idea of a RRG is basically that of pooled self-insurance, with a third party involved to administer the instrument. WG members felt that this mechanism would confer the highest costs to the producers who participated and would provide benefits to participants should they qualify for a claim. It would confer no costs on technology developers but would provide an indirect benefit to them because they wouldn’t be involved in liability issues.

WG members felt that they wanted to meet one additional time prior to the March 5-6, 2012 AC21 plenary, and requested that Dr. Schechtman find a suitable time slot for the meeting.

**Appendix I.**

**Property Insurance vs. Liability Insurance**

Property Insurance:

Property insurance provides the owner or user of property with protection against the risk of its loss (including its ability to generate income) due to covered causes such as fire, theft and weather. Property insurance offers coverage for first party claims, i.e., claims by the insured party. As a result, in many situations settlement of a property insurance claim need involve only the insured party and the insurer. The policies offered through the Federal crop insurance program are a form of property insurance. The insured is provided coverage against the loss of production (property) due to natural causes, such as drought, excess precipitation, etc. [In the case of revenue crop insurance policies, coverage is also provided against adverse price movements.]

In general, the covered causes of loss for property insurance depend upon whether the coverage is “all risks” or “named peril”. All risk policies provide coverage for all causes of loss not specifically excluded in the policy. Common exclusions include damage resulting from earthquakes, floods, nuclear incidents, acts of terrorism, and war. In contrast, named peril policies provide coverage for only those specific causes of loss identified in the policy, such as hail. Most policies offered through the Federal crop insurance program occupy a middle ground between all risks and named peril coverage. For example, the causes of loss section of the Coarse Grains (e.g., corn) crop provisions states:

*In accordance with the provisions of section 12 of the Basic Provisions, insurance is provided only against the following causes of loss which occur within the insurance period:*

*(a) Adverse weather conditions;*

*(b) Fire;*

*…*

*(g) Volcanic eruption;*

*(h) Failure of the irrigation water supply due to a cause of loss specified in sections 8(a) through (g) that also occurs during the insurance period.*

Thus, while Federal crop insurance policies provide coverage against an extensive set of causes of loss, the covered causes of loss are explicitly named in the policy.

As noted previously, under prevailing interpretation of the Federal Crop Insurance Act, Federal crop insurance policies could not provide coverage against contamination of a non-genetically modified organism (non-GMO) crop from a GMO crop, absent a change in statute.

Liability Insurance:

Liability insurance provides the insured with protection against the risk of liability if the insured is determined to be legally liable for losses or damage to the property of others. Thus, liability insurance offers coverage against third party claims of loss, i.e., claims by an entity that is not a party to the insurance policy. As a result, there are at least three parties involved in settling a liability claim – the insured party, the insurer, and the third party that is claiming loss or damage. The source of such legal liability can arise from torts, contracts, or statute. It appears the source most directly applicable to GMO contamination issues is that of tort. As defined by the American Institute for Chartered Property Casualty Underwriters (AICPCU), “A tort is a wrongful act (other than a breach of contract) committed by one person against another for which a civil lawsuit can provide a remedy.” A common basis for a tort claim is that of negligence, defined by the ACPCU as “Failure to act in a manner that is reasonably prudent or failure to exercise an appropriate degree of care given the circumstances.”

The writer of a liability insurance policy has three primary responsibilities: 1) the duty to defend the insured against the claim; 2) the duty to pay all claims for which the insured is held liable (up to the policy limits); and 3) the duty to settle reasonably clear claims to avoid unnecessary expense and risk for the insured. Unless the policy states otherwise, the legal costs incurred to defend against a claim do not count against policy limits.

Liability insurance coverages have various complexities as compared to property insurance coverages. For example, two liability coverage designs are available, “claims made” and “occurrence”. With a claims-made policy, the responsible insurer is that which has the policy when the third party files a claim. With an occurrence policy, the responsible insurer is that which has the policy when the alleged damage occurred. Issues of joint/several liability will also be a consideration in the design of a liability policy for cases when there are multiple defendants parties, particularly if the third party files suit. With several liability, the responsibility for the payment of damages is apportioned according to each defendant’s share in the fault, e.g., if defendant A is determined to be 50 percent at fault, defendant A would be responsible for 50 percent of the damages. With joint liability, responsibility for the payment of the entire amount of the damages rests with all of the defendants, regardless of the individual degree of fault. For example, if defendant A dies, defendant B is responsible for paying 100 percent of the damages even though defendant B was only 25 percent at fault.

Another complexity of liability insurance is the greater scope for damages to be assessed, beyond those reflecting the damage to the property, again particularly if the third party files suit. For example, a judgment on a liability claim may involve payments for specific damages (reimbursing the third party for all material losses), general damages (compensating the third party for non-material losses), as well as punitive damages (to discourage others from undertaking similar activities).