**ADVISORY COMMITTEE ON BIOTECHNOLOGY AND**

 **21ST CENTURY AGRICULTURE**

***“Who Pays?” Working Group Conference call—February 15, 2012***

*Conference Call Summary*

A two-hour conference call was held, with Working Group (WG) members Daryl Buss, Angela Olsen, Leon Corzine, Melissa Hughes, Philip Miller, and Robert Uram participating. Michael Schechtman, Executive Secretary, AC21, facilitated the conversation. Four AC21 members who were not members of the working group, Lynn Clarkson, David Johnson, Jerry Slocum, and Isaura Andaluz also listened in on the conversation. The goals of call were: to identify and discuss principles the AC21 should consider for recommendation to the Secretary to guide the choice of entity/entities who would fund a compensation mechanism if it is decided that one should be instituted; and to choose a rapporteur to present at the AC21 meeting and provide guidance on that presentation.

The call started with Dr. Schechtman reminding WG members that they should focus on identifying principles that should guide the choice guide the choice of entity/entities who would fund a compensation mechanism if it is decided that one should be instituted, rather than specifically argue for having one particular entity or another fund a compensation mechanism. Dr. Schechtman noted the various principles that had been somewhat unsystematically gathered thus far without lengthy evaluation of any of them. He also noted that one WG member, Paul Anderson, was on travel and unable to participate in the conference call, but had requested that the following principle be considered:

A free market should be allowed to operate as best as possible.  A corollary is that a consumer of a product of choice should bear the cost of product production.  For GM-free food, I believe there may be multiple ways of doing this.

Another WG member offered as a principle “market based compensation.” Under this principle, she indicated, premiums should compensate growers for accepting additional risks and the cost of production. Another member, in supporting and elaborating on this principle, suggested that under this principle, the market would determine how farmers are compensated for any losses. If buyers don’t believe they can cover any added costs, then they won’t pay them and farmers will decide not to grow the particular crop. Another member argued that this was not a principle underlying a compensation system for unintended GE presence, but was instead a means of making some entities bear costs that others impose. Several members noted the relationship between the need for any compensation mechanism and the outcome of the AC21 evaluations of the size and scope of the problem of GE-presence-related economic losses.

Another WG member suggested that market-based compensation was necessary for setting of prices and the overall functioning of the market.

Another questioned whether a producer who is denied access to a market should be compensated for that loss. In response, one member asserted that farmers can’t necessarily grow everything they want, but are limited by markets, soils, the environment, and other factors. If producers choose to enter a particular market, it is up to them to maintain purity. There was discussion of regulations governing cotton production in Arizona under which colored cotton producers are required to make sure they don’t contaminate white cotton. Another regulation in Arizona relating to unintended GE presence was also cited, but on quick fact-checking, this regulation was limited to experimental testing of regulated GE plants. Another member questioned whether there was anything unique in protecting organic crops against unintended GE presence as opposed to any other unwanted material. In that member’s view, the issue is purity, whether the crop is organic, GE, or other, the terms are dictated under the contract, and the grower needs to take necessary steps to meet the contract terms. The question was raised as to whether the proponent of the “market-based compensation principle” intended that market-based compensation be the sole form of available compensation. The response, though not clearly stated, seemed to be yes.

One member suggested that a market based premium would work if the market were a balanced one in which everyone had a level playing field rather than having only some sectors absorbing the costs imposed by neighbors through unintended GE presence. Since such additional costs are being unevenly imposed, the question in his mind was how to compensate for extra costs imposed by GE crops. In response, one WG member noted that market-based compensation would not necessarily exclude purchasing additional crop insurance, the cost of which would add to cost of production and should be factored into any contract. Under this reasoning, if the products are desired in the marketplace, the market will cover those costs through the premium offered and the cost of the insurance will ultimately pass to the consumer. Another WG member disagreed, noting that crop insurance is not set up to deal with unintended GE presence. In her view, growers who have no control over unintended GE presence are bearing all the risk for market losses. With one side bearing all the risk, then the whole premise of successful coexistence collapses. There was discussion about whether the assertion that farmers have no control over unintended GE presence is accurate as well as discussion about whether a compensation system ideally should incentivize prevention of unintended GE presence.

Another member offered as a potential principle “responsibility and shared responsibility.” According to her, that principle would encompass recognition of all the measures that various seed and technology companies have taken to deliver products that are as pure as possible. Shared responsibility would imply a preference for preventative rather than punitive solutions, and practices that encourage stewardship at the grower and local levels. One member asked whether such practices should be put into regulations so that they are enforceable.

Two other WG members offered the principle of “contractual responsibility.” Under it, growers would need to understand the benefits and costs of meeting contractual responsibilities. A farmer should not be eligible for compensation in a situation where he intentionally contracts for to deliver a particular product knowing that the contractual requirements can’t be met. Another WG member offered that that principle might apply to a different WG rather than the Who Pays? Group. There was no consensus about its relevance. Dr. Schechtman observed that such a principle would lead to the conclusion that no additional compensation mechanisms were necessary. The proponent of the principle agreed.

Another WG member offered the opinion that if the principle of shared responsibility is relevant to the Who Pays discussion, it is important to note that there are costs associated with responsibilities. For non-GE producers, there are for example buffer zone requirements. She inquired about enforcement of responsibilities from the standpoint of the technology providers and GE growers. In response, investments in maintaining the highest purity of GE seed were noted. One farmer who grows GE crops described a series of measures taken regarding timing, clean-out of machinery and storage facilities, separate harvest of border areas, etc. One member inquired whether following that principle would mean that GE growers would take some responsibility to help other growers around unintended GE presence, including “some cleanup work.” Most of the burden around unintended GE presence falls to identity-preserved producers, who take a number of measures to address the issue, including planting of buffers. In contrast, another member characterized the costs of buffer zones as costs of doing business, which should not be covered as losses due to unintended GE presence.

Dr. Schechtman noted that with any compensation mechanism that may be put in place, it would likely be desirable to try to keep the need to pay compensation as low as possible and the amounts paid as well. If no additional compensation mechanisms other than the status quo are called for, then the scope of compensable damages—whether economic losses of costs of doing business—becomes irrelevant. One WG member noted the need that the AC21 make decisions based on data. For a compensation mechanism to be considered, it would need to have been established that something went wrong. Dr. Schechtman then provided a brief summary of where he thought the discussions in WG 1 on size and scale of risks were leading, namely that evidence for a modest level of rejected shipments had been provided and a number for maximum projected losses, rather than actual losses, could be calculated based on that information, that the data was not comprehensive, but that probably most members would accept at least some general conclusions about the data they had examined that acknowledged the existence of some losses.

A WG member offered the principle of “avoidance of regulation that discourages innovation.” Another member noted that he had sent around to WG members another set of potential principles, which were:

Funding by the parties responsible for the GMO technology

Minimization of the number of payers

      Clarity

Simplicity

Ease of audit and enforcement

Payer has the ability to control or limit unwanted presence

System should incentivize prevention

The WG then discussed some of these principles. The principle “clarity” was accepted by everyone, though one member cautioned that it is hard to anticipate every circumstance that may arise. There was also no consensus around another suggested principle, “funding by those responsible for GMO technology:” one member suggested it was not a principle (while its proponent asserted that it was a principle in opposition to the market-based compensation principle, on which there also was no consensus), and another WG member asserted that it would hold entities liable for harm that has not yet been established, analogous to strict liability provisions, which have never been enforced on safe, legal products.

The proponent of the principle asserted that in cases of unintended GE presence there would be a chain of causation leading to culpability analogous to assignment of responsibility for abandoned minelands from coal mining. In that instance, Congress didn’t try to go back to figure out which company was responsible for which old mine, but set up a fund. Under that reasoning, someone engaged in a particular legal activity can be asked to pay a fee. Another member disagreed, noting that.under the organic standard, the mere presence of GE material doesn’t equal harm, and whatever is happening happens under a contract. There was no consensus on this principle.

Another of the potential principles from that list, “minimization of number of payers” was not agreed upon by all WG members. Another, “simplicity,” was generally thought of as a laudable goal for a hypothetical payout mechanism and those monitoring payments, i.e., for ease of audit and enforcement (another proposed principle), but there was not general agreement on its applicability for the “who pays” decision, and members thought it difficult to evaluate more generally without additional context from other WGs. Dr. Schechtman described, in brief, the three types of compensation mechanisms under discussion by WG 2.

Another WG member offered another set of potential principles, which there was no time to discuss:

Autonomy and farmer choice

Equity in treatment of different risks

Voluntary participation

Equality in treatment of (different) grower segments.

WG members were invited to submit additional principles or provide explanatory information on ones that had been submitted.

The discussion turned to who should serve as rapporteur at the next AC21 plenary session. It was agreed that Leon Corzine should lead the presentation, with Missy Hughes assisting.

The discussion closed with reference to the Secretary’s idea that the AC21 would need to “lead from the middle.” Some WG members felt that the concept should not be included as a principle, while others asserted that the discussions today demonstrated that two sides have been expounded and the next need is to find that middle ground.

A current list of principles offered at this meeting or earlier and their status is listed in the appendix below.

**APPENDIX I:**

**Ideas mentioned thus far as potential principles for guidance to USDA for a “who pays” decision as of February 23, 2012**

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These items are provided in alphabetical order and I have paraphrased some so that all will have parallel structure.

*Potential “Who Pays?” principles on which there is WG consensus*

* Clarity

*Potential “Who Pays?” principles on which there has been some WG discussion*

* Contractual responsibility
* Funding by the parties responsible for the GMO technology
* Ease of audit and enforcement
* Leading from the middle
* Market-based compensation
* Minimization of the number of payers
* Payer has the ability to control or limit unwanted presence
* Responsibility and shared responsibility
* Simplicity
* System should incentivize prevention

*Potential “Who Pays?” principles identified which the WG has not yet discussed*

* Autonomy
* Autonomy and farmer choice
* Basis on reasonable contracts
* Coequal status of science and values
* Community
* Contractual responsibility
* Proportionality
* Encouragement of good neighbor relations.
* Equity
* Equity in treatment of different risks
* Equality in treatment of (different) grower segments.
* Fairness
* Flexibility
* Funding by the parties responsible for the new cost
* Inclusiveness
* Preservation of choice
* Reliance on science
* Shared responsibility
* Should be designed to minimize the need for compensation
* Voluntary participation