**ADVISORY COMMITTEE ON BIOTECHNOLOGY AND**

 **21ST CENTURY AGRICULTURE**

***“Who Pays?” Working Group Conference call—January 19, 2012***

*Conference Call Summary*

A two-hour conference call was held, with Working Group (WG) members Daryl Buss, Darren Ihnen, Paul Anderson, 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 Greg Jaffe also listened in on the conversation, as did Russell Redding, the AC21 Chair, and Cindy Smith from USDA/APHIS, who serves as a liaison between USDA and committee members. The goals of call were to: introduce the WG to the task at hand and introduce WG members; discuss how to complete the plan of work over several working group meetings; and share information and discuss the first one or two substantive topics in the Plan of Work (attached as Appendix I on this summary).

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 on behalf of the committee. Dr. Schechtman reminded the WG that answering the “Who Pays” question is not specifically in the Secretary’s charge to the AC21 and that accordingly the WG is not charged with making any decisions on the question, and should instead concentrate on setting some groundwork to help the full committee provide some guidance to the Secretary on such a decision, should establishing a compensation mechanism be deemed appropriate. He also reminded the WG that the question of whether a compensation mechanism is appropriate or needed is also outside the WG’s purview.

The WG turned to the Plan of Work and how to complete it. Support for the overall Plan of Work was expressed and members thought that the Plan of Work should be addressed step-by-step, while noting that the work of this WG was interdependent with that of the other WGs. He also summarized some of the ideas that were brought forward by several AC21 members at the last plenary meeting for potential principles that might help guide the “Who Pays” decision on any compensation mechanism.

In considering how to begin work, one member suggested that conceptually at least it might make sense to list out all the potential payees for a compensation mechanism. Another member noted that the data was not yet in on the size and scope of risk and that it was possible that the Size and Scope of Risk WG could conclude that there was insufficient data or that there was no economic harm. Another member noted that the results coming from that other WG should influence the amount of compensation funding needed, not the equities of who should pay, which was the work of this working group. It was also noted that the choice of compensation mechanism may strongly influence who pays.

One WG member expressed concern with reliance on what he termed “flowery principles” offered by two members at the previous AC21 plenary session as potential guidance for who should pay for a compensation mechanism. He cautioned that they should not be treated as agreed-upon. The WG was reminded as well that the Secretary had indicated that the AC21 should not be limited in its thinking to current legal authorities in thinking about compensation mechanisms.

There was discussion around the meaning of economic losses, the requirements put forward in contracts, and the practices put in place to maintain crop value and minimize unintended GE presence. The need for establishing standards for acceptable unintended presence levels and best management practices was noted by one participant. Another WG member cautioned that neither the WG nor the AC21 as a whole would be able to establish specific practices or determine specifically who should pay, but the work must instead be at the conceptual level. Dr. Schechtman noted that some of the parameters around tools and standards for compensation mechanisms were being worked out by WG 3 and invited a member of that WG listening in on the call, Greg Jaffe, to summarize the general categories of such tools and standards under discussion there. Dr. Jaffe obliged, noting four general themes: establishing prior intent to produce a particular product, providing proof of use of adequate farm practices, demonstrating the reasonableness of the contractual purity requirements, and providing proof of economic loss.

Another member remarked that ultimately the farmer will end up paying, one way or another. Accordingly, the easiest thing to do would be to figure out a way for farmers to do the right thing so no one has to pay. If a compensation fund were set up, he noted, it could easily be abused. By contrast, other mechanisms would be easier to administer.

There was considerable discussion of risks in contractual obligations and who should pay for them. The importance of having contracts with reasonable contractual obligations was noted. One WG member with experience in growing identity-preserved crops such as white corn noted the approach of considering commodity prices versus the premium opportunities for specialty product added value, and the considerations involved in agreeing to contracts of various sorts with various purity requirements and implicit thresholds. He noted that as a farmer he pays for delivering segregated product, but the buyer also pays. The farmer is not always successful at delivering the intended product, and in order to be successful long-term, must correctly figure in his risk costs, factoring in things link potential flooding, insect or disease damage, etc. These costs can possibly be covered in whole or in part by crop insurance; organic crop insurance now exists as well. These mechanisms spread risk throughout the gen populace.

Another member added that signing a contract means assuming the risk to take whatever steps are needed to deliver the product at contractual specifications regardless of what your neighbors do. In theory, the higher the purity level required and thus the risk for operating an identity preservation system to those specifications, the higher the value of the contract should be, in order to cover the risks associated with it. He questioned whether the principles applying to contracting and delivery of a specialty product like white corn should be any different that those applying to non-GE or organic products. Another WG member offered a different view, arguing that for non-GE and organic farmers, “someone else’s technology” is taking away their ability to deliver products of acceptable quality according to their contracts. According to some but not all WG members, that is a risk that is accepted when the contract is signed and a choice the producer makes based on the potential value of the contract, and unintended GE presence is no different from other outside factors such as weather, insect damage, etc.

One member pointed out that in cases of unintended GE presence, it may not be possible to determine whose actions led to it. Another member noted that a compensation mechanism need not assign blame to anyone (including neighbors), but shared responsibility was still required for successful coexistence. Another member framed the issue in terms of the increased difficulties faced by organic farmers in managing the risks posed by GE presence—in his explanation, farmers growing GE crops are introducing costs into organic farming operations, costs that GE farmers do not incur. He made the analogy to land use regulations, noting that when there is a new land use, the person(s) introducing the new land use are responsible for mitigating the costs imposed on other users. Another member noted in response that pollen drift is a phenomenon that has been going on with or without the use of GE crops. The fundamental point of contention among WG members remained whether any additional costs posed by GE cultivation for other farmers should be internalized in the terms of the contracts those farmers sign.

In leading up to a conversation about additional principles that could help to guide the Secretary in making the “who pays” determination, assuming a compensation mechanism is deemed appropriate, one member offered the view that whatever payment system is established, it should be: clear, simple, easy to audit and enforce, funded by the parties responsible for causing the cost, proportional to amount of cost introduced, and should be designed to minimize the number of payers and minimize the need for compensation. (Only some of these factors would fit as principles to guide the “Who pays” determination—others go to how a compensation system would be structured.)

Dr. Schechtman asked WG members if they had additional potential principles to add to a list for further WG analysis. The following candidates were identified:

* Contractual responsibility
* Market-based compensation
* Reasonable contracts (i.e., not attempting to deliver product that cannot be reasonably produced using standard management practices)
* Equitable treatment of risk (i.e., not treating the risk of unintended GE presence differently from other adventitious presence issues unrelated to GE that are addressed by standard identity preservation systems).

Other WG members indicated that they would have additional potential principles to add to the list, and Dr. Schechtman advised WG members to wait and provide those potential principles on the next WG call in February, given time limitations on the current call.

In further conversations, one WG member pointed out that what is unique about organic production is that it is serving a strong consumer demand for products without GE inputs. In his view, the choice to purchase organic products should not be accompanied by undue costs. There was continued dialogue about whether responsibility for funding a compensation mechanism should go to those imposing the new costs, or whether it should be entirely contained within the contractual premium offered.

The potential increase in market complexity was discussed. One member offered the view that for crops like corn and soy, the issue will not get more complicated because new GE varieties will just essentially replace older ones, i.e., most of those crops are already GE. It was noted that for newer crops, such as alfalfa, work had already been done to address segregation issues. There are efforts going on to promote alfalfa seed stewardship and a grower education program, with both seed and commodity (hay) components. GE wheat was raised as an example of a crop which, in introduced without a good segregation system in place, would likely result in the loss of organic wheat production in the U.S. because of consumer concern. To address the needs around GE wheat introduction, according to this WG member, farmers would need to be compensated for GE-related losses and there would need to be a system of incentives for GE farmers to take on helpful stewardship practices. Another participant noted that wheat is a self-pollinated crop, so a number of the biological issues would be minimized, but handling and segregation, and the need for separate handling and distribution systems would be at issue.

There were additional discussions around the need to focus on consumers who purchase products and derive benefits from them. Analogies were drawn with other industrial sectors by various members, noting the risks and rewards inherent in them and the linkages to contract law when defective source materials are employed in a manufacturing process. There was also some discussion of the regulatory system for GE plants, which to some members has authority to make decisions on products based on only a limited set of potential impacts. One member contrasted this situation with a broader review process undertaken with respect to land use issues in California.

Another WG member questioned the analogy, noting that in land use questions, issues often go to health, safety, and the environment, not the preservation of markets. He questioned whether other examples exist where the government steps in to preserve markets. The previous member reiterated that the organic and non-GE industries don’t impose costs on GE sector, but the reverse is not true. To extent those costs are pushed down the chain to consumers, his view was that that would be a detriment to the system and unfair to consumers. In solving the problem, though, he thought it would be appropriate to be able to minimize disputes between neighbors. He also noted the increased costs incurred on non-GE and organic farmers for testing and buffer crops. One member responded that those farmers were choosing to embark on a more expensive process to produce a higher-valued product, noted that as seen in a presentation at the first plenary session, organic farmers are doing better economically than conventional ones, and consumers are paying for the costs of organic processes.

Dr. Schechtman offered to compile a complete list of all the potential “who pays” principles based on the plenary session and this call and circulate it to WG members. (That list is provided as Appendix II.) He asked WG members to consider whether there were other principles that might be added to the list, which would be discussed on next conference call.

**APPENDIX I:**

**Plan of work for the Who Pays? Working Group**

1. What principles should the AC21 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?
2. Which are the entities or sectors that could potentially be called upon to fund or help fund a compensation mechanism? What measures, if any, is each entity currently taking to prevent unwanted GE presence in products where it is not wanted? What economic reward or cost does each entity receive/incur for such measures?
3. How would the various principles in I. align with the various entities identified in II?
4. What would be the likely market impacts of each potential assignment of funding obligations and why might those impacts occur?

**APPENDIX II:**

**Ideas mentioned thus far as potential principles for guidance to USDA for a “who pays” decision**

Notes from Michael Schechtman

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* These items are provided in alphabetical order and I have paraphrased some so that all will have parallel structure.
* Some of the ideas that have arisen may be more appropriate as potential guidance around the structure of the compensation mechanism chosen, rather than to the choice of payer. That distinction may await further WG discussion, but I have separated out some that may be more system-focused and listed them separately. The two lists may be combined, rearranged, and edited as WG members see fit.

*Potential “who pays?” principles*

* Autonomy
* Coequal status of science and values
* Community
* Contractual responsibility
* Proportionality
* Encouragement of good neighbor relations.
* Equitable treatment of risks
* Equity
* Fairness
* Flexibility
* Funding by the parties responsible for the new cost
* Inclusiveness
* Leading from the middle
* Market-based compensation
* Minimization of the number of payers
* Preservation of choice
* Reliance on science
* Shared responsibility

*Other potential compensation mechanism principles*

* Basis on reasonable contracts
* Clarity
* Simplicity
* Ease of audit and enforcement
* Proportionality to the amount of cost introduced

Should be designed to minimize the need for compensation.