**ADVISORY COMMITTEE ON BIOTECHNOLOGY AND**

 **21ST CENTURY AGRICULTURE (AC21)**

***Tools and Standards to Verify Eligibility and Losses Working Group Conference call—***

***January 11, 2012***

*Conference Call Summary*

A two-hour conference call was held, with Working Group (WG) members David Johnson, Mary-Howell Martens, Charles Benbrook, Greg Jaffe, Rachel Lattimore, Karil Kochenderfer, and Brad Shurdut. Michael Schechtman, Executive Secretary, AC21, facilitated the conversation. One AC21 member who was not a member of the working group, Lynn Clarkson, also listened in on the conversation. The goals of the 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 two or three substantive topics in the Plan of Work (attached as an appendix to 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.

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.

Some members of the WG requested clarification on the meaning of “eligibility standards” and “tools and triggers.” In brief, members agreed that their focus was to describe a framework that the full AC21 could consider for deciding which losses are compensable, and for documenting and/or verifying that a loss has occurred. The WG recognized that the focus of the first two points of the Secretary’s charge to the AC21 is economic losses to farmers and how to establish that they occurred and provide suitable compensation. Follow-on work relating to “other measures that would strengthen coexistence” under the third point of the charge could potentially address other losses. One member noted that if a model or an approach for addressing compensation to farmers is established in the initial output from the AC21, it could potentially be applied for losses suffered by other entities in the production chain.

Members recognized that merely intending to enter a certain market and being unable to derive the premium offered by that market because of unintended GE presence would not by itself be sufficient to justify compensation. Farmers would need to establish that they had had some sort of plan that had been carried out or had utilized best practices to produce material that would meet that market’s requirements, and that the contract provisions that they were intending to meet were reasonable. Members recognized that losses that might need to be addressed could occur in organic, non-GE, or even other GE crops.

There was considerable discussion about whether the WG or the full committee would be discussing the setting of a threshold of some sort. One view expressed with which there was considerable agreement was that the WG would need to discuss potentially setting a level of unintended GE presence below which no contract would be judged to be reasonable, i.e., contracts for shipments requiring unintended GE levels below that amount would assume private risk and not be compensable under any compensation mechanism under consideration. It is not clear that such a “contract eligibility standard” can properly be called a “threshold” or a “tolerance”. (The alternate term “trigger” was also suggested, but there was no additional discussion around it.) But farmers entering into contracts requiring unintended GE presence levels anywhere above that set level could potentially be eligible for compensation under some circumstances if their product were rejected under the terms of the contract. Some committee members additionally offered the view that a “tolerance” in the sense of a legal marketing standard for what is considered non-GE or organic would also be helpful for some market participants. Others did not support the development of such a standard. There was discussion of other existing standards, such as standards under the Federal Seed Act and Federal Grain Standards Act for off-types. One WG member pointed out that different markets impose different standards depending on market, crop, intended use, etc., and that the U.S. agricultural industry attempts to meet as many as possible of them.

One meeting participant pointed out the distinction between numerical requirements for GE presence for serving non-GE or organic markets (which he termed “cultural distinctions”) and numerical requirements for those GE events with functional alterations where the presence of GE material could alter the functional characteristics of the commodity. He noted that in the former case, the market is moving toward a 0.9% threshold, but in the latter, GE content of less than one part in ten thousand might be required to ensure product integrity. He added his view that contractual standards need to be reasonable in order to be deemed to be eligible for compensation. Eligible farmers would also need to have grown their crop consistent with some set of rules. Downstream handlers could also pose potential losses for farmers as well. Some testing would need to occur before harvest.

There was discussion of the need for farmers to have used best practices or production standards in order to be eligible for compensation, plus, potentially, meeting other requirements. (One member pointed out that there was an assumption that best practices would be sufficient to meet contractual requirements.) One member expressed the view that the AC21 would benefit from a better understanding of the tools and practices currently available and in use for selling into AP-sensitive markets, and to better understand the meaning of particular numerical values showing up on a particular test.

The working group on further discussion agreed that four types of requirements would need to be met to be eligible for compensation:

1. Proof of intent to produce a particular crop or a crop for a particular market
2. Proof of use of adequate farm practices
3. Reasonableness of the non-GE market requirements or contract requirements
4. Proof of economic loss.

There was discussion of whether proof of organic production would be sufficient to meet requirement #1. WG members thought this was not quite sufficient, but also there would need to be documentation that reasonable precautions were in fact taken, perhaps through an organic production plan. It was noted that the presence of GE material doesn’t preclude the sale of crops as organic per se. However, others noted that the “reasonable precautions” to produce non-GE crop were also required. Organic farmers sometimes produce their crops from non-organic seed, but in order to do so and produce an organic crop, they need to document that no organic seed is available, and provide a statement that the seed used was non-GE and was not treated seed. It was noted that even though the presence of GE in a crop doesn’t render it non organic and farmers are unlikely to lose their organic certification because of GE presence when they followed protocols, fields with high levels of GE materials might need to be put back into organic transition before they could be used again for organic production.

The question of liability for GE farmers who were deemed to have been the source of unintended GE presence in other farmers’ crops, even though they followed best practices, was raised. Dr. Schechtman noted that the intent of the Secretary’s interest in this discussion was to arrive at a solution that would get away from questions of liability and the courts.

There was discussion around the effectiveness of management practices for pollen and GE crop movement, and the need to be sure that reasonable and effective procedures are being put in place. One working group member expressed the view that pollen flow from GE events needs to be contained. In his view, the purpose of a compensation mechanism would be to address, without a knock-down legal fight, instances when the containment system didn’t work.

There was additional discussion on the meaning of different percentage “contamination” standards in existing federal seed quality standards and in commodity grading. The history and purpose of those standards were discussed, and they may have taken into account the inherent variability in biological systems as well as impacts on production costs. Whatever measures are put in place through the marketplace or through other means to manage pollen flow, uncertainty and practicality would similarly need to take these factors into account, as well. It was pointed out that even though GIPSA commodity grain standards exist, most buyers aren’t buying grain based solely on those standards anyway.

One WG member expressed concern that putting in place a de facto threshold for non-GE crops, say 0.9%, could cause economic harm to farmers based on an arbitrary number. Another WG member noted the view of many organic consumers that if a set number can’t be met, a product shouldn’t be deemed to be organic, a view which could lead to market problems. The view of many such consumers is that lack of meeting such a standard is evidence that GE producers are not doing enough to meet their stewardship requirements.

There was further discussion of criterion #1 above. WG members agreed on the need for verification of prior intent to produce a particular type of crop, which might be a pre-production contract, or organic certification, as well as verification of the starting seed. One member offered the view that if a producer had sold into a market the previous year and stated his intent to do it again that might be adequate.

It was noted that compensation should not be available for “freeloaders” who plant their crop without clear intent of doing all that is required to service a particular market but attempt to gain the production premium nonetheless.

There was discussion of the meaning of economic loss. Dr. Schechtman, in response to questioning, offered the view that compensation would not cover regular testing costs. A WG member noted that there is a hierarchy of economic losses that might be addressed in ongoing discussions. Direct market losses would likely have the highest level of committee support, followed by testing costs, then reputational losses or ongoing loss of access to a market. He noted that the AC21 is likely to focus primarily on the first type of loss, but that this approach will not satisfy everyone.

Another member noted that once there is a documented loss, it is an open question as to which and how much of the total losses a farmer would get paid for.

The WG now turned to the second item in the Plan of Work, namely, “what are options for the types of tools that could be implemented to verify that damage occurred and to ascertain the extent of loss?” One scenario would be: providing certification than an organic production plan was followed, providing a copy of a rejection stamp from an elevator, and providing information about the purchasing price not gotten at the elevator. It was pointed out that while it should be straightforward in principle to settle what was the agreed-on price, in practice it will be much trickier on to agree on what were best management practices and what the farmer was expected to do to be eligible. It will matter who specifies the minimum practices and how are they communicated to and agreed by farmers. It was noted that outside of organic production, no comprehensive practice-based standard- setting program exists, so that setting best management practices for other types of production will be complex.

One member noted that questions will arise on some shipment rejections regarding differing test results on the same shipment (sometimes performed at origin and at destination) and technical issues will surely arise around methods and results interpretation. An adequate evidentiary basis for conclusions will need to be established. Further work may need to be done to verify the underlying reliability of testing methodologies.

Another participant agreed that testing at both ends of a shipment is a chronic problem. It is partially addressed by using prearranged testing labs when a receiving country allows it. USDA- approved labs are used. A continuing problem is the sampling protocol: it’s very tricky to get representative sample.

In his company, loads from farmers are tested as they come in, but farmers exhibit a range of practices as to what they ship. For the tightest biotech-sensitive program, his company hires the state AOSCA agency to go to farm and inspect prior to harvest, and go back and test in bins on farm. If the crop “passes,” it’s approved but then tested when it comes in. AOSCA also comes in to his facility and retests regularly.

There are rarely disagreements about lab methodologies or statistical tools with his buyers. However, all acknowledged the difficulty of guaranteeing both accuracy and precision of tests. Despite those problems, sellers of commodity and seed have a good idea of what they have in their own products.

Another WG member underlined the challenges of ensuring consistency and replicability in testing. Despite the challenges, though, the marketplace needs tools to determine products are suitable or unsuitable for particular buyers. Testing standardization of testing methods is extremely important. Another WG member noted that previous AC21 reports have also made this point.