



**CORNUCOPIA**  
I N S T I T U T E

January 23, 2012

Phyllis Fong  
Inspector General  
United States Department of Agriculture  
PO Box 23399  
Washington, DC 20026-3399

Dear Ms. Fong,

The Cornucopia Institute respectfully requests that your office conduct an investigation into the process at the last meeting of the National Organic Standards Board (NOSB) meeting in Savannah, Nov 29-Dec 2, 2011, that led to the approval of materials on the USDA's National List of Approved Substances that would appear to be illegal under the Organic Foods Production Act and federal regulations governing organics.

It is our contention that unethical and possibly illegal actions by Martek Biosciences Corporation (the petitioner), Dean Foods and its WhiteWave division (Martek's largest organic customer), and a number of their agents might have inappropriately influenced the Board. Furthermore, undisclosed conflicts of interest by at least three Board members, who voted in favor of the Martek petition, should be investigated.

The vote to place Martek's DHA Algal Oil and ARA Fungal Oil on the National List followed several actions of misconduct by NOSB chairperson, Ms. Miedema, that violate the policies of the NOSB, as written in the NOSB Policy Manual. As a member of the NOSB's Handling Committee, Ms. Miedema spearheaded the effort to gain approval for Martek's petitioned ingredients. We believe these acts of wrongdoing, in concert with the actions by the corporate representatives, contributed to the persuasion of several NOSB members to discount oral and written testimony to the Board from a number of NGOs questioning the propriety of the Martek petition.

### **Misleading NOSB members**

NOSB Board Chair Tracy Miedema, in concert with the Martek lobbyist William J. Friedman, misled other NOSB members about the materials under review. Some Board members were concerned about the powdered form of DHA algal oil, which is processed using methods and materials that are explicitly banned in organic production, and contain

additional synthetic ingredients that are also strictly prohibited by the federal organic regulations (and that were not disclosed in the Martek petition).

At one point, a Board member asked specifically whether the powdered form of algal oil in baby food was part of the petition. According to the official petition, as submitted by Martek Biosciences Corporation, the powdered form is included and a vote in favor of the petition would approve the powdered form (as well as a liquid form).

However, the attorney for Martek, William J. Friedman, responded on the record that the powdered form of algal oil was not part of the petition. Board Chair Miedema then stated for the record that the powdered algal oil was not part of the proceedings, misleading the other Board members.

In addition to failing the legal requirement to review synthetic “other ingredients” that are present in the powdered form (and might be present, although undeclared, in the liquid version), the subterfuge perpetrated by Mr. Friedman and Ms. Miedema led to the failure of the board's review of a processing method used only in the powdered form, microencapsulation, listed in the organic standards as an “excluded method” (meaning it is banned in organic production). As a result of Mr. Friedman and Ms. Miedema's assertion that this was not part of the petition, the other Board members never questioned the use of microencapsulation.

Furthermore, although it is well known that volatile synthetic solvents are banned in organic production, it appears that Mr. Friedman, and Martek, in communicating with individual board members and brokering the compromise language that would be ultimately approved by the board, withheld information about solvent extraction. This led the decision-makers to believe that if hexane, a solvent used to extract some of the Martek products, was excluded in an annotation, that that would solve the *solvent* extraction problem.

The reality is that all varieties of Martek oils are solvent-extracted, not just the ones that utilize hexane.

Mr. Friedman also reportedly told individual board members that the extraction process used to produce the oil that goes into Dean Foods' Horizon milk is “alcohol.” He failed to inform board members that the variety of alcohol is “isopropyl alcohol,” which is very different from a food grade ingredient that might very well be appropriate for use in organics. He apparently hid this fact because isopropyl alcohol, produced with petroleum and natural gas, would be prohibited in organic processing.

### **Allowing a deficient Technical Review**

The Board Chair allowed a deficient Technical Review that did not comport with the requirements set forth in the NOSB Procedure Manual, to provide the basis for the vote on Martek's DHA algal oil and ARA fungal oil.

On page 34 of the Manual, criteria are listed for a Technical Review (TR) to be considered acceptable. The TR for DHA Algal Oil fails the majority of these criteria, including the

requirement to be consistent, to be free from opinion and conjecture, to be based on the best available information, and to be thoroughly supported using literature citations.

The Technical Review includes numerous unreferenced statements that mirror Martek's claims, and fails to include widely known scientific meta-analysis studies whose conclusions call into question those of Martek. Without an independent, comprehensive and professionally produced review, with balanced and unbiased information, the Board members, mostly lay citizens, were not able to vote in the best interest of the organic industry.

A full analysis of the Technical Review for DHA Algal Oil, and its deficiencies, is available from The Cornucopia Institute (this comprehensive analysis was provided to the Board prior to the meeting).

### **Failure to disclose conflicts of interest by some Board members**

The NOSB has strict procedures requiring the disclosure of conflicts of interest by board members, or the corporations and organizations they are affiliated with, before voting on specific issues and materials.

Two members of the Board who voted in favor of the Martek petition, Ms. Miedema and John Foster, are employed by the giant organic produce distributor, Earthbound Farms. In 2011, Earthbound Farms engaged the services of Dr. Alan Greene, a physician who has worked for a number of other corporate agribusinesses including Dean Foods/White Wave, on whose behalf he testified at the NOSB meeting.

Dr. Greene's role, in addition to impugning the reputation of one of the principal critics of the Martek petition, was to help persuade the Board that the material in question is nutritionally necessary and efficacious. His testimony was especially noteworthy because the vast majority of peer-reviewed scientific research, including meta-analysis studies, clearly illustrates that the Martek claims are principally unsubstantiated marketing hype.

The likelihood that Ms. Miedema, or her colleague at Earthbound Farms, Mr. Foster, collaborated with executives and lobbyists from Martek, Dean, their lawyers and lobbyists, seems likely based on Ms. Miedema's behavior and the fact that there was an undisclosed economic relationship between one of the prime tactical players and the employer of Ms. Miedema and Mr. Foster. This warrants investigation.

In addition to Ms. Miedema and Mr. Foster's conduct, the potential conflict of interest of one other NOSB member, Katrina Heinze, who also voted in favor of the Martek petitions, should be investigated. Ms. Heinze works for General Mills, which entered into a licensing agreement with Martek Biosciences in 2009 for its microencapsulation technology. General Mills' relationship with Martek Biosciences was also not declared at the meeting.

The NOSB Policy Manual has a Conflict of Interest policy that states: "Board members shall disclose their interest to the Board and the public, when they or their affiliated business stand to gain from a vote, which they cast in the course of Board business. Under certain

circumstances, the Board may determine whether it is appropriate for the member to vote.”

None of the three aforementioned board members disclosed these potential conflicts of interest and did not recuse themselves from the vote – a practice that is standard and expected when a Board member’s employer has a financial interest in the petitioned product.

### **Possible use of genetically engineered ingredients**

We ask that you conduct an investigation into the failure of the Board to determine whether the petitioned materials include genetically modified organisms (GMOs), which are explicitly banned in organic production. The petitioner was asked repeatedly about the use of GMOs, and did not provide any documentary evidence or proof that its materials are free of GMOs.

The Board members did not fully investigate the possible use of GMOs by Martek, including the algal and fungal strains, the “other ingredients” added to the final product (including modified starch and glucose syrup solids) and the substrate used to ferment the algae and fungus.

### **“Other Ingredients”**

We would request that the review of incidents at the meeting include a determination of whether the staff at the National Organic Program (NOP) should have intervened to illustrate the legal responsibility of the NOSB to fully examine all synthetic substances before they are added to the list of approved materials.

The NOP sent a public memo to Ms. Miedema and the Board members prior to the Board meeting, to request that they evaluate the appropriateness of “other ingredients” that are part of formulated petitioned materials, like the Martek oils.

Some materials containing unapproved “other ingredients” have been added to the list in the past, but this does not release Board members from their responsibility to follow the law.

The fact that the NOSB had been asked by the NOP to promulgate a global approach to reviewing "other ingredients" does not allow the current board to violate the law by recommending synthetics be placed on the list without reviewing them first. Their only option in this regard would have been to postpone their evaluation of the Martek proposal until a new governance procedure addressing "other ingredients" became part of the regulations.

### **Allowing personal attacks during public comment**

Numerous corporate lobbyists, attorneys, executives, scientists and spokespeople testified in favor of Martek Biosciences Corporation’s petitioned materials, which was countered by testimony from individuals representing organic farmers and organic consumers. Several

citizens testifying for Martek disparaged individuals and organizations leading the opposition to the petition.

A farmer associated with Dean Foods attacked the credibility of The Cornucopia Institute without interference from the Board Chair.

Another commenter, Dr. Alan Greene, made allegations against an individual working for an organization that opposed the Martek petitions, Mark Kastel. Mr. Kastel was present in the audience, and Dr. Greene named Mr. Kastel during his disparaging remark in public testimony.

This violates the NOSB policy, as stated in the Policy Manual, that “Individuals providing public comment will refrain from any personal attacks and from remarks that otherwise impugn the character of any individual” (page 27 of the NOSB Policy Manual).

Such behavior during public comment has never been tolerated in the past. Ms. Miedema and previous Board Chairs have been diligent about their responsibility to ensure that this NOSB policy is respected. But Ms. Miedema allowed Dr. Greene, and the farmer affiliated with Dean Foods, in separate testimony, to continue unabated with their remarks, which were meant to impugn Cornucopia and Mr. Kastel’s character and cast doubt on the validity of the organization’s position and presented research (please note that The Cornucopia Institute, of which Mr. Kastel is a co-director, was the non-profit organization leading the campaign against the Martek petitions).

### **Disparaging remarks against the work of non-profit organizations**

And finally, to open the official discussion about the Martek Biosciences petitions, Ms. Miedema talked at length about the perceived merits of allowing Martek’s DHA and ARA oils in organic foods, none of which respected findings by independent scientists or independent consumer surveys.

While never naming a specific organization by name, Ms. Miedema spoke extensively of “misinformation” put out by organizations. These unsupported allegations were clearly an attempt to discredit and disparage the work of consumer and farmer groups challenging Martek's petition.

At one point, Ms. Miedema stated that previous testimony by non-profit organizations was a “waste of time.” Specifically, Ms. Miedema objected to Cornucopia’s previous testimonies on behalf of parents whose infants suffered serious gastrointestinal symptoms from consuming Martek’s DHA algal oil and ARA fungal oil. These FDA adverse reaction reports, and contact information from the parents who gave Cornucopia permission to share these reports during public testimony, are available upon request.

Thank you for conducting an investigation into these allegations of misconduct at the NOSB meeting in Savannah, GA, in the fall of 2011, which led to the approval of Martek’s DHA algal oil and ARA fungal oil.

Sincerely,

Will Fantle  
Research Director  
The Cornucopia Institute

PS: Although unrelated to the controversial NOSB meeting in Savannah, we would also respectfully request that you and your staff look into the legality of allowing Martek oils to continue to be used in organic food subsequent to the USDA's pronouncement, in April 2010, that these products had been inappropriately allowed in organic food by the former NOP director (who overruled her staff, who had analyzed the materials and found them to be illegal in organics).