



CORNUCOPIA
INSTITUTE

October 4, 2018

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National Organic Standards Board
USDA-AMS-NOP
1400 Independent Ave., SW
Room 2648-S, Mail Stop 0268
Washington, D.C. 20250-0268

Re: Meeting of the National Organic Standards Board

Docket # AMS-NOP-18-0029-0001
Federal Register Number: 2018-16386

Dear National Organic Standards Board Members:

The following comments are submitted to you on behalf of The Cornucopia Institute, whose mission is, in part, to support economic justice for family-scale farming.

Developing Criteria for Risk-Based Accreditation Oversight

SUMMARY

The Cornucopia Institute submits this comment in response to the Compliance, Accreditation and Certification Subcommittee's (CACS) request for **criteria for identifying certifiers having a higher risk of fraud, either within its organization or the operations it certifies.**

In addition to the criteria listed on pages 40 and 41 of the NOSB Proposals & Discussion Documents, we recommend the CACS include the following:

Factors that contribute to a certifier's risk and activities to address them:

CONFLICTS OF INTEREST BY EMPLOYEES

Certifier provides services to an operation that employs a former member of the certifier's staff, or the certifier hires and/or seeks advisory or consultancy services from an individual who was previously employed by an operation it certifies

- a. The NOP should ban such relationships for a set period of time.
- b. At a minimum, the NOP should flag any such certifier for enhanced oversight;

- c. The NOP should require certifiers to disclose these employment relationships and issue guidance to assist certifiers in implementing protocols that minimize the likelihood of corruption.

Certifier or certified entity engages a former National Organic Program employee as a consultant, board member, advisor, or employee

- a. The NOP should ban such relationships for a set period of time.
- b. At a minimum, the NOP should flag any such certifier for enhanced oversight;
- c. The NOP should require that the former NOP employee, certifier, and certified entity disclose the nature of the relationship (including the disclosure of financial interests) between former NOP employees, certifiers and/or certified entities.

Rationale:

- “A conflict of interest arises when someone who is expected to act impartially has a personal stake in an issue (emotional, financial, etc.). In every case, a conflict of interest is a real problem – *even if nobody misbehaves.*”ⁱ
- The public must have confidence in the institutions that safeguard health, particularly those institutions and individuals who influence, oversee, and regulate organic food production.
- When employment arrangements facilitate improper financial inducements or incentivize improper access to information or unethical exercise of influence, even the appearance of impropriety should be regulated.
- The movement of employees between certifiers and the entities they certify can lead to such conflict of interest situations, increasing the risk of corruption.
- Likewise, the movement of NOP personal into employment, consultancy, or advisory roles with certifiers, creates a conflict of interest that demands increased scrutiny.
- Individuals who move between employment with certifiers and the entities they certify, and between the NOP and certifiers and certified entities, have inside knowledge and personal connections that create an environment ripe for fraud.
- The potential for corruption can arise in a myriad of ways, including individuals using connections or information from prior employment to: (1) favorably influence certification decisions; (2) facilitate business transactions for the benefit of the certified entity or operation even though a product is not genuinely organic; (3) use knowledge about one entity’s financial status or business practices to improperly influence certification agreements and/or fee arrangements and; (4) leverage information gained in

one employment setting for personal financial gain through unethical and illegal methods in the form of off the books payments, kick-backs, or even extortion.

- Preventative measures to reduce opportunities for conflicts of interest in many “revolving door” employment scenarios are routinely mandated by law and/or through codes of conduct implemented by professional boards and private entities.
- Similarly, the NOP must take specific measures to identify potential conflicts of interest, and prevent fraud, which could arise from the movement/employment of individuals between certifiers, certified entities, and the NOP.

Proposal:

Transparency fosters integrity.

- The simplest and “cleanest” solution to the actual or appearance of a conflict of interest, when rotating employment back and forth between certifiers, certified entities or the USDA, would be, as elsewhere in government, to prohibit the practice for a given period of time. Other alternatives include the following:
- Certified entities should be required to immediately disclose to the NOP the employment of any individual who was previously employed by its certifier or previously employed by the NOP.
- Certifiers should be required to identify and disclose to NOP auditors any individuals it currently employs who were previously employed by the NOP or any entity the certifier currently certifies.
- Individuals employed by the NOP, a certified, or certified operation should be required to recuse themselves from any certification evaluations or decisions affecting an entity with which the individual has negotiated employment.
- The NOP should issue guidance for certifiers to assist in their implementation of effective policies and written protocols that restrict employees, for a period of time, from undertaking tasks that relate to the certification of the individual’s previous employer.
- Certifiers should ensure that information barriers are in place to ensure employees, in the course of carrying out job duties related to certification decisions, are isolated from all contact with the certified entity which previously employed the individual.
- Certifiers should establish written protocols for maintaining information barriers, i.e. restricting an employee’s access to information related to the certification of the individual’s former employer. Certifiers should make, and the NOP should require that these policies be available for inspection during NOP audits.
- To the extent it has not done so, the NOP must implement policies and procedures that create and enforce information barriers to prevent NOP employees from exercising any

oversight or decision making authority related to the performance of a certifier or certified entity with which the employee has had a business or advisory relationship.

- The NOP should flag as high risk any certifier who employs or employed an individual who has also been employed by an entity to which the certifier currently or previously offered certification services.
- The NOP should flag as high risk any certifier or certified entity that employs, consults with, or seeks advice from former NOP employees.

DISCUSSION

The revolving door scenarios presented above refer to (1) the movement of employees from certifier to certified entity or vice versa or (2) the movement of NOP employees to certifiers or certified entities or vice versa.

While the revolving door scenario does not alone suggest improprieties exist, the circumstances clearly invite fraud and require that the NOP take preventative action to avoid even an appearance of wrongdoing.

Efforts to deter corruption arising from conflicts of interest are routinely acknowledged and implemented in other revolving door settings and when new and former employment scenarios or relationships could generate opportunities for abuse.

For example, the law imposes certain time-limited restrictions on former public officials in accepting employment in the private sector, and professional bodies have often implemented precautionary measures to minimize the likelihood of fraud arising from conflicts of interest.

Federal employees in the executive branch of government are restricted from performing certain post-employment activities like advising foreign political governments and parties (18 U.S.C. § 207). Similarly, there are restrictions on former Congressional members imposing “cooling off” periods before they can lobby Congress. (18 U.S.C. § 207).

Lawyers are governed by strict rules of professional conduct specifically addressing potential conflicts of interest. Lawyers must obtain consent from a former client before representing a new client in matters that are adverse to the interests of former clients. (Rule 1.9—Duties to Former Clients).

The pharmaceutical and medical device industries are required to disclose consultancy relationships with physicians to avoid the appearance that medical entrepreneurship is prioritized over research or patient care. (42 U.S.C. § 1320, Physicians Payment Sunshine Act).

Private parties, through covenants not to compete and similar employment agreements, enter into binding contracts to prevent not only competition, but to avoid incentives to capitalize on conflicts of interest that can arise in subsequent employment settings.

All of these situations recognize that access to information and personal relationships in one employment setting can be used for improper purposes in an individual’s subsequent employment.

CONCLUSION

Decision-making power and access to information and influence are invitations for corruption and are

present when individuals move from employment between the NOP, certifier and certified entity. Precautionary measures minimizing the likelihood of abuse should be implemented where personal and professional relationships converge in ways that can facilitate fraud by those willing to engage in unethical conduct.

Therefore, the CACS should recommend the following factors be included in assessing certifier risk for fraudulent conduct:

The certifier provides services to an operation that employs a former member of the certifier's staff, or the certifier hires an individual who was previously employed by an operation it certifies.

The certifier engages a former National Organic Program employee as a consultant, board member, advisor or employee.

ⁱ Dennis G. Jerz, Ph.D., Associate Professor of English, Seton Hall University, <https://jerz.setonhill.edu/EL227/2009/07/conflict-of-interest/>.