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File: 44200-70 POULTRY INS

DELIVERED BY E-MAIL

James Mack
Assistant Deputy Minister
Agriculture Science and Policy
Ministry of Agriculture
5th Floor, 808 Douglas St
Victoria, BC V8W 2Z7

Dear Mr. Mack:

AMENDMENTS TO THE *NATURAL PRODUCTS MARKETING (BC) ACT*, POULTRY DISEASE INSURANCE AND AUGUST 14, 2014 SUPERVISORY DECISION

This is in follow up to our discussions about some of the potential considerations should the proposed amendments to the *Natural Products Marketing (BC) Act (NPMA)* be passed. These amendments would give explicit authority to commodity boards and commissions (boards) to implement biosecurity programs to protect and promote the safety of regulated products, require mandatory insurance and assess administrative penalties.

Given these amendments broaden the scope of regulatory authority of the boards, and issues arising go to the core supervisory goals of the BC Farm Industry Review Board (BCFIRB) for the BC regulated marketing system, I thought it useful to provide further background and procedural information regarding:

- The Amendments;
- Governance and Decision-making;
- Financial Accountability;
- Regulated Boards and Mandatory Insurance;
- Background to the August 14, 2014 Order (Poultry Insurance); and,
- Requests to Amend or Rescind the August 14, 2014 Order – BCFIRB Expectations.

I am copying the boards on this letter as they bear first instance responsibility for administering the *NPMA* under their respective schemes. This includes addressing the amendments appropriately as statutory decision makers. As outlined below, much lies ahead should the amendments come into force and only when processes that might arise are completed will BCFIRB as the supervisory agency – and

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as a tribunal – be able to determine any outcome(s). As we agreed, I cannot pre-determine the eventual decisions of BCFIRB in regards to any implementation of the amendments generally or with respect to poultry insurance specifically.

The Amendments

BCFIRB is on record following the 2004 Avian Influenza outbreak that, although there is a strong argument that boards have authority over biosecurity, it would be preferable to have that authority confirmed through amendments to the *NPMA*. Therefore BCFIRB staff, on behalf of the board, worked closely with the Ministry of Agriculture in support of the 2015 amendments which, among other things, will ensure existing “biosecurity” programs – as defined in the *NPMA* – continue to be authorized going forward.

BCFIRB is also on record as acknowledging that insurance generally is an important risk management tool for producers and recognizing insurance can be part of sound marketing policy. Therefore it also supported that amendment.

Likewise, BCFIRB supported the establishment of administrative penalties as an appropriate mechanism to enhance the capacity of commodity boards to provide situation-appropriate, consistent, graduated and effective enforcement of their schemes and orders. A Cabinet regulation is required to bring the *NPMA* amendments related to administrative penalties into force and processes used by boards to administer such a regime require BCFIRB prior approval. I therefore anticipate considerable discussion between the boards, BCFIRB and the ministry on the implementation of administrative penalties before any such regulation is enacted.

To what extent the potential addition of specified authority over biosecurity programs and administrative penalties to the *NPMA* may affect any proposal regarding mandatory insurance will have to be determined.

Governance and Decision-Making

The legislated authority granted to boards by Government gives rise to a public expectation that these regulatory bodies will operate on the basis of sound governance and accountable decision-making. Major legal and policy initiatives such as, for example, the potential implementation of mandatory insurance in the regulated poultry sector are an opportunity for the boards concerned to demonstrate due diligence and accountability in the first instance in support of the industries for which they have statutory responsibility.

BCFIRB continues to work with the boards on sound governance and decision-making through strategic planning goals and implementation of a principles/outcomes-based approach to regulation. The objectives are to demonstrate the accountability of the BC regulated marketing system and to support a strong, effective and strategic value-chain for the benefit of BC agriculture.

Financial Accountability

An important supervisory consideration for BCFIRB is whether there are appropriate oversight measures (transparent, accountable) in place within the boards, producer associations and any other organization (e.g. BC Poultry Association) receiving funds collected under *NPMA* authority. BCFIRB

– in keeping with the accountability principles espoused by Government (e.g., Taxpayer Accountability Principles) – already requires all regulated boards to ensure there is a full accounting of the funds they collect and distribute under authority of the *NPMA*. This is the first instance responsibility of all boards and is an ongoing “work in progress”. The boards and BCFIRB must be satisfied that existing or new accountability measures are sufficient to meet these expectations.

Regulated Boards and Mandatory Insurance

In regards to the potential implementation of mandatory insurance (of any kind), it must be understood that the amendments to the *NPMA* leave this to the discretion of the regulatory agencies.

Therefore boards in the first instance and, as the supervisory board, BCFIRB in the second instance are governed by the *NPMA* and the principles of natural justice must be taken into account in making decisions to implement such programs in future.

This includes, as required in s. 9 of the *NPMA*, ensuring that any decisions are in compliance with a scheme enacted under the *NPMA* and “accord with sound marketing policy”. Also under s. 8 of the *NPMA*, persons aggrieved by or dissatisfied with such decisions have the right of appeal to BCFIRB. Should BCFIRB determine that it is in the best interest of the industry and public to address a matter in its supervisory capacity, and therefore remove the right of appeal from affected persons, it remains incumbent upon BCFIRB to meet the statutory obligations of the *NPMA* and to ensure that its processes are appropriate to the decision being made.

BCFIRB Expectations

As set out in its March 3, 2015 letter to poultry boards and copied to the other boards and commissions, BCFIRB expects:

If the *NPMA* is amended in this area [mandatory insurance] there will be several considerations for regulatory boards:

1. In general, all boards and commissions must ensure any exercise of that authority is undertaken in accordance with the following:
 - Use of an appropriate SAFETI¹ process to determine what, if any, insurance may be required to help ensure orderly marketing.
 - Ensure the resulting decision(s) reflects legal and sound marketing policy considerations.
 - Decisions and rationale are made publicly available in a timely manner.

...

Specific decisions by any board regarding insurance matters that fall outside of the framework provided by BCFIRB supervisory direction would be appealable under s. 8 of the *NPMA*.

These expectations and the right of appeal apply to any potential proposal by any board or commission in making any type of insurance mandatory (disease or potentially other).

Background to August 14, 2014 Order (Poultry Insurance)

A group of BC poultry producers sought to establish a captive insurance company (to be owned and operated by the poultry producer associations) which would provide insurance coverage to licensed

¹ Strategic Accountable Fair Effective Transparent Inclusive

producers against low and high pathogenic avian influenza outbreaks. The proposal was based on the poultry boards using an assumed authority under the *NPMA* to: (a) make avian influenza insurance mandatory for licensed producers; and, (b) collect levies for the purposes of producers' premiums as well as capitalizing and operating the captive insurance company.

Neither the poultry boards nor BCFIRB would have regulatory or supervisory responsibilities related to the proposed captive insurance company (or another approach to insurance) if it did not involve the exercise of authority under the *NPMA*.

The two initial determinations for BCFIRB to make under s. 9 of the *NPMA*² were:

- Whether mandatory insurance fell within the poultry board's legal authority, and;
- Whether mandatory insurance accorded with sound marketing policy.

Legal Authority

In response to the poultry insurance initiative, BCFIRB concluded there was an absence of clear legal authority under the *NPMA* to implement the proposal and that doing so also presented potential legal risk to existing biosecurity programs. Therefore BCFIRB determined that it was not in the best interest of the regulated poultry sector to proceed with the insurance initiative and the poultry boards were directed to not exercise their regulatory authority in relation to the proposed insurance company.

Sound Marketing Policy

BCFIRB acknowledged that there are sound marketing policy arguments supporting boards being provided with limited authority to make insurance mandatory in response to certain circumstances. However, BCFIRB remained unconvinced that:

... mandatory insurance (an extra level of regulation) for the purposes of establishing and operating a captive insurance company to provide coverage for avian influenza contributes effectively and strategically to orderly marketing beyond the authorities and tools already in place.

The full background, including the August 14, 2014 Order, extensive correspondence, questions raised by BCFIRB, submissions and related documents can be found on BCFIRB's web site at: (http://www.firb.gov.bc.ca/2011_supervisory_review_poultry_insurance.htm).

² 9 (1) The Provincial board has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined by the Provincial board under this Act or a federal Act and to make any order permitted to be made.

(2) Without limiting subsection (1), the Provincial board has exclusive jurisdiction to inquire into, hear and determine whether a decision, order or determination of a marketing board or commission accords with either or both of the following:

(a) sound marketing policy;

(b) a scheme or the orders of the marketing board or commission.

(3) A decision, order or determination of the Provincial board under this Act on a matter in respect of which the Provincial board has exclusive jurisdiction is final and conclusive and is not open to question or review in any court.

Requests to Rescind or Revise August 14, 2014 Order – BCFIRB Expectations

BCFIRB's August 14, 2014 Order specifically addresses the use of poultry board regulatory authority under the *NPMA* to support the proposed insurance company. The Order sets out:

...boards are directed not to exercise their regulatory authority under their schemes at this time for the purpose of supporting the proposed captive insurance company

As specified in the March 3, 2015 letter, this Order remains in effect until such time as:

- any changes to the *NPMA* are effected;
- poultry boards as first instance regulators provide a SAFETI-based³ proposal and rationale (legal and sound marketing policy) to BCFIRB regarding mandatory insurance going forward; and,
- BCFIRB issues any resulting further supervisory direction.

Expected requirements for any new submissions

Under the *NPMA*, boards and BCFIRB are obligated to ensure both legal and sound marketing policy conditions are met by any proposal related to the Order. Should a poultry board(s) make a new proposal to use regulatory authority for the purposes of supporting an insurance company (directly or indirectly), BCFIRB would require:

- That the outstanding sound marketing policy questions as described in the August 14, 2014 decision (pages 4-5) and other related correspondence be comprehensively addressed by the board(s).
- That if a specific provider(s) is proposed directly or indirectly as mandatory and there are competing insurance companies offering services, a rationale – including a risk assessment – as to why a provider(s) can (legally) and should be (as a matter of sound marketing policy) given preference.
- What the potential impact would be on the existing, multi-purpose contingency funds if producers are required to obtain insurance (within or without a captive insurance company). Or in other words, would this extra expense replace monies currently going to the contingency funds; and, if so, what would be the potential impact on a board's capacity to deal with other events or issues that may require use of contingency funds?
- That the potential financial and competitive impact on their (BC) producers be assessed and reported on in light of increasing cost, pricing and other pressures on the supply management system (e.g., the recent updating of the Ontario chicken CoP and the corresponding impact on all Canadian production, increasingly detailed food safety, animal welfare and biosecurity program requirements raising labour, management and facility costs, market allocations related to import pressures, etc.).

None of the above is new to the boards as thorough risk analysis and comprehensive legal and policy assessments are integral to SAFETI. SAFETI is a tool by which the boards (and BCFIRB) can demonstrate that their processes, including consultation with their producers and other stakeholders, meet the standards required of statutory decision-makers.

³ Strategic, Accountable, Fair, Effective, Transparent, Inclusive

Concluding Comments

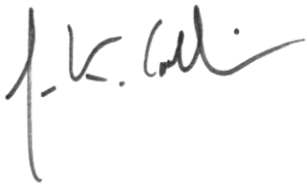
BCFIRB supported biosecurity, insurance and administrative penalty amendments to the *NPMA* as contributing to orderly marketing. Major legal and policy initiatives such as the potential implementation of mandatory insurance in the regulated poultry sector will require the boards concerned to demonstrate due diligence and accountability in the first instance in support of the industries for which they have statutory responsibility. As I indicate above, that work remains to be done.

All boards are expected to use the SAFETI principles to assist in determining ‘sound marketing policy’ and be able to confirm that their decisions and processes related to mandatory insurance programs are legally defensible under the new legislative framework. That is a fundamental legal requirement of the boards – and BCFIRB – in making any order, decision or determination under the *NPMA*.

I note again that the August 14, 2014 Order related to the proposed insurance company remains in effect until such time as it is amended. As mentioned, I am not in a position to pre-determine what BCFIRB may or may not decide in response to any new proposal it receives from the poultry boards but in this letter I have tried to provide as much guidance as appropriate. The critical factor in terms of BCFIRB revisiting its Order is a comprehensive and informed legal and policy analysis by the boards as first instance regulators.

BCFIRB will continue to provide as much information as it can as part of its commitment to working with the ministry and boards following any amendments to the *NPMA*.

Yours truly,

A handwritten signature in black ink, appearing to read 'J. K. Collins', written in a cursive style.

Jim Collins
Executive Director

cc: BCFIRB board

Marketing board and commission chairs and executive staff

BCFIRB web site