



Preamble: The National Association for the Employment of People who Are Blind (NAEPB) operates as a not-for-profit association under section 501 (C) (6) of the Internal Revenue Code. It represents 60 nonprofit agencies for the blind participating in the Javits Wagner O'Day (JWOD) program. NAEPB would like to offer the following summary comments in response to the Federal Register notice dated December 16, 2005 on the issue of nonprofit agency governance and executive compensation. NAEPB intends to offer more detailed written testimony prior to the end of January.

The member agencies of NAEPB participating in the JWOD program are legally-designated not-for-profit corporations and/or state agencies who share a common mission and charitable purpose.

NAEPB and its member agencies and their Boards of Directors/Governing bodies recognize that this designation carries with it certain requirements and expectations for operational ethics and business practices and that while these expectations may vary slightly from community to community, or state to state, they do not vary in their essence and can thus be said to apply to all agencies as standards of good governance.

NAEPB and its member agencies agree that the Committee for Purchase from People who Blind or Severely Disabled ("The Committee"), the federal agency charged with administering the JWOD Program, has a legitimate interest in being assured that these standards of good governance are being met in agencies operating within the JWOD program.

NAEPB and its member agencies believe that standards of good governance apply to all aspect of our operations, ranging from fundraising practices to human resources policy to product and service pricing to executive compensation.

NAEPB and its member agencies agree that while they often compete with private industry when recruiting senior executives, executive compensation in the not-for-profit sector is subject to different considerations than in the private sector.

NAEPB and its member agencies will embrace clear standards of good governance developed through a public-private partnership utilizing third party contractors and a monitoring/certification process implemented through NIB.

NAEPB cautions that current Congressional interest and potential action in adopting governance standards covering all nonprofit organizations makes it prudent for the Committee to closely monitor Congressional action prior to adopting any final rules.

In summary, NAEPB supports the Committee's efforts to strengthen the JWOD program through the following actions:

1. The development of Committee-endorsed standards of governance for NAEPB member agencies through a joint effort of the National Industries for the Blind, the NAEPB, and appropriate third-party contractors;
2. The development of specific and rigorous processes and guidelines within these standards of governance for the setting of executive compensation, designed to create a fully rebuttable presumption of reasonableness in each case;
3. Assignment of the responsibility to NIB to monitor and certify compliance by NAEPB agencies with these governance standards as part of its annual compliance review process, and to include such certification as a part of NIB's policy on Good Standing;
4. The Committee's acceptance of NIB Certification as proof of compliance with the governance standards.

Additional comments in response to the December 16, 2005 Federal Register Notice.

While NAEPB supports the use of third party contractors for the development of Committee-endorsed standards of governance and the assignment of responsibility to NIB for monitoring/certification of such standards, we oppose the Committee itself becoming a federal government-operated accreditation agency. We are responding below to the sixteen specific questions raised in the December 16, 2005 Federal Register notice. Such responses should not be seen in any way as an endorsement of the Committee itself becoming a federal government-operated accreditation agency.

The December 16, 2005 Federal Register notice included the following statements/questions:

There are a number of criteria and tests that are widely considered as benchmarks of good nonprofit agency governance practices. The Committee believes the following to be representative of such "best practices" but not all-inclusive:

(1) The board of directors (the board) should be composed of individuals who are personally committed to the mission of the organization and possess the specific skills needed to accomplish the mission.

(2) Where an employee of the organization is a voting member of the board, the circumstances must insure that the employee will not be in a position to exercise "undue influence."

(3) The board should have no fewer than five unrelated directors. Seven or more directors are preferable. The board chairperson should not also be serving as the nonprofit agency's CEO/President.

(4) The organization's bylaws should set forth term limits for the service of board members.

(5) Board membership should reflect the diversity of the communities served by the organization.

(6) Board members should serve without compensation for their service as board members. Board members may be reimbursed only for expenses directly related to carrying out their board service.

(7) The full board or some designated committee of the board should hire the executive director, set the executive's compensation, and evaluate the director's performance at least annually. In cases where a designated committee performs this responsibility, details should be reported to the full board.

(8) The board should periodically review the appropriateness of the overall compensation structure of the organization.

(9) The full board should approve the findings of the organization's annual audit and "management letter" and approve a plan to implement the recommendations of the management letter.

(10) Nonprofits should have a written conflict of interest policy. The policy should be applicable to board members and staff, who have significant independent decision-making authority regarding the resources of the organization. The policy should identify the types of conduct or transactions that raise conflict of interest concerns, should set forth procedures for disclosure of actual or potential conflicts, and should provide for review of individual transactions by the uninvolved members of the board of directors.

(11) The accuracy of the agency's financial reports should be subject to audit by a Certified Public Accountant. The board of directors should have at least one "financial expert" serving;

(12) Nonprofit agencies should periodically conduct an internal review of the organization's compliance with existing statutory, regulatory and financial reporting requirements and should provide a summary of the results of the review to members of the board of directors.

(13) Nonprofit agencies should prepare, and make available annually to the public, information about the organization's mission, program activities, and basic audited (if applicable) financial data. The report should also identify the names of the organization's board of directors and executive management staff.

(14) Executive compensation paid to the Chief Executive Officer (CEO)/President and "highly compensated individuals" must be monitored by the board of directors. The full board should approve all compensation packages

for the CEO/President and all highly compensated employees through a "rebuttable presumption" process to determine reasonableness.

The Notice also posed the following questions in regard to governance practices. NAEPB's responses are included here in italics.

The Committee is seeking further information and perspective in the following areas related to governance practices:

(1) Are these criteria comprehensive and inclusive enough to effectively evaluate that a nonprofit agency demonstrates good governance practices and should be deemed qualified to participate in the JWOD Program?

- *Criteria are comprehensive and inclusive. We support their inclusion as part of a third party development of governance standards.*

(2) Are there additional criteria that should be used, or substituted for the above, to evaluate evidence of good governance practices by nonprofit agencies in the Program?

- *Generally agree with many of the criteria listed above, however, flexibility may be needed based on size and resources of the organization, physical location (rural vs. metropolitan) and many other factors. This can be included as part of a third party development of governance standards.*
- *Consistent with existing IRS or other legal requirements, Criteria # 11 should apply only to agencies over a certain size.*

(3) Should accreditation by one or more state or national organizations be recognized as evidence of a nonprofit agency adhering to good governance practices without further review by the Committee?

- *See the NAEPB statement at the start of this document. We agree that third party development of governance standards and monitoring/certification by NIB is the best method for achieving the desired end result without federal government intervention. Because of the wide variations in overall missions, sizes, and capabilities of our member organizations, and because many of our members organizations are currently committed to specific certification and accreditation processes, we do not support any requirement for full accreditation by any organization. We support the development of uniform standards of governance to be monitored and certified by NIB.*
- *The Committee does not have the resources and should not be assuming the role of a federally operated accreditation agency.*
- *Instead, the Committee should endorse governance standards developed by a third-party contractor/s with monitoring/certification by NIB as part of its public/private partnership, and accept NIB certification as evidence of a nonprofit agency adhering to good governance practices without further review by the Committee.*

(4) Should different benchmarks be used for nonprofit agencies that are state, county, or local government agencies, or should they be exempt from any Committee regulations in this area?

- *Governance standards developed by a third party must take into account any variations between standards for state, county or local government agencies versus other agencies.*
- *As the Committee contemplates becoming an accrediting agency, it should fully explore the federalism implications of its proposed benchmarks to determine whether it has the legal right and ability to adopt benchmarks for state, county or local government agencies, while also guarding against adopting policies that provide a competitive advantage to one class of nonprofit agencies against others.*

(5) Should the size and/or the annual revenue of the nonprofit agency be a factor or factors in assessing appropriate governance practices?

- *As in (4) above, governance standards developed by a third party must take into account any variations in agency size, annual revenue, and mission.*

(6) What is the best way to ensure that only qualified central nonprofit agencies and nonprofit agencies, with an internal structure that minimizes opportunities for impropriety, participate in the JWOD Program?

- *Assuming development of governance standards as described throughout this document, the Committee should accept NIB certification as evidence of a nonprofit agency adhering to good governance practices without further review by the Committee.*

(7) What if any enforcement mechanisms should be adopted to ensure only the qualified central nonprofit agencies and nonprofit agencies participate in the JWOD Program?

- *The Committee should accept NIB certification as evidence of a nonprofit agency adhering to good governance practices without further review by the Committee. In the event that an agency fails to achieve certification, the Committee should then employ progressive disciplinary sanctions designed specifically for dealing with agencies failing to achieve or maintain third party accreditation.*

(8) What steps will the nonprofit agencies and central nonprofit agencies need to take to avoid conflicts of interest among its board members?

- *Governance standards must adequately address conflicts of interest among both boards and staff of agencies.*

(9) What steps will the nonprofit agencies and central nonprofit

agencies have to take to demonstrate financial responsibility?

- *Governance standards must adequately address a variety of activities that will ensure a demonstration of financial responsibility.*

The Notice also posed the following questions in regard to executive compensation. NAEPB's responses are included here in italics.

The effect of Executive Compensation on Fair Market Price Determinations

Board involvement in setting the compensation of the CEO/President and other highly compensated employees is one of the benchmarks of effective nonprofit governance practices. In furtherance of assessing information used to set the initial fair market price for products and services added to the Procurement List, and then periodic adjustments to the price thereafter, the Committee is seeking information on the following:

(1) What is the threshold beyond which the compensation paid to the executives in a JWOD-participating nonprofit agency should be considered as influencing a proposed fair market price determination? For example, if the agency receives more than a certain percentage of its total revenue from sales through the JWOD Program, is there a compensation level (total dollars paid or total dollars paid as a percentage of total revenue) at and above which fair market price impact would be deemed to occur?

- *We believe that the underlying assumption that Executive compensation affects Fair Market Price (FMP) is a mistaken assumption. If it were to be correct, it would mean that by not considering such executive compensation as part of FMP determination until now, the Committee has erred previously in establishing appropriate fair market prices.*
- *Most JWOD Fair Market prices are based on marketplace comparability and hence Executive compensation does not impact them.*
- *The use of the 9.5% G&A limit (which is even lower than that used by commercial firms), ensures that excessive compensation would not impact fair market price.*
- *The Committee has the sole authority and responsibility under the JWOD Act to establish fair Market Prices. Rather than attempting to control executive compensation, the Committee should adopt effective policies that ensure that the prices it establishes are in fact fair market prices.*

(2) Conversely, is there a point below which executive compensation, regardless of the dollar amount paid, would not be considered as influencing a recommended fair market price? Is such a de minimis test appropriate for large diversified nonprofits where total JWOD sales represent only a small percentage of total revenue?

- *Same response as # 1 above. Accordingly, the question is moot.*

(3) Without regard to any analysis of JWOD-related revenue, is there an established benchmark or absolute dollar threshold above which compensation would be deemed as influencing a proposed fair market price?

- Same response as # 1 above. Accordingly, the question is moot.

(4) Should receipt of documentation to support a "rebuttable presumption of reasonableness" serve to demonstrate that executive compensation does not by itself influence a proposed fair market price or any adjustment thereto?

- *Same response as # 1 above. Accordingly, the question is moot.*
- *However, irrespective of the discussion regarding fair market price, governance standards should include a requirement to demonstrate a rebuttable presumption of reasonableness.*

(5) To what extent should there be a relationship between the pay and compensation of line workers and highly compensated individuals?

- *Whereas the pay of workers is governed by Fair Labor Standards Act and the Service Contract Act, as applicable, as well as by their individual levels of productivity; and*
- *Whereas a Governing Body's decisions about compensation of executives, assuming its adherence to standards of good governance, is informed by that executive's duties and responsibilities as well as by a well-designed marketplace comparison and IRS rules covering excessive compensation;*
- *Therefore, there should be no artificial relationship between the pay and compensation of line workers and highly compensated individuals.*
- *Establishing such a relationship may have unintended consequences. Rather than reducing the executive compensation, it may limit employment opportunities for workers with productivity impairments – the very group of individuals that the JWOD program is supposed to help.*

(6) At what point would be appropriate to begin a review of an executive compensation package even if the proposed price for a product or service would fall within a range that it could be considered as a fair market price?

- *Same response as # 1 above. The question is moot.*

(7) What approaches are available to identify and monitor nonprofit agencies executive compensation that would provide such information to the Committee routinely but without placing an undue burden on agencies?

- *The Committee could require nonprofit agencies that are required to file 990 forms with IRS, to simultaneously provide a copy of their 990 submission to the Committee.*