



ORGANIC FARMERS ASSOCIATION

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National Organic Program
1400 Independence Ave. SW
Room 2642-So., Ag Stop 0268
Washington, DC 20250-0268

Re: Docket No. AMS-NOP-17-0065-0001

To Whom It May Concern:

The Organic Farmers Association is led by domestic certified organic farmers and only certified organic farmers determine our policies. Preventing fraud in the organic marketplace through stronger enforcement has been a top priority for OFA members since our founding.

Our advocacy has included working to include the provisions in the 2018 Farm Bill that are being implemented through this proposed rule. U.S. organic farmers have already experienced significant economic harm from fraud in organic markets, in both domestic and import supply chains. The need for stronger enforcement efforts by the National Organic Program (NOP) was brought to the forefront by years of effort by organic farmers and advocates.¹ U.S organic grain farmers reported negative impacts on the prices they could get for their products after increased volumes of organic grains abruptly started to arrive in the United States several years ago. Since then, imports from regions with questionable oversight and that seem to lack sufficient organic acreage to produce the amount of organic product being exported from that region have continued, while several high profile investigations have also revealed large-scale domestic efforts to sell fraudulent organic products. The net effect of both domestic and

¹ "U.S. Farmers Stalk Fraudulent Imports to Save Their Markets." Minneapolis Star Tribune. July 16, 2019. <https://www.startribune.com/organic-farmers-stalk-fraudulent-imports/511952972/?refresh=true>; "The Labels Said 'Organic.' But These Massive Imports of Corn and Soybeans Weren't." *Washington Post*. May 12, 2017. https://www.washingtonpost.com/business/economy/the-labels-said-organic-but-these-massive-imports-of-corn-and-soybeans-were-not/2017/05/12/6d165984-2b76-11e7-a616-d7c8a68c1a66_story.html?utm_term=.bc595122d7b9; "the Tragedy of Fraud." Organic Farmers Association. Summer 2020. <https://organicfarmersassociation.org/news/the-tragedy-of-fraud/>.

imported products being revealed or suspected to be fraudulent has not only economic impacts on the producers who are complying with organic standards but are being undercut in the market by fraudulent products, but also in consumer confidence in the organic label as a whole.

Therefore, we believe that this proposed rule is critical to both the long-term viability of the organic label and organic farmers. And we know that enhanced enforcement efforts by the NOP are long overdue, so we urge the agency to finalize this rule and put it into effect as soon as possible. U.S. organic farmers will continue to suffer economic harm while these regulations are not in effect.

Before we address the specific provisions of the proposed rule and the questions posed for public comment, we have some overarching suggestions and concerns about the proposed rule.

Scope - The broad scope of this proposed rule presents its own challenges. We are concerned that the proposed rule covers so much ground that it will be difficult to get everything in the package finalized. The complexity of some of the topics included in the proposed rule may mean that a significant amount of work remains to be done to resolve concerns raised through this public comment period. But other provisions in the proposed rule, such as the new requirements for import procedures and addressing which entities must be certified, are vitally needed and should be finalized and implemented as soon as possible. If the agency finds as a result of this comment period that some portions of the proposed rule need more in-depth revisions or other work, we urge the agency to consider splitting the proposed rule up so that the sections that are complete can be finalized and implemented quickly.

Emphasis on Auditing - The primary focus of the proposed rule seems to be to improving procedures that will enhance the process of auditing or investigating potential fraud after it has already taken place. We understand that auditing is a major component of organic oversight. But we also urge the agency not to prioritize auditing at the expense of enforcement activities that can prevent fraud from occurring in the first place, especially in complex supply chains.

NOP Enforcement Capacity – We are concerned that the proposed rule lacks information about the NOP’s commitment to increasing its own capacity to do enforcement activities, in addition to the regulatory changes spelled out in the proposed rule. We urge the NOP to share with the organic community more information about how the new authorities and regulations in the proposed rule impact the NOP’s workplan and staffing needs. Specifically:

- How will the NOP increase the profile of its enforcement functions as a way to deter those considering fraud?
- How will the NOP utilize the existing authority, programs and personnel of other government agencies (such as the Automated Commercial Environment system at ports

of entry) to increase the NOP's ability to stop shipments until their organic status can be verified?

- How will the NOP increase the regular training of agency partners, such as Customs and Border Protection (CBP) and Animal Plant Health Inspection Service (APHIS) port specialists on organic requirements and documentation?

Certifier Oversight – It is also important to put the new requirements that will be created by the proposed rule into the context of the NOP's existing authority and mandate to provide oversight of accredited certifying agents (certifiers) as a primary method of ensuring integrity. Because certifiers play such an integral role in the daily work of ensuring that certified operations are meeting the organic standards, it makes sense that this proposed rule focuses a lot of attention on certification activities. But we are concerned that the proposed rule pays insufficient attention to the NOP's oversight over certifiers, including vital activities involved in accreditation.

The list of controversies in the organic community that are caused by inconsistent interpretation or application of organic regulations is quite long, and includes access to pasture, hydroponic and greenhouse operations and transition of organic livestock. The role of NOP in ensuring that certifiers are using consistent interpretations of the regulations cannot be overstated. We welcome the improvements to certifier practices that this proposed rule will require, but that alone is not enough to prevent fraud. We will continue to push the NOP to improve oversight of certifiers as a key component of enforcement.

NOP Requirements – This proposed rule creates new responsibilities for many players in the organic supply chain, including certifiers, which is appropriate. But we are concerned that the proposed rule does not outline how the NOP will hold itself to similar high standards as those it is setting for other players in the organic sector. For example:

- Will the NOP communicate with other accreditation agencies internationally about potential fraud or certifier noncompliance?
- Will the NOP raise the training and experience requirements for its staff who work on accreditation and enforcement?

Interagency Coordination – We understand that the NOP is not as large an agency as others that deal with imported agricultural products, and that there are not NOP personnel present at critical points in the supply chain, such as international certification office locations or ports of entry. This makes it critical that the NOP is able to leverage personnel from other government agencies who may be present in places where the NOP is not. We urge the agency to continue to prioritize coordination with and education and training for other agencies such as CBP and APHIS. Efforts devoted to educating staff from these agencies about the organic requirements, as well as finding ways to integrate the organic designation into their systems, are a critical way to multiply the reach of NOP in preventing fraud.

Questions for Comment

General Topics

1. *The clarity of the proposed requirements. Can certified operations, handlers, and certifying agents readily determine how to comply with the proposed regulations?*

Defining Risk - The proposed rule contains numerous references to certifiers and operations assessing risk and then creating procedures based on the level of risk (for example, in determining inspection frequency or a fraud prevention plan.) We urge the NOP to clearly define different levels of risk to ensure that certifiers are using consistent methods to determine what practices constitute high risk. It may be necessary for the NOP to issue guidance on how to determine risk, or require training for certifiers on this critical assessment process.

When the NOP is coming up with guidance on how to assess risk, we believe that the size of operations and the complexity of supply chains must be considered. While organic certification is size neutral, as an operation grows, the amount of product sold and required inputs increase, which increases the potential to introduce and conceal fraud within the complexity of an operation. Size should be one factor that is considered to increase risk, as should the complexity of an operation and its supply chain for inputs and sales.

We also believe that operations deemed to be higher risk should trigger a requirement for inspection and review by more experienced and specialized reviewers and inspectors.

Defining Audits: In different sections of the proposed rule and the accompanying narrative, the terms “supply chain audit” and “traceback audit” are used. More clarity is needed on these terms, as a supply chain audit sounds much more comprehensive than a traceback audit.

2. *The implementation timeframe. AMS is proposing that all requirements in this proposed rule be implemented within ten months of the effective date of the final rule (this is also one year after publication of the final rule).*

Because this proposed rule is so complex and covers so many different topics, we suggest that the NOP consider setting different implementation dates for different sections. We have heard from some certifiers that the proposed implementation date of ten months after the effective date is not feasible to make the changes required for certifiers. Smaller certifiers in particular may need more time, as well as technical assistance.

But the implementation date for the requirements for import procedures should be as soon as possible, ideally faster than 10 months after the effective date of final rule. The problem of fraud in organic supply chains has been hurting U.S. organic farmers for years, and the

measures in the proposed rule are long overdue. We can't afford to wait for another year for these enhanced efforts at fraud prevention to begin.

Applicability and Exemptions from Certification

1. *Are there additional activities that should be included in the proposed definition of handle (i.e., are there additional activities that require certification)? Are there any activities in the proposed definition of handle that should be exempt from certification?*

We suggest that to be explicitly clear, the NOP should add the terms "importing," "exporting," "transloading," "relabeling," "splitting," "opening," "packaging," "private labeling" and "sorting" to the definition of handle.

We also have concerns about some forms of transport remaining exempt from certification. Some types of containers used for large bulk shipments, or containers that are permeable, could create risk for commingling with non-organic product or contact with prohibited substances. Transport of large volumes of product or transport involving commingling are factors to consider for requiring certification.

Another area that needs clarity is certification for private label products. Companies that sell private label organic products (but do not otherwise handle organic products) should be required to be certified. Companies that sell organic products need to understand the special requirements organic products have as they move through the supply chain, whether or not they produced them. Allowing an entity to benefit from the premium associated with the organic label by selling private label products without being required to do the same work to be certified that is required of other certified entities producing a similar branded product creates an unlevel playing field.

2. *Are there specific activities not included in the proposed rule that you believe should be exempt from organic certification?*

We urge the NOP to clarify that on-farm seed production can take place under the scope of a crop certification, and does not require an additional certification as a handler.

3. *Are there additional requirements that exempt handlers described in this proposed rule should follow?*

We believe the NOP should establish and require a uniform affidavit process to provide more structure to exempt entities providing transport or storage services to ensure those entities understand that organic products must be handled in ways that prevent contact with prohibited substances or commingling. Ensuring that exempt handlers use and provide uniform affidavits vouching for how organic products were handled should be the responsibility of a buyer of organic product.

The proposed rule would allow facilities that only store organic product to be exempt from certification. But oversight is still needed for these facilities to ensure that these operations are aware of and following the organic regulations to prevent contact with prohibited substances and commingling. Later provisions of the proposed rule about special handling instructions and notification of organic status on nonretail containers could be useful for exempt storage facilities. But we urge the NOP to consider what else can be done to ensure that these exempt operations understand the special handling needed for organic products.

For transport activities or activities at a port that may not require certification, the NOP could require a transport plan from the owner of the certified product. This plan would detail where products goes and what happens at each stage of the transportation, and could be connected to the uniform affidavit system.

Imports to the United States

1. *Is the 30-day timeframe for certifying agents to review and issue an NOP Import Certificate appropriate? Why or why not?*

We are concerned about a different timing issue that was mentioned in the narrative description of the proposed rule, but not specifically mentioned in the regulatory text, that imported shipments be “associated with” but not “accompanied by” the Import Certificate and that importers would have up to 10 days to submit the certificate to the Automated Commercial Environment (ACE) system. This lag time between a shipment entering the country and the import certificate being made available in the ACE system is far too long. The lag between the product and the certificate arrivals could substantially diminish the chance that a problematic shipment is prevented from entering commerce, or make it impossible to prevent fraudulent product from being recovered once it does. This lag time could be the difference between preventing fraudulent product from entering the country or merely finding out that this happened later during an audit, after it is too late to prevent.

The Import Certificate should accompany the imported shipment and be submitted to the CBP ACE system upon shipment from the foreign port. Without a verified import certificate in the ACE system, a shipment should not be unloaded at a U.S. port of entry.

2. *How could the mode of transportation and frequency of shipments affect the use of the NOP Import Certificate?*

We urge the NOP to consider specifying a limited number of ports of entry (for each mode of transportation) where organic imports are allowed to enter the United States. As the NOP continues to build its capacity to work with these new import certificates and other government agencies like CBP and APHIS, it makes sense to first refine these systems and train

other agency partners at a few main ports of entry. This would help NOP refine its procedures before they could eventually be expanded to more ports of entry.

Additional Comments on Imports to the United States

We support the requirement created by the proposed rule that imported organic products must have an import certificate. But we urge the NOP to do more with these new certificates than is outlined in the proposed rule, as recommended by the USDA's Office of Inspector General (OIG). The OIG recommended in its 2017 audit report that the NOP "develop and implement a plan to verify NOP import certificates at U.S. ports of entry, identify fraudulent import certificates, and capture organic import data."² We believe the proposed rule could go further to establish systems for achieving the OIG's recommendation. Requiring import certificates is a critical first step, but it should not be the only step that NOP takes.

For import certificates to have real value in preventing fraud, the NOP will need to have a plan, and the capacity to implement it, that allows the verification of the information on the certificates. Simply having certificates on file with no follow-through to verify the information they contain will provide false confidence. The NOP's ability, working with CBP and other agencies, to flag shipments whose information cannot be verified while still at the port, is what will have a deterrent effect on parties considering an attempt to import fraudulent products.

The proposed rule also does not make clear how the NOP will capture organic import data from import certificates in a useful time frame to influence its oversight of certifiers or other countries' accreditation systems. Capturing data to indicate trends, such as a surge in imports from a particular broker or from a particular region, could inform the NOP's oversight of certifiers or accreditors operating in those regions, or indicate the need for further investigation. The NOP should develop a set of investigative procedures that are triggered by import data, such as automatically conducting an investigation when there is a significant surge in imports for a specific product category to determine if fraudulent activity is contributing to that increase and conducting an automatic investigation when a product entering a port has been certified or produced by an entity that is under investigation from another competent authority such as the EU.

Another area where the proposed rule could be clearer is how the NOP will work to address the recommendation from the OIG for improved coordination between the NOP, APHIS and CBP to ensure that APHIS officials at a port are notified about what to do if APHIS fumigates organic products with prohibited substances. The OIG called on the NOP to work with CBP to update

² USDA Office of Inspector General. "National Organic Program – International Trade Arrangements and Agreements." Audit Report 01601-0001-21. September 2017. Recommendation 4.

the ACE system message sets to ensure that APHIS officials are notified of steps to take when organic agricultural imports are treated with NOP-prohibited substances and that importers are notified that treated organic products can no longer be sold, labeled, or represented as organic. We understand that the NOP has been participating in a working group with CBP and other agencies on issues related to imported products, and we urge the agency to continue with that process. But providing more context in the proposed rule about how these inter-agency coordination efforts connect to the new regulatory requirements will help the organic industry understand what is happening at ports of entry and possibly deter fraud by making clear that NOP is leveraging the resources of other agencies to strengthen oversight.³

Labeling or otherwise providing a visual indicator that a container holds organic products is a good first step. But unless the person seeing the container knows what organic means, providing this information will not do much good. Therefore, the NOP should design simple training modules for employees of other government agencies and uncertified entities in the supply chain on the specifics of the handling requirements and rules for organic products, emphasizing prohibited materials, restrictions on fumigants and restrictions on commingling.

The proposed rule was also not clear about how the NOP is addressing Recommendation 7 of the OIG report, on how NOP will notify the trade to ensure fumigated product is not sold as organic.⁴ This notification could be improved by the provisions of the proposed rule relating to removing exemptions for some types of handlers and improving the requirements that nonretail containers indicate organic status. But the proposed rule does not clearly describe how the NOP will improve the procedures to notify the trade if organic product is mistakenly treated with prohibited substances, specifically how organic labeling on a nonretail container must be altered to indicate that a product has lost its organic status.

Finally, we urge the NOP to go beyond what is required by the Farm Bill for information captured by the ACE system for organic imports. Information that the NOP should consider utilizing in addition to the new import certificate includes other types of documents that are widely used in commerce, such as bills of lading, insurance certificates and shipping manifests. We are aware that audits and inspections by certifiers may utilize these types of documents. But we urge the NOP to consider ways to use these documents to provide additional information to detect potentially fraudulent imports as shipments arrive at ports of entry, in order to prevent fraud. For large bulk shipments of products such as grain, which are likely to contain the commingled production of many operations, having additional information could be critical in detecting fraud and preventing these shipments from entering commerce. As the NOP continues to improve its enforcement capacity, we urge the agency to consider expanding

³ USDA Office of Inspector General. 2017. Recommendations 6 and 7.

⁴ USDA Office of Inspector General. 2017. Recommendation 7.

requirements about what information a broker, importer or other handler must provide to buyers at the time of import to include information about all of the operations that supplied the product in a commingled shipment.

Labeling of Nonretail Containers

AMS seeks comment regarding the proposed amendments to the labeling of nonretail containers, specifically whether or not the certified operation that produced or last processed the product must be listed (i.e., not optional) on all nonretail container labels.

We support requiring the labeling identified in the proposed rule section 205.307(a), items which “must” be listed. But we believe that some items listed in proposed rule 205.307(b), items which “may” be listed, are so important that they should be made mandatory and not left to the discretion of handlers to decide. Specifically, we urge the agency to move the following items to 205.307(a) so they will be required for nonretail containers:

- Producer contact info (or last certified handler)
- Special handling instructions (such as “Organic – Do Not Fumigate”)
- Country of origin
- USDA organic seal

We believe the proposed rule’s definition of nonretail container is too limited. Large nonretail containers used for shipping (tankers, containers, barges, etc.) should also be covered by these labeling requirements because they are used in complex supply chains and have high potential for commingling. This labeling could provide a very important last layer of protection to prevent commingling or contact with prohibited substances at a port or other facility that handles more than organic products, or is being shipped or stored by entities that may remain exempt from certification.

And we urge the NOP to think beyond labeling requirements and to explore methods that are already used in food supply chains, such as tamper-proof seals on shipping containers. These seals could also potentially be color-coded or somehow identify organic status.

Finally, we are aware that the NOP is concerned that requiring labeling of very large, bulk-scale, containers may be challenging. If that is the case, then we suggest that those types of containers are too large to be used for shipping organic products. We believe it is appropriate for organic shipments to have restrictions on the type of containers that can be used for transportation, given the special handling requirements needed to protect organic integrity. Extremely large vessels, such as those using bulk cargo holds, encourage commingling of product and increase the potential for fraud. We urge the NOP to consider requiring that organic commodities be shipped in containers that can be loaded onto ships and then onto rail

or trucks, while remaining sealed with tamper-proof devices. This could eliminate one weak point in long complex supply chains.

On-Site Inspections

We support codifying the NOP's guidance that certifiers must conduct unannounced inspections for a minimum of five percent of the operations they certify annually. The NOP had previously issued this as a best practice, but the proposed rule will now make this requirement enforceable.

We support the requirements for mass balance and traceback audits, as well as provisions that prevent certifiers from operating in regions where they lack capacity to conduct unannounced inspections.

We urge the NOP to require that certifiers perform unannounced inspections during critical times, such as during the grazing season for a dairy operation that may not be complying with the pasture rule.

The discretion given to certifiers in selecting which operations receive unannounced inspections makes it even more critical that the NOP can ensure that certifiers are using a consistent process for determining which operations are high risk. As we described earlier in this comment, the NOP should clarify definitions of how risk is evaluated, issue guidance and perhaps require training for certifiers on how to assess risk. We believe that the size of an operation must be a main factor in assessing risk, both because of the complexity that comes with maintaining organic practices on larger operations and the volume of product that larger operations release into commerce.

Certificates of Organic Operation

- 3. Should an expiration date be included on all certificates of organic operation? Would this make them more useful?*

Organic farmers usually do not control the timing of their certificate renewal. They are bound by decisions involving their certifier about when their inspection can take place and the final review of their application completed. Therefore, we urge the NOP to ensure that any expiration date on certificates allow time for delays in inspection or review by the certifier. We do not want farmers to be left without a valid certificate because the process ran behind schedule due to things they cannot control.

Additional Comments on Certificates of Organic Operation

Section 205.404 (b) of the proposed rule would require a certifier to issue a certificate that is generated from the INTEGRITY database and states that a certifier may provide a certificate to certified operations electronically. We suggest that the NOP to add a provision that requires certifiers to provide certified operations with the option to receive paper copies of their certificate. There are still many farm operations that do not have sufficient internet connections to rely on electronic records, or do not wish to do so.

Including acreage data in the INTEGRITY database is necessary to do thorough mass balance audits that can detect fraud, by showing if a region does not have enough acreage to supply the amount of product claimed to originate there. We urge the NOP to include acreage data by crop and region to allow this kind of analysis. But there will need to be some flexibility in how this data is collected and presented to avoid creating a burden for farmers. For example, for producers with a diversified crop mix, especially fruit and vegetable producers who may grow many varieties every year on small parcels of land, a streamlined way to estimate acreage will be needed to avoid creating a huge reporting burden for these operations.

And farmers have also expressed some concerns about how acreage data is presented in the database. One particular concern is whether buyers could access detailed acreage information about specific certified operations in the database, in order to gain an advantage in marketing negotiations. We suggest that the NOP consult with the USDA's National Agricultural Statistics Service about how that agency addresses such concerns in the course of conducting and reporting data from the Census of Agriculture. One potential method for addressing this problem could be to aggregate the acreage data by some regional area (such as the county level in the United States) to prevent an individual operation's acreage from being accessible in the database. Another potential option would be to limit who can access acreage information to certifiers and the NOP, to prevent buyers or others involved in marketing from accessing this information.

Personnel Training and Qualifications

3. Should any other types of knowledge, skills, and experience be specified?

We believe the NOP should require specific qualifications for different types of inspectors and reviewers employed by certifiers. Specific examples include experience working on or managing an operation of the type they are qualified to inspect or review. For example, an inspector or reviewer evaluating a dairy operation should be required to have knowledge of how dry matter intake calculations are done and have experience with dairy operations.

We also urge the NOP to create requirements for inspectors and reviewers who deal with high-risk operations, with more qualifications required to be eligible to certify those operations. As will be discussed in more detail below, we also suggest that the NOP consider specialized training or requirements for certifiers that wish to certify grower groups, due to the complexity and specific risks created by those systems.

Oversight of Certification Activities

In section 205.501 (a) (22) of the proposed rule, we are concerned about why a new certification office has 90 days to notify the NOP that it has started operations. This seems like far too long for a certifier to operate in a new area without letting the NOP know they have started certification activities there. We urge the agency to drastically shorten the length of time certifiers have to notify the NOP about opening a new office, and to consider requiring notification before certification activities in the new area can begin.

Accepting Foreign Conformity Assessment Systems

AMS seeks comment regarding whether the public sees a differential risk to enforcement associated with certain organic trade relationships. Specifically, compared with organic equivalence determinations, are there increased risks associated with recognition agreements where other countries' governments oversee the implementation of NOP certification?

The 2017 report by the OIG outlined numerous ways that the NOP needed to “strengthen its controls over the approval and oversight of international trade arrangements and agreements for the import of organic products into the United States.”⁵ These included better tracking and public notification of differences between foreign and U.S. organic standards, as well as oversight and audits of countries with equivalency and recognition agreements. Until all of the recommendations from the OIG’s report are fully implemented, there will continue to be risk associated with both types of organic trade agreements. The agency must develop a better system for identifying and accepting public comment on differences between U.S. and foreign organic standards and how to resolve them.

Additional Comments on Accepting Foreign Conformity Assessment Systems

The NOP should conduct more frequent audits for certification agencies and certifiers’ foreign satellite offices using a risk-based approach. Audits of satellite offices in other countries outside the location of the certifier’s headquarters office should be required for accreditation of the

⁵ USDA Office of Inspector General. 2017

certifier as a whole, and the certifier's headquarters office should be held responsible for any noncompliance found at their satellite offices.

Additionally, the agency should not restrict its relationship with governments of trading partners solely to standards setting activities. These governments are also providing oversight and accreditation of the organic sector in their countries, and the NOP and these trading partners should be collaborating on enforcement activities as well as data that could inform decisions about risk for fraud in international supply chains. A more expansive approach to the scope of the relationship with recognition or equivalency agreement countries would include the foreign governments' role as accreditors. If a country the United States has a trade relationship with has taken enforcement action against a certifier or certified operation, that information should be shared as part of the trade relationship. This could prevent unscrupulous operations or certifiers from using the United States as a destination for product they could no longer sell in another country due to an enforcement action. This communication needs to be ongoing, in real time, and public – not something that only occurs during a regular two-year review.

Compliance – General

We support the proposed rule language regarding the NOP's ability to initiate enforcement action against any person who sells, labels or provides other market information concerning an agricultural product if such label or information implies, directly or indirectly, that such product is produced or handled using organic methods, if the product was produced or handled in violation of the Organic Foods Production Act (OFPA) or regulations. This was the intent of the Farm Bill provisions to strengthen the NOP's capacity to take enforcement actions when fraud happens, and we believe more robust enforcement activities by NOP will deter fraud in the future.

Noncompliance Procedure for Certified Operations

In addition to the clarification in the proposed rule about a person who is responsibly connected to an operation that violates OFPA or the regulations being subject to penalties, we urge the agency to review and upgrade their procedures for coordinating with other government agencies with the capacity and authority to provide enforcement, such as the Department of Justice, state attorneys general, the Department of Treasury and others who have been involved in past investigations and prosecutions of organic fraud cases.

We also urge NOP to consider how to maximize civil penalties in the case of fraud, by setting the number of violations per bushel or other unit of production so that the penalties are actually punitive to those who committed fraud and to deter others who may be considering it.

We also urge the agency to make explicit in the proposed rule that any business or individual found to have intentionally violated the organic regulations for the purpose of fraud can never again receive an organic certificate. We think that it is necessary for the NOP to clarify that unintentional violations due to mistakes or confusion about the standards are not the intent of this provision, and that the penalty of being ineligible for future organic certification is due to intentional violations and intent to commit fraud.

Grower Group Operations

OFA is aware that there are successful and well-run grower group networks around the world that provide a viable way for small producers to participate in the organic market. We are supportive of those operations having this opportunity and see the concept of grower groups as a very valuable option for small operations, both internationally and in the United States. But we do have concerns about the complexity of grower group systems and the need for well-designed and well-run internal control systems and thorough oversight by certifiers.

We have some specific thoughts in response to the questions posed for comment, which we offer below. But first we would like to express our more general concern that there should be a much more thorough conversation among the entire organic community about the best way to set rules for grower groups that strike the proper balance between allowing this unique system to provide small growers a way to participate in the organic market and reducing the potential for violations of the organic standards or unfair economic conditions for growers. We believe that discussion should be initiated at the National Organic Standards Board because it has been over a decade since this topic was last addressed in that venue, which serves as a forum for the entire organic community.

The inclusion of new regulations for grower groups in this larger proposed rule on enforcement is problematic. We think that the best approach is to take the grower group section out of the proposed rule, so that it may receive more discussion and consideration, without delaying the rest of the proposed rule, which needs to be implemented as soon as possible. The stakes for getting these rules for grower groups right are very high for many small farms around the world. It is worth taking more time to make sure the rules are as thorough and well-designed as possible. The best way to do that is to remove this section from the proposed rule, so that there is not unnecessary pressure to rush through this process to complete the larger package of issues in the proposed rule.

With that general caution about process, we offer the following specific thoughts in response to the questions for comment.

- 1. Should there be limits on gross sales or field sizes of individual grower group members? If yes, please describe these limits.*

We believe there is some need for a limit on the scale of operations that are eligible to participate in a grower group. We view grower groups as an appropriate way for smaller operations, who may not be able to manage organic certification on their own, to enter into the organic industry. There may be a point at which some operations grow in size or experience, making the process of getting their own certification more feasible. But we understand that for some operations this may never happen. It does seem to create the opportunity for imbalances in the decision-making process of a grower group if a few participating operations are radically larger than others, as well as creating challenges for calculating who should get an annual inspection or other oversight.

We believe the NOP should consider some guidelines for how to address limits on the scale of operations eligible to participate in grower groups, but understand that this is a very complex subject because of the huge range of operations around the world that participate in this system. We believe it is unlikely that a single metric like acreage or sales value will be sufficient to encompass the diversity of different grower group networks around the world, and it will likely require a multi-part test to assess this.

2. *Should there be a limit on the maximum number of members allowed in a grower group operation or in a grower group production unit? If yes, please describe these limits.*

This question also illustrates the need for a very thorough discussion of grower groups by the entire organic community. An arbitrary limit on the number of operations in a grower group will not be useful, because so many factors ranging from geographic range covered to the quality of the internal control system impact risk. But the complexity involved in managing larger numbers of members in a grower group, both for the internal control system and for certifiers, needs to be addressed.

3. *Should there be a limit to the geographical distribution of members? This includes limits to the maximum geographical proximity or distance between grower group members, grower group production or gathering areas, or grower group production units within a single grower group operation. If yes, please describe these limits.*

Similarly, this needs thorough discussion in the organic community. But a larger geographical distribution of members in a grower group does increase the complexity of the system and this must be considered in how certifiers and internal control systems define risk.

Additional Comments on Grower Groups

In addition to the questions posed for comment, we have other concerns that we think would best be addressed in a discussion with the organic community before finalizing any new rules for grower groups.

Protections for Farmers – The requirement that members of a grower group can only market their organic products through the grower group is logical from the perspective of how to create a system with control over organic integrity. However, this could create an imbalance in power between individual farmer members and the grower group entity. If farmers have some concern or dispute with the grower group entity over prices or other treatment, they have few or no options to seek a better price or better conditions if they cannot market their products elsewhere without losing their organic certification. Because they cannot sell the product as organic in any other way, they have no leverage in the transaction with the grower group buyer. This requires some other mechanism for protecting farmers from retaliation or other unfair treatment at the hands of the grower group entity. The NOP should convene a discussion with the larger organic community, including international organizations with experience in running grower groups, about models including cooperative structures or other grower protections that may be necessary to protect individuals participating in grower groups.

The experience of contract poultry growers and other contracting arrangements in the United States comes to mind when considering a requirement that a farmer must sell their product in a specific channel. The imbalance in power between the buyer/owner in a vertically integrated supply chain and individual producers can become severe and lead to unfair practices ranging from preferential treatment of some producers relative to others to retaliation against individual producers who challenge a decision by the buyer or complain to authorities. If the use of grower groups expands, especially in countries where vertically integrated supply chains is predominant, it will be important to have options for individual growers to protect their rights while still being able to participate in a grower group.

Livestock - The proposed rule would not allow livestock producers to participate in a grower group, but does not explain why. There are honey producers operating around the world who use a grower group model currently, and it does not seem appropriate to cut them off from the grower group system without clear justification. And with proper rules to address scale and other factors, small farms raising livestock may be interested in this model, especially if a grower group network could share the infrastructure for processing that is so often a limiting factor for animal products.

But if the grower group model were to be expanded to livestock, especially in the United States, there are additional factors to be considered. The model of vertically integrated contract livestock operations in the United States is not one that should be imitated in the organic sector. We do not want organic growers to end up having to suffer unfair treatment or prices as a condition of being able to market their products as organic. If livestock is to be allowed in the grower group model, the NOP should consider whether to require that individual growers own the animals and also have some ownership or control of the processing infrastructure and decision-making of the grower group.

Retail - Although it is not included in this proposed rule, OFA oppose the use of the grower group model for retailers. If retail operations require certification because they meet the definition of a handler under the new requirements of the proposed rule, individual locations should be required to be certified.

Certifier Requirements - The certification of grower groups is complex due to the complicated structure of this system and the need for an excellent understanding of the risks posed by large numbers of operations operating over a potentially large geographic area. The NOP should consider a special type of accreditation for certifiers that have the necessary training and experience to certify grower groups.

Single Crop – The NOP should clarify the use of the phrase “single crop” in the proposed rule on grower groups. As currently written, it could be interpreted to mean that a grower group can only market one crop, which could have negative implications for crop rotation on small farms.

European Union Standards - The European Union is in the process of revising their standards for grower group certification. Many grower groups around the world sell to both the U.S. and EU markets. Therefore, we encourage the NOP to consult with the EU before finalizing new U.S. standards on grower groups to ensure they are as compatible as possible to alleviate the burden on grower groups that sell into both markets.

Supply Chain Traceability and Organic Fraud Prevention

1. *Does the proposed definition of organic fraud encompass the types of fraudulent activities you witness in the organic supply chain?*

NOP should consider how to clarify this definition to make clear that entities that may not take legal possession of a product (because they are a broker, shipper, processor or facility that stores product owned by someone else) are still covered by this definition.

Additional Comments on Supply Chain Traceability and Organic Fraud Prevention

In section 205.501 (a) (21) of the proposed rule, we urge the NOP to provide more clarity on the difference between a “supply chain audit,” the term used in the regulation text, and a “traceability audit,” the term used in the narrative. A supply chain audit sounds much more comprehensive than a traceability audit, which could focus on the one stop forward and back approach of whether an operation can provide that level of traceability, as opposed to vouching for the entire supply chain of a product.

Additional Amendments Considered But Not Included in This Proposed Rule

Packaged Product Labeling

1. *For private-label packaged products, which certified operation(s) should be listed on the retail label (brand name/distributor, contract manufacturer, or both)?*

Both the brand name/distributor and the contract manufacturer should be listed on retail labels. This increases the transparency of the organic marketplace, which benefits producers and consumers by allowing them to understand the supply chain responsible for a product.

2. *Which certifying agent(s) should be listed?*

The certifying agent for both the brand name/distributor and contract manufacturer should be listed. If a product that is not sold under a private label must list its certifier, products sold under a private label must also list their certifier.

3. *Should the certifying agent listed on a label always be the certifying agent of the certified operation listed on the label (i.e., should the certifying agent match the operation)?*

Yes. Allowing labels to list certifying agents that do not match the operation that actually produced the product is not only allowing inaccurate information to be presented to consumers, which could undermine their confidence in the organic label, but also could encourage frequent changes in suppliers or certifiers by private label product manufacturers. This kind of frequent switching could create a dynamic where buyers are constantly pitting suppliers (and their certifiers) against each other to create an advantage by cutting prices paid to farmers or compliance with organic standards.

4. *Should listing contract manufacturers on labels be mandatory? Should it be optional?*

Listing contract manufacturers on labels should be mandatory. Organic consumers value transparency and providing this information on labels increases the transparency of the organic supply chain. Organic farmers and handlers also benefit from increased transparency in the supply chain, which helps them assess opportunities in the marketplace.

Expiration of Certification

4. *Could an operation with unresolved adverse actions renew certification?*

This depends on the number and severity of the adverse actions. The NOP should discuss with the organic community how to design a system that would not block an operation from getting its certificate renewed due to minor non-compliances, if the operation had a record that indicates that they are working in good faith to address the problems. But there should be an

option for an operation with a history of repeated adverse actions and a record of failing to address them to be prevented from renewing its certification.

5. *Would a grace period be appropriate for operations that failed to renew by the expiration date? If so, what length grace period would be appropriate?*

We have heard concerns from organic farmers that some certifiers could suspend a certification for missing the deadline to submit an application or pay fees. In this scenario, there should be some sort of grace period so that certifiers can contact the operation to make sure there wasn't a miscommunication or reasonable explanation for the delay. This is a topic that the Accredited Certifiers Association may be well-suited to address and develop best practice recommendations.

6. *What process should exist for an operation to regain organic certification should it allow its certification to expire?*

There are some valid reasons why a farm operation may have allowed its certification to expire, such as illness or other setback on their farm operation that caused the farmer to fall behind with paperwork. We suggest that the NOP discuss this topic with the organic community to try to find a reasonable process for an operation that had previously been in good standing and can offer a valid reason why their certificate expired to regain certification. One idea for doing this would be to only allow an operation to use this process once and also to include a farm using this process of regaining certification in any future assessment of risk for this operation (for determining unannounced inspections or other certification activities.)

7. *Should certifying agents notify certified operations of their upcoming expiration of certification?*

Yes, certifiers should notify certified operations of their upcoming expiration. This could prevent operations from losing their certification because they are a small business struggling to keep up with paperwork or because of some other disruption they are facing. If an operation needs this reminder repeatedly, this may be something that certifiers could consider as a factor in assessing risk for this operation.

Fees to AMS and Oversight of Certifying Agents' Fees

Fees Paid to NOP – We are concerned about the approach of having an agency rely on user fees for the revenue it needs to run operations. Creating a reliance on user fees brings with it some risk that a disruption to the industry generating the fees can leave an agency starved of funds it needs to operate. For example, because of the disruptions to global trade and air travel caused by the coronavirus pandemic, user fees that fund agricultural import inspection activities performed by CBP are hundreds of millions of dollars lower than projected for the year. This

has left that agency short of funding and in need of an emergency infusion of funds from Congress to maintain operations.⁶

We are also very concerned about the power dynamic created by a user fee relationship. When an agency is reliant on fees paid by the entities it is regulating, it can create a disincentive to penalize or remove one of those entities from the program because doing so could reduce the user fees that provide revenue for operations. We believe that shifting the NOP to a more user fee-dependent model is a mistake that will make the agency's enforcement activities harder to accomplish, which would undermine the viability of the organic industry.

NOP Oversight of Fees Paid by Certified Operations – In addition to the question of fees paid to the NOP, our members believe that the agency should also increase its oversight of the fees that operations pay for certification. Farmers report a wide range of fees charged by certifiers and wonder if more consistency would alleviate confusion about differences between certifiers and the burden of having to do research to choose a certifier. And as we continue to try to remove obstacles to new farmers getting their organic certification, the cost of certifying remains a barrier for many small operations and those run by socially disadvantaged farmers. The NOP should convene a conversation with the organic community to evaluate certification fees and whether options like a sliding scale for small, beginning, and socially disadvantaged farmers would increase participation in organic certification.

Related to the issue of certification fees, OFA remains very concerned about what happened to the organic certification cost share program this year. We urge the NOP to advocate with other USDA agencies such as the Farm Services Agency, which administers the cost share program, to help protect the cost share program and restore it to previous reimbursement levels.

Conclusion

This proposed rule is a long overdue first step towards the robust enforcement we need to protect the integrity of the organic label and the economic viability of organic farms that rely on consumer trust in that label. We urge the NOP to make the revisions we outline in this comment and to finalize the rule as soon as possible. To do so, we believe that the NOP should prioritize finishing the most urgent, and closest to completion, provisions of the rule such as the import requirements. If other provisions, such as the grower group regulations, need more discussion and evaluation, we suggest that the agency remove those sections from the proposed rule so that work can be done without holding up the rest of the package.

But once this rule is finalized, there is still more work to do prevent fraud in the organic sector. We believe that the NOP should seek from Congress any additional authority it needs to address fraud in domestic or international markets, such as stop sale authority. And we will

⁶ "Ag Groups Warn of Ag Inspection Funding Shortfall." *Feedstuffs*. June 30, 2020. <https://www.feedstuffs.com/news/ag-groups-warn-ag-inspection-funding-shortfall>

continue to advocate for resources for the NOP to increase the agency's capacity to hold itself to the same standards of training, information sharing and other enforcement activities that it has set out for other entities in this proposed rule.

Beyond personnel and funding, the NOP must have the will and mindset needed to prioritize enforcement actions and visibility in the marketplace to deter fraud. We understand that auditing is a cornerstone of the organic certification system. But an overemphasis on auditing things after the fact, at the expense of active involvement in the marketplace through verification activities and coordination with other agencies, will not solve the problem facing the organic industry.

Finally, we urge the NOP to take seriously its role as an accreditor and to acknowledge that its role as an accreditor is inextricably tied to its enforcement mandate. The oversight of organic certifiers is essential, and the accreditation procedures that are not addressed in this proposed rule are a key component of how organic standards are actually enforced on the ground. Ensuring that certifiers consistently interpret and apply the standards, everywhere they operate, is critical to the integrity of the organic label. And the NOP is the only entity that can ensure that this happens. As the agency works to finalize the provisions of the proposed rule and implement new requirements for certified operations and certifying agents, it cannot overlook the work it needs to do as well to fulfill its critical role in the enforcement process.

Thank you for the opportunity to comment on these issues that are of critical importance to U.S. organic farmers.

Sincerely,

A handwritten signature in black ink, appearing to read "Kate Mendenhall".

Kate Mendenhall
Director