

**National Organic Standards Board
Compliance, Accreditation, and Certification Sub-Committee
Discussion Document
Voluntary Retail Certification Requirement Clarification and Guidance**

August 13, 2013

1. Introduction

While the National Organic Standards and various National Organic Program (NOP) guidance resources are clear on the compliance expectations for growers, handlers, and livestock operators, the NOP's expectations are less clear for retail operators. Retail stores function not only as handlers of organic products, but also as purchasers, verifiers, and marketers of specific products and organic agriculture in general. In many cases, retail operations are exempt from the requirement for certification for handlers (7 CFR 205.101(a)(2)) and excluded from the certification requirement (205.101(b)(2)). However, this exclusion and exemption are not completely clear regarding the extent to which a retailer may handle and process products while still qualifying for the exemption and/or exclusion. Numerous retailers have become voluntarily certified as handlers, yet there are many areas where handling organic system plans (OSP) and operational expectations do not apply directly to retail operations, and the retail sector would benefit from clearer NOP guidance on its expectations for compliance for certified and non-certified retail operations. Finally, retailers who sell both organic and non-organic products, market their certification to consumers, often using the USDA seal. Retailers (along with other producers) need clear guidance on the use of the USDA Organic Seal and the "organic" claim in general, in the marketing of split operations.

The CAC Sub-Committee through this new discussion document is reaching out to the various organic stakeholders that are impacted by the 2009 NOSB guidance recommendation "Clarification of Marketing for Voluntary Retail Certification" and asking for their input as to what specific issues need more clarity to help with understanding and compliance. We would also like to solicit detailed information about any existing inconsistencies that could use more clarity to enable a more consistent process of review and accreditation by the various accredited certifying agents (ACAs), NOP, and ultimately the retailers themselves.

This is a very complex issue and it is the intent of the CAC Sub-Committee that after receiving feedback from the various stakeholders impacted by this discussion document, it can then move forward with an additional guidance recommendation for the National Organic Program. The intent is to attempt to accomplish this through education and outreach, in a way that can provide better clarification to assist the retailers and certifiers with a more clear and concise understanding of what is required of an organic retailer by the regulation.

2. Background

In 2009, the NOSB approved a CACS Guidance Recommendation entitled "Clarification of Marketing for Voluntary Retail Certification." This recommendation presented general background on the exemptions allowed for retailers, and described a need for clearer guidance around the use of the USDA seal and the "organic" claim in the marketing of organic retail stores. The recommendation acknowledged that the phrase "Certified Organic Retailer" may be challenging to a consumer, and identified a need for clearer guidance around the use of this term.

The 2009 recommendation then identifies a number of specific certification areas where the NOP should provide clearer guidance in order to facilitate consistency and clarity among retail operators:

- Guidance on the use of the USDA seal in marketing certified retail operations.
- Clear and consistent guidelines for deli and bakery operations, identifying precisely under what conditions certification is required. Additional guidance on the ACAs' role in managing voluntary retail certification programs. Clarity on retailers' role in improving the marketing of voluntary retailer organic certification.

A number of the 2009 NOSB's recommendations remain unaddressed by the NOP. Given that the issues described in the earlier recommendation remain critical, we have updated that recommendation to include a number of additional concerns and requests.

3. Relevant Areas of the Rule

§ 205.100 What has to be certified.

(a) Except for operations exempt or excluded in § 205.101, each production or handling operation or specified portion of a production or handling operation that produces or handles crops, livestock, livestock products, or other agricultural products that are intended to be sold, labeled, or represented as "100 percent organic," "organic," or "made with organic (specified ingredients or food group(s))" must be certified according to the provisions of subpart E of this part and must meet all other applicable requirements of this part.

(b) Any production or handling operation or specified portion of a production or handling operation that has been already certified by a certifying agent on the date that the certifying agent receives its accreditation under this part shall be deemed to be certified under the Act until the operation's next anniversary date of certification. Such recognition shall only be available to those operations certified by a certifying agent that receives its accreditation within 18 months from February 20, 2001.

(c) Any operation that:

(1) Knowingly sells or labels a product as organic, except in accordance with the Act, shall be subject to a civil penalty of not more than 3.91(b)(1)(xxxvii) of this title per violation.

(2) Makes a false statement under the Act to the Secretary, a governing State official, or an accredited certifying agent shall be subject to the provisions of section 1001 of title 18, United States Code.

§ 205.101 Exemptions and exclusions from certification.

(a) *Exemptions.*

(1) A production or handling operation that sells agricultural products as “organic” but whose gross agricultural income from organic sales totals \$5,000 or less annually is exempt from certification under subpart E of this part and from submitting an organic system plan for acceptance or approval under § 205.201 but must comply with the applicable organic production and handling requirements of subpart C of this part and the labeling requirements of § 205.310. The products from such operations shall not be used as ingredients identified as organic in processed products produced by another handling operation.

(2) A handling operation that is a retail food establishment or portion of a retail food establishment that handles organically produced agricultural products but does not process them is exempt from the requirements in this part.

(3) A handling operation or portion of a handling operation that only handles agricultural products that contain less than 70 percent organic ingredients by total weight of the finished product (excluding water and salt) is exempt from the requirements in this part, except:

- (i) The provisions for prevention of contact of organic products with prohibited substances set forth in § 205.272 with respect to any organically produced ingredients used in an agricultural product;
- (ii) The labeling provisions of §§ 205.305 and 205.310; and
- (iii) The recordkeeping provisions in paragraph (c) of this section.

(4) A handling operation or portion of a handling operation that only identifies organic ingredients on the information panel is exempt from the requirements in this part, except:

- (i) The provisions for prevention of contact of organic products with prohibited substances set forth in § 205.272 with respect to any organically produced ingredients used in an agricultural product;
- (ii) The labeling provisions of §§ 205.305 and 205.310; and
- (iii) The recordkeeping provisions in paragraph (c) of this section.

(b) *Exclusions.*

(1) A handling operation or portion of a handling operation is excluded from the requirements of this part, except for the requirements for the prevention of commingling and contact with prohibited substances as set forth in § 205.272 with respect to any organically produced products, if such operation or portion of the operation only sells organic agricultural products labeled as “100 percent organic,” “organic,” or “made with organic (specified ingredients or food group(s))” that:

- (i) Are packaged or otherwise enclosed in a container prior to being received or acquired by the operation; and

(ii) Remain in the same package or container and are not otherwise processed while in the control of the handling operation.

(2) A handling operation that is a retail food establishment or portion of a retail food establishment that processes, on the premises of the retail food establishment, raw and ready-to-eat food from agricultural products that were previously labeled as “100 percent organic,” “organic,” or “made with organic (specified ingredients or food group(s))” is excluded from the requirements in this part, except:

(i) The requirements for the prevention of contact with prohibited substances as set forth in § 205.272; and

(ii) The labeling provisions of § 205.310.

(c) *Records to be maintained by exempt operations.* (1) Any handling operation exempt from certification pursuant to paragraph (a)(3) or (a)(4) of this section must maintain records sufficient to:

(i) Prove that ingredients identified as organic were organically produced and handled; and

(ii) Verify quantities produced from such ingredients.

(2) Records must be maintained for no less than 3 years beyond their creation and the operations must allow representatives of the Secretary and the applicable State organic programs' governing State official access to these records for inspection and copying during normal business hours to determine compliance with the applicable regulations set forth in this part.

§ 205.270 Organic handling requirements.

(a) Mechanical or biological methods, including but not limited to cooking, baking, curing, heating, drying, mixing, grinding, churning, separating, distilling, extracting, slaughtering, cutting, fermenting, eviscerating, preserving, dehydrating, freezing, chilling, or otherwise manufacturing, and the packaging, canning, jarring, or otherwise enclosing food in a container may be used to process an organically produced agricultural product for the purpose of retarding spoilage or otherwise preparing the agricultural product for market.

(b) Nonagricultural substances allowed under § 205.605 and nonorganically produced agricultural products allowed under § 205.606 may be used:

(1) In or on a processed agricultural product intended to be sold, labeled, or represented as “organic,” pursuant to § 205.301(b), if not commercially available in organic form.

(2) In or on a processed agricultural product intended to be sold, labeled, or represented as “made with organic (specified ingredients or food group(s)),” pursuant to § 205.301(c).

(c) The handler of an organic handling operation must not use in or on agricultural products intended to be sold, labeled, or represented as “100 percent organic,” “organic,” or “made with organic (specified ingredients or food group(s)),” or in or on any ingredients labeled as organic:

(1) Practices prohibited under paragraphs (e) and (f) of § 205.105.

(2) A volatile synthetic solvent or other synthetic processing aid not allowed under § 205.605: *Except*, that, nonorganic ingredients in products labeled “made with organic (specified ingredients or food group(s))” are not subject to this requirement.

§ 205.310 Agricultural products produced on an exempt or excluded operation.

(a) An agricultural product organically produced or handled on an exempt or excluded operation must not:

(1) Display the USDA seal or any certifying agent's seal or other identifying mark which represents the exempt or excluded operation as a certified organic operation, or

(2) Be represented as a certified organic product or certified organic ingredient to any buyer.

(b) An agricultural product organically produced or handled on an exempt or excluded operation may be identified as an organic product or organic ingredient in a multi-ingredient product produced by the exempt or excluded operation. Such product or ingredient must not be identified or represented as “organic” in a product processed by others.

(c) Such product is subject to requirements specified in paragraph (a) of § 205.300, and paragraphs (f)(1) through (f)(7) of § 205.301.

§ 205.311 USDA Seal.

(a) The USDA seal described in paragraphs (b) and (c) of this section may be used only for raw or processed agricultural products described in paragraphs (a), (b), (e)(1), and (e)(2) of § 205.301.

(b) The USDA seal must replicate the form and design of the example in figure 1 and must be printed legibly and conspicuously:

(1) On a white background with a brown outer circle and with the term, “USDA,” in green overlaying a white upper semicircle and with the term, “organic,” in white overlaying the green lower half circle; or

(2) On a white or transparent background with black outer circle and black “USDA” on a white or transparent upper half of the circle with a contrasting white or transparent “organic” on the black lower half circle.

(3) The green or black lower half circle may have four light lines running from left to right and disappearing at the point on the right horizon to resemble a cultivated field.



Figure 1

§ 205.400 General requirements for certification.

A person seeking to receive or maintain organic certification under the regulations in this part must:

- (a) Comply with the Act and applicable organic production and handling regulations of this part;
- (b) Establish, implement, and update annually an organic production or handling system plan that is submitted to an accredited certifying agent as provided for in § 205.200;
- (c) Permit on-site inspections with complete access to the production or handling operation, including noncertified production and handling areas, structures, and offices by the certifying agent as provided for in § 205.403;
- (d) Maintain all records applicable to the organic operation for not less than 5 years beyond their creation and allow authorized representatives of the Secretary, the applicable State organic program's governing State official, and the certifying agent access to such records during normal business hours for review and copying to determine compliance with the Act and the regulations in this part, as provided for in § 205.104;
- (e) Submit the applicable fees charged by the certifying agent; and
- (f) Immediately notify the certifying agent concerning any:
 - (1) Application, including drift, of a prohibited substance to any field, production unit, site, facility, livestock, or product that is part of an operation; and
 - (2) Change in a certified operation or any portion of a certified operation that may affect its compliance with the Act and the regulations in this part.

Questions and/or Concerns requiring additional clarification:

The following questions and concerns should be reviewed in the context of the consumer and the integrity of the USDA organic seal. Consumers expect to be able to track every ingredient

listed on a product back to the organic certificate. Whether purchasing from a Farmers' Market or large store the consumer expects clear proof of certification. What mechanisms need to be in place to show proof of who certified the cut of meat, or the granola scooped out of a bulk bin at a large store?

Issue 1 – Who does 205.101(a)(2) apply to? What is a retailer who "handles but does not process?"

Section 205.101(a)(2) exempts retail food establishments or portions thereof that handle organic agriculture products but do not process them:

A handling operation that is a retail food establishment or portion of a retail food establishment that **handles** organically produced agricultural products **but does not process** them is exempt from the requirements in this part.

Section 205.2 defines "handle:"

Handle. To sell, process, or package agricultural products, except such term shall not include the sale, transportation, or delivery of crops or livestock by the producer thereof to a handler.

And "processing:"

Processing. Cooking, baking, curing, heating, drying, mixing, grinding, churning, separating, extracting, slaughtering, cutting, fermenting, distilling, eviscerating, preserving, dehydrating, freezing, chilling, or otherwise manufacturing and includes the packaging, canning, jarring, or otherwise enclosing food in a container.

By these definitions, all processing constitutes handling, but not all handling is processing. What are these instances of handling that are not processing? The very broad definition of "processing" includes any act of packaging or "enclosing food in a container." It appears that the only retail activity that could be considered handling but not processing is merchandising and stacking produce. What about filling bulk grocery bins, or displaying cuts of meat to be wrapped and labeled for the customer?

Issue 2 – Who does the 205.101(b)(2) exclusion apply to?

Section 205.101(b)(2) excludes retail food establishments or portions thereof that process on-premises raw and ready-to-eat food from certified organic products:

205.101(b)(2) (exclusions): A handling operation that is a retail food establishment or portion of a retail food establishment that processes, on the premises of the retail food establishment, **raw and ready-to-eat food from agricultural products** that were previously labeled as "100 percent organic," "organic," or "made with organic (specified ingredients or food group(s))" is excluded from the requirements of this part, except:

- (i) the requirements for the prevention of contact with prohibited substances as set forth in 205.272; and
- (ii) the labeling provisions of 205.310.

What is "raw and ready to eat?" Does this group of products include all fresh meat, bulk groceries, etc.?

Does this exemption apply to brick and mortar retailers who package products under the exemption, then sell them on websites and mail them to offsite customers? Does it apply to retailers who only operate online?

Does this exemption apply to farms that may process and/or package products on farm, then sell them at a farmer's market? What about selling such products at the farm gate?

Does this exemption apply to farms that may process and /or package products on the farm and then sell these goods via web-based sales?

Issue 3 - Under what conditions is a retailer exempt from certification? The following scenario is presented to help illustrate the confusion around exempt retail operations: A retailer purchases certified organic bulk olive oil and transfers it to a bulk delivery bin (fusti) as well as bottles it. The handling operations and the retail front are all in the same building. They "handle" and sell direct to customers through retail (store and website) sales. The fusti and the bottle have their own company label. No references to any certification or any use of the USDA organic seal are used. They also sell bottled olive oil on their website, as well as at their brick and mortar location. Would this operation be considered exempt? What are the ACAs hearing about these types of situations? What actions are being taken by the ACAs, if any? With the increase in web-based retail sales who is collecting or monitoring this newest form of retail sales? How is this going?

Issue 4 - To what extent can a retailer process foods without certification? Does all repackaging constitute processing? What about simple repackaging, such as placing figs in plastic containers and affixing stickers to them? Is there a way the "on premise" exclusions in section 205.101(b)(2) can be defined and made easier to understand so that more there can be more consistency for retailers?

Issue 5 - May non-certified exempt retailers make a "certified organic" claim for products processed in store? For an example: Is simply stacking and merchandizing produce such as vegetables or fruit, considered to be "handling" or can this be considered to be "processing"? Is this exempt?

Issue 6 - What are the guidelines for making a "Certified Organic Retailer" claim?

Note that some retailers are certified for a specific department, and some for many departments and product categories. Can a store that only has a single department certified claim to be a "certified organic retailer?"

While the regulations are clear as to the use of the USDA seal and the organic claim with individual food *products*, there are no guidelines for the use of the seal in marketing an entire store, portion of a store or product line which contains both organic and non-organic products. The same issue applies to split agricultural operations (e.g. a farm that grows both organic and

non-organic produce), and clear marketing guidance would be beneficial for these operations as well.

Issue 7 – How can we help to foster consistency between “all” retail operations, certified or not? How can we ensure consistency between how ACA’s and the NOP look at retail operations to ensure that they are in compliance?

Issue 8 – How can we communicate in a consistent and easy to understand manner what the NOP’s expectations are to the various retail operations, whether they are brick and mortar, sell at farmers markets, farm stands, or sell using on-line sales methods, to ensure that they are better informed. Thus, helping to ensure that they each have been properly communicated with and have been made aware of what is expected of them, as an organic retail operation.

Issue 9 – Is there anything else we could/or should look at? What are the inconsistencies that are currently aiding in creating confusion amongst retailers, ACA’s, or with the consumer? Suggestions on how these can be brought into a more balanced base for consistency purposes?

The CAC Subcommittee would like to solicit stakeholder feedback and input about areas of the rule that are unclear. The feedback will then be included in a recommendation to the NOP requesting the development of Education and Outreach guidance to clarify the existing rule. This clarification will provide retailers with a clearer more concise understanding of how the rule applies to a retail operation (certified or non-certified), so each retailer can ensure that they are in full compliance thus, helping to protect and maintain consumer confidence and organic integrity.

Motion: To approve the Retail Certification document as presented

Motion: Jean Richardson

Seconded: John Foster

Yes: 7 No: 0 Abstain: 0 Absent: 1 Recuse: 0

Approved by Joe Dickson, Subcommittee Chair, to transmit to NOSB August 13, 2013

