

Formal Recommendation
From: National Organic Standards Board (NOSB)
To: the National Organic Program (NOP)

Date:

Subject:

Chair:

The NOSB hereby recommends to the NOP the following:

Rulemaking Action:

Guidance Statement:

Other:

Statement of Recommendation: U

Rationale Supporting Recommendation (including consistency with OFPA and NOP):

Committee Vote:

Moved:

Seconded:

Yes:

No:

Abstain:

Absent:

Recuse:

National Organic Standards Board
Compliance, Accreditation, and Certification Sub-Committee
Request for NOP Clarification and Guidance on Retail Compliance and Certification

***Reviewed February 25, 2014 - Minor revisions.**

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, 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 Subcommittee (CACS) prepared a discussion document on this topic for the scheduled 2013 NOSB meeting in Louisville. While that meeting was not held, we received sufficient written comments from organic stakeholders to move forward with a proposal. The discussion document sought to engage all impacted stakeholders and ask for their input as to what specific issues need more clarity to help with understanding and compliance. We also sought 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.

Based on public comment received for the fall 2013 meeting, the subcommittee has prepared a proposal which asks the National Organic Program to provide enhanced education and outreach targeting the retail sector. 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.

The CAC subcommittee prepared a discussion document for the scheduled fall 2013 NOSB meeting, which was cancelled. However, the written public comment received for that discussion document was used in the development of the current proposal.

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 multiingredient 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.

4. Recommendations

The CACS requests that the NOP provide clear general education and guidance on organic compliance to the retail sector, and clarify several specific sections of the Rule as it applies to retail operations.

Education and Outreach

Our discussions and comments received highlighted the need for increased education and training for retailers, especially non-certified retailers. While certified retailers receive oversight and certification from Accredited Certifying Agents, non-certified retailers (including farmers markets and online retailers) do not have the benefit of direct certifier outreach. We believe that the NOP can play a more active role in educating retailers about the regulatory requirements that govern their operations. Since the implementation of the Rule, a number of retailers have become voluntarily certified. As a number of commenters noted, such certification can benefit consumers through third-party verification of organic sourcing, handling and merchandising activities. NOP educational materials for retailers should highlight the opportunity and potential benefits of voluntary retail certification. Enhanced education and support services for retailers will ensure consistent compliance with the National Organic Standards, increasing consumer understanding of and trust in the USDA organic label.

Clarification of the Rule as it Applies to Retail Operations

Written comments described a number of sections of the regulations which are unclear as to how and when they apply to retail stores. We ask the National Organic Program to issue concise guidance, in conjunction with the education and training described above, which clarifies the application of the Rule's regulatory requirements to retail operations. We support the summary presented by the Organic Trade Association (OTA), based on its consultation with its retail members, in its written public comments:

- *Section 205.101(a) and (b) - The requirements for an "exempt" retail establishment vs. the requirements for an "excluded" retail establishment are not clear.*
 - *Are exempt retailers required to comply with the commingling and contamination prevention standard (§ 205.272) and/or the labeling provisions (§ 205.310) of the NOP regulations? The regulation under exemptions and exclusions (§ 205.101) only specifies that exempt retailers maintain records as detailed under § 205.101(c), while excluded operations are subject to § 205.272 and § 205.310.*

- *Furthermore, are excluded operations required to comply with the record requirements of § 205.101(c)? The regulation specifies that records are to be maintained by “exempt” operations, but an “excluded” operation is not mentioned. In other words, the regulations appear to require the following:*
 - *Exempt retailers are required to maintain records as detailed under § 205.101(c).*
 - *Excluded retailers are required to comply with the commingling and contamination prevention standard and comply with the labeling provisions of § 205.310.*
- *Can an exempt or an excluded retail establishment handle or process NOP certified products and then sell the products off-site? For example, can the products be handled or processed on-site of the retail establishment, but then sold as “organic” at a farmers’ retail sales? The regulation is clear that excluded retail establishments must process “on the premises of the retail food establishment.” The regulation is not clear about “where” the sale of the product must occur.*
- *Sections 205.308, 205.309 and 205.310 – Labeling requirements:*
 - *Can an exempt non-certified retail establishment “handle” a product and then display the USDA seal or represent the product as “certified” organic? In other words, can they handle a product (either transfer the product from a container to a display case, or, transfer from the product from the original container to a store container (i.e., bulk flour bin)) and then transfer the information from the original container/label to the store display label?*

As noted in the discussion document, the exemption in 7 CFR 205.101(a)(2) applies to a retailer that “handles but not process” organic agriculture products. However, the definition of “handle” in §205.2 includes the term “process,” which is also defined in the regulation. While we believe that the intent of the regulation is to exclude retailers who handle organic products but do not otherwise transform them, we ask that the NOP clarify the precise contours of this exemption, especially as they apply to simple repackaging of organic foods.

We also ask that the NOP clarify the application of the exemption and exclusion to online businesses that ship organic products to customers, including the retail portions of certified farms and processing facilities that conduct online sales. As noted in the OTA’s comments, the regulation clearly requires that processing activities occur on the retail premises, but does not specify where the sales of such products must occur. Does the online sales activity of a retail business constitute a “retail food establishment,” and if the exemption does apply to online retailers, how should such products be labeled?

Finally, the written comments confirm an opportunity for clarification as to the conditions under which a retailer may label a product as “certified organic” or use the USDA seal when, for example, organic produce is removed from packaging and merchandised, or a bulk grain is placed into a bulk bin. The OTA notes:

There appears to be some contradiction between sections 205.308, 205.309 and 205.310 of the regulations, all of which together address how products at the point of retail can be labeled, and how products produced on exempt and excluded operations can be labeled.

As we have explained above, § 205.308 could be read to mean that a product produced in a certified facility can be displayed in a retail display using the USDA seal and identifying mark of the certifying agent. There is some confusion, however, about whether “prepared in a certified facility” would apply to the retailer that is handling or processing the product, in which case the retailer would need to be certified in order to display the USDA seal or make reference to certification. Furthermore, § 205.310 states that an agricultural product produced or handled in an excluded or exempt operation must not display the USDA seal or represent the product as certified organic.

The current and common practice at non-certified exempt retail establishments is to handle certified organic products and transfer from a box to a display case or from a bag into a bulk bin the same information as provided on the original container. For example, a bag of certified organic flour would be transferred to a bulk bin and the bulk bin label would display “certified organic flour. “ It may also display the USDA seal. We believe this practice is compliant, as supported by section § 205.308 of the regulations. However, clarification is needed.

In conclusion, we ask that the NOP develop clear and actionable guidance for retailers on the points noted above and in the earlier discussion document. The development of such guidance should include the consultation of retailers and ACAs. We believe that focused education and outreach to the retail sector will help improve compliance with the regulation, foster consistency across certified and non-certified operations, and promote consumer confidence in the USDA Organic label. Retailers represent the final interface with consumers in the organic supply chain, and it is crucial that organic integrity in merchandising, handling and marketing be vigilantly maintained.

Recommended Motion:

Motion to accept the Request for NOP Clarification and Guidance on Retail Compliance and Certification proposal

Subcommittee Vote:

Motion by: Jean Richardson

Seconded by: John Foster

Discussion: none

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

Approved by Carmela Beck, Subcommittee Chair, to transmit to NOSB February 22, 2014.