

**FORMAL RECOMMENDATION BY THE
NATIONAL ORGANIC STANDARDS BOARD (NOSB)
TO THE NATIONAL ORGANIC PROGRAM (NOP)**

Date: 11-10-06

Subject: Guidance – Listing of Certifying Agents Name on Packaged Product

Chair: Kevin O’Rell

Recommendation

The NOSB hereby recommends to the NOP the following:

Rulemaking Action: _____
Guidance Statement: XXX
Other: _____

Statement of the Recommendation (including Recount of Vote): See attached NOSB responses to 3 NOP Questions that are being submitted as guidance.

Board Vote: Motion: Andrea Caroe **Second:** Bea James

14- Yes 0 – No 0 – Abstain 0 – Absent

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

The USDA National Organic Program (NOP) has requested that the NOSB provide recommended guidance concerning clarification of the listing of a Certifying Agent’s name on a packaged product. The NOP can review and distribute this recommendation to accredited certifying agents and post on the NOP website.

Response by the NOP:

**National Organic Standards Board
Accreditation and Certification Committee
October 19, 2006**

Guidance: Listing of Certifying Agent's Name on Packaged Product

Introduction

The USDA National Organic Program (NOP) has requested that the NOSB provide recommended guidance concerning clarification of the listing of a Certifying Agent's name on a packaged product. The NOP can review and distribute this recommendation to accredited certifying agents and post on the NOP website.

Background

The following question was submitted to the National Organic Program (NOP) for clarification:

"A retail establishment has been voluntarily certified by an USDA accredited certifying agent (ACA), "Certifier X," to sell organic products. The certified retail establishment contracts with a certified organic handling operation, certified by "Certifier Y," to manufacture organic products for distribution by the retail establishment. The organic products that are produced by the contracted handling operation are also packaged and labeled by the handling operation. However, the labels used to label the packaged products are supplied to the contracted handling operation by the certified retail establishment. The certified retail establishment does not perform any processing function for this product during its manufacture."

The role of the retailer, handler, and processor in certification.

Under the rule as written, retailers and other companies that commission the production and handling of organic products, do not have to be certified if they do not physically "handle" products. The rule specifically gives exemption from the requirements of certification for "retail" operations; on the other hand, as stated under CFR 205.100 the *processing* operations that manufacture the products must be certified. However, retail operations are not clearly defined by the regulation and retail establishments that do opt for voluntary certification are certified as a handler. For the sake of this discussion we want to clarify that a commission merchant may not be a retailer, yet retail establishments that also commission private label products can be considered a commission merchant. Both retailer and commission merchant can be certified under voluntary certification as a handler. The term 'commission merchant' and 'retailer' may be used in this discussion interchangeably when referring to private labelers.

Understanding the Retailers Responsibility:

The regulation defines Retail food establishment to be:

A restaurant; delicatessen; bakery; grocery store; or any retail outlet with an in-store restaurant, delicatessen, bakery, salad bar, or other eat-in or carry-out service of processed or prepared raw and ready-to-eat-food.

Voluntary Certification applies to retail establishments and is vaguely described in the December 21, 2000 Federal Register (page 80552):

This regulation establishes several categories of exempt or excluded operations. An exempt or excluded operation does not need to be certified. However, operations that qualify as exempt or excluded operation can voluntarily choose to be certified. A production or handling operation that is exempt or excluded from obtaining certification still must meet other regulation requirements contained in this rule as explained below.

Although the voluntary certification of a retail operation as a handler offers the same responsibilities and benefits as mandatory establishments that are certified as a handler, both are certified to the extent of the rule for handling only. 205.303(b)(2), 205.304(b)(2).

The regulation defines “handler” 205.2 to mean:

Any person engaged in the business of handling agricultural products, including producers who handle crops or livestock of their own production, except such term shall not include final retailers of agricultural products that do not process agricultural products.

The regulation further defines “Handle” 205.2 to be:

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

Additionally, Section 205.101(a)(2) of the rule states:

*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.*

Lastly, regarding defining the role of the processing Section 205.2 defines processing as:

*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*

As is indicated, voluntary certification is offered to entities that opt to participate in certification in a situation in which the regulation does not mandate certification. Since retailers are exempt under 205.101 (a)(2), participation in the NOP certification program is considered voluntary. However, as a participant, applicants for voluntary certification are responsible for compliance with all requirements of the program. 205.400 Likewise, ACAs that provide voluntary certification are accountable for their decision to grant voluntary certification. 205.404

*The regulation requires that products making an organic claim (100% organic, organic, or made with organic ****) disclose the name of the “final handler” on the ingredient panel.*

Since the retailer does “handle” organic products by their effort “to sell”, a retailer may apply for voluntary certification as an organic handler. Since this retailer takes on the responsibility of the regulation and is certified by an ACA to those requirements, and since the retailer is a handler, it is then reasonable to state that the retailer may voluntarily become the final handler.

When a retailer assumes the functions of a handler in commissioning an organic product to be produced by a certified co-packer they are able to seek voluntary certification. In doing so they adopt all of the rights and responsibilities of a certified handler.

Some possible scenarios of retailer activity which would qualify them for mandatory or voluntary certification are:

Requires no certification. Can use voluntary certification:

1. Exclusively receives and sells packaged products, with no handling or processing of the products. They come in wrapped and leave wrapped with no handling or repackaging in between.
2. Receives and sells packaged products, with some handling operations such as (produce storage, stacking, cheese cutting and wrapping) but no processing.
3. Receives and sells packaged product with handling and processing within confines of the retail establishment only (prepared foods, bakeries, etc).

4. Limited co-packer private labeling (retailer or commission merchant selects pre-existing products and has them relabeled with retailer or commission merchant logo)
5. Extensive co-packer private labeling (retailer or commission merchant is voluntarily certified and plays a major role in specifying attributes of PL products and commissioning their production); identity of co-packer is invisible to consumer, and retailer or commission merchant uses their certification on product thus assumes legal liability for product.

Requires mandatory certification:

1. Retailer (or other commission merchant) that actually processes and packages its own private label products (bakeries etc) not intended for ready to eat service.

Additionally, under the FDA regulation 21 CFR 101.5 labeling regulations clearly state the following:

Food labels must list:

Name and address of the manufacturer, packer or distributor. Unless the name given is the actual manufacturer, it must be accompanied by a qualifying phrase which states the firm's relation to the product, e.g., "manufactured for" or "distributed by."

Street address if the firm name and address are not listed in a current city directory or telephone book;

City or town;

State (or country, if outside the United States); and

ZIP code (or mailing code used in countries other than the United States).

This FDA regulation supports adequate traceability by having two points of contact for an investigation by requiring the name of the commission merchant as well as the certifiers name on the final product.

Furthermore:

In section 205.2 the term "otherwise manufacturing" could be misinterpreted to include or not include the action of a retailers involvement with a private label product. For example, many retailers are involved in procuring ingredients for a product, providing labels for a final product, and commissioning specific details for a final product, all of which could be considered a function of processing.

However, if a retailer *chooses* voluntary certification, such as in the example, and *chooses* to use their certifier's name on the final product they *then* become liable for product claims, processes, or systems used to create said product, and assume liability and responsibility, thus becoming the first point of contact in the event of an investigation.

A retailer that is not involved in the processing of the final product is NOT required to undergo mandatory certification as a processor, or voluntary certification as a handler. If the retailer who commissions the organic product chooses not to be certified, then the co-packer (processor) would become the entity responsible for compliance with the regulation in full and their certifier's name must be indicated on the final product and would also be the first point of contact in the event of an investigation.

Guidance: The committee wants to emphasize the statements above which clarify that if the voluntarily certified handler (private labeler) uses the name of its certification agent on its package it assumes responsibility for the product otherwise the manufacture or processor of any final said product is the responsible party and assumes all liability for compliance with the regulation.

Specific Questions Addressed from Submission

Sections 205.303 (b) (2) and 205.304 (b) (2) of the NOP regulations state that "On the information panel, below the information identifying the handler or distributor of the product and preceded by the statement, "Certified organic by...", or similar phrase, **identify the name of the certifying agent that certified the handler of the finished product: Except**, that the business address, Internet address, or telephone number of the certifying agent may be included in such label."

1. Based on the scenario presented and the requirements contained in the NOP regulations, which ACA is "required" to be identified on the label of the packaged product, "Certifier X" or "Certifier Y?" Please provide your rationale.
2. Can a final retail establishment that does not process agricultural products be considered a handler under the definition of "handler" contained in the NOP regulations? Please provide your rationale.
3. Can a final retail establishment that does not process agricultural products be certified as an organic handler under the NOP regulations?

The CAC Committee recommends the following responses to questions submitted by the NOP:

Response to Question 1

1. *Based on the scenario presented and the requirements contained in the NOP regulations, which ACA is "required" to be identified on the label of the packaged product, "Certifier X" or "Certifier Y?" Please provide your rationale.*

The scenario states that the retailer "has been voluntarily certified by an USDA accredited certifying agent". The retailer in this scenario is an exempt retailer that is voluntarily certified and may *choose* to use their accredited certifying agent "Certifier X" on the final product. In doing, they assume full liability and responsibility and become the first point of contact in the event of an audit trail. If the retailer does not volunteer for certification, then "Certifier Y" would be represented and they then assume full responsibility and liability for the manufacturer who remains "final handler" and would become the first point of contact in the event of an audit trail.

Response to Question 2

2. *Can a final retail establishment that does not process agricultural products be considered a handler under the definition of "handler" contained in the NOP regulations? Please provide your rationale.*

Yes, under the provisions stated in the preamble of the regulation that allow for an operation to voluntarily participate in certification. Operations that are not mandated for certification under the regulation may take on this responsibility and participate in the rights associated with that certification.

Response to Question 3

3. *Can a final retail establishment that does not process agricultural products be certified as an organic handler under the NOP regulations?*

Yes, again the preamble allows for voluntary participation of entities that are not required to become certified. Based on the fact that retailers function in a capacity "to sell" organic products, these certifications are considered that of a handler.

Committee vote

Motion made by Joe Smillie and seconded by Kevin O'Rell

7 – Yes 0 – No 0 – Abstain 0 – Absent

Minority opinion

None

Board vote

Motion made by Andrea Caroe and seconded by Bea James

14 –Yes

0 – No

0 – Abstain

0 – Absent