



October 5, 2020

Dr. Jennifer Tucker
Deputy Administrator
National Organic Program
USDA-AMS-NOP
Room 2646 – So., Ag Stop 0268
1400 Independence Avenue SW
Washington, DC 20250-0268

Re: Strengthening Organic Enforcement Proposed Rule;
Docket Number AMS-NOP-17-0065; NOP-17-02

Submitted electronically

NOC Comments on the Strengthening Organic Enforcement proposed rule

Dear Dr. Tucker:

The National Organic Coalition (NOC) is a national alliance of organizations working to provide a "Washington voice" for farmers, ranchers, conservationists, consumers, and industry members involved in organic agriculture. NOC seeks to advance organic food and agriculture and ensure a united voice for organic integrity, which means strong, enforceable, and continuously improved standards to maximize the multiple health, environmental, and economic benefits that organic agriculture provides. The coalition works to assure that policies are fair, equitable, and encourage diversity of participation and access.

Below we provide comments on the Strengthening Organic Enforcement proposed rule.



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Introduction

NOC strongly supports the Strengthening Organic Enforcement (SOE) proposed rule. NOC thanks the USDA Agricultural Marketing Service (AMS) and National Organic Program (NOP) for their commitment to making regulatory changes to advance organic integrity. We urge the USDA to finalize the rule as soon as possible to make long-awaited improvements in the organic standards to address fraud in the organic supply chain and enforcement challenges.

NOC, NOC Members, and Network Affiliates have recognized and asked for action to address problems with fraud in the organic supply chain, especially with organic grain imports, since 2015. Issues of fraud were a focus in NOC's Pre-NOSB meeting in St. Louis in the fall of 2016, and in many subsequent meetings NOC has organized with the USDA, organic stakeholder groups, and Members of Congress. NOC strongly advocated for 2018 Farm Bill provisions to address uncertified entities, import certificates, and NOP's authority to oversee certification activities and certification agencies' foreign satellite offices. We applaud the NOP and the National Organic Standards Board (NOSB) for their sustained commitment to addressing both domestic, as well as international fraud in organic supply chains. NOC believes the SOE proposed rule is an important first step for a broader set of much-needed changes. NOC is committed to addressing these complex issues through our support of the SOE proposed rule and beyond to ensure that current gaps that allow for fraud, loopholes, and lack of enforcement are addressed to ensure integrity, consistency across certifiers, and trust in the USDA organic seal.

The SOE proposed rule makes significant and impactful changes to the organic regulations that are critical to preserving consumer and industry confidence in the organic seal. In our comments below, NOC identifies the areas of the proposed rule that we support, areas that require clarification, and gaps we see in the proposed rule that we would like the USDA Agricultural Marketing Service (AMS) to address in the final rule.

In summary, NOC strongly supports the following provisions:

1. Regulatory changes to require more handling operations to become certified;
2. Additional labeling requirements to ensure that nonretail containers identify the product as organic and display the name of the certifying agent;
3. Codification of the requirement that certifiers conduct unannounced inspections for a minimum of 5% of the operations they certify annually;
4. The clarification that mass balance and trace back audits should be conducted annually for every organic operation as part of the annual inspection process;



5. A requirement that inspectors and certification review staff have the knowledge, skills, and experience needed to conduct inspections and perform reviews based on the scope and scale of the operations they are inspecting;
6. A requirement that inspectors and certification review staff complete a minimum of 20 hours annually of training on relevant topics;
7. Codification of requirements for grower groups;
8. The inclusion of a definition for “organic fraud” in the regulations;
9. Consistent implementation of existing and additional record keeping requirements for operations and certification agencies to ensure traceability;
10. A requirement that certifiers conduct supply chain audits for high risk operations;
11. A requirement that certifiers share information with one another for enforcement purposes; and
12. Requirements for certified operations to develop fraud prevention plans.

We elaborate on our support for these and other provisions in our detailed comments below. In some cases, we ask that AMS go further in their requirements to ensure full supply chain traceability or to address additional concerns.

NOC appreciates that the proposed rule reflects amendments to the OFPA included in the Agricultural Improvement Act of 2018 which were widely advocated for by organic community stakeholders, and that portions of the proposed rule reflect NOSB recommendations. We are concerned however that the National Organic Standards Board (NOSB) has not had an opportunity to weigh in on all aspects of the proposed rule, as required by OFPA.¹ NOC requests that AMS provide the public and the members of the NOSB with a detailed analysis of the SOE rule’s provisions to explain how each of those provisions align with recommendations made by the NOSB. The NOSB should also be given an opportunity to weigh in on provisions that it has not

¹ See 7 U.S.C. § 6503(c) “In developing [the national organic production] program...the Secretary shall consult with the National Organic Standards Board”; see also 7 U.S.C. §6518(a) “The Secretary shall establish a National Organic Standards Board...to assist in the development of standards for substances to be used in organic production and to advise the Secretary on any other aspects of the implementation of [OFPA].”



had a chance to consider. NOC is concerned that the SOE proposed rule does not state the position of the National Organic Standards Board (NOSB) on the provisions of this rule, nor does it confirm that the agency consulted with the NOSB on the proposed rule.

NOC has also identified significant gaps in the proposed rule and concerns that we would like AMS to address in the final rule and, in some instances, through other mechanisms as well.

The gaps we have identified include:

1. **Electronic Import certificates:** It is not clear that the requirements for import certificates will have the intended impact. NOP import certificates are intended to provide an accurate accounting of the organic status and quantity for a specific shipment of imported organic products, thus ensuring that conventional products do not fraudulently enter the organic marketplace, and to link the physical product with the associated organic certification agency and organic operations. In the explanatory text that accompanies the proposed regulatory language on import certificates, AMS states that the organic product can come into the port of entry without the accompanying documentation – the NOP Import Certificate must be uploaded into the ACE system within 10 calendar days of the shipment entering the United States. Allowing importers 10 days to file the electronic certificate after the shipment has reached a U.S. port could mean the difference between preventing fraudulent products from entering the U.S. and having to try to retrieve them once they have entered commerce. Furthermore, if the information in the import certificate is insufficiently verified or up to date, the certificate provides a false sense of confidence in the organic status of the product. These proposed regulations do not sufficiently prevent conventionally produced imports from being fraudulently represented and sold as organic. Fraudulent import certificates could exacerbate challenges if it leads to a false sense of confidence. NOC urges the USDA to shorten the time frame allowed for an importer to submit an electronic import certificate into the ACE system.
2. **Gaps in regulatory language:** In some parts of the proposed rule, there is no specific regulatory language that clearly accomplishes the intent expressed by the explanatory text that accompanies the proposed rule. Without adding specific regulatory language, certain provisions cannot be consistently enforced by the NOP.
 - a. **Reporting organic acreage:** NOC has strongly advocated that AMS implement a new requirement that certifiers report product and acreage data into organic integrity database (OID). NOC recommends that AMS include specific regulatory language in the proposed rule to codify this requirement. NOC recommends that AMS use a sound and sensible approach to ensure that for certifiers working with small, diversified producers, data can be captured in a reasonable way. AMS must



establish meaningful crop categories, ideally ones that are harmonized with the NASS codes used in the 2014 and 2015 Organic Certifiers Surveys that NASS conducted. Accredited Certifying Agents (ACAs) should be required to report aggregated production area certified by crop and location at least on an annual basis to the Organic Integrity Database (OID).

- b. **Risk-based:** NOC is requesting that AMS formalize and clarify what the terms “risk-based” and “high-risk” mean in various contexts. AMS outlines criteria for assessing risk in several parts of the proposed regulation:
- i. In the section of the proposed rule that deals with **Grower Groups**, on pages 123-124 of the proposed rule,² AMS describes risk factors certifying agents should consider when determining which grower group members to inspect;
 - ii. In the section of the proposed rule related to **On-Site Inspections**, AMS explains that unannounced inspections could be conducted randomly, based on risk, or in response to complaints or investigations. On pages 137 and 138, AMS outlines the “risk-assessment criteria” certifying agents could consider when determining which operations, products and supply chains are vulnerable to fraud and intentional mishandling;³
 - iii. In section 18 of the proposed rule on **Supply Chain Traceability and Organic Fraud Prevention**, AMS introduces a new requirement that certifying agents develop procedures for “identifying high-risk operations and agricultural products to conduct risk-based supply chain audits;”
 - iv. AMS has adopted a risk-based approach to conducting accreditation audits for certifying agents, and;
 - v. AMS also uses “high-risk” as part of the NOP Livestock Compliance Initiative, with little transparency on how those risk determinations are made.

² Strengthening Organic Enforcement Proposed Rule, pgs. 123-124. <https://public-inspection.federalregister.gov/2020-14581.pdf?1596545113>

³ Strengthening Organic Enforcement Proposed Rule, pgs. 123-124. <https://public-inspection.federalregister.gov/2020-14581.pdf?1596545113>



Therefore, NOC recommends that AMS develop guidance to delineate some of the criteria and risk-factors AMS would like to see certifiers consider in these various contexts, and that AMS will use in conducting accreditation audits. The guidance document should be broken into subsections that pertain to different contexts. A section of the guidance document should detail the criteria used by AMS in its risk-based approach to accreditation audits; these criteria should reflect the NOSB recommendation on “Risk-based Accreditation Oversight” from October 2018.⁴ NOC recognizes that the criteria used may fluctuate based on “market trends, enforcement actions, and changing practices within the organic industry.” Guidance will be helpful in communicating best practices and ensuring consistency while still allowing certifying agents and AMS the necessary flexibility in developing risk-based approaches of oversight.

- c. **Other areas:** Throughout our more detailed comments below, we make note of areas where we believe the regulatory text falls short of fully conveying the intent of the SOE proposed rule.
3. **Role and responsibility for USDA NOP:** The proposed regulations impose numerous new requirements for operations and certifiers. NOC supports these requirements with some clarifications, additions, and changes. We are also calling on AMS, the NOP, and CBP to update and change practices to catch up to the new challenges we face in organic supply chains. The proposed rule is silent in this area.
 - a. **Training and Qualification for NOP staff:** The rule requires that inspectors and certification review staff have the necessary qualifications, but does not say how the NOP will ensure that accreditation auditors and enforcement staff are trained, qualified, and have the relevant knowledge.
 - b. **Information sharing between accreditation agencies:** The proposed rule requires certifiers to share information with other certifiers in efforts to enforce the organic regulations and crack down on fraud. In a similar vein, NOC believes it is imperative that the NOP shares information with other accreditors to flag risky certifiers and operations in the organic supply chain. NOC would like to see this commitment articulated in the organic regulations.

⁴ <https://www.ams.usda.gov/sites/default/files/media/CACSRiskBasedAccreditationOct2018Rec.pdf>



- c. **Other areas:** Throughout our more detailed comments below, we make note of areas where we believe the regulatory text falls short of clearly delineating the role and responsibility of the USDA NOP.
4. **Unintended consequences for small and lower-resourced operations:** NOC strongly supports provisions that increase supply chain traceability, but we have important questions about how these provisions could inadvertently negatively impact some operations in the organic supply chain.
- a. **On farm processing and seed production:** We are concerned that new requirements for more operations to get certified could have the unintended consequence of creating disincentives for on-farm organic seed production or negatively impact operations in the organic supply chain by requiring these operations to obtain handling certificates. NOC has proposed language that would clarify which types of operations can be certified under the crops scope to clarify when a handling certificate would not be necessary, and we describe that proposed language on page 16 of these written comments. Our goal is to avoid imposing unreasonable burdens on operations engaged in on-farm seed production and other post-harvest handling activities with products produced on their own farms.
 - b. **Grower groups:** NOC has put forward recommendations to ensure that new grower group requirements fully address any organic integrity concerns, but also do not unduly harm or cause loss of organic market access for legitimate grower groups and their members. These farmers represent the largest percentage of organic farmers worldwide.

We discuss these gaps and our recommended changes to the SOE to address them in the detailed comments below.

NOC recognizes that the SOE proposed rule is a first step in addressing issues of supply chain traceability, fraud, equal enforcement, and consistency across certification agencies. Additional actions are needed from AMS and NOP to ensure integrity, as well as consumer and industry trust in the organic seal.

- 1. **More frequent audits:** To address domestic and international fraud, the NOP must also conduct more frequent audits of certification agencies, including certifiers' foreign satellite offices, using a risk-based approach. Desk audits are necessary during the pandemic. Unannounced as well as scheduled audits should be conducted in geographic



areas where risk has been identified as soon as it is safe to resume travel, such as Eastern European countries, or Texas/California as recommended in the executive summary from the 2018 American National Standards Institute (ANSI) Peer Review Panel Report.⁵

2. **Risk-based approach:** The NOP should adopt criteria for risk-based accreditation oversight based on the NOSB recommendation on this topic from October 2018.⁶ For example, the NOP should give additional scrutiny to a certifier whose accreditation has been revoked by a nation with which the U.S. has an organic equivalency arrangement and should work closely with other accreditation bodies operating in the region where fraud has been found. The NOP should explain to the NOSB and public stakeholders through regular updates how the NOP's accreditation and enforcement activities reflect this risk-based approach.
3. **Using import data to detect fraud:** The NOP should implement a policy to conduct an automatic investigation whenever there is a significant surge in imports for a specific product category to determine if fraudulent activity is contributing to that increase.
4. **Increase education and oversight:** NOP should increase its education and oversight of all entities and agencies that have control over non-retail containers, including trailers, tanks, railcars, shipping containers, grain elevators/silos, vessels, cargo holds, freighters, barges, or other methods of bulk transport or storage. While a visual indicator on a container—potentially the USDA organic seal—is a great first step, NOP should design simple, clear training modules on the specifics of what that organic means for the organic products in these containers, including:
 - a. What is organic?
 - b. What fumigants can and cannot be used.
 - c. Prohibited materials.
 - d. Prohibition on opening containers.
5. **Annual reporting:** Acknowledging the breadth of the entities and agencies that have control over these non-retail containers, NOP should include information in reports

⁵ 2018 Peer Review Executive Summary for USDA AMS NOP, May 2018:

<https://www.ams.usda.gov/sites/default/files/media/2018USDANOPPeerReviewExecutiveSummaryReport.pdf>

⁶ Formal Recommendation from NOSB to NOP on Risk-Based Accreditation Oversight, October 25, 2018:

<https://www.ams.usda.gov/sites/default/files/media/CACSRiskBasedAccreditationOct2018Rec.pdf>



provided at the NOSB meetings twice a year regarding progress in communicating these controls throughout the entire non-retail supply chain.

6. **Learning from other sectors:** The NOP should identify other industries/products that have a longer history of dealing with fraud and learn from the measures they took and their outcomes and should share these findings with the NOSB and the public.
7. **Leverage OIG, FAS, CBP resources:** NOP should continue to work to leverage the resources of other USDA sub-agencies and other federal agencies to include them in the effort to deter fraud in organic supply chains.
8. **Organic Imports Interagency Working Group:** This interagency working group with representatives from the NOP, APHIS, and CBP, should continue to convene regularly.
 - a. The working group should examine the limitations of the NOP's authority over uncertified entities engaging in fraudulent activity, as well as for operations that have surrendered their certificates, including plans to use trademark protection to crack down on bad actors. The working group should assess and share with the NOSB and organic stakeholders which additional measures will be pursued beyond the provisions in the 2018 Farm Bill and Strengthening Organic Enforcement (SOE) proposed rule to address challenges related to uncertified operations that are committing fraud.
 - b. The working group should consider ways to use insurance information to flag potentially fraudulent activity. Imported grain that is insured as a conventional product and then sold as organic is suspect.
 - c. The working group should also examine strategies to prevent imports fumigated with prohibited substances from being sold, labeled, or represented as organic. NOC is concerned that the provisions in the SOE do not adequately address this issue, which we will address in our more detailed comments.
 - d. The working group should assess whether new legislation is needed to improve the ability to track organic imports. For example, can CBP currently require bills of lading for incoming shipments to include more detailed information about the contents of the shipment to give the ports of entry information that would be useful in the inspection process, or would additional legislative authority be needed to implement such a requirement?



9. **Harmonized tariff codes:** AMS, CBP, and organic stakeholders must determine how to obtain additional harmonized tariff codes through the US International Trade Commission. These codes determine which organic products are tracked by USDA's Foreign Agriculture Service via the Global Agricultural Trade System (GATS). Currently, the U.S. government only tracks the value and quantity of a limited number of organic imports product categories based on the limited number of codes in the harmonized tariff schedule. More complete data on organic imports is essential to flag areas of risk.
10. **Stop sale authority:** NOC seeks clarification regarding whether or not the NOP has stop sale authority. If stop sale authority is within the NOP's control, we further seek clarification on what practices are in place to reimburse for losses when this authority is executed and the product does not end up being fraudulent, such as an indemnification fund.
11. **Peer review audits:** The NOP should continue to conduct peer review audits annually and should make the full results publicly available, as required by OFPA and the organic regulations.
12. **Animal welfare:** AMS should immediately reinstitute the Organic Livestock and Poultry Practices rule to require meaningful outdoor access for poultry and egg operations in compliance with the organic law. The Organic Livestock and Poultry Practices rule has been withdrawn by the USDA, which sends the wrong message to consumers and a market that is reliant on public trust in the certified organic label. Most certified operations already meet the standards in the withdrawn rule. Operations that are not compliant with industry best practices must be brought into compliance to ensure consistency and to meet consumer expectations.
13. **Origin of Livestock:** AMS should immediately close loopholes and clarify requirements for the transition of conventional dairy cows into organic herds. With broad support from the organic community, Congress required in FY 2020 agriculture funding legislation that AMS finalize the long-delayed Origin of Livestock proposed rule by June 17, 2020. AMS has missed that deadline. Organic dairy farmers are suffering and continued delays in implementing this rule will prolong the dire economic fate facing organic dairy farmers, as well as jeopardize consumers' trust in the organic label.
14. **Livestock Compliance Initiative & Pasture Rule Enforcement:** The NOP should continue the Livestock Compliance Initiative to identify bad actors in dairy and other livestock sectors so NOP can bring them into compliance or exclude them from the organic program. NOC believes dairy and livestock Pasture Rule enforcement is still falling short.



NOP needs to do more to make sure all operations meet the requirements for pasture access, dry matter intake (DMI) compliance on pasture, livestock living conditions, and livestock health care standards not only on paper, but also in actual practice.

15. **Hydroponics:** NOP must halt the continued certification of hydroponic systems until the NOSB has fully reviewed these systems and made recommendations to the NOP about the compatibility of hydroponic systems with the requirements of OFPA and its implementing regulations. If it is deemed that certain hydroponic systems are appropriate for organic, certification of such systems should not be permitted unless and until NOP rules are promulgated to set standards.

Economic Impact Analysis

NOC strongly supports the implementation of the SOE proposed rule to strengthen trust in the USDA organic program. We concur with the NOP that when the organic regulations were published twenty years ago, they were written to effectively provide oversight to organic products that were marketed mostly locally and regionally, with shorter supply chains. The current global organic marketplace demands new tools due to the longer, more complex supply chains and many new handlers who have entered the marketplace without the necessary oversight to prevent intentional fraud.

As AMS's Regulatory Impact Analysis for the SOE proposed rule indicates, the benefits of implementing the proposed changes (\$83.99 to \$86.87 million when annualized) far exceed the anticipated costs (\$7.2 to \$7.35 million when annualized) to certifying agents, excluded handlers, and certified operations in the organic marketplace. AMS estimates that approximately 2 percent of organic products are fraudulent, and that the implementation of these changes will reduce the prevalence of organic fraud to 1 percent, a 50 percent reduction. When products are fraudulently represented as organic, consumers are unwittingly paying a premium for products that they would not otherwise purchase at a premium.

As a result, reducing the prevalence of fraudulent organic product will result in economic benefits that far exceed the costs of implementation. NOC believes additional benefits, beyond those quantified by AMS, will accrue in the organic marketplace. When consumers and industry members believe fraud is prevalent in the organic marketplace or hear about high profile cases of



fraud, such as has been reported in the Washington Post in 2017^{7,8,9,10,11} and 2018,¹² and in more recent news stories about domestic fraud,¹³ it may impact consumers' willingness to purchase organic products. When consumer trust is high and organic fraud is low, domestic organic operations will benefit from increased sales because consumers will be more likely to pay organic premiums knowing they can trust the USDA organic seal. These benefits have not been quantified in USDA's regulatory impact analysis. Organic has grown exponentially, increasing from \$3.4 billion in 1997 to \$55.1 billion in 2019. The value of organic will continue to grow with the implementation of new regulations to address fraud.

Implementation Period

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). NOC supports the Accredited Certifiers Association request for a phased approach, with a 1-year implementation for some items and a 2-year timeframe for others, which would spread the cost over a 2-year time period.

⁷ Whoriskey, P. "The labels said 'organic.' But these massive imports of corn and soybeans weren't." May 12, 2017. The Washington Post. <https://www.washingtonpost.com/news/wonk/wp/2017/06/12/millions-of-pounds-of-apparently-fake-organic-grains-convince-the-food-industry-there-may-be-a-problem/>

⁸ Whoriskey, P. "Millions of pounds of apparently fake 'organic' grains convince the food industry there may be a problem." June 12, 2017. The Washington Post. <https://www.washingtonpost.com/news/wonk/wp/2017/06/12/millions-of-pounds-of-apparently-fake-organic-grains-convince-the-food-industry-there-may-be-a-problem/>

⁹ Whoriskey, P. "'Uncertainty and dysfunction' have overtaken USDA program for organic foods, key lawmakers say." July 13, 2017. The Washington Post. <https://www.washingtonpost.com/news/wonk/wp/2017/07/13/uncertainty-and-dysfunction-have-overtaken-usda-program-for-organic-foods-key-lawmaker-says/>

¹⁰ Whoriskey, P. "Bogus 'organic' foods reach the U.S. because of lax enforcement at ports, inspectors say." September 18, 2017. The Washington Post. <https://www.washingtonpost.com/news/wonk/wp/2017/09/18/lax-enforcement-at-ports-allows-bogus-organic-foods-to-reach-u-s-government-report-says/>

¹¹ Whoriskey, P. "Organic food fraud leads Congress to weigh bill doubling USDA oversight." December 21, 2017. The Washington Post. <https://www.washingtonpost.com/news/wonk/wp/2017/12/21/organic-food-fraud-leads-congress-to-weigh-bill-doubling-usda-oversight/>

¹² Whoriskey, P. "USDA officials said they were guarding against organic food fraud. Congress decided they need help." December 20, 2018. <https://www.washingtonpost.com/business/2018/12/20/usda-officials-said-they-were-guarding-against-organic-food-fraud-congress-decided-they-need-help/>

¹³ "Field of schemes fraud results in over a decade in federal prison for leader of largest organic fraud case in U.S. history." August 19, 2019. Department of Justice, U.S. Attorney's Office, Northern District of Iowa.

<https://www.justice.gov/usao-ndia/pr/field-schemes-fraud-results-over-decade-federal-prison-leader-largest-organic-fraud#:~:text=Randy%20Constant%20and%20Three%20Others,Grain%20Falsely%20Marketed%20as%20Organic&text=Randy%20Constant%2C%20age%2061%2C%20from,one%20count%20of%20wire%20fraud>



ACA suggests and NOC supports implementation of the following portions of the proposed rule within 1 year:

- NOP Import Certificates
- Unannounced inspections
- Continuation of certification (OSP update, annual inspection)
- Annual performance evaluations
- Notification of new certification office
- Mediation procedures
- Adverse action appeals

NOC supports the ACA request for a 2-year implementation period for these parts of the proposed rule:

- 20 hours of training + inspector qualifications
- Generating certificates in OID
- Certification for all operations that are no longer exempt/excluded
- Supply chain traceability/fraud prevention
- Maintaining current list of operations in OID
- Labeling of non-retail containers (label use-up for some clients)

Section (1) Applicability and Exemptions from Certification

Overview

NOC strongly supports the provisions of the AMS proposed rule that would reduce the types of uncertified entities in the organic supply chain that can operate without an organic certificate and oversight from NOP. This change is one of the key requirements that Congress included in the 2018 Farm Bill to address organic fraud and strengthen organic integrity, and probably the single most critical aspect of the AMS Strengthening Organic Enforcement proposed rule.

NOC wholeheartedly agrees with the AMS proposed rule preamble statement:

“The need for more consistent oversight to protect organic integrity is a product of the rapidly expanding organic market, increasingly complex organic supply chains, and price premiums for organic products. Total sales of organic agricultural products in the United States grew from \$3.4 billion in 1997 to \$55.1 billion in 2019. This substantial market growth has allowed many additional types of business to participate in the organic supply chain, and organic agricultural products are now traded on a global scale. Today's global organic marketplace is marked by a multifaceted supply chain with organic products increasingly sold and handled by entities not regulated by the USDA. The absence of direct



enforcement authority over some entities in the organic supply chain, in combination with price premiums for organic products, presents the opportunity and incentive for organic fraud, which has been discovered in the organic sector by both the National Organic Program (NOP) and organic stakeholders. The amendments in this proposed rule are designed to mitigate the occurrence of organic fraud.”

We also agree with the AMS explanatory text, which further states:

“The evolution of the organic industry has made clear that the current terms handle, handler, and handling operation, as defined at § 205.2 of the organic regulations, no longer adequately represent the full scope of organic supply chains. The allowance of uncertified handlers creates gaps in the organic supply chain, breaking chains of custody and complicating the verification of product origin.”

Based on these shared concerns, NOC starts its analysis of this section of the AMS proposed rule with the premise that the ideal approach for preserving and enhancing organic integrity would be for all parts of the organic supply chain to be certified organic. However, we realize that for logistical reasons it may be appropriate to exempt some operations from certification if doing so poses little or no risk of breaching organic integrity. There is no question that there are valid reasons to exempt some entities from certification, but in our view, that list should be very short.

NOC strongly agrees with the central focus of this part of the AMS proposed rule, which proposes to revise the definitions of the terms “handle,” “handler,” and “handling operation” under §205.2, as follows:

Handle. To sell, process, or package agricultural products, including but not limited to trading, facilitating sale or trade, brokering, repackaging, labeling, combining, containerizing, storing, receiving, or loading. (new language in italics)

Handler. Any person engaged in the business of handling agricultural products.

Handling operation. Any operation or portion of an operation that handles agricultural products, except for operations that are exempt from certification.

NOC strongly supports these definitional revisions because they mean that importers, brokers, grain elevators, ports, and storage facilities that process or alter (pack or repack) products, and traders of organic products that previously abstained from organic certification are now required to become certified. The result of this change is explained in the AMS proposed rule which states:



“Certified organic products that are handled by an uncertified, non-exempt operation at any point in the supply chain will lose their certified organic status and may no longer be sold, labeled, or represented as organic. In turn, certified organic operations that receive products from uncertified, non-exempt handlers and subsequently label the products as organic, use as feed for organic livestock, or use as ingredients for organic products, are in violation of USDA organic regulations, and may be subject to proposed suspension or revocation of certification and possible civil penalties.”

NOC Recommendation for a Broadened Definition of the Term “Handle”

NOC is concerned the list of activities in AMS proposed revision of the definition of “handle” in §205.2 is insufficient to fully encompass all of the handling activities in the organic supply chain that need to be certified.

Private Labels

Notably absent from AMS proposed list of handling activities under the definition of the term “handle” are “private labeling” and “transloading,” both of which handling activities are frequently done by uncertified entities and carry high risk to organic integrity. Private label owners who work with certified copackers must themselves be certified to ensure complete supply chain traceability and allow for successful mass balance audits (especially when the private label owner supplies ingredients to the copacker).

The section of the AMS proposed rule entitled Additional Amendments considered but not included in this Proposed rule, asks a series of questions about the role of private label arrangements and how certification should work for those arrangements. NOC believes that excluding private label operations from certification would cause a significant segment of the organic supply chain to be excluded from certification in a manner that could undermine organic integrity, and believes therefore that “private labeling” should be included in the definition of “handle.”

Importing and Exporting

One of the primary reasons NOC has been advocating for AMS to move forward with this SOE rule has been to address fraudulent organic imports. NOC is concerned that the AMS proposed definition of “handle” will be interpreted to exclude organic exporters and importers from certification, which would interfere with the goal of addressing fraudulent organic imports. In addition, in Section 2 of this AMS proposed rule regarding Imports to the United States, the explanatory text states:



“an organic exporter must be certified organic by certifying agents accredited by the USDA or certifying agents authorized by a trade arrangement, and must maintain records required under §205.130.”

In addition to exporters, the AMS proposed rule section regarding Imports to the United States also includes explanatory text that states:

“An organic importer of record must be certified and must maintain records required under 7 CFR 205.103. The proposed rule would specify that there is a consistent party, the organic importer of record, that is responsible for ensuring the compliance of organic agricultural products imported into the United States.”

NOC argues that organic importers also need to be certified so that they fully understand the need for and have a direct stake in maintaining the organic integrity of the products they import to the United States. Therefore, NOC recommends that the regulatory text in §205.2 be expanded to include the words “importing” and “exporting.”

Distinguishing Between On-Farm and Off-Farm Seed Handling Activities, and Related Certification Scope Categories

Currently, there is confusion and inconsistency between certifiers regarding whether farms that produce seeds on farm, both for sale and for their own use, are required to be certified as handlers. The confusion arises as to whether or not these operations should be certified under the crops scope or as handlers. The AMS proposed revision to the §205.2 definition of “handle” does not resolve the confusion.

Without resolving this confusion, we are concerned that new requirements for more operations to get certified could have the unintended consequence of creating disincentives for on-farm organic seed production or negatively impact operations in the organic supply chain by requiring these operations to obtain handling certificates. Our goal is to avoid imposing unreasonable burdens on operations engaged in on-farm seed production and other post-harvest handling activities with products produced on their own farms.

There are many activities that take place on farm related to seed production and post-harvest handling. Some of the standard elements of on-farm seed production include wet processing, seed cleaning, sorting, sizing and grading, debris removal, fermentation, and threshing. These activities should be covered under an operation’s crop scope certification, as long as those activities are taking place on the farm of origin (farm where the seed was produced). However, if an operation is taking seeds produced elsewhere by other operations and undertaking these activities on behalf of other farm operations, then that operation should be required to be certified as a handler. In addition, some activities, such as seed priming, should be considered



handling that requires certification as a handler, no matter where it is done, because it actually alters the seed. Seed priming involves starting the germination process in the seed and then stopping it so that all of the seed germinates at the same time, which moves beyond activities related to the raw product and actually alters the seed.

Therefore, NOC recommends that the definition of “handle” in the AMS proposed revision to §205.2 be modified to clarify this confusion regarding seed handling activities that are covered under a farm operation’s crop scope and those activities that should require certification as a handler.

NOC Recommended Revisions to the AMS proposed definition of “handler” in §205.2

Based on these and other instances where import organic supply chain operations and activities are not adequately covered in the AMS proposed regulation, NOC recommends that the regulatory definition of “handle” be expanded, with NOC recommended edits in red, as follows:

Handle. To sell, process, or package agricultural products, including but not limited to trading, facilitate sale or trade, brokering, **exporting, importing, augering, opening, packaging,** repackaging, **closing, enclosing,** labeling, **relabeling,** combining, containerizing, **splitting,** storing, receiving, **private labeling, transloading,** loading, and **seed handling activities unless conducted on the farm of origin (including but not limited to wet processing, cleaning, sorting, sizing and grading, debris removal, fermentation, treating, coating, inoculating and threshing), and seed priming.**

Exempt Operations and Necessary Procedures to Ensure that The Exemptions Do Not Cause Burdens and Reduce Organic Integrity Downstream in the Supply Chain

With regard to exemptions that the AMS proposes to continue, NOC is generally in agreement, with a few caveats and questions. The AMS proposed rule retains the following existing exemptions:

- for operations with \$5,000 or less in annual income from organic sales,
- for retail operations, and
- for transporters (i.e. trucks) and storage facilities that do not “process or alter” the organic products.

NOC also agrees with the AMS explanatory text, that even those operations who are exempt will still need to comply with provisions in the regulations that prevent contact of organic products



with prohibited substances (§ 205.272), as well as specific labeling and recordkeeping requirements.

While the proposed rule specifies the parts of the organic regulations with which exempt operations must comply, NOC notes that having exemptions for these operations in the supply chain places increased paperwork and verification burdens on downstream certified entities and certifiers to ensure that the exempt operations are not using prohibited substances or commingling organic products with conventional products. One way to reduce this burden and help protect organic integrity is to establish a uniform affidavit form that downstream certified entities could use to ensure the exempt operations are following the organic requirements.

For instance, if a certified organic livestock farmer is receiving a load of organic grain, and the trucker delivering the grain is exempt, they should have access to a standardized clean truck affidavit that the trucker will sign to show they have adequately cleaned the truck before loading it with organic grain, and they have not use prohibited substances during its transport. Likewise, having a standardized affidavit that a storage facility can sign, even though the storage facility is exempt from certification, will 1) help to educate the exempt operation about what is expected when transporting or storing organic products, 2) help to protect the downstream certified organic entity from uncertainty about the handling of the products that are being transported or stored on their behalf by exempt operations, and 3) facilitate certifier trace-back and supply chain audit procedures.

NOC also remains concerned about what mechanisms will be in place to enforce requirements for labeling and to prevent contamination for retailers and other uncertified entities. NOC requests that AMS more clearly explain how they will ensure adequate enforcement in the final SOE rule.

Further Clarification is Needed on Labeling of Organic Products for both Certified and Uncertified Retailers

Currently, there is confusion and inconsistency between certifiers regarding the labeling of certified organic products that are processed onsite by both certified and exempt retail operations. For example, some certified organic retailers are not clear if deli products can be labeled organic. The AMS final rule should provide clarity to avoid inconsistencies in how the rule is applied across certifiers.

NOC recommends that AMS be more explicit about the circumstances under which trucks, rail cars, and ships must be certified

NOC believes that the AMS proposed rule should provide more clarity regarding the intent for the proposed change to the regulation for the exemption at §205.101(e):



An operation that only stores, receives, and/or loads agricultural products, but does not process or alter such agricultural products.

Are transportation or storage activities of any types required to be certified? If so, under which circumstances?

For example:

- 1) If a storage operation is handling goods in permeable containers, which poses a risk for contamination if prohibited substances are present in the storage areas, are those operations required to be certified?
- 2) Milk haulers often commingle loads from different farms in the same truck, especially if the farms are not large enough to fill the entire truck. If those haulers are uncertified, does this pose a risk for contamination?
- 3) Is the proposed rule specific enough to cover the threat of contamination in storage facilities that have the potential to commingle lots of bulk grains?
- 4) If ships or railcars carrying organic products are exempt from certification, what is the process to ensure the ship and rail personnel are aware of USDA organic regulatory restrictions regarding use of prohibited substances and commingling with conventional products? (See NOC comments in the section regarding Labeling of Nonretail Containers, where we argue for organic labeling and special handling signage on large shipping and rail containers to minimize this risk.)

Given the potential vulnerabilities and risk to organic integrity by having these activities in the supply chain exempt from certification, we urge AMS to clarify when storage and transportation operations would be required to be certified, and what safeguards will be established to ensure that any exemption from certification does not undermine the integrity of the organic supply chain.

In addition, NOC recommends revising 205.101(e) to clarify that operations responsible for transloading bulk unpackaged products such as grain into to a different container, a high-risk activity, must be certified, and to clarify that importers and exporters are not exempt.

NOC recommended revisions to §205.101(e) are **in red**.



An operation that only stores, receives, and/or loads agricultural products **unless loading includes containerizing**, but does not process or alter such agricultural products. **An importer or exporter of record is not exempt.**

Retailer Exemption

In §205.2, AMS proposed a revised definition of “retail operation,” which refers to “virtual transactions” without defining the term. NOC recommends that the term “virtual transaction” be defined in §205.2, as follows:

NOC’s recommended addition to §205.2 is as follows:

Virtual Transaction. Any form of transaction that does not occur in person.

However, it is our understanding of the current wording of the proposed rule that certain online retailers, which are really distribution centers based on their activities, need to be certified. We support this inclusion of a critical component of the organic supply chain.

Role and Responsibility of USDA NOP

While we understand the important role that the certification agencies must play, we feel it is important to note that ultimately, the NOP’s accreditation, investigation, and enforcement activities must be robust enough to both support certification agencies in their efforts, as well as hold them accountable.

Answers to AMS Questions in this section

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?

In our comments, NOC has recommended that the “handle” definition be expanded as follows:

Handle. To sell, process, or package agricultural products, including but not limited to trading, facilitate sale or trade, brokering, **exporting, importing, augering, opening, packaging,** repackaging, **closing, enclosing,** labeling, **relabeling,** combining, containerizing, **splitting,** storing, receiving, **private labeling, transloading,** loading, and **seed handling activities unless conducted on the farm of origin (including but not limited to wet processing, cleaning, sorting, sizing and grading, debris removal, fermentation, treating, coating, inoculating and threshing), and seed priming.**



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

In our comments, NOC proposes that the definition of “handle” be modified to address certain seed handling activities, but that on-farm seed handling activities be exempt. See our comments for more details.

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

In our comments, NOC proposes that a uniform affidavit form be developed by NOP as a clean truck, railcar, or ship affidavit. See that section of our comments for more details.

4. Activities at ports may present a threat to the integrity of organic products due to the multiple types of handling activities performed in these locations. It is common for independent operations to perform specific physical handling activities within a port (e.g., loading, unloading, or transfer of packaged, unpackaged, or bulk organic product). The proposed rule would require certification of these operations, who are often contractors. What other activities performed at ports should require certification and why?

NOC recommends adding the word “augering” to the list of special physical handling activities in the paragraph above. The process of augering commodity products from bins into ships is a point of vulnerability in the supply chain because of the possibility of commingling.

Section (2) Imports to the United States

Overview

NOC supports the required use of NOP Import Certificates for all organic products entering the United States. We also acknowledge and recognize the need for “equivalent data sources” to the import certificate. We support the allowance for alternative data sources, provided that the OFPA specifications of what information must be included on an NOP Import Certificate (7 U.S.C. 6502(13)) and the stipulation that information from the NOP Import Certificate must “be available as an electronic record” and captured in a tracking system maintained by the U.S. Government (7 U.S.C. 6514(d))—in this case, the Automated Commercial Environment (ACE) system of the U.S. Customs and Border Protection (CBP)—is required and enforced equally for equivalent data sources.



In our introductory comment, we note that there are gaps in the regulatory language in some parts of the AMS proposed rule where the regulatory language fails to clearly accomplish the intent expressed by the explanatory text. This is one such area. It is not clear that the requirements for import certificates will have the intended impact. NOP import certificates are intended to provide an accurate accounting of the organic status and quantity for a specific shipment of imported organic products, thus ensuring that conventional products do not fraudulently enter the organic marketplace, and to link the physical product with the associated organic certification agency and organic operations.

We offer suggestions to provided better clarity and consistency throughout the regulatory language in the AMS proposed rule and to help certified operations, handlers, and certifying agents readily determine how to comply with the AMS proposed regulations.

Section §205.2

Definitions of “Organic exporter” and “Organic Importer of Record”

We agree that organic exporters and organic importers of record should be required to be certified organic, but we share the concerns of the Accredited Certifiers Association (ACA) that some may interpret AMS’s proposed §205.101(e) as exempting those entities from certification:

AMS proposed §205.101(e) – “An operation that only stores, receives, and/or loads agricultural products, but does not process or alter such agricultural products.”

Within the explanatory text in the Imports to the United States section of the AMS proposed rule, it clearly states that “an *organic exporter* must be certified organic by certifying agents accredited by the USDA or certifying agents authorized by a trade arrangement, and must maintain records required under §205.130.” This explanatory language needs to be codified within the regulatory text of [§ 205.2](#) to prevent loopholes and maintain consistency of interpretation of the regulations.

NOC makes the following recommendation, with new language **in red** below:

Organic exporter. The owner or final exporter of the organic product who facilitates the trade of, consigns, or arranges for the transport/shipping of the organic product from a foreign country. **An organic exporter must be certified organic by certifying agents accredited by the USDA or certifying agents authorized by a trade arrangement, and must maintain records required under §205.130.**



Likewise, the explanatory text clearly states that “an organic importer of record must be certified and must maintain records required under 7 CFR 205.103.” In addition, the explanatory text in this section states:

“An organic importer of record must be certified and must maintain records required under 7 CFR 205.103. The proposed rule would specify that there is a consistent party, the organic importer of record, that is responsible for ensuring the compliance of organic agricultural products imported into the United States.”

Here again, this clarifying language needs to be codified within the regulatory text of §205.2 to prevent loopholes and maintain consistency of interpretation of the regulations.

NOC makes the following recommendation, with new language in red below:

Organic importer of record. The operation responsible for accepting imported organic products within the United States and ensuring the compliance of such products with USDA organic standards. An organic importer of record must be certified organic and must maintain records required under §205.130.

Proposed New §205.273 (a-e)

Imports to the United States

NOC strongly supports the addition of this new section to regulations. However, we recommend some modifications to clarify terms and processes, and to ensure timeframes for organic documentation necessary to verify compliance with USDA organic standards prior to entry of imported products into the U.S. stream of commerce.

Clarify the terms “equivalent data source” and “equivalent”

The use of the terms “equivalent data source” and “equivalent” in this section are vague. NOC notes that AMS proposed §205.273(e) offers the following explanation of the use of the term within this section:

(e) The use of the term equivalent in this section refers to electronic data, documents, identification numbers, databases, or other systems verified as an equivalent data source to the NOP Import Certificate.

AMS should consider providing further guidance to explain why it is necessary to allow for alternative data sources and give example of the types of alternative data sources that would be acceptable to AMS. In that context, the proposed rule should clarify that USDA makes the decision about which data sources are acceptable in their equivalence.



Therefore, NOC recommends the following revision to AMS proposed §205.273(e), with our new recommended text **in red**.

§205.273(e) – The use of the term equivalent in this section refers to electronic data, documents, identification numbers, databases, or other systems verified as an equivalent data source, **as determined by the USDA**, to the NOP Import Certificate.

What information must be included on the NOP Import Certificate, and Who Verifies It?

Regarding the requirements about what information must be included on the NOP Import Certificate, the explanatory text notes:

“AMS proposes that NOP Import Certificates must be provided in a standardized electronic format to ensure consistency. AMS anticipates that Form NOP 2110-1, or an electronic equivalent that provides the same data will serve this purposes, because it includes fields for the information needed to meet the requirements of the NOP Import Certificate as defined in the OFPA: origin; destination; the certifying agent issuing the NOP Import Certificate; harmonized tariff code, when applicable; total weight; and the organic standard the product was certified to (7 U.S.C. 6502(13)).”

While this explanation is helpful, the regulatory text itself must be clear enough to be properly applied. For instance, while implied, there is no actual reference in the proposed regulatory text of §205.273 to the NOP Import Certificates being “provided in a standardized electronic format to ensure consistency,” as the explanatory text states.

Therefore, NOC recommends that §205.273 be changed as follows, with NOC’s recommended edit **in red**.

§ 205.273. Each shipment of organic products imported into the United States through U.S. Ports of Entry must be certified pursuant to subpart E of this part, labeled pursuant to subpart D of this part, be declared as organic to U.S. Customs and Border Protection, and be associated with a valid NOP Import Certificate **provided in electronic form to ensure consistency** (Form NOP 2110-1) or equivalent data source.

The AMS explanatory text further states:

“AMS expects some of the information collected via the NOP Import Certificate may be modified.”



NOC strongly agrees that there may be a need to expand the list of information required on the NOP Import Certificate in the future, and NOP should retain the flexibility to update Form NOP 2110-1 to include information beyond those required by OFPA.

Regarding the OFPA requirement that “**origin**” be included on the NOP Import Certificate, we note that Box 6 on Form NOP 2110-1 comes the closest to getting to any information regarding origin:

Box 6. Product Exported From: Enter the name and address, including postal code, of the port of embarkation (address from which products leave the country).

However, this provides no information on where the product or products within the shipment originated. It would appear that the information required by Box 6 may be information on where the products were aggregated, but not where they originated. “Country of origin” must be more clearly defined, and it must be clear whether the shipped product originates from multiple sources, and if so, those sources must be identified. While this is the most pressing piece of information that must be clarified, we recommend the regulations provide a definitive list of what must be on the NOP Import Certificate, as well as how the information must be organized to require a form that is user-friendly and easy to navigate. The AMS proposed rule will require a consistent organic certificate, fixing a problem that has been around since the program began. We do not want to see the same problem recreated by not requiring a consistent form to provide information for the import certificate.

With regard to clarifying **who is responsible for verifying** that the shipment for which the NOP Import Certificate has been requested complies with USDA organic regulations or equivalent standards, the explanatory text repeatedly states that the organic exporter’s certifying agent will be responsible for this verification. With the AMS explanatory text, certifiers can begin to piece together what is expected:

“This means that: (1) the information submitted on the NOP Import Certificate, or equivalent, is accurate, including confirmation of the organic status of each product listed on the NOP Import Certificate; and (2) the final handler has the capacity to produce or handle the quantity of organic product to be exported. The final handler would typically be the exporter or the last handler that processed the product. Verifying that the product complies with the organic standards includes, but is not limited to, verifying that the import has not been exposed to a prohibited substance, treated with a prohibited substance as a result of fumigation or treated with ionizing radiation at any point in the products’ movements across country borders.”



NOC recommends that the information in this explanatory text be provided to certifiers in guidance. Without guidance that lays out clear expectations, the expectation of consistency across certifiers cannot be met.

Timeframes for Certifiers to Issue NOP Import Certificate and for the Import Certificate to be Uploaded into the Customs and Border Protection (CBP’s) ACE System

NOC does not support the 30-day timeframe for certifying agents to review and issue an NOP Import Certificate, as specified in AMS proposed new §205.273(b). We understand that the question of high-frequency imports by rail and truck from Canada and Mexico into the United States presents challenges for certifiers when issuing import certificates. However, the larger issue is that organic fraud issues are at a crisis point and must be addressed as such.

Additionally, we are very concerned about the explanatory text that accompanies the proposed regulatory language on import certificates, in which AMS states that the organic product can come into the port of entry without the accompanying documentation – the NOP Import Certificate must be uploaded into the ACE system within 10 calendar days of the shipment entering the United States. Allowing importers 10 days to file the electronic import certificate after the shipment has reached a U.S. port could mean the difference between preventing fraudulent products from entering the U.S. and having to try to retrieve them once they have entered commerce.

While the explanatory text indicates that this approach (allowing importers 10 days to file the electronic import certificate after the shipment has reached a U.S. port) “is consistent with existing trade filing timeframes in ACE using the Entry Summary process,” a “business as usual” approach is not good enough. The proposed regulations do not sufficiently prevent conventionally produced imports from being fraudulently represented and sold as organic. It is imperative that organic documentation be in place before a shipment enters the stream of commerce.

Therefore, NOC makes the following recommendation with new or revised language **in red** below to §205.273(b) as follows:

§205.273(b) – The certifying agent must review an NOP Import Certificate request, determine whether the shipment complies with the USDA organic regulations, and issue the NOP Import Certificate or equivalent **available with receipt of product at shipment** ~~within 30 calendar days of receipt~~ if the shipment complies with the USDA organic regulations.

However, NOC acknowledges the concerns that members of the organic trade have about agreeing to tight regulatory timeframes for producing organic import certificates and uploading those certificates into the CBP Automated Commercial Environment (ACE) system. Those



concerns are understandable because the organic interface with the ACE system is not fully functional yet. NOC is aware that the NOP and CBP initiated the electronic organic import certificate (or "message set") in the ACE system in April 2020 as an optional filing step. NOC further understands that it will become mandatory to unload the organic import certificate into the ACE system once the SOE rule is finalized. However, NOC wants to underscore the importance of testing out the system well before it becomes mandatory, to address any glitches that may arise.

Need to Codify Responsibility of the Exporter to Upload the NOP Import Certificate or equivalent data into the ACE system

The AMS explanatory text clearly states who would be responsible for uploading the NOP Import Certificate or equivalent data into the ACE system:

“once completed by the certifying agent, an NOP Import Certificate or equivalent is provided to the organic exporter, and the organic exporter must provide the data associated with the NOP Import Certificate to CBP by uploading the data into the ACE system as an electronic record”.

This language should be codified by regulatory language.

Therefore, NOC recommends the following change (in red) to AMS proposed §205.273(c):

§205.273(c) – Each compliant organic shipment must be declared as organic to U.S. Customs and Border Protection through a U.S. Port of Entry by uploading the unique NOP Import Certificate, or equivalent electronic data entry into the U.S. Customs and Border Protection’s Automated Commercial Environment system. **The organic exporter is responsible for uploading the unique NOP import certificate.**

Answers to AMS Questions in this section

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

NOC feels strongly that the 30-day timeframe for certifying agents to review and issue an NOP Import Certificate is not appropriate. Organic fraud issues are at a crisis point and must be addressed as such.

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



We understand that the question of high-frequency imports by rail and truck from Canada and Mexico into the United States presents challenges for certifiers when issuing import certificates; however, the timeframes in the proposed rule are too long to allow for intercepting perishable goods if found to be fraudulent. The larger issue, as noted above, is that organic fraud issues are at a crisis point and must be addressed as such. A “business as usual” approach is not good enough. It is imperative that the organic documentation be in place before a shipment enters the stream of commerce.

Section (3) Labeling of Nonretail Containers

NOC supports the new regulatory requirements for additional information on nonretail containers, but we would like to see the USDA AMS go further in what it requires.

Overview

NOC strongly agrees that regulatory changes are needed to provide more clarity regarding labeling of nonretail containers in order to protect and enhance organic integrity. However, we recommend several changes to the regulatory text for improve traceability and avoid unintentional mishandling.

AMS’ proposed revision to §205.2

Definition of “Nonretailer Container”

NOC agrees with the explanatory text that reads:

“Accurate labeling of non-retail containers used to ship or store organic products is critical to organic integrity. Detailed labeling reduces misidentification and mishandling, facilitates traceability through the supply chain, reduces the potential for organic fraud, and allows accurate identification of organic product by customs officials and transportation agents.”

However, as it currently stands, the proposed regulatory text is unclear as to exactly what is included in the definition of *nonretail container*. NOC recommends a revision to AMS’s proposed definition of nonretail container in §205.2 to address this issue.

In addition, NOC disagrees with AMS’ argument that it is impractical to label large nonretail containers. While being mindful of practicalities, NOC recommends that AMS require labeling of large nonretail containers with the words “organic” and “do not fumigate.” Further, NOC recommends that labels on both large and smaller retail containers display these two pieces of information in local languages as well as English to ensure that all those who handle organic products are aware of the necessary handling requirements and to prevent commingling.



Without requiring labeling for both large and smaller nonretail containers, the proposed rule cannot accomplish the goals stated in the explanatory text:

“This proposed amendment will provide an additional safeguard for organic integrity by alerting certifying agents, handlers, and border agents to the contents of nonretail containers, and by helping prevent unintentional mishandling of organic product. This proposed action also aligns with the OFPA requirement that an agricultural product which is sold or labeled as organic must have been produced and handled without prohibited synthetic chemicals (7 U.S.C. 6504(1)).

“Some stakeholders have asked AMS to limit the applicability of §205.307 to packaged organic products described in §§205.303–304, i.e., products labeled “100% organic,” “organic,” or “made with organic (specified ingredients or food group(s)).” AMS believes that amending the regulations to require a statement of organic status on all nonretail containers, including those which contain unpackaged and/or unlabeled product, is a more comprehensive and enforceable solution. Further, this will support the requirement for certified operations to maintain auditable records (§205.103(b)(2)). An audit trail, as defined by the regulations, includes documents that show the source, transfer of ownership, and transportation of any agricultural product with an organic label (§205.2). Obscuring the “organic” status of any product during a segment of the supply chain disrupts the audit trail. By clearly stating that nonretail containers must be labeled with the product’s organic status and the name of the certifying agent (both currently optional), this proposed amendment will ensure that all organic product in nonretail containers is identifiable.”

AMS’ proposed §205.307(a) vs §205.307(b)

What information should be required versus suggested to be displayed on nonretail containers?

NOC agrees with our colleagues at the ACA that having the generic type of product listed on the nonretail container, in addition to the organic status category, is critical to improving traceability and further deterring fraud. In that context, we recommend a revision to the AMS’ proposed language in §205.307(a) to also require that the name of actual product type to be listed on the label (e.g. oranges).

NOC further agrees with our colleagues at the Accredited Certifiers Association (ACA) that a business name and address should be required on nonretail containers, and suggest removing this language from §205.307(b)(3) and adding it to list §205.307(a). Understanding that some private labelers will have a desire to conceal the manufacturer’s name, while also understanding



that doing so impedes trace-back and supply-chain audits due to lack of information, we suggest that AMS consider allowing a number identifier for traceability, such as the OID number along with the “certified by” statement of manufacturer, in lieu of requiring a business name of the certified producer or last handler of the product.

NOC strongly believes that “special handling instructions needed to maintain the organic integrity of the product” should also be required on nonretail containers. The AMS’ proposed regulation suggests, but does not require, nonretail containers to display special handling instructions. This provision is necessary to prevent fumigation with prohibited substances when organic products cross borders. Therefore, NOC recommends moving the “special handling instructions” language from the list of optional (“may display”) labeling provisions in AMS’ proposed §205.307(b)(1) to the list of required (“must display”) labeling requirements in AMS’ proposed §205.307(a). In addition, NOC recommends that the language be expanded to specifically require use of the words “do not fumigate with substances prohibited under the USDA organic regulations,” on the label, since inappropriate fumigation of organic products is a major example of mishandling noted by the USDA Office of Inspector General audit of NOP.

Therefore, NOC is recommending that a new subsection be added to AMS’ proposed list in §205.307(a) as follows:

(x) Special handling instructions needed to maintain the organic integrity of the product, including, but not limited to, the words “do not fumigate with substances prohibited under the USDA organic regulations;”

This instruction not to fumigate organic products is just one example of the type of special handling instructions that nonretail containers should display. Because there are many other necessary types of special handling instructions, AMS should define the term “special handling instructions” in §205.2 and create a guidance document to provide information to certifiers, organic inspectors, and operations regarding which special handling instructions should be displayed on nonretail containers.

To improve traceability, NOC also recommends that AMS’s proposed §205.307(a) be expanded to require that the country of origin of the product be clearly displayed on nonretail containers. The need for country of origin labeling is discussed in greater detail in NOC’s comments in Section 10.

NOC’s Recommended Revisions to the Proposed Regulation

NOC makes the following recommendations, with new or revised language in red below.

§205.307 – Labeling of nonretail containers.



§205.2 – Revise – *Nonretail container*. Any container used for shipping or storage of a **packaged or unpackaged** agricultural product that is not used in the retail display or sale of the product, **including, but are not limited to:**

- (1) Produce boxes, totes, bulk containers, bulk bags, flexible bulk containers, harvest crates and bins, except for those containers exclusively used on-farm or in direct-to-consumer marketing channels, such as farmers markets and Community Supported Agriculture (CSA) operations;
- (2) Boxes, crates, cartons, and master cases of wholesale packaged products, except for those containers exclusively used on-farm or in direct-to-consumer marketing channels, such as farmers markets and Community Supported Agriculture (CSA) operations; and
- (3) Large nonretail containers that are associated with a mode of transportation or storage, such as trailers, tanks, railcars, shipping containers, grain elevators/silos, vessels, cargo holds, freighters, barges, or other method of bulk transport or storage.

§205.307(a) – Revise – Nonretail containers used to ship or store certified organic product must display **in English and the applicable local language**, the following:

- (1) The term, “100 percent organic,” “organic,” or “made with organic (specified ingredients or food group(s)),” as applicable, to **modify the name of** identify the product;
- (2) **The generic name of the product enclosed in the container, such as “oranges,”**
- (3) The statement, “Certified organic by * * *,” or similar phrase, to identify the name of the certifying agent that certified the producer of the product, or, if processed, the certifying agent that certified the last handler that processed the product;
- (4) The production lot number of the product, shipping identification, or other information needed to ensure traceability;
- (5) **The name or number identifier and contact information of the certified producer of the product, or if processed, the last certified handler that processed or handled the product;**
- (6) **Special handling instructions needed to maintain the organic integrity of the product, including, but not limited to, the words “do not fumigate with substances prohibited under the USDA organic regulations”;** and
- (7) **A clear identification of the country of origin of the product.**

§205.307(b) – Nonretail containers used to ship or store certified organic product may display the following:



- ~~(1) Special handling instructions needed to maintain the organic integrity of the product;~~
- (2) The USDA seal. Use of the USDA seal must comply with §205.311;
- ~~(3) The name and contact information of the certified producer of the product, or if processed, the last certified handler that processed the product;~~
- (4) The seal, logo, or other identifying mark of the certifying agent that certified the producer of the product, or if processed, the last handler that processed the product; and/or
- (5) The business address, website, and/or contact information of the certifying agent.

Role and Responsibility of USDA NOP

AMS should also clarify how the provisions in the proposed rule pertaining to nonretail containers, in addition to the requirements for import certificates, will address the 2017 OIG report finding that “AMS has not established and implemented controls at U.S. ports of entry to identify, track, and ensure treated organic products are not sold, labeled, or represented as organic.” NOC is unclear how the provisions in the proposed rule will ensure that organic products are not fumigated with prohibited substances or that organic products that are fumigated with prohibited substances are not sold in the marketplace as organic. Our comments have attempted to provide a solution to this problem through more explicit signage requirements on large nonretail containers associated with storage or mode of transportation.

AMS should also consider establishing a process whereby larger nonretailer containers associated with mode of transportation or storage include a lock or breakable seal that clearly identifies the product as organic, so that anyone opening the container for purposes of inspection and possible fumigation would have to be aware of the organic status of the product, even if they missed the other signage.

Answers to the AMS Question in this Section

1. 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.

As noted above, NOC agrees with our colleagues at the ACA that a business name and contact information should be required on nonretail containers, and suggests removing this language from AMS’s proposed §205.307(b)(3) and adding it the list in AMS’ proposed §205.307(a). Understanding that some private labelers will have a desire to conceal the manufacturer’s name, while also understanding that doing so impedes trace-back and supply-chain audits due to lack of information, we suggest AMS consider allowing a number identifier for traceability, such as the OID number along with the



“certified by” statement of manufacturer, in lieu of requiring business name of the certified producer or last handler of the product.

Section (4) On-Site Inspections

NOC strongly supports codifying the guidance that certifiers conduct unannounced inspections for a minimum of 5% of the operations they certify annually. We also strongly support the requirements for mass-balance and trace-back audits, as well as provisions that prevent certifiers from operating in regions where they lack capacity to conduct unannounced inspections.

AMS Proposed §205.403(b)

Key Provisions of NOP Instruction 2609 Regarding Unannounced Inspections Should be Codified in Regulatory Language

NOP previously issued a “best practice” document in a 2012 instruction to certifiers (NOP Instruction 2609), but this instruction is not enforceable since the organic regulations currently *allow for*, but do not *require*, unannounced inspections. NOC recognizes that NOP Instruction 2609, which most certification agencies already follow, provides a much greater degree of specificity regarding unannounced inspections than the proposed additions to the organic regulations. In order to clarify key questions that arise based on the sparse AMS regulatory language proposed, we recommend adding language from the existing, well-written NOP Instruction 2609.

Unannounced inspections are an effective and useful tool in the USDA organic regulations to ensure compliance across certified operations and bolster consumer trust in the organic label. Both random and risk-based (or unannounced inspections in response to complaints) play different and equally valid roles. While certification agencies need enough flexibility to conduct unannounced inspections in a meaningful way, we believe it is necessary for certifiers to make use of both random, as well as risk-based approaches, in conducting unannounced inspections.

NOC recognizes that unannounced inspections that are limited in scope, depth, and breadth that may cover only certain aspects of an operation, as well as unannounced inspections that fulfill the requirements for the annual on-site monitoring inspections required by §205.403, play important roles. We feel it is important that certifying agents employ both types when conducting unannounced inspections. While we understand that requiring all unannounced inspections be full annual inspections would present a challenge to certifiers, inspectors, and operators, we also see great value in using a combination of the two when it comes to this critical enforcement tool for ensuring ongoing compliance by organic operations.



NOC's Recommended Additions to the AMS Proposed Regulation

Therefore, NOC recommends adding three new subsections to the regulatory language of §205.403(b), as follows:

§205.403(b)(3) – Add – Unannounced inspections must be conducted broadly across all certified operations, including a broad spectrum of production types, products, and locations.

§205.403(b)(4) – Add – Operations chosen for unannounced inspections may be random, risk-based, or the result of a complaint or investigation. The certifying agent must utilize a combination of these approaches when selecting operations for unannounced inspections.

§205.403(b)(5) – Add – Unannounced inspections may be limited in scope, depth, and breadth, and may cover only certain aspects of the operation, or unannounced inspections may fulfill the requirement for annual on-site monitoring inspections required by §205.403 only if the inspector is able to conduct a full inspection of the operation as required by this section. Certifying agents must employ both types.

Role and Responsibility of USDA NOP

NOC notes that it is the responsibility of the USDA National Organic Program, through their accreditation process, to ensure that certifiers are performing unannounced inspections during critical times (i.e. during the grazing season for a dairy operation that may not be complying with the pasture rule), as well as at other times that are valuable for addressing others concerns (i.e. during the nongrazing season to evaluate compliance with the pasture rule based on grazing records, ensure outdoor access during the winter months, etc.).

Similarly, during accreditation visits, the NOP must evaluate the certification agency's overall approach to unannounced inspections (i.e. the criteria being used to identify operations for unannounced inspections, the agency's long-range plans, whether or not unannounced inspections are conducted broadly across all operations, products, and locations, the use of data, non-compliance issues, complaints, and other risk-based factors to determine which operations to inspect, etc.).

With regard to a "risk-based" approach, NOC recommends that AMS develop guidance to delineate some of the criteria and risk-factors AMS would like to see certifiers consider in the context of unannounced inspections. As explained in more detail in our introductory comment, without this guidance, there will likely be wide variations across certifiers in how they implement



this requirement. NOC recognizes that the criteria used may fluctuate based on “market trends, enforcement actions, and changing practices within the organic industry.” Guidance will be helpful in communicating best practices and ensuring consistency while still allowing certifying agents and AMS the necessary flexibility in developing risk-based approaches of oversight.

Section (5) Certificates of Organic Operations

NOC agrees that is important to build the Organic Integrity Database formally into the organic regulations, and to provide clarity to certifiers and organic operations about the procedures for generating organic certificates. We make the following recommendations for the regulatory proposals in this section of the proposed rule.

AMS Proposed Addition to §205.2

NOC Proposed Revision to AMS Definition of Organic Integrity Database

While NOC is supportive of the addition of the definition for the Organic Integrity Database (OID) at §205.2, we recommend retaining the name *Organic Integrity Database (OID)* instead of rebranding the database as “INTEGRITY” and reserving the term “integrity” to describe the organic integrity of the supply chain. This will help avoid confusion.

NOC Recommended Revision to the AMS Proposed Definition in the Regulation

§205.2 – ~~INTEGRITY~~ *Organic Integrity Database (OID)*. The National Organic Program’s electronic, web-based reporting tool for the submission of data, completion of certificates of organic operation, and other information, or its successors.

NOC Proposed Addition of Definition of “Organic Integrity”

Organic integrity is one of the key tenets the Strengthening Organic Enforcement proposed rule is meant to uphold. It is a term that is used often by the NOP, NOSB, organic stakeholders, and consumers, and is actually defined by AMS in the preamble text of this proposed rule. Including that common definition in the organic regulations would provide a clear baseline for a concept that is integral to the organic program. NOC supports the proposal of the Organic Trade Association to define the term “organic integrity” in §205.2.

NOC Recommended Addition of New Definition to the Regulatory Text of §205.2, which is identical to the AMS preamble language on this topic:

§205.2 – Add new term – *Organic Integrity*.



The unique attributes that make a product organic, and define its status as organic. A product that fully complies with the USDA organic regulations has integrity, and its organic qualities have not been compromised.

AMS Proposed Revision to §205.404(b)

NOC's Recommended Revision Regarding Procedure for Generating Organic Certificates

NOC strongly supports requiring a standardized organic certificate that is available electronically, and we feel this can be done in ways that can help move this portion of the AMS proposed rule forward more quickly and efficiently. We note the concerns shared by the ACA regarding the potential need to modify databases, which could be costly and time consuming. We are encouraged by the ACA's commitment to standardized organic certificates.

NOC's Recommended Revision to Regulatory Text, with new or revised text in red

§205.404(b) – Revise – The certifying agent must issue a certificate of organic operation. The certificate of organic operation must ~~be generated from INTEGRITY~~ match the certificate in the Organic Integrity Database (OID) and be available in electronic form. It may be provided to certified operations electronically.

AMS Proposed Addition of new §205.404(c)

NOC Recommended Revision Regarding Expiration Date of Certificates

NOC recommends removing the requirement for an expiration date on organic certificates. As noted in the explanatory text, "An operation's organic certification does not expire—once granted, it may only be suspended, revoked, or surrendered." Basing the decision to add expiration dates to certificates on an NOSB recommendation from November 11, 2006, a recommendation made almost 14 years ago, without further NOSB and stakeholder discussion, raises concerns.

It would appear that the intent of the expiration date is to ensure that certifiers have updated information within the OID. NOC does not understand AMS's rationale for expiration dates beyond this purpose, which can be accomplished through other means. "Expiration dates are intended to prompt the generation of an updated organic certificate, rather than to void or have any effect on the operation's certification status; an operation could remain certified even if their organic certificate has expired." This change would create much confusion. The intent of having information within the OID updated in a timely manner is addressed in other ways within the AMS proposed rule that are more straightforward and would not create confusion.



NOC recommends removing #6 from §205.404(c) based on our recommendation that expiration dates not be added to organic certificates. Additional recommendations to §205.404(c) are based on our recommendation regarding the term Organic Integrity Database (OID).

NOC's Recommended Revision to AMS Proposed New §205.404(c), with NOC changes in red

§205.404(c) – Add – In addition to the certificate of organic operation provided for in §205.404(b), a certifying agent may issue its own addenda to the certificate of organic operation. If issued, any addenda must include:

- (1) Name, address, and contact information for the certified operation;
- (2) The certified operation's unique ID number/code that corresponds to the certified operation's ID number/code in ~~USDA Organic INTEGRITY~~ the USDA Organic Integrity Database (OID);
- (3) A link to ~~USDA Organic INTEGRITY~~ the USDA Organic Integrity Database (OID) or a link to the certified operation's profile in ~~USDA Organic INTEGRITY~~ the USDA Organic Integrity Database (OID), along with a statement, "You may verify the certification of this operation using ~~USDA Organic INTEGRITY~~ the USDA Organic Integrity Database," or a similar statement;
- (4) Name, address, and contact information of the certifying agent; and
- (5) "Addendum issue date."
- ~~(6) "Addendum expiration date," which must not exceed the expiration date of the certificate of organic operation.~~

Answers to AMS Questions in this section

1. How frequently should accredited certifying agents update the information in an operation's organic certificate?

At minimum, certificates should be updated annually when there are no changes for the operation throughout the year. As noted in our comments for Section 7, ACAs should be required to report acreage and livestock data at minimum on an annual basis into the Organic Integrity Database (OID). Otherwise, information should be updated in real time, such as when additions are made to operations – adding products or parcels/facilities, changes in contact information, or when items are eliminated.

2. Should a minimum reporting frequency (e.g., monthly, quarterly, etc.) be added to the regulations?



Timely updates to maintain data reflecting an operation’s current status, including certified products and acreage, is critical to commerce and enforcement. See our answer to #1 above – certificates should be updated in real time, with minimum reporting of annually when there are no changes for the operation throughout the year.

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

As noted above, NOC is not in support of expiration dates on certificates. Given that certificates do not expire, and that the intended purpose of the expiration date on certificates would be addressed elsewhere within the AMS proposed rule, we feel that expiration dates on organic certificates would only serve to create confusion.

Section (6) Continuation of Certification

NOC supports the revised language to §205.406(a) in the AMS proposed rule, which adds flexibility and efficiency to the annual update process for both the producer and the certifier. We are aware that many certifying bodies already operate in this way pursuant to previously published NOP instructions to certifying agents (NOP 2615 and NOP 2601), and appreciate that these proposed changes will ensure legal enforceability, consistent practices between certifying agents, and reduce paperwork burden of organic certification.

We have no objections to removing the need to annually update the correction of minor noncompliances previously identified by the certifying agent.

AMS proposed revision to §205.406(b)

NOC’s Recommendation to Add More Details Regarding Timing of Annual On-Site Inspections

NOC supports the AMS proposed revision to §205.406(b) clarifying that the certifying agent must arrange and conduct an on-site inspection, pursuant to §205.403, of the certified operation at least once per calendar year. Clarifying that on-site inspections must take place “once per calendar year” allows flexibility while still adding clarity to an area of the rule that has provided a loophole to some who have interpreted the regulations to mean that an operation may be inspected once every 18 months on an ongoing basis.

“Once per calendar year” indicates that the inspection must take place at some point between January 1 and December 31 in any given year. While we can envision that due to extenuating circumstances an operation’s inspection did not happen in a given year between January 1 and



December 31, but happened the following January or February. This should be rare, and there should be a detailed explanation presented for such when the certifier is audited, as well as a clearly stated plan for how the certifier will ensure that this does not continue to happen. In addition, in order to keep this operation on track for a “once per calendar year” inspection, the operation would need to have an additional inspection in that same January 1 through December 31 time frame.

We understand from the AMS explanatory text that the intent would be that “revision of paragraph (b) would clarify that all certified operations must be inspected at least annually, regardless of (1) when the certified operation was last inspected and (2) when, or if, the certified operation provided its annual updates.” However, this must be explicitly stated in the regulatory text to provide clear expectations.

The explanatory text further notes that the AMS proposed language at §205.406(b) “would allow certifying agents flexibility to conduct on-site inspection at any time during the year (essential for verifying activities throughout the growing season, for example) while ensuring that an inspection is conducted every single calendar year.” While we appreciate the flexibility, we feel it imperative to add language from §205.403(b) to ensure consistency across the rule that annual on-site inspections must be scheduled and conducted “when the land, facilities, and activities that demonstrate compliance or capacity to comply can be observed.”

Here again, we can envision that due to extenuating circumstances an operation’s inspection did not happen at a time “when the land, facilities, and activities that demonstrate compliance or capacity to comply can be observed.” Again, this should be rare, and there should be a detailed explanation presented for such when the certifier is audited, as well as a clearly stated plan for how the certifier will ensure that this does not continue to happen.

We heartily agree that “annual inspection cycles are essential to vigilant oversight” and appreciate that “AMS seeks to eliminate confusion around and deviations from alternative timing of on-site inspection.” In order to accomplish these goals, the regulatory language must leave no doubt as to the need for inspections to be conducted “when the land, facilities, and activities that demonstrate compliance or capacity to comply can be observed.”

NOC Recommended Revision to AMS Proposed Regulatory Text, with new or revised text in red.

§205.406(b) – Revise – The certifying agent must arrange and conduct an on-site inspection, pursuant to §205.403, of the certified operation at least once per calendar year, **regardless of:**



(1) when the certified operation was last inspected; and
(2) when, or if, the certified operation provided its annual updates. The annual on-site inspections must be scheduled and conducted in accordance with §205.403(b), when the land, facilities, and activities that demonstrate compliance or capacity to comply can be observed.

Section (7) Paperwork Submissions to the Administrator

NOC supports the removal of §205.405(c)(3) and applauds the NOP's efforts to lessen the paperwork burden for accredited certifiers. We strongly agree that accurate and current data must be maintained within the Organic Integrity Database (OID).

AMS Proposed Revision to §205.501(a)(15)

NOC's Recommended Addition to Require Certifiers to Input Acreage and other Data into OID

NOC has strongly advocated that AMS implement a new requirement that certifiers report product and acreage data into the Organic Integrity Database (OID). NOC recommends that AMS include specific regulatory language to codify this requirement. NOC recommends that AMS use a sound and sensible approach to ensure that for certifiers working with small, diversified producers, data can be captured in a reasonable way. AMS must establish meaningful crop categories, ideally ones that are harmonized with the NASS codes used in the 2014 and 2015 Organic Certifiers Surveys that NASS conducted. Accredited Certifying Agents (ACAs) should be required to report aggregated production area certified by crop and location at least on an annual basis into the Organic Integrity Database (OID).

As noted in the text of the AMS proposed rule, "The availability of accurate and current information about certified operations is an essential tool for certifying agents and operations in the organic supply chain to support the verification of specific organic products." In order to ensure that all accurate and current information is available consistently across all operations and certifiers, a complete list of data fields that are required to be updated in the OID should be described in an NOP guidance document, to give certifiers clear direction but also to allow flexibility for the list of required data fields to be updated periodically.

Several times the AMS explanatory text refers to "mandatory data requirements" that will include "certified products and acreage," noting this information "is critical to commerce and enforcement," while providing no regulatory text that would define exactly what the "mandatory data requirements" include. If mandatory data reporting in the OID is to be a "general requirement for accreditation to reinforce that data reporting is a mandatory practice," then we must be explicit in exactly what data is required to be reported.



NOC agrees with the ACA that it is important to be able to track applicants that were denied certification, surrendered their certificate, had their certificate suspended or revoked, or withdrew with adverse actions; however, we will further address these required updates into the OID in Section 12.

NOC Recommended Revision to AMS Proposed Regulatory Text, with NOC revisions in red

§205.501(a)(15) – Revise – Maintain current and accurate data in ~~INTEGRITY~~ the Organic Integrity Database (OID) for each operation which it certifies, including reporting by crop type, acreage, and location; number of livestock by type and location; updated at minimum annually into the OID.

Role and Responsibility of USDA NOP

Using import data to detect fraud: The NOP should implement a policy to conduct an automatic investigation whenever there is a significant surge in imports for a specific product category to determine if fraudulent activity is contributing to that increase.

Section (8) Personnel Training and Qualifications

Overview

NOC supports the use of highly trained certification review staff and organic inspectors. It is essential that these personnel have the knowledge, skills, and experience needed to evaluate compliance of certified operations and applicants for certification. We appreciate the focus on continuing education included in the proposed rule, which is necessary for all of us to achieve the spirit of continuous improvement upon which the organic industry is founded. NOC supports the requirement that certification review staff and inspectors complete a minimum of 20 hours of training in relevant topics and we are requesting more clarity on what training opportunities fulfill this requirement. Regarding the requirement that inspectors have one year of field-based experience “related to both the scope and scale of operations they will inspect”, NOC has proposed an alternative approach that we believe will more effectively accomplish the goals articulated by AMS. NOC supports the requirement for onsite evaluations of inspectors once every three years, but we request clarification to better define when more frequent on-site evaluations are needed.

NOC believes the proposed rule should also ensure that accreditation auditors and enforcement staff at NOP have the necessary training, qualifications, and relevant knowledge, in addition to the requirements for inspectors and certification review staff. This should be accomplished



through addition of new regulatory text in Subpart F of the NOP regulations to address accreditation auditor and enforcement personnel training and qualifications.

AMS proposed revision to §205.510(a)(4)(i)(B)

Clarification is Needed on What Training Opportunities Meet the 20-Hour Requirement

We are concerned that the AMS proposed language at §205.510(a)(4)(i)(B) does not provide a clear understanding of what training opportunities would be adequate to meet the 20 hours requirement, or who would be considered a “relevant training provider.” It is our observation that many different types of learning and experience can enable an inspector or file review staff member to verify organic integrity at a farm or handling operation and should be considered. Understanding of, and familiarity with, “topics that are relevant to inspection” can be conferred not only by studying them in an educational institution or working in the field as an employee or owner, but also through farm tours, webinars and workshops, trainings from IOIA/ACA/NOP/OILC or certifiers, conference demonstrations and presentations, volunteering at a farm, shadowing another inspector, and even simple conversation with other inspectors or farmers.

NOC Recommendation

NOC recommends the NOP provide additional clarity through a guidance or instruction to certifiers to explain what would “demonstrate successful completion” of trainings and who would be considered as a “relevant training provider.” We would further recommend that the NOP consider adding a training log to the Organic Integrity Learning Center (OILC) as a way for inspectors and certification review staff to track their training hours.

AMS proposed revision to §205.510(a)(4)(i)(C)

Ensuring Inspectors Have the Necessary Knowledge, Skills, and Experience

While we appreciate the essentiality of addressing personnel training and qualifications, we do not want to see this done in a way that creates barriers of entry for new inspectors or certification review staff, thus making it more difficult for the industry as a whole to achieve the requirements of both current and proposed regulations. The revised language for §205.501(a)(4)(i)(C) may leave the industry with too few “qualified” inspectors, especially given the number of previously uncertified handlers that will be requiring certification, especially if only one year is offered for implementation. In addition, the requirement may prevent existing inspectors from adding new scopes or scales of operations to their repertoire, as it does not appear to leave room for on-the-job training, mentoring/apprenticeships, or non-field-based learning.



As noted above, it is our observation that many different types of learning and experience can enable an inspector or file review staff member to verify organic integrity at a farm or handling operation. Stipulating that an inspector must have one year of field-based experience [205.501(a)(4)(i)(C)] with organic production is too limiting when considering the full range of experiences that may confer “required knowledge, skills and experience... to evaluate compliance with the applicable regulations.”

Additionally, we are challenged to interpret the requirement that experience be relevant to the “scope and scale” of an operation. It would seem logical to interpret “scope” to simply mean Crop, Wild Crop, Livestock, and Handling, we question whether it is clear that this is the way it should be interpreted. While this would be consistent with language elsewhere within the regulations, it does not seem to align with the granularity of evaluation discussed in the explanatory text, which suggests that “scope” may mean something more detailed about the type of operation and activities conducted.

For example, for the livestock scope, working at a poultry operation is not, by itself, adequate experience to evaluate pasture rule compliance at a dairy, nor vice versa. Few inspectors have direct experience with commercial production of wild crops, but most crop inspectors can learn to identify good management. Granularity becomes even more challenging with the handling scope. Is an inspector’s one year of experience making artisanal cheese adequate (per AMS’s intent) to inspect the following operations: maple syrup producer, grain elevator, brewery, coffee roaster, produce distributor, spice importer, custom feed mixer? Does it make a difference if the inspector was the primary cheesemaker/formulator, a bookkeeper or salesperson for the cheesemaker, or a worker responsible for cleaning equipment and monitoring temperature?

The issue of “scale” is potentially even more challenging for both producer and handler inspectors. Does milking 25 cows for a year qualify someone to inspect a 300-cow dairy? Does working on a 15-acre vegetable farm qualify a person to inspect 200 acres of small grains and hay, or a commercial greenhouse selling potted plants, microgreens, and sprouts? Does distributing food at a multi-farm CSA qualify someone to inspect a large distribution warehouse? Some current inspectors may not meet the requirement even if they have been successfully inspecting for many years (unless inspection itself can qualify as field-based experience, as it should). The requirement that inspectors have one year of field-based experience related to both scope and scale would be difficult to interpret and enforce.

NOC Recommendation

Rather than require in the regulation that inspectors have one year of field-based experience relevant to the scope and scale of each operation they will inspect, we recommend an approach



similar to that used for risk assessment of certified operations: a list, described in guidance, of qualifying knowledge and skills, related to scope and scale, from which inspectors must have a majority as applicable to the type of operation they will inspect. Certifiers would prioritize topics for training based on any knowledge or skills gaps identified based on this list. For the regulation itself, it would be preferable to require at 205.501(a)(4)(i)(C) that:

NOC Proposed Revision to AMS proposed regulatory text at 205.501(a)(4)(i)(C). NOC's new or revised text is **in red**.

(C) Certifying agents must demonstrate that ~~inspectors have a minimum of 1 year of field-based experience related to both the scope and scale of operations they will inspect before assigning inspection responsibilities~~; all persons who conduct inspections, including staff, volunteers, or contractors, have the relevant knowledge, skills, and experience required to perform inspections of operations assigned and to evaluate compliance with the applicable regulations of this part;

This revision would provide adequate teeth to the regulation for NOP to issue a noncompliance to a certifier who uses an inspector lacking the relevant knowledge, skills, and experience. It would also provide inspectors flexibility in how they acquire these traits and provide certifiers flexibility in how they evaluate inspector qualifications. The requirement at 205.501(a)(4)(iii) that certifiers maintain training requirements, procedures, and records for all inspectors and reviewers will allow AMS to evaluate these procedures for adequacy.

AMS proposed revision to §205.510(a)(6)

More Clarity is Needed Regarding On-site Evaluation of Inspectors

NOC supports on-site evaluation of inspectors once every three years, but is concerned that the proposed regulatory language falls short of defining “more frequently if warranted.” In order to ensure that all actors have a common understanding of what warrants greater inspector scrutiny and evaluation, there must be more clarity around this language.

In addition, the regulatory text in AMS proposed §205.510(a)(6)(i)(A) allows for a broad definition of “certifying agent personnel who are qualified to evaluate inspectors.” Here again, more clarity is warranted.

NOC Recommendation

NOP should develop a guidance or instruction to certifiers to provide clarity regarding when it is “warranted” to conduct field evaluation of inspectors more frequently than once every three



years, but also to more clearly define what is meant by “certifying agent personnel who are qualified to evaluate inspectors” under AMS proposed §205.510(a)(6)(i)(A) .

Role and Responsibility of USDA NOP

Training and Qualification for NOP staff: The rule requires that inspectors and certification review staff have the necessary qualifications, but does not say how the NOP will ensure that accreditation auditors and enforcement staff are trained, qualified, and have the relevant knowledge. NOC recommends that AMS include new regulatory language in Subpart F in the proposed rule to more fully define continuing education requirements for NOP accreditation auditors and enforcement staff.

Answers to AMS Questions in this section

1. Is 20 training hours a year an appropriate amount of continuing education for organic inspectors and certification review personnel?

NOC supports requiring continuing education of all inspectors and certification review staff, and feels that a minimum of 20 hours of training on relevant topics is appropriate. We offer thoughts above regarding what should be considered as “relevant topics” in order to meet this requirement.

2. Should organic inspectors be evaluated on-site more frequently than once every three years?

NOC supports the requirement for organic inspectors to be evaluated on-site with a field evaluation once every three years, or more frequently, if warranted. We further support the unchanged requirement that all certification staff and organic inspectors receive annual evaluations.

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

The ACA Guidance on Organic Inspector Qualifications¹⁴ describes skills and areas of expertise that should be specified. NOC supported the NOSB’s recommendation to the NOP dated May 29, 2018, recommending the NOP develop guidance or instruction on the topic of inspector qualifications and training. The ACA Guidance document was part of the proposal put forth by the Compliance, Accreditation, and Certification

¹⁴ ACA Guidance on Organic Inspector Qualifications, <https://www accreditedcertifiers.org/wp-content/uploads/2018/02/ACA-Guidance-on-Inspector-Qualifications-with-IOIA-Evaluation-Checklist.pdf>



Subcommittee (CACS) for the Spring 2018 NOSB meeting. This document also includes recommendations for prior experience and training, as noted in our comments above.

Section (9) Oversight of Certification Activities

NOC concurs with the statement in the explanatory text of the AMS proposed rule that “clarifying the oversight of certifying agents is a critical component of this proposed rule, because it will allow the NOP to provide robust enforcement of the USDA organic regulations.” We offer recommendations that will enable certifying agents to readily determine how to comply with the proposed regulations.

NOC strongly supports closing the gap in the oversight of certification offices by requiring NOP be notified of the opening of new certification offices. We agree that “accurate and timely reporting of information about certification activities will bolster the NOP’s ability to oversee certifying agents, and provide more equitable enforcement of the Act and the USDA organic regulations.” We do not agree that notifying NOP after certification activities begin in a new certification office achieves this goal.

AMS proposed new regulatory definition for “certification activity” in §205.2

NOC recommended revision to add issuance of NOP Import Certificates to the regulatory list

NOC recommends adding “and NOP Import Certificates” to the new definition of *certification activity* to be thorough in the definition. Section 2 of the AMS proposed rule clearly outlines the required use of NOP Import Certificates as certification activities.

NOC’s Recommended Addition to Regulatory Definition of “certification activity”, with NOC’s new proposed text *in red*

§205.2 – Add new term – *Certification activity*. Any business conducted by a certifying agent, or by a person acting on behalf of a certifying agent, including but not limited to: certification management; administration; application review; inspection planning; inspections; sampling; inspection report review; material review; label review; records retention; compliance review; investigating complaints and taking adverse actions; certification decisions; and issuing transaction certificates **and NOP Import Certificates.**

AMS proposed new regulatory definition for “certification office” in §205.2

NOC’s recommended revision clarifying that staffers’ home offices do not constitute “certification offices”



NOC recommends a revision to the proposed language to clarify that remote staff working from home do not represent a *certification office* as long as oversight activities are not occurring at these home locations. We do not believe it is the intent of the AMS NOP to consider every remote employee as a new certification office.

NOC Recommended revision to AMS proposed new regulatory definition, with new text in red:

§205.2 – Add new term – *Certification office*. Any site or facility where certification activities are conducted, except for **home offices and** certification activities that occur at certified operations or applicants for certification, such as inspections and sampling.

AMS proposed new §205.501(a)(22)

NOC Recommended Revision to Require NOP to be Notified Prior to Opening of New Certification Offices, and Add the Word “location” into the Text

NOC strongly recommends that AMS be notified **no later than 30 calendar days prior** to certification activities beginning in a new certification office. This would appear to be a standard business practice that would not create a hardship for certifiers to follow.

The explanatory language in the AMS proposed rule states:

“Another gap in the oversight of certification offices is the current lack of requirements to notify the NOP of the opening of new certification offices. Because of this, the NOP has difficulty readily quantifying how many certification offices exist; this is compounded by reports of offices opening and closing frequently and unpredictably, complicating the NOP’s ability to effectively oversee the activities of these offices.”

If new certification offices are opening and closing so frequently and unpredictably that they cannot provide a 30-day notice of opening prior to being opened, we are left to wonder how we can expect them to notify AMS no later than 90 calendar days after certification activities begin in a new certification office. Further, we would propose that not being able to provide at minimum a 30-day notice the AMS regarding the opening of a new office where certification activities will take place should be a red flag to AMS prompting greater scrutiny of what caused such urgency.

Within the explanatory text AMS notes,

“The notification must include basic information to assist the NOP in effectively overseeing the office, including the countries served, **location and** nature of the



certification activities, and the qualifications of the personnel that will provide the certification activities.” (emphasis added)

We are unsure why the term “location” was dropped in the shift from the explanatory text to the regulatory text, but only requiring that information to be provided on the countries served, and not the location within the countries, is too broad to allow for AMS to clearly evaluate the need for additional oversight.

NOC Recommended Revision to AMS proposed new §205.501(a)(22), with new/ revised text in red:

§205.501(a)(22) – Add – Notify AMS ~~not later than 90 days after certification activities begin~~ **no later than 30 calendar days prior to certification activities beginning** in a new certification office. The notification must include the countries where the certification activities are being provided, **location, and** nature of the certification activities, and the qualifications of the personnel providing the certification activities.

AMS proposed changes to §205.640 regarding accreditation fees

NOC does not support the proposed changes to §205.640, as these changes are not explained in the explanatory text and the purpose and impact of the changes are unclear. We are unable to agree to a change that has not been adequately explained.

Role & Responsibility of USDA NOP

More frequent audits using risk-based approach: To address domestic and international fraud, the NOP must also conduct more frequent audits of certification agencies, including certifiers’ foreign satellite offices, using a risk-based approach. Desk audits are necessary during the pandemic. Unannounced as well as scheduled audits should be conducted in geographic areas where risk has been identified as soon as it is safe to resume travel, such as Eastern European countries, or Texas/California as recommended in the executive summary from the 2018 American National Standards Institute (ANSI) Peer Review Panel Report.¹⁵

NOC reiterates our recommendation for NOP to issue a guidance document regarding risk. As part of the document, NOP should adopt criteria for risk-based accreditation oversight based on the NOSB recommendation on this topic from October 2018.¹⁶ For example, the NOP should give

¹⁵ 2018 Peer Review Executive Summary for USDA AMS NOP, May 2018:

<https://www.ams.usda.gov/sites/default/files/media/2018USDANOPPeerReviewExecutiveSummaryReport.pdf>

¹⁶ Formal Recommendation from NOSB to NOP on Risk-Based Accreditation Oversight, October 25, 2018:

<https://www.ams.usda.gov/sites/default/files/media/CACSRiskBasedAccreditationOct2018Rec.pdf>



additional scrutiny to a certifier whose accreditation has been revoked by a nation with which the U.S. has an organic equivalency arrangement and should work closely with other accreditation bodies operating in the region where fraud has been found. The NOP should explain to the NOSB and public stakeholders through regular updates how the NOP's accreditation and enforcement activities reflect this risk-based approach.

Within the AMS proposed rule at §205.403(b)(2), language is added stating that “[c]ertifying agents must be able to conduct unannounced inspections of any operation it certifies and must not accept applications or continue certification with operations located in areas where they are unable to conduct unannounced inspections.” This must also apply to AMS NOP accreditation of certifying agents and satellite offices of certifying agents.

This issue is further brought to light in the March 2010 Office of Inspector General Oversight of the National Organic Program Audit Report, “Finding 7: NOP oversight of foreign certifying agents needs significant improvement.”¹⁷ This finding noted that “NOP did not complete required onsite review of 5 of 44 foreign certifying agents.” And that “NOP officials did not develop a policy for handling applicants located in countries where conditions may make travel hazardous.” This could just as easily apply to satellite offices of accredited certifiers, and must be taken into consideration at this time.

On-site evaluation of certifiers and their satellite offices are essential to “bolster the NOP's ability to oversee certifying agents, and provide more equitable enforcement of the Act and the USDA organic regulations.” To demonstrate this, the OIG report notes:

“Our review of a judgmental sample of 14 of the 44 foreign certifying agents illustrates the importance of performing onsite reviews once a new certifying agent has begun certifying organic operations for program participation. Of these 14 agents, 10 had received initial onsite reviews while the other 4 did not. NOP identified major noncompliances during the initial onsite reviews of 7 of the 10 agents.”¹⁸

The report goes on to note, “We found that 5 of the 44 foreign accredited certifying agents had not received onsite reviews from NOP personnel since they were conditionally accredited.” “NOP allowed these 5 agents, who had been participating in the program for up to 7 years..., to remain accredited despite the lack of onsite reviews.”¹⁹

¹⁷ Office of Inspector General, *Oversight of the National Organic Program, Audit Report 01601-03-Hy*, March 2010.

¹⁸ *Ibid*, p.28.

¹⁹ *Ibid*, p.29.



Section 4 of the proposed rule lays out certifier requirements for on-site inspections under §205.403(b)(2). To further emphasize the need for similar language to apply to AMS, the OIG report notes, “Three foreign certifying agents, who had been accredited for periods of between 6 to 7 years, did not receive onsite reviews because of travel warnings issued by the U.S. Department of State after the agents were conditionally accredited.”²⁰ These three agents were located in Israel, Bolivia, and Turkey, and accredited over 1,400 organic operations.

The 2018 USDA NOP Peer Review Panel Report from the American National Standards Institute (ANSI)²¹ clearly shows that this issue had not been sufficiently dealt with in the ten years since the referenced OIG report. The 2018 Peer Review Report identified ten opportunities for improvement, including the following:

2018-USDA NOP-05-O- ricj-(ISO 17011 v. 2004) 7.5.7.

“For initial assessments, in addition to visiting the main or head office, visits shall be made to all other premises of the CAB from which one or more key activities are performed, and which are covered by the scope of accreditation.

Satellite offices of certifiers, especially international locations, are not audited on a frequent enough basis to reduce risk and prevent potential fraud.

Evidence: File review indicates that some certifiers have many additional satellite offices in numerous countries, and these numbers are increasing each year. NOP 2000 requires that all CAB must have both a mid-term and five-year site visit with witness audits, although Section 7 of NOP 2000 indicates that witness audits are not conducted for every satellite office with each assessment. Section 7 states: “A site visit and on-site visit will ultimately take place.” NOP Lead Auditor prepared a five-year plan to conduct audits of satellite offices, but at least two large CABs have over 20 satellite offices in several countries, which will result in increased risk if they are not more regularly audited, including witness audits.

A risk-based approach to identify and prevent fraud suggests that some satellite offices could apply to become a separate CAB, and that an additional number of auditors are needed to conduct regular audits of the growing number of satellite offices.

²⁰ *Ibid*, p.29.

²¹ 2018 Peer Review Executive Summary for USDA AMS NOP, May 2018:
<https://www.ams.usda.gov/sites/default/files/media/2018USDANOPPeerReviewExecutiveSummaryReport.pdf>



Fraud prevention could be addressed by conducting a number of audits, both unannounced and regular audits, in a specific geographic area where risk has been identified, such as Eastern European countries, or Texas/California.”²²

“In order to evaluate the agent’s actual certification process and to assure that all regulatory and other requirements are being met, NOP must complete an onsite review at the certifying agent within a reasonable timeframe after initial accreditation has taken place.”²³

The AMS explanatory text in Section 4 of the proposed rule states the following with regard to certifier on-site inspection responsibilities:

“A certifying agent that cannot conduct unannounced inspections in an applicant's or certified operation's location due to logistical challenges, staffing, security, or other reasons, is considered to not have or no longer have the administrative capacity for certification activities in that area, consistent with § 205.501(a)(19). In this case, the certifying agent would need to document the specific reasons it does not have, or no longer has, the administrative capacity to certify in that area, and would need to inform the applicant or certified operation to seek certification from another certifying agent. If new certification is not obtained, the operation's certification would be suspended.”

NOC argues that this same process should apply in the case of USDA’s accreditation of certification agencies. If the NOP cannot conduct unannounced inspections in a certifier’s main office or satellite location due to logistical challenges, staffing, security, or other reasons, then the NOP should be considered to not have or no longer have the administrative capacity to accredited certifiers in that area. In these cases, the NOP should be required to document the specific reasons it does not have, or no longer has, the administrative capacity to accredit in that area and would need to inform the applicant or certifier of such, and the certifier would be suspended until such time that the NOP would once again have the capacity to accredit them, or they would need to surrender their accreditation.

Section (10) Accepting Foreign Conformity Assessment Systems

NOC supports codifying in the regulations the USDA’s authority to make equivalence determinations, describing the criteria, scope, and other parameters to establish, oversee, or

²² *Ibid*, p.8.

²³ Office of Inspector General, *Oversight of the National Organic Program, Audit Report 01601-03-Hy*, March 2010, p.28.



terminate such equivalence determinations, all of which are critical to the enforcement of organic imports.

AMS Proposed New §205.511(c)

NOC's Recommended Revision to Require More Transparency

While we understand from the explanatory text in the AMS proposed rule that “the section codifies the agency’s existing practices and does not establish any new requirements,” it continues to lack codification of the procedures to document and disclose the results of that process to interested parties and the public. This issue was identified in Office of Inspector General’s September 2017 Audit Report of the NOP.²⁴ At that time, AMS concurred with this finding:

“AMS agrees that public-facing final equivalency documents do not explicitly indicate how those variances were resolved. To ensure greater transparency when establishing future equivalency arrangements, AMS will develop and implement a procedure to clearly document and disclose the final outcome of the variances from the side-by-side analysis of organic standards to assure interested parties and the public that all variances were resolved in a way that justifies the equivalence determination. AMS plans to complete this request by July 2018.”²⁵

It is time to codify the entire process to include transparency. The “NOP Handbook instructions for equivalence determination procedures state that equivalence determinations will be transparent, enabling all interested parties and the public to understand the basis for its actions.”²⁶ Codifying the authority of AMS to make equivalency determinations without also codifying the responsibility of AMS to communicate data and provide transparency is ineffective, and will result in reduced consumer confidence in the integrity of organic products imported into the United States.

Therefore, NOC recommends the following revision with the AMS proposed new §205.511(c), with NOC’s now proposed text **in red**:

§205.511(c) – Add – AMS will describe the scope of an equivalence determination. **AMS will clearly document and disclose the conformity assessment system undertaken as part**

²⁴ Office of Inspector General, *National Organic Program – International Trade Arrangements and Agreements*, Audit Report 01601-0001-21, September 2017.

²⁵ *Ibid.* p.6.

²⁶ USDA NOP, *National Organic Program Handbook, NOP 2100 Equivalence Determination Procedures*, October 29, 2015.



of the assessment of proposed equivalency arrangement, including an analysis of the variances between the organic standards of the United States and the other nation. Prior to an equivalency determination, AMS should publish information regarding the proposed resolution to variances.

AMS proposed new §205.511(d)

NOC's recommended revision to the section provides for more frequent review timeframes when necessary, and public disclosure of the review process

AMS should allow for flexibility in the review and reassessment timeframes to allow for concerns that arise during the AMS conformity assessment and equivalence determination, and a timeframe for review and/or reassessment should be negotiated, as appropriate. As noted above, this would become part of the public-facing final equivalency documents that AMS would provide as a part of codifying a process that includes transparency.

NOC's Recommended Revision to AMS proposed new §205.511(d), with NOC revisions in red

§205.511(d) – Add – AMS will conduct reviews on a two-year cycle, beginning at the close of the prior review, **or more frequently as determined based on the findings of the AMS assessment or concerns that arise within the two-year cycle**, to assess the effectiveness of the foreign government's organic certification program. AMS will reassess a country's organic certification program that AMS has recognized as equivalent every five years, **or more frequently as determined based on the findings of the AMS assessment or concerns that arise within the five years**, to verify that the foreign government's technical requirements and conformity assessment program continue to be at least equivalent to the requirements of the Act and the regulations of this part, and will determine whether the equivalence determination should be continued. **AMS will clearly document and disclose the review cycle and reassessment cycle of all countries with which equivalence has been granted, as well as an explanation as to any variations in the two-year review and five-year assessment routine.**

Answers to AMS NOP Question

1. 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?

NOC feels strongly that there are increased risks associated with recognition agreements where other countries' governments oversee the implementation of NOP certification.

Current equivalency agreements will need to be revised under this rule, or at least reviewed to determine whether they are in alignment with the rule. NOC recommends that all recognition agreements also be reassessed under the newly established §205.511 – Accepting foreign conformity assessment systems. This can be accomplished through a transparent scheduled phase-in period.

Section (11) Compliance—General

To make the NOP regulatory authorities align more closely and rationally with those authorities laid out under the Organic Foods Production Act (OFPA), AMS has proposed a new §206.606(c), as follows:

The Program Manager may 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 or the regulations in this part.

NOC strongly supports the addition of this new section to the NOP regulations, which will more closely align the regulations with OFPA, as explained by AMS in the following explanatory text:

The OFPA at [7 U.S.C. 6505\(a\)\(1\)](#) states: (A) A person may sell or label an agricultural product as organically produced only if such product is produced and handled in accordance with this chapter; and (B) no person may affix a label to, or provide other market information concerning, an agricultural product if such label or information implies, directly or indirectly, that such product is produced and handled using organic methods, except in accordance with this chapter. Further, the OFPA at [7 U.S.C. 6506\(a\)\(7\)](#) requires that the NOP provide for appropriate and adequate enforcement procedures, as determined by the Secretary to be necessary and consistent with this chapter.

In the past, some entities who have fraudulently labeled conventional products as organic have sought to escape NOP enforcement by either surrendering their organic certification or by failing to get certified in the first place. This loophole has existed because the existing regulations



suggest that NOP only has authority over certified operations, which is nonsensical and in direct conflict with the §6505(a)(1) and §6506(a)(7) of OFPA, as explained above.

In addition, NOC also supports the corresponding revision to the title of §205.661 from the current title of “Investigation of certified operations” to “Investigations.”

Section (16) Grower Group Operations

Overview

Organic certification should be available for all farmers and handlers who are able to meet the standards. However, the process and expense of individual organic certification can be burdensome, particularly for limited resource farmers. In that context, the concept of grower group certification has been in use in organic for years as an alternative certification mechanism that makes organic certification more accessible by allowing those farmers to be certified as a group as opposed to being certified individually.

Grower group certification benefits farmers and consumers. The ability of consumers to buy products produced by limited resource farmers greatly expands the diversity of products available to those consumers.

NOC supports the grower group certification model in both the international and U.S. contexts, as long as the right guardrails and robust enforcement mechanisms accompany that model. NOC is also very interested the conversations currently underway about the possibility of using the grower group model to address barriers of certification for limited resource farmers in the United States.

It is estimated that 2.6 million organic small-scale producers worldwide are certified through the grower group model. Grower group certification is particularly common for the production of organic coffee, cocoa, bananas, tea, and spices.

In some cases, grower group certification could be viewed as a “starter” certification model for limited resource farmers until they can become more established and able to graduate to individual certification on their own. This model may be more common for production in countries of the global North. In other cases, due to geographic, marketing, and/or persistent poverty circumstances of a region, a grower group member may continue their certification through a grower group for the duration of their operation. This model may be more common for production in countries of the global South.



Because the grower group certification model is premised on the need for alternative organic certification models to allow limited resource, small-scale farmers to produce and market organically, it is entirely appropriate for the SOE rule to include provisions to require grower group operations to establish scale and geographic parameters and guardrails on grower group membership and operations. However, in NOC’s discussions within our membership and with other members of the organic community, it has been difficult to come up with scale and income-based limitations that are universally appropriate, given the wide variation of geographic, social, crop, marketing channel, and income variations in grower groups throughout the world.

A common theme that has been raised throughout our discussions about the proposed SOE grower group regulatory changes is that a robust and effective Internal Control System (ICS) is paramount to preserving the integrity of the grower group model. Without that, the grower group certification model will lack integrity, no matter the scale. For example, a small grower group with a weak ICS is likely to lack integrity, while a large grower group with a strong ICS will likely be of high integrity in terms of adherence to USDA organic standards.

Related to this is the important role of organic certifiers in overseeing and enforcing strong standards of integrity for grower groups, as well as the need for USDA’s accreditation system to be enhanced to oversee the accredited certifier agencies (ACAs) that certify grower groups. For the grower group system to work, as is true with individual certification as well, oversight systems must be robust at every stage of the process, including USDA’s accreditation process.

In that context, NOC strongly supports the codification of the proposed grower group definitions in AMS’ proposed revisions to §205.2, the ICS requirements in proposed §205.201(c), and grower group certifier and inspector requirements in proposed §205.403(a)(2), and the grower group operation requirements in proposed §205.400(g), with some modifications and additions proposed by NOC, as described below. In addition, NOC is recommending additional accreditation requirements and structures for USDA’s role in accrediting certifiers who certify grower group operations.

AMS Proposed New Addition to §205.2

Grower Group Definitions

NOC strongly supports AMS’s proposal to revise §205.2 to create new regulatory definitions for the terms “grower group member,” “grower group operation,” “grower group production unit,” and “internal control system.”

However, we recommend amending the proposed definition of “grower group operation” under revised §205.2 to clarify that a grower group is not restricted to production of only one single crop. While it was probably not the intent of the AMS, the current proposed language could cause



confusion because of the “single crop” reference, which has been read by some to suggest that only one crop would be allowed to be produced by a grower group operation. This should be clarified because promoting monocultural production practices and discouraging crop diversity would be in direct conflict with the principles of organic. We believe that the proposed definition of “grower group production unit” more appropriately addresses the intent, by defining such a unit as:

“A defined subgroup of grower group members in geographical proximity as a part a single grower group operation that **use similar practices and shared resources to grow or gather similar crops and/or wild crops.**” (emphasis added)

AMS Proposed New §205.201(c)(1-11)

Internal Control System (ICS) Requirements

As explained in our comments above, having a robust internal control system (ICS) is the single most important determinant of whether a grower group operation has integrity or not. Therefore, with regard to the proposed regulations addressing required ICS functions, NOC strongly supports all of the proposed regulatory additions to specify the requirements of internal control systems [§205.201(c)(1-11)].

However, we recommend the addition of a new requirement for the description of the ICS in the grower group operation’s organic system plan. Specifically, there should be an additional requirement added to the list in §205.201(c) as follows:

() Define scale variation limitation criteria between grower group members within grower group production units;

Extreme variations in scale within the grower group membership should not be permitted. Having a wide variation of scale of operation within a grower group significantly complicates the job of the ICS and also establishes power dynamics between grower members that are challenging to manage from an oversight and conflict-of-interest perspective. For example, having a grower group operation with 500 grower group members of 1 to 5 hectares in size, and 2 grower group members of 1000 hectares may be unworkable. Whereas, having all grower group members being within a range of 1 to 100 hectares may be more workable. Setting a specific scale variation limit worldwide through the SOE rule would be unreasonable and arbitrary. Instead, the ICS of each grower group operation should be required to establish the criteria for scale variation limitation based on their own systems.

In addition, under proposed §205.201(c)(4), ICSs are required to describe characteristics of high-risk grower group members and grower group production units. To help ICS personnel



understand what is expected in this area, we recommend that NOP augment this regulatory change by publishing a guidance on this topic. The explanatory text in the certifier requirement section of the grower group part of SOE proposed rule includes a very good list of high-risk criteria for grower group members. This list should be the basis of a NOP guidance, which can be easily modified over time as needed.

Grower Group Scope, Scale, and Ownership Limitations

With regard to limitations on grower groups, NOC recommends the following:

Members of a grower group should be similarly situated with a homogeneity of production. For example, there should not be a wide variation in scale of operations within a grower group. However, as described in the ICS section above, the ICS, and not USDA, should establish its own criteria for limitations on scale diversity and variation between grower group members, with oversight by the certifier. It is often true that some grower group members are larger in scale and more established than new grower group members. This dynamic should be permitted to a certain degree, because it can be useful to help establish mentoring relationships within the grower group membership, and it can also help the grower groups meet minimum production volumes needed to reach certain markets. However, extreme variations in scale within the grower group membership should not be permitted, and the ICS should be required to set limits in that regard.

In terms of limitations on the size of the grower group itself, NOC has struggled to come up with an absolute size limit for grower group membership without setting an arbitrary limit that would result in a counter-productive division of an existing, well-functioning grower group. NOC is aware of some small grower groups that lack integrity because of a lack of an adequate ICS, as well as large grower groups that are well functioning with high integrity. Therefore, we do not recommend establishing a rigid regulatory limit on grower group membership numbers at this time. However, we recommend that guidance be given to certifiers that certify grower group operations to flag grower groups operating with more than 2000 to 2500 grower group members under one ICS to be of higher risk and recommending higher re-inspection rates for the members in that grower group operation.

With regard to the question about whether there should be geographic limitations on individual grower groups, NOC again believes that it is very difficult to establish specific geographic limitations on a grower group without being arbitrary. The argument for establishing geographic limits is that if grower group members are too spread out geographically and it takes too long for the ICS personnel to travel between the members' farms for purpose of inspection, it will tend to undermine the integrity of the ICS. However, NOC strongly supports the requirement in proposed



§205.201(c)(3) that the ICS “[d]efine geographical proximity criteria for grower group members and grower group production units.” Certifiers should require each grower group ICS to explain the rationale for the geographic limits they have imposed, and should issue non-compliances if they have failed to establish rational geographic proximity criteria for their grower group. NOC strongly supports the added requirements that the proposed SOE rule places on grower group operations and grower group certifiers with regard to geographic proximity limitations.

With regard to livestock grower groups, NOC recommends that grower group certification be allowed for livestock operations. The proposed SOE rule restricts grower group certification to crop and/or wild crop operations without offering any rationale for excluding livestock operations. In contrast, both the EU organic standards and the IFOAM standards allow for grower group certification of livestock operations.

However, NOC recommends that ownership and structural control limitations should be applied for livestock grower group operations to ensure that grower group certification does not become a mechanism for vertically integrated livestock and poultry companies to avoid individual organic certification. Therefore, grower group members raising livestock and livestock products should own the animals in their operation. Alternatively, it should also be permitted for the livestock in grower group operation to be cooperatively owned by the grower group, as long as the cooperative structure is fully enforced by the ICS and overseen by the certifier. In addition, the grower group members should have some ownership stake in the processing facilities, such as slaughterhouses or processing plants, used to process their livestock. It should never be permissible for a livestock or poultry company to structure itself as a grower group, and contract with grower group members to raise the animals for them while retaining ownership of the animals and processing facilities at the company level.

Similar to the ownership requirements NOC recommends for livestock grower groups, we recommend that similar ownership requirements be required for crop and wild crop grower groups, where the grower group members should have ownership of the crops they raise and the processing facilities for their crops, either individually or through a cooperative structure where the growers have a voice in the management of the grower group.

AMS Proposed Section 205.400(g)
Requirements for Grower Group Operations

NOC strongly supports all of the requirements for grower group operation as specified in proposed §205.400(g)(1-10), with a few modifications:



NOC's Recommended Revisions to AMS proposed new §205.400(g), with new or revised text in red.

In addition to paragraphs (a) through (f) of this section, a grower group operation must:

(1) Be a single producer organized as a person;

~~(2) Sell, label, or represent only crops and/or wild crops as organic;~~

(3) Use centralized processing, distribution, and marketing facilities and systems;

(4) Be organized into grower group production units;

(5) Ensure that all **products** ~~crops and/or wild crops~~ sold, labeled, or represented as organic are from grower group members only;

(6) Ensure that grower group members do not sell, label, or represent their **products** ~~crops and/or wild crops~~ as organic outside of the grower group operation unless they are individually certified;

(7) Report to the certifying agent on an annual basis the name and location of all grower group members and grower group production units, and the crops, wild crops, **livestock, livestock products**, estimated yield **and total production**, and size of production and harvesting areas of each grower group member and grower group production unit;

(8) Conduct internal inspections of each grower group member, at least annually, by internal inspectors, which must include mass-balance audits and reconciliation of each grower group member's and grower group production unit's production yield and group sales;

(9) Document and report to the certifying agent the use of sanctions to address noncompliant grower group members, at least annually; and

(10) Implement procedures to ensure all production and handling by the grower group operation is compliant with the USDA organic regulations and the Act, including recordkeeping requirements to ensure a complete audit trail from each grower group member and grower group production unit to sale and distribution.

(11) Establish procedures to ensure that each grower group member has ownership, individually or collectively, of the livestock, livestock products, and crops they produce, and has an ownership stake in the processing facilities used to process their products.



AMS Proposed New §205.403(a)(2)-

Role of Organic Certifiers

In general, with regard to regulations addressing the role certifiers and inspectors of grower group operations, NOC supports the proposed regulatory additions under new proposed §205.403(a)(2) to specify the requirements of initial and annual on-site inspections of grower group operations.

However, we are recommending a modification of §205.403(a)(2)(iii) to clarify the re-inspection rate for grower group members should be 1.4 times the square root of the number of grower group members, as AMS proposes, but only for grower groups with membership of fewer than 2500. As pointed out in the comments submitted by our colleagues at IFOAM, while the 1.4 times the square root formula works well as a re-inspection rate for grower groups smaller than 2000 to 2500 members, that formula results in too few inspections for larger grower groups. Therefore, like IFOAM, we are recommending that the annual re-inspection rate be 2 to 3 percent of grower group members for grower groups with membership in excess of 2500. This is consistent with the statement made by AMS in the explanatory text suggesting that in some cases, the re-inspection rate may need to be in excess of the 1.4 times the square root figure specified in the actual regulatory text. We are recommending that this requirement be more explicit in the regulatory text.

In addition, the reference in §205.403(a)(2)(iii) to the high-risk criteria established in Section 205.201(c)(4) should be deleted, because that would essentially require certifier agencies to conduct grower group member re-inspections based on risk criteria established by the grower group itself. This would undermine the ability of certifiers to scrutinize group operations based on the certifier's own independent analysis of risk.

NOC's Recommended addition to AMS proposed new §205.403(a)(2), with NOC new or revised language in red:

Initial and annual on-site inspections of a grower group operation as defined in § 205.2 must:

- (i) Assess the compliance of the internal control system of the organic system plan, or its capability to comply, with the requirements of § 205.400(g)(8). This must include review of the internal inspections conducted by the internal control system.
- (ii) Conduct witness audits of internal control system inspectors performing inspections of the grower group operation.
- (iii) Individually inspect at least 1.4 times the square root of the total number of grower group members. This must include an inspection of all grower group members determined to be



high risk ~~according to criteria in 205.201(c)(4)~~. At least one grower group member in each grower group production unit as defined in § 205.2 must be inspected. **For grower groups with membership in excess of 2500, at least 2 to 3 percent of the grower group members must be individually inspected.**

(iv) Inspect each handling facility.

As described in our earlier comments with regard to ICS requirements in AMS's proposed section 205.201(c)(4), NOC recommends that NOP issue guidance to certifiers about expectations with regard to "high-risk," as referenced in proposed §205.403(a)(2)(iii). The AMS's explanatory text in the grower group section includes a very comprehensive list of risk criteria that certifiers of grower groups should use in identifying high risk grower group members. This list should be turned into a NOP guidance document to assist certifiers and grower group internal control system personnel in understanding NOP's expectations for identifying high risk grower group members.

Necessary Connection Between the Personnel Training and Qualifications for Certifiers and Inspections and the Grower Group Sections of the Proposed Rule

In the personnel training and qualifications section of the proposed rule, NOP has proposed important revisions to §201.501(a)(4-6) to detail training and qualification requirements for inspection and certification review staff. Guidance should be issued to clarify and reinforce that those same requirements apply to certification activities with regard to grower group operations, given the extra complexities and vulnerabilities associated with certifying grower groups.

Role and Responsibility of the AMS NOP Accreditation System

With regard to the role of USDA in accrediting ACAs that certify grower groups, NOC recommends that a separate accreditation scope be created for grower group ACAs, as is currently the practice for IFOAM accreditation standards. Not all certifiers are qualified to certify grower group operations. In addition, similar to the new proposed training and qualification requirements for certifier and inspector personnel under the proposed revision of §205.501(a)(4), NOC is recommending that specific qualifications and training standards be established for USDA accreditation personnel, as well. For example, USDA accreditation staff who work on accreditation of certifying agencies that certify grower group operations should be required to demonstrate a minimum of 1 year of field-based experience related to grower group certification, and a minimum of 20 hours of training in topics that are relevant to grower groups, and also be required to demonstrate proficiency through passage of an examination specific to grower group certification and oversight.



In Closing

The grower group section of the proposed SOE rule is one of the most complicated sections because it involves a completely different model of organic certification, it applies to significant percentage of the organic operations in the world, and covers a huge diversity of production, processing, and marketing situations throughout the world.

NOC offers these comments to help contribute to the debate about the best approaches to grower group certification. However, because of the sheer number of operations affected and extreme diversity of situations involved, it is a challenge to find the right line between setting hard NOP regulatory limitations on grower groups operations, and allowing flexibility at the grower group level through the Internal Control System (ICS). In our comments, NOC has attempted to strike the right balance.

NOC is aware that the European Union is also in the process of revising their organic standards with regard to grower group certification. Ideally, since many of the world's grower groups sell to both EU and US markets, there should be an effort by the US and the EU to harmonize their standards with regard to grower group certification. However, harmonization for harmonization's sake is not the right path. Many NOC members are concerned with the rigidity of some of the proposed EU grower group certification standards. There should be a concerted effort, perhaps as part of the upcoming review of the US-EU organic equivalency arrangement, to discuss efforts to make international grower group certification standards more consistent, but to do so in a sound and sensible manner.

Section (17) Calculating the Percentage of Organically Produced Ingredients

The SOE has proposed a clarification of 7 CFR 205.302 by changing the denominator of the calculation from "finished product" to "all ingredients." This is proposed to reduce confusion about calculations of products whose weight of the finished product may be less than the weight of all ingredients at formulation. This simple change does not alter the method of calculating the organic percentage of a product nor does it change the actual practice of most certifiers; it simply eliminates the potential for confusion about what number to use as the denominator in the calculation. NOC supports this language.

We strongly disagree with comments that suggest that water and salt be excluded from the product formula as added ingredients, rather than from each individual ingredient.



Without the clarification provided in AMS' proposed rule, in the most extreme example, an organic product such as tea, broth, or sweetened water could be used as an ingredient of another product and the water portion would count as part of the organic content. Counting water as organic could put the product in the "organic" category even though the percentage of organic content would be less than 70% when the added water is correctly excluded from the ingredient before calculation. Even less extreme examples, such as products that include processed cheese (with added water) as an ingredient, can result in a percentage calculation that would put the product in the "organic" instead of "made with organic" category.

Another actual example is a product that combines a liquid organic product that is mostly added water with a solid nonagricultural substance listed on 205.605 and is then dehydrated. When water is correctly excluded from the weight of the liquid organic product, the resulting dehydrated product consists mostly of the nonagricultural substance making it ineligible for organic certification. If the water added to the organic ingredient is counted as organic content the product would be in the "organic" category.

The USDA organic regulations and multiple guidance documents from the NOP have been consistent that water added to an ingredient and remaining in that ingredient must be excluded before calculating the organic percentage of a multi-ingredient product.

From NOP PM 11-9 retaining guidance published August 23, 2002:

Reference: Subpart D, Labeling, 7 CFR 205.302(a).

Section 205.302(a) requires a handler to exclude added water and salt from the weight and/or fluid volume of organic ingredients at formulation and to exclude salt and water from the total net weight of the finished product when calculating the percentage of organically produced ingredients in a product.²⁷

From Draft Guidance NOP 5037 published in 2016 and based on an NOSB recommendation from 2013:

3.1: Calculating the organic content of multi-ingredient ingredients and products

Formulated multi-ingredient certified organic products often contain organic ingredients that are themselves composed of multiple ingredients. Section 205.302(a)(1) states the method of calculation as "[d]ividing the total net weight (excluding water and salt) of combined *organic ingredients* at formulation by the total weight (excluding water and salt) of the finished product." [Emphasis added.] To accurately calculate the organic percentage, it is necessary to divide the total net weight (excluding water and salt) of

²⁷ USDA NOP PM 11-9 Calculating the Percent of Org Prod Ingrid Rev02 10 31 11, <https://www.ams.usda.gov/sites/default/files/media/NOP-PM-11-9-CalculatingPercentageofIngredients.pdf>



combined *organic ingredients* at formulation by the total weight (excluding water and salt) of *all ingredients*.

3.1.2: Added Water and Salt

The percentages of water and salt *added* during the manufacture of the ingredient, and that *remain* in the ingredient, should be disclosed by the organic ingredient supplier. Certified operations must keep records to demonstrate to their certifier that the final product calculations supplied to the certifier have excluded the relevant salt/water from incoming organic ingredients.²⁸

From the Sample Calculation Worksheet NOP 5037-1 column headings:

- Weight of ingredient in formulation (exclude added water/salt from each ingredient)
- % organic content ingredient (exclude added water/salt from each ingredient)²⁹

§205.302 Calculating the percentage of organically produced ingredients.

(a) The percentage of all organically produced ingredients in an agricultural product sold, labeled, or represented as “100 percent organic,” “organic,” or “made with organic (specified ingredients or food group(s)),” or that include organic ingredients must be calculated by:

(1) Dividing the total net weight (excluding water and salt) of combined organic ingredients at formulation by the total weight (excluding water and salt) of the finished product.

(2) Dividing the fluid volume of all organic ingredients (excluding water and salt) by the fluid volume of the finished product (excluding water and salt) if the product and ingredients are liquid. If the liquid product is identified on the principal display panel or information panel as being reconstituted from concentrates, the calculation should be made on the basis of single-strength concentrations of the ingredients and finished product.

(3) For products containing organically produced ingredients in both solid and liquid form, dividing the combined weight of the solid ingredients and the weight of the liquid ingredients (excluding water and salt) by the total weight (excluding water and salt) of the finished product.

(b) The percentage of all organically produced ingredients in an agricultural product must be rounded down to the nearest whole number.

²⁸ USDA NOP 5037 Calculating the Percentage of Organic Ingredients in Multi-Ingredient Products, December 5, 2016, <https://www.ams.usda.gov/sites/default/files/media/NOP5037DraftGuidancePercentCalculations.pdf>

²⁹ *Ibid.*



(c) The percentage must be determined by the handler who affixes the label on the consumer package and verified by the certifying agent of the handler. The handler may use information provided by the certified operation in determining the percentage.

NOC recognizes the issue as noted in the explanatory text:

“This terminology has created confusion, unnecessary paperwork burden, and enforcement challenges for certifying agents and organic handlers, as it is not clear if “finished product” is meant to specifically describe the product after processing or if it simply means the sum of all ingredients at the time of formulation. The proposed changes would clarify that the calculation of organic content is to be made at the time of formulation, regardless of whether processing (currently defined at § 205.2) occurs after formulation.”

NOC supports this clarification of the standards as a critical element of organic integrity.

Section (18) Supply Chain Traceability and Organic Fraud Prevention

Overview

NOC appreciates all that the AMS proposed rule does to begin to clarify supply chain traceability throughout other sections. Improving supply chain traceability is a theme of the entire AMS proposed rule and several indirect methods have also been proposed in other parts of the rule that would enhance supply chain traceability. Some other areas of the rule that will improve supply chain traceability include, for example, requiring additional operations to become certified, requiring import certificates, and requiring trace-back and mass-balance audits during on-site inspections.

AMS also proposes additions to the regulations to impose new record keeping requirements for both certified operations and certifying agents to improve three components of traceability within the organic supply chain: (1) traceability within a single operation; (2) traceability one step forward and one step back from an operation in a supply chain; and (3) bidirectional traceability along an entire supply chain, source to consumer, by a third party. The proposed additions to the regulations require information sharing between certifying agents and reporting by certifying agents of “credible evidence of organic fraud to the Administrator.”

Under the proposed regulatory changes, certified operations would be required to:

- (1) Identify products as organic on all records and labels;



- (2) Maintain records to document a product's source and chain of custody; and
- (3) Implement a plan to detect and prevent organic fraud in any organic product that they produce, receive, and/or handle.

Certifying agents would be required to:

- (1) Develop and document procedures to designate operations and/or products as high risk for organic fraud;
- (2) Conduct supply chain audits on a sample of operations and products that they have determined to be high-risk; and
- (3) Share information with other certifying agents for the purposes of certification and enforcement.

NOC strongly supports the new regulatory requirements for certified operations and certifying agents to improve supply chain traceability.

AMS new proposed definition of "organic fraud" under §205.2
NOC recommendation to delete phase "for illicit economic gain"

NOC suggests a revision to the proposed definition for organic fraud. We recommend that the words "for illicit economic gain" be removed to ensure that even when economic gains are not realized, any intentional deception is recognized as fraud. Any willful violation of organic regulations or misrepresentation qualifies as fraudulent activity regardless of the ability to achieve economic gain.

NOC's recommended revision to AMS proposed definition of "organic fraud" in §205.2, with NOC's proposed revision **in red**:

§205.2 *Organic fraud*. Intentional deception **for illicit economic gain**, where nonorganic products are labeled, sold, or represented as "100 percent organic," "organic," or "made with organic (specified ingredients or food group(s))."

NOC also seeks two clarifications regarding the proposed definition of "organic fraud"

There are two important examples of organic fraud which need to be covered under the definition of "organic fraud." For both of these examples, NOC is unclear whether they are adequately covered by AMS' proposed definition. Specifically,



1. NOC would like to ensure that the definition is inclusive of fraud that could be committed by, for example, a co-packer or an entity that may not be selling a product, but instead is processing, trading, or brokering the product in some way. If an entity is not taking legal possession of a product, we believe this definition of organic fraud should still apply, and we would like AMS to make that clear in the final rule.

2. NOC believes that using the USDA organic label on seafood should be considered organic fraud under the definition laid out by AMS. While Canada and the European Union have established standards for organic aquaculture products, USDA has not completed organic aquaculture standards and there are no equivalency agreements in place for aquaculture. Therefore, foreign “organic” fish and seafood products should not carry the USDA organic label, and the organic fraud definition in the proposed rule should make it possible to enforce against the use of the organic label on domestic and foreign seafood in the absence of USDA organic standards for aquaculture. NOC is requesting that AMS make clear in the final rule that this example of fraud would be encompassed within the “organic fraud” definition.

Section §205.2

NOC recommends that the terms “trace-back audit” and “supply-chain audit” be defined in §205.2

The proposed rule references three different types of audits that can help ensure traceability and integrity in the organic supply chain:

1. Mass balance audits
2. Trace-back audits
3. Supply chain audits

AMS has proposed regulatory language at §205.403(d)(4) that adequately defines a mass balance audit as verifying “that sufficient quantities of organic product and ingredients are produced or purchased to account for organic product sold or transported.” The proposed regulations do not, however, adequately distinguish between trace-back audits and supply-chain audits, though both are referenced. These terms need to be clearly defined in the regulations. The rule proposes that trace-back audits be performed during all initial and annual on-site inspections of operations. Supply-chain audits, on the other hand, are to be conducted by certifying agents “on a sample of operations and products which it determines to be high risk.” Furthermore, “the proposed rule does not establish a specific metric for the number of annual supply-chain audits that a certifying



agent needs to conduct, because the quantity and types of high-risk operations will vary by certifying agent.”

NOC understands supply-chain audits to be far more extensive than trace-back audits. While trace-back audits use transaction and on-farm or processing records to identify and trace organic products and ingredients back to the time of production or purchase and forward to the time of sale or movement of product, supply-chain audits often require communication and coordination across multiple certifiers to fully track products across the entire supply chain from farm to fork through all movements, transactions, processing activities, and changes in custody. The differences between trace-back audits and supply chain audits should be fully spelled out in the regulations, as well as the circumstances and requirements for certifiers to perform each type of audit.

Examples of Existing Industry Practices that Should be Referenced in the AMS Proposed Rule to Enhance Traceability

NOC notes that there are already practices in place that can be incorporated into the regulatory text to help accomplish these goals. For example, many imports are shipped or stored in sealed or locked trailers, tanks, railcars, shipping containers, silos, vessels, cargo holds, freighters, barges, or other method of bulk transport or storage and must have the seals checked at each transfer to possession. As long as the seal or lock number matches the one on shipping documentation, integrity is reasonably assured. In those instances where a seal or lock is broken, as in cases where Customs and Border Protection (CBP) personnel inspect the shipment, that removal is documented, and the new seal or lock number recorded. Seals or locks cannot be used again, and often are saved as part of maintaining integrity and providing trace-back information. NOC also discusses this issue briefly in our comments in section 3 regarding Labeling of Nonretail Containers, and raises the question about whether these existing mechanisms should be more formally referenced in this section of the proposed rule or in Section 3, in order to protect organic integrity and facilitate supply-chain audit trails.

Role and Responsibility of USDA NOP

The proposed rule adds a requirement that certifiers must provide the following information to be accredited by the National Organic Program (NOP):

§205.504(b)(7) A copy of the criteria to identify high-risk operations and products; and procedures to conduct risk-based supply chain audits, as required in §205.501(a)(21); and procedures to report credible evidence of organic fraud to the Administrator.

NOC strongly supports this requirement that certifiers develop risk-assessment criteria to determine which operations, products, and supply chains are vulnerable to fraud or mishandling.



While the text accompanying the proposed regulatory changes describes potential risk-assessment criteria certifiers can use, it does not define the term “high risk.”

As explained in greater detail in our introductory comments, NOC believes that AMS must formalize and clarify what the terms “risk-based” and “high-risk” mean in this context. NOC recommends that AMS develop guidance to delineate the criteria and risk-factors AMS would like to see certifiers consider, to ensure that all actors have a common understanding of what constitutes high-risk, and to guide certifiers in fulfilling requirements to perform supply-chain audits (proposed addition at §205.501(a)(21)).

NOC recommends that the proposed rule more clearly define the NOP’s roles and responsibilities.

Additionally, the proposed rule has introduced many new requirements for both certifiers and organic operations to facilitate detection and enforcement activities to deter organic fraud. The NOP, however, also plays a critically important role and must continue to improve its own oversight and enforcement processes. NOC recommends that the proposed rule more clearly define the NOP’s roles and responsibilities. For example, just as certifiers should share information to facilitate the detection of fraud, USDA should also be required to share and utilize information from other accreditors. If foreign governments with whom we have equivalency arrangements, such as the European Union and Canada, are detecting fraud in organic supply chains, the NOP should be using that information to flag and take actions against bad actors.

Answers to AMS Questions in this section

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

As described in more detail above, NOC poses the question of whether the AMS proposed definition of “organic fraud” adequately addresses fraudulent activities of private labeling operations as well as seafood products fraudulently labeled as “organic,” in the absence of organic aquaculture standards.

2. Should certifying agents be required to perform a minimum number of trace-back audits each year?

As noted in our comments above, the proposed regulations do not adequately distinguish between trace-back audits and supply-chain audits, and this confusion is further emphasized by the wording of this question. These terms need to be clearly defined in the regulations.



The rule proposes that trace-back audits be performed during all initial and annual on-site inspections of operations. NOC fully agrees.

Supply chain audits, on the other hand, are to be conducted by certifying agents “on a sample of operations and products which it determines to be high risk.” Furthermore, “the proposed rule does not establish a specific metric for the number of annual supply chain audits that a certifying agent needs to conduct, because the quantity and types of high-risk operations will vary by certifying agent.” However, the proposed rule also notes that “because a product or operation’s level of risk may change over time, it is important that certifying agents conduct supply chain audits of lower-risk products (in addition to supply chain audits of high-risk products) to support proactive fraud prevention and detection.”

Given that the language in the explanatory text is ambiguous regarding which operations should have supply chain audits, and provides no guidance on the number of annual supply chain audits a certifier must conduct, there can be no expectation for consistent implementation. More regulatory language is required to address this issue overall.

3. Should more specific fraud prevention criteria be included in the regulation?

The differences between trace-back audits and supply-chain audits should be fully spelled out in the regulations, as well as the circumstances and requirements for certifiers to perform each type of audit. See our more extensive comments above.

Section (20) Additional amendments considered but not included in this Proposed Rule.

At the end of the proposed SOE rule, AMS asks the public to comment on the following question:

“Since the final rule establishing the National Organic Program (NOP) was first published in the **Federal Register** in 2000, the production, marketing, and sale of organic foods has undergone tremendous growth. The proposed rule is intended to strengthen enforcement of the USDA organic regulations through many actions, including strengthened certification processes and coverage of importers, brokers, and traders of organic products. Section 2107 (a)(10) of the Act allows the NOP to include fees from producers, certifying agents and handlers. AMS periodically reviews the fees for accreditation and accreditation services to ensure that they are in compliance with Circular A-25.^[60] AMS also oversees the NOP fees that certifying agents and others charge for their services.



AMS is seeking public comments in this proposed rule on how fees in the NOP could strengthen testing and enforcement across all stakeholders to ensure that the NOP keeps pace with the rapid growth and better serves the industry.”

NOC agrees that it is reasonable for USDA to recoup costs for its direct accreditation services by charging fees from the certifying agents who are being accredited. This is the status quo.

However, NOC would strongly oppose any effort to require the overall funding of the National Organic Program to come from user fees, instead of being funded through the annual appropriations process, as authorized under OFPA (7 U.S.C. 6522). There are significant benefits of organic agriculture, including environmental and public health benefits, which accrue to society at large. Therefore, it is entirely appropriate and in keeping with the Congressional intent of OFPA to have the function of NOP funded by the taxpayers through the annual appropriations process.

However, on a related topic, NOC is increasingly concerned about the barriers of access to organic certification, including those barriers associated with the cost of annual certification. Because of the multiple societal benefits of organic agriculture, it behooves our nation to encourage new and existing farmers to transition to organic, and to encourage existing organic farmers to continue to be certified. NOC is very concerned by recent actions of USDA (through the Farm Service Agency) to reduce the Congressionally authorized reimbursement rates under the National Organic Certification Cost Share Program (NOCCSP) and the Agricultural Management Assistance Act (AMA) because of lack of funding. The lack of funding stems from the accounting inaccuracies on the part of USDA in 2018, when USDA provided inaccurate data to Congress during the final 2018 Farm Bill negotiations regarding available carryover funds for the NOCCSP. USDA’s Farm Service Agency has acknowledged their error in the data provided to Congress, but has declined to take any action to find a solution to the resulting funding shortfall. Instead, USDA has asked Congress to fix the problem for them, by providing supplemental funding for the annual appropriations process. USDA has indicated to Congress that only \$9 million in extra funds are needed to resolve the funding shortfall for the NOCCSP through the remainder of the Farm Bill cycle (through the end of fiscal year 2023). NOC believes that it is incumbent on USDA to take actions to find the funding, using its many legal authorities and generous funding allotments from Congress, to resolve this problem.

Also related to our concerns about barriers to organic certification, NOC is encouraging a broader dialogue within the organic community, and with AMS and Congress, about barriers to certification for farmers of color and for limited resource farmers. The organic community benefits from having a diversity of experience and cultural perspectives reflected in organic production and handling. The topic of certification costs should be one part of that broader discussion.



Thank you for your consideration of these comments.

On behalf of National Organic Coalition Members:

A handwritten signature in black ink that reads "Abby Youngblood". The signature is written in a cursive, flowing style.

Abby Youngblood
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National Organic Coalition Members signing onto these comments:

Center for Food Safety
Consumer Reports
Equal Exchange
Food & Water Watch
Maine Organic Farmers and Gardeners Association
Midwest Organic and Sustainable Education Service
National Co+op Grocers
Northeast Organic Dairy Producers Alliance
Northeast Organic Farming Association
Ohio Ecological Food and Farm Association
Organic Seed Alliance
PCC Community Markets
Rural Advancement Foundation International – USA