

BEFORE THE UNITED STATES DEPARTMENT OF AGRICULTURE

Washington, D.C. 20250-0237

In the Matter of

Proposed Rule To Exempt Organic
Producers From Assessment by
Research and Promotion Programs,

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Docket Number:

PY-02-006 [RIN 0581-AC15]

COMMENTS OF CROPP COOPERATIVE

Respectfully Submitted,

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Re: Docket Number PY-02-006

Proposed Rule To Exempt Organic Producers From Assessment by Research and Promotion Programs

CROPP Cooperative respectfully submits these comments to the Agricultural Marketing Service ("AMS") regarding the above referenced docket and USDA's Proposed Rule implementing the Section 10607 of the 2002 Farm Bill (hereinafter "Exemption statute"). CROPP's previously submitted comments regarding the Proposed Rule to Exempt Organic Producers and Marketers From Assessments for Market Promotion Activities Under Marketing Order Programs; Federal Register, Volume 68, Number 231, Page 67381 (December 2, 2003) filed February 2, 2004 are attached hereto as Exhibit 1 and are incorporated herein by reference. CROPP also expressly notifies the Secretary that it supports the arguments advanced in the comments filed by Horizon Organic Dairies.

In its prior comments CROPP argued the definitions of the Farm Security and Rural Investment Act of 2002 ("FAIR Act"), when read together with the Organic Foods Production Act of 1990 ("OFPA"), compelled the Secretary to give the widest possible application to the Exemption Statute. Those arguments are incorporated herein by reference and, additional arguments are advanced demonstrating that CROPP Cooperative's certified organic producers, and CROPP Cooperative itself as a certified organic fluid milk marketer/handler, are entitled to exemption from assessments under the Dairy Milk Promotion Order, 7 C.F.R. Part 1150 and the Fluid Milk Promotion Order, 7 C.F.R. Part 1160. Similarly situated organic dairies are entitled to the same complete exemption. *See e.g.* Comments of Horizon Organic Dairies.

CROPP Cooperative's "Organic Valley" label is the nation's largest farmer-owned certified organic brand. The Cooperative's membership includes nearly 600 organic family farms in 16 states. The Cooperative produces an extensive line of refrigerated dairy products, eggs, juices, produce and meat, all of which are certified organic. The Cooperative's total revenues were in excess of \$155 million in 2003. Membership in the Cooperative is limited to qualified certified organic farmers. To qualify for membership, the farmer must be engaged in the production of certified organic agricultural products, meet the quality standards of the Cooperative, bear the risk of production, and reside in a region served by the Cooperative. The focus of the

Cooperative is to provide certified organic products recognized by consumers as a trusted food source supporting family farms, humane treatment of farm animals, sustainable agricultural production, and environmental protection. CROPP's dairy products are 100% organic and CROPP does not produce or market non-organic products.

CROPP Cooperative believes that in order to ensure that the plain meaning of the Exemption statute to exempt certified organic farmers and eligible fluid milk processors from assessments under AMS research and promotion programs, and the intent of Congress is satisfied, the Final Rule must be amended to accord with the following points.

SUMMARY

- A certified organic producer that produces and markets 100 percent organically the particular commodity governed by the commodity promotion program to which the exemption would apply, is eligible for the statutory exemption. If the producer is in possession of a certificate stating that the producer is certified in the production of 100% organic of the covered commodity, that producer is eligible for the exemption.
- A certified organic producer that produces 100 percent organically the particular commodity governed by the commodity promotion program to which the exemption would apply qualifies for the exemption without regard to whether the commodity is ultimately sold with an “organic” label affixed or in the conventional marketplace.
- Each organic producer that possesses a certificate from a USDA accredited certifier, that lists the particular commodities the producer can produce and market organically, and that does not operate a split-operation, should be required to only present that certificate to meet to qualify for the exemption. The continued eligibility of a certified organic producer to receive an exemption should turn on the continued certification of that producer, and not an annual review or renewal procedure adopted by the relevant commodity board.
- Congress intended certified organic fluid milk handlers/processors to be exempt from assessments imposed under the Fluid Milk Promotion Order, 7 C.F.R. Part 1160, because:
 - A fluid milk processor, defined in 7 C.F.R. § 1160.108¹, that pays the assessments under 7 C.F.R. § 1160.211 and that is a

¹ See also e.g. 7 U.S.C.A. § 6402(4)(statutory definition of fluid milk processor in Fluid Milk Promotion Act of 1990).

certified entity under the OFPA is a person eligible for the statutory exemption under the Proposed Rule without regard to whether the *facility* wherein the processing takes place also handles non-organic fluid milk because the certified entity processes and markets in consumer-type packages and pays assessments.

- A certified organic fluid milk processor/handler that markets nothing but certified organic milk products, is eligible for the statutory exemption under the Proposed Rule because Congress required only that the person seeking the exemption market “solely 100% organic products” and *did not require* that the marketed organic products bear labels stating “100% organic” under the NOP labeling rule. Thus a person seeking an exemption that sells “organic milk” is eligible for the exemption. *Compare* 7 C.F.R. § 205.301(a) (labeling “100% organic”) with 7 C.F.R. § 205.301(b)(labeling 95% organic).

I. Introduction

In its 2002 Farm Bill, Congress amended Section 501 of the FAIR Act by adding Section 10607, entitled Exemption of Certified Products From Assessments. Section 10607 exempted from assessments imposed by AMS programs all organic products. On April 26, 2004, the Agricultural Marketing Service of USDA opened Docket Number PY-02-006 to implement Section 10607 of the Farm Bill of 2002 and fixed a 30-day comment period. *See* Fed. Register, Volume 69, Number 80, p. 22690 (hereinafter “Proposed Rule”). The time for comment submission was subsequently enlarged up to and including June 25, 2004. *See* Fed. Register, Volume 69, No. 102, Page 29907 (May 26, 2004). The Proposed Rule addresses exemptions for organic entities from assessments under sixteen research and promotion programs.

The Exemption Statute provides:

(e) Exemption of certified organic products from assessments

- (1) Notwithstanding any provision of a commodity promotion law, a person that produces and markets solely 100 percent organic products, and that does not produce any conventional or non-organic products, shall be exempt from the payment of an assessment under a commodity promotion law with respect to any agricultural commodity that is produced on a certified organic farm (as defined in section 6503 of this title).²

² 7 U.S.C. § 7401(e)(1).

Relying on the distinction between certified organic and generic commodities it created with the 1990 Organic Foods Production Act (“OFPA”), Congress amended the FAIR Act by exempting certified organic products from all assessments arising from generic research and promotion laws. The policy rationale behind the Exemption statute is that organic producers, processors and their consumers do not benefit from non-organic commodity research and promotion programs. The two dairy-related programs affected, the Dairy Milk Promotion Order, 7 C.F.R. Part 1150 and the Fluid Milk Promotion Order, 7 C.F.R. Part 1160, lead to manipulation of the marketing and pricing of non-organic commodities, and do not maintain or expand markets for organic products.

As in all statutory construction matters, the Secretary must begin with the language of this statute, and the controlling statutory regime into which this amendment fits. *See e.g. Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)(noting the first step “is to determine whether the language at issue has a plain and unambiguous meaning”). The Exemption statute, while not particularly well drafted, is not ambiguous. *See e.g. INS v. Cardoza-Fonseca*, 480 U.S. 421, 447-448 (1987) (deference to agency interpretation only arises when statute is ambiguous). Congress left only a small gap in its organic exemption agenda, leaving to the Secretary the duty only to confer the full benefit intended, and to ensure it is widely and timely conferred. The eligibility criteria for the organic exemption are established by Congress in the Exemption statute and the Secretary must faithfully implement these criteria.

II. Specific Comments

A. Congress Recognized a Separate and Distinct Organic Marketplace when it Adopted the OFPA in 1990.

Congress recognized in 1990 the existence of the separate market for organic products because an organic product is a unique agricultural commodity compared to its non-organic, or conventional counterpart. Organic agriculture represents a method of production that is meticulously regulated and is subject to scrutiny by USDA accredited certifiers throughout the nation. It is a system that “integrat[es] cultural, biological, and mechanical practices that foster cycling of resources, promote ecological balance, and conserve biodiversity.” 7 C.F.R. § 205.2. The “organic product” represents the end result of the process, and Congress has recognized that the final product is distinct from the product of conventional agriculture, and certified organic agricultural commodities are the only commodities that may be sold in this legally distinct marketplace. *See e.g. OFPA*, 7 U.S.C. § 6501 *et seq.*; *see also Pringle v. USA*, 1998 U.S. Dist. Lexis 19378 (awarding higher disaster benefits to organic farmers based on the higher value of the organic crop and finding the organic market distinct and a special end use).

The OFPA was enacted, “to establish national standards governing the marketing of certain agricultural products as organically produced products.” 7 U.S.C. § 6501(1). In order to clearly distinguish generic agricultural commodities from organic agricultural commodities Congress preempted the field and forbid the use of the term “organically produced” unless it meant “an agricultural product that is produced and handled in

accordance with this chapter.” 7 U.S.C. § 6502 (14). Products not meeting the standards set forth in the OFPA may not be “sold or labeled as an organically produced agricultural product.” 7 U.S.C. § 6504; *see also* 7 U.S.C. § 6505 (compliance requirements); *accord* 7 C.F.R. Part 205 (National Organic Program); 7 C.F.R. § 205.100 (What has to be certified); 7 C.F.R. § 205.102 (Use of the Term Organic) To ensure the borders of the separate market for organically produced products are maintained, Congress imposed a civil penalty of up to \$10,000 for selling or labeling generic agricultural commodities or products as organically produced. *See* 7 U.S.C. § 6519(1) (Violations of chapter, Misuse of Label) 7 C.F.R. § 205.100(c)(Penalty for misuse of organic in sale or labeling).

B. Several Initiatives in the 2002 Farm Bill Demonstrate Congress’s Continued Treatment of Organic Commodities as a Separate and Distinct Class of Products and the Exemption Statute must be Implemented Against this Legal and Policy Backdrop

In addition to the Exemption Statute, the 2002 Farm Bill contains several initiatives by Congress that support the development of organic production methods and domestic and international markets for organically produced and handled agricultural commodities.

- Organic Agriculture Research and Extension Initiative. *See* § 7218
- Organic Production and Market Initiatives. *See* § 7407
- International Organic Research Collaboration. *See* § 7408
- Report on Producers and Handlers of Organic Agricultural Products. *See* § 7409
- National Organic Certification Cost-Share Program. *See* § 10606

Each of the foregoing amendments adopted by Congress in 2002 demonstrates two key features of U.S. agricultural policy:

- continued Congressional recognition of and support for the organic production methodology as a separate and unique production technique, distinct from the conventional agricultural method, and,
- continued Congressional recognition that organically produced and handled agricultural commodities constitute a separate and unique market that is characterized by vibrant competition and is best served by an independent marketing framework.

Congress recognized that organic commodities do not benefit from the generic promotional efforts supported by the research and promotion programs because organic producers do not market their products in the “conventional” marketplace. Because they are unable to take advantage of these programs, and do not benefit from these efforts, Congress removed the obligation to contribute to these efforts through the assessments. Congress’s recognition that the two dairy program assessments referenced herein do not benefit the organic producers, the organic processors and handlers, nor their consumers, is consistent with the U.S. Supreme Court’s characterization of related marketing programs. *See e.g. Glickman v. Wileman Brothers and Elliot Inc.*, 521 U.S. 457, 461 (1997)(citing 7 U.S.C. § 602(1)(noting marketing programs benefit only those “producers in a particular market”).

C. Commodity Promotion Laws are Enacted on a Specific Commodity by Commodity Basis, and the Exemption Statute Must be Implemented on the Same Commodity-by-Commodity Basis.

There is no disputing that the “central Congressional purpose underlying each commodity promotion law has always been to maintain and expand markets and uses *for the agricultural covered by the law*,” and Congress has consistently adopted commodity specific marketing order statutes to minimize their market distorting influence. *See generally* U.S. CODE, TITLE 7, CHAPTER 101, (Agricultural Promotion) at § 7401(b)(3); TITLE 7, SUBCHAPTER II (Canola and Rapeseed); TITLE 7, SUBCHAPTER III (kiwifruit); TITLE 7, CHAPTER 90 (Mushrooms); TITLE 7, CHAPTER 91 (Limes). Congress has also commanded the funds gathered pursuant to assessments imposed under these programs be expended only to advance the markets for the designated commodity. *See e.g.* 47 U.S.C. § 7414(e)(Activities and Budgets requiring each board submit a budget for “promotion, research, or information *relating to the commodity covered by the order*.”). The Department’s regulations have faithfully implemented those statutes on a commodity by commodity basis. *See generally* 7 C.F.R. Chapter IX, Parts 900-999 (fruit and vegetable marketing orders; regulations issued commodity by commodity); *See also* 7 U.S.C. § 7401(b)(Congressional findings that repeatedly limit the reach of generic commodity promotion programs to the “covered commodities” and commodities “covered by the law”); 7 U.S.C. § 7401(b)(4)(findings respecting the “commodity covered by the law”); (b)(6) (same); (b)(7)(findings noting promotion programs are intended to expand market “for that commodity”).

The commodity by commodity approach, and the deployment of the assessments to benefit only the subject commodity, has been recognized by the U.S. Supreme Court as the typical approach. *See Glickman v. Wileman Bros. and Elliot Inc.*, 521 U.S. 457, 461 (1997) (finding the commodity-specific programs serve the economic interests of the producers of each program commodity and are “paid from funds collected pursuant to the marketing order.”); *accord* 7 U.S.C. § 7416(a)(requiring assessments be paid to specific marketing board) The policy underpinnings of the commodity by commodity approach maximizes “the producers’ common interest in disposing of their output on favorable terms” while minimizing the extent to which “economic regulation...has displaced

competition,” in the overall food market. *Glickman*, 521 U.S. at 462 As the Secretary considers implementation of the Exemption statute as it relates to the two referenced dairy programs, she must recognize that the entire economic rationale for such programs is underpinned by a commodity-by-commodity approach that mandates a similar outcome in this rulemaking.

1. The Exemption Statute Must be Implemented in Light of the Existing Commodity by Commodity Approach of Commodity Promotion Laws to Comport with Congressional Intent and the Secretary’s Prior Implementation of the Dairy Milk Promotion Order and the Fluid Milk Promotion Order, and The National Organic Program.

The first clause of the Exemption Statute states a person shall be exempt from assessment if that person “produces and markets solely 100 percent organic products.” 7 U.S.C. § 7401(e)(1). It is irrelevant that the producer also sells *other* commodities that are not certified organic because the commodity by commodity approach controls. If the agricultural commodity is produced on a certified organic farm, that producer is marketing “100 percent” organic products and is eligible for the exemption. The commodities that are organically produced on a certified organic farm can easily be determined from the producer’s organic certificate. The National Organic Program (“NOP”) rules require that any USDA accredited certifying agent, that issues a certificate after an inspection of a farm, must specifically identify the “Categories of organic operation, including crops, wild crops, livestock or processed produced by the certified operation.” *See* 7 C.F.R. § 205.404(b) Any commodity board may easily determine that the producer is a certified producer of a particular commodity. Of course, both the Dairy Milk Promotion Order and the Fluid Milk Promotion Order address only milk and milk products. *See* 7 C.F.R. § 1150.111-113 (defining milk, fluid milk and milk products); 7 C.F.R. § 1150.107-09 (defining fluid milk product, fluid milk processor and milk) All of CROPP’s producers possess organic certificates bearing product designations that conform to the categories of the two existing research and promotion programs, thus squarely placing them in line for the relief Congress intended.

Congress intended the Exemption Statute exempt “any agricultural commodity that is produced on a certified organic farm (as defined by section 6502 of this title).” By referencing the OFPA and its definitions, Congress explicitly *did not* limit such exemption in the event of approved split operations. To the extent the Proposed Rule contains an example that suggests that products from split-operations approved under the OFPA and certified by an USDA accredited certifying agent are ineligible for the Statutory Exemption, the Proposed Rule would create unnecessary conflict with the OFPA. *Compare* 7 U.S.C. § 6502(5) (definition “organically produced”) with 7 U.S.C. § 6502(4)(certified organic farm means “a farm, or portion of a farm”) and 7 U.S.C. § 6502(10)(certified organic handling operation means “any operation or portion of an operation); *see* 7 C.F.R. § 205.2 (split operation means “An operation that produces or handles both organic and non-organic agricultural products.”) Thus, it is the nature and legal status of the organic agricultural product that is the touchstone of eligibility under

Congress' approach because both Congress and the Secretary have already determined a "split-operation" may produce 100% certified organic products. To construe the Exemption Statute to the contrary would create irrevocable conflict with the OFPA, and represent an unreasoned and unjustified departure from the Department's past practice.

Moreover, under certain circumstances, even a farmer that does not operate a split-operation, may be compelled to sell products from his organic farm in conventional sales channels. *See e.g.* 7 U.S.C. 6506(b)(2)(discretion to adopt provisions regarding "federal or state emergency" spray programs); 7 C.F.R. § 205.2(definition of emergency pest or disease treatment program); 7 C.F.R. 205.238(c)(7) (barring organic livestock producer from withholding healthcare to maintain organic status of animal; mandating diversion to conventional market); 7 C.F.R. § 205.290 (Temporary Variances)(listing conditions under which suspension of requirements may occur); 7 C.F.R. § 205.101(a)("exemptions"); 7 C.F.R. § 205.2(a)(definition of "drift"); 7 C.F.R. § 205.272 (prohibiting commingling of organic products with "nonorganic products" and prohibited materials). In the Exemption statute Congress focused on providing relief to certified entities that produce and market certified organic products, and limited the eligibility for the exemption only by requiring that the person seeking relief demonstrate the commodity for which assessment relief is sought is 100% produced and marketed as organic under the OFPA. No other limitation was adopted and no other eligibility limitation may be imposed without exceeding the authority delegated under the Exemption Statute. An

[A]gency's interpretation of the statute is not entitled to deference absent a *delegation of authority* from Congress to regulate in the areas at issue. (emphasis by court)

Motion Picture Ass'n. v F.C.C., 309 F.3d 796, 798 (D.C. Cir. 2002).

The examples appearing in the comments submitted in this docket by Horizon Organic Dairy ("HOD") are adopted herein because they succinctly describe several absurd results that may arise from the Proposed Rule's failure to tightly focus on the organic status of the *specific commodity* for which the exemption is sought. In the case of both HOD and CROPP Cooperative, their certified organic dairy producers are eligible for exemption without regard to the commercial sale of organic non-dairy commodities from the dairy farm, or the production and sale of non-organic, non-dairy commodities, or the sale of organic dairy products through conventional sales channels.

If carried forward to the Final Rule, the Secretary's examples appearing in the Proposed Rule will result in a rule that frustrates and blocks the full reach of the exemption by artificially constraining the eligibility of certified organic producers. If a certified organic farmer produces all of his dairy products organically, then he is eligible for the exemption as applied to any dairy-product based assessment. If that farmer produces non-organic honey or meat or corn (none of which are governed by the commodity promotion law for which exemption is sought) he is still eligible for the exemption on the program crop. Additionally, if that farmer must divert an animal or a

crop product to the conventional market in order to comply with the organic rules as discussed above, that would not constitute a disqualifying sale because such a construction would impermissibly penalize the farmer for compliance with the National Organic Program's rules. It would be absurd to conclude that Congress intended a farmer would lose the entitlement to an exemption created for organic farmers *when acting to maintain full compliance with the Secretary's organic program.*

D. An Organic Product Does not Lose its Legal Status as the Product of a Certified Organic Farm When it is Transacted in the Conventional Marketplace and such Sale Does Not Impact the Eligibility for the Exemption.

In passing the Exemption statute, Congress demonstrated that it recognized that the current commodity promotion laws assist in the marketing of conventional products, and that the organic marketplace represents a separate marketing effort. Congress's focus in the statute was to provide relief to any "producer who *produces and markets* solely 100 percent organic products and *does not produce* any conventional or non-organic products." Eligibility for the exemption turns, not on the label or the ultimate sales channel, but on the certified organic status of the commodities. As a policy matter, because the farmer does not market the commodity in the conventional marketplace, the farmer does not benefit from the commodity promotion laws, and is therefore within the policy contours of the exemption. As a legal matter, a certified organic product does not lose its legal status because it is transacted in the conventional marketplace nor does the farmer or handler lose their certification as a result of such sale. To construe the Exemption statute in a manner that restricts eligibility for the exemption based on a transaction that does not and cannot change the fact that the product was produced on a certified organic farm, would be manifestly contrary to the plain meaning of the Exemption statute and the OFPA, and would impermissibly assume Congress intended to "paralyze with one hand what it sought to promote with the other." *Escondido Water Co. v. LaJolla Indians*, 466 U.S. 765, 777 (1984).

As noted above, the Proposed Rule leaves open the possibility that eligibility for the Exemption may be eliminated if a certified organic producer is forced, in an isolated instance, to sell a certified commodity on the conventional market. For example, if a dairy farmer is forced to give an animal antibiotic treatment, for humane purposes (required by the Organic Food Production Act), the farmer must then sell the animal conventionally. This cannot result in a loss of eligibility for the exemption. Nor should the farmer lose the exemption if a farmer's certified organic product is ultimately sold without an organic label, or with an organic label but on the conventional market, either by a third party down the supply stream, or from the farm because of a lack of an adequate organic market. If the farm maintains its organic certification, there is no reason the farmer should not be exempt from the assessments on the commodity produced, and be able to concentrate his marketing efforts and marketing dollars in the organic marketplace, as Congress intended.³

³ Congress left open the possibility that in the future assessment monies may be aggregated by organic producers and handlers to pursue separate marketing efforts for the organic marketplace.

A certified organic producer who produces 100 percent organically the particular commodity governed by the commodity promotion program to which the exemption would apply qualifies for the exemption without regard to whether the commodity is ultimately sold with an “organic” label or disposed of it in the conventional marketplace. Congress did not intend to bar eligibility for the exemption if a certified organic product is transacted in the conventional marketplace. In that situation the product remains an organic product and would not run afoul of the limited bar on production and direct sale of nonorganic products. The fact that the certified organic product does not transact in the organic marketplace is irrelevant as to its organic nature at the time it was produced.

E. An Organic Certificate from a USDA Accredited Certifying Agent Contains Sufficient Information to Permit any Commodity Board to Determine Eligibility for the Exemption and No Additional Paperwork Should be Required

The Proposed Rule includes a new 7 C.F.R. § 1150.157 that provides:

(a) To apply for an exemption under this section, a producer pursuant to Sec. 1150.152(a), and (b) shall submit a request for exemption to the Board on a form provided by the Board at any time initially and annually thereafter on or before July 1 as long as the producer continues to be eligible for the exemption, and (c) the request shall include the following: the producer's name and address, a copy of the organic farm or organic handling operation certificate provided by a USDA-accredited certifying agent as defined in section 2103 of the Organic Foods Production Act of 1990 (7 U.S.C. 6502), and a signed certification that the applicant meets all of the requirements specified in paragraph (a) of this section for an assessment exemption.

See Proposed Rule at 22694-95. The Proposed Rule suggests this form-based approach,

[R]equires the minimum information necessary to effectively administer the exemption provision, and its use is necessary for compliance purposes.

Proposed Rule at 22692. CROPP respectfully suggests that the Secretary amend this proposed approach by requiring only that the eligible entity provide its organic certificate issued by an USDA accredited certifying agent rather than a separate form bearing a separate signed certification by the eligible entity. The organic certificate contains all of the information required to determine eligibility, and significantly reduces the paperwork burden. *See 7 C.F.R. 205.404(3)*(requiring that the organic certificate include “Categories of organic operation; including crops, wild crops, livestock or processed products produced by the certified operation.”).

Moreover, the potential for confusion exists because the Proposed Rule requires that the certified producer issues its own statement confirming the following:

(a) A producer described in Sec. 1150.152(a) and (b) who produces and markets solely 100 percent organic products and does not produce any conventional or non-organic products shall be exempt from the payment of assessments on milk provided the milk is produced on a certified organic farm as defined in section 2103 of the Organic Foods Production Act of 1990 (7 U.S.C. 6502).

See Proposed Rule at 22694. This provision relies on the Exemption statute's terminology and that language differs from the typical language used by USDA's certifying agents. Certified organic producers may be confused by this shift in terminology and this problem is easily avoided by use of the organic certificate.

Finally, the separate requirement that the eligibility for exemption be re-determined on an annual basis would be unnecessary if the organic certificate is used. *See* 7 C.F.R. § 205.404(c) ("Once certified, a production or handling operation's organic certification continues in effect until surrendered by the organic operation or suspended or revoked by the certifying agent, the State organic program's governing State official or the Administrator."). The existing organic certification is sufficient to demonstrate eligibility for the Exemption proposed by Congress and reliance thereon eliminates the additional burden on producers, and the burden on each commodity board to develop its own form. Reliance on the standardized approach to organic certificates would eliminate this issue.

F. The Final Rule Must Exempt Fluid Milk Processors That Receive and Market Only Organic Products.

The Proposed Rule includes an amendment to the National Fluid Milk Promotion Order 7 C.F.R. Part 1160.215, allowing for the exemption from the assessment for any fluid milk processor who produces and markets solely 100% organic products, and who does not produce any conventional or non-organic products.

(b) A fluid milk processor described in Sec. 1160.211(a) who produces and markets solely 100 percent organic products, and who does not produce any conventional or non-organic products, shall be exempt from the payment of assessments on fluid milk products produced on a certified organic farm as defined in section 2103 of the Organic Foods Production Act of 1990 (7 U.S.C. 6502). For purposes of this section, produce means to grow or produce food, feed, livestock, or fiber or to receive food, feed, livestock, or fiber and alter that product by means of feeding, slaughtering, or processing.

See Proposed Rule at p. 22695. CROPP agrees with the foregoing section.⁴ However, the discussion of the Regulatory Flexibility Act in the Proposed Rule indicates that the Secretary did not identify any fluid milk processors that would be eligible for the assessment. See *Proposed Rule at p. 22693* (Regulatory Flexibility Act analysis; valuing at zero the estimated fluid milk processor exemption amount). Apparently the Secretary concluded that no certified organic handler of fluid milk would meet the eligibility criteria set forth above, and thus none qualify for an exemption from assessments imposed under the National Fluid Milk Promotion Order. No explanation for this conclusion appears in the text of the Proposed Rule.⁵ In the absence of a clearly stated rationale, CROPP believes the erroneous conclusion is the result of one or two misconceptions, each of which may be readily cleared up. As is demonstrated below, CROPP Cooperative, and other certified organic fluid milk processors similarly situated, are eligible persons under the Exemption statute and are entitled to the exemption.

First, it is possible that the Secretary mistakenly believes that the use by certified organic fluid milk processors like CROPP Cooperative of processing facilities that handle organic and conventional processing, as designated agents for the purposes of administering the assessments, disqualifies the certified organic processor because non-organic products are handled at that *facility*. Second, it is possible that the Secretary mistakenly determined that organic fluid milk that is not typically labeled “100% organic” under the National Organic Program (“NOP”) labeling rules appearing at 7 C.F.R. § 205.301(a) but instead is labeled “organic milk” under 7 C.F.R. § 205.301(b), disqualifies its processor from eligibility because Section 10607 requires the processor’s milk be *labeled* “100% organic.” Each is addressed separately below.

1. If a Processor Currently Pays the Assessment, and The Products It Markets Are 100% Organic, the Processor is Eligible For the Exemption.

CROPP Cooperative and similarly situated organic fluid milk processors are eligible for the assessment relief. CROPP Cooperative meets the definition of a person that pays an assessment, is certified by an accredited certifying agent of the USDA, and does not produce or market any dairy products except ones produced on certified farms

⁴ The Proposed Rule’s definition of the class of eligible persons irrefutably includes fluid milk processors like CROPP Cooperative. First, “To be eligible for an exemption, the person must be subject to an assessment under a research and promotion program.” *Proposed Rule at p. 22691*. Second, “person” includes, “an individual, group of individuals, corporation, association, cooperative, or other business entity.” *Id.* Third, eligible persons include “handlers, first handlers, processors...” *Id.* Fourth, such persons “must possess certification from a USDA-accredited certifying agent and certify that the farm or handling operation meets the requirements of 100 percent organic as defined in section 2103 of the Organic Foods Production Act of 1990 (7 U.S.C. 6502).” *Id.* Finally, the definition of “fluid milk processor” appearing in 7 C.F.R. 1160.211 provides, “Each fluid milk processor shall pay to the board....an assessment....”

⁵ The Proposed Rule noted, “No respondents were identified for the fluid milk, popcorn, and egg programs. * * * Among assessment payers, no solely 100 percent organic processors or producers are known” *Proposed Rule at 22693*. It is unclear how this conclusion was reached.

and handled by certified handlers thus meeting the Exemption statute's requirements of "100 per cent organic" products and the absence of non-organic products. Finally CROPP meets the definition of a fluid milk processor under the Fluid Milk Promotion Order, as a "person who processes and markets commercially fluid milk products in consumer-type packages in the United states..." 7 C.F.R. § 1160.108. As stated above, CROPP Cooperative's "Organic Valley" label is the nation's largest farmer-owned certified organic brand. CROPP Cooperative's membership produces 100% organic milk, all of which is marketed through the cooperative, which purchases the milk from the farmers and is responsible for all processing, product design, packaging and marketing of the milk. CROPP Cooperative pays the 20 cent promotion fees currently, through its designated agent, and therefore is eligible for the exemption. The fact that the *facility* of the designated agent which CROPP Cooperative or any other organic fluid milk processor chooses to use, does not handle 100% organic products cannot disqualify the certified processors like CROPP from the exemption.

2. Congress was not Referring to the National Organic Program Labeling Rules when it Limited Eligibility for the Exemption to those Persons that Produce and Market Solely 100% Organic Products.

Congress's eligibility restriction on the Exemption to those persons that produce and market "solely 100 per cent organic products, and that does not produce any conventional or non-organic products" should not be confused with the federal organic labeling rules for several reasons.

First, Congress chose to require "100 per cent organic products" rather than "products that are labeled 100% organic." *See* 7 C.F.R. § 205.301(a). In other words, Congress expressly declined to use the NOP labeling term "100% organic."⁶ That manifest expression of Congressional intent to *avoid* the agency's labeling matrix should end the interpretive inquiry right there.

[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S 837, 842-43 (1984).

⁶ This is readily confirmed upon examining the National Organic Program rules regarding labeling that appear at 7 C.F.R. Part 205. *See e.g.* 7 C.F.R. § 205.301 (Product Composition authorizing label to read "100% organic" when the "raw or processed agricultural product...contain[s] (by weight or volume, excluding water or salt) 100% organically produced ingredients"); *see* 7 C.F.R. § 205.303(1)(Packaged products labeled "100% organic" or "organic")(on packaged products, "100 percent organic" is synonymous with "organic"); *see* 7 C.F.R. § 205.307 (rules regarding labeling of containers the same for "100% organic" and "organic" products); *see also* 7 C.F.R. § 205.308(rules regarding labeling for non-packaged products the same for products claiming "100% organic or organic").

Second, the “100% organic” label is one of several labeling provisions governing organic products under the NOP rules, and that provide additional information regarding ingredients to consumers. However, each product to which an organic label is affixed is an organic product under the OFPA and demonstrates that many different formulations meet the dictates of the OFPA. *See e.g.* 7 C.F.R. § 205.301(a-d) Third, the labeling categories adopted in the NOP rule, such as “100% organic” do not themselves appear in the OFPA and are solely for the purpose of ensuring that “agricultural products and ingredients are consistently labeled to aid consumers in selection of organic products and to prevent labeling abuses.” *See Final Organic Rule at pg. 108.* Fourth, each of the labeling categories appearing at 7 C.F.R. § 205.301(a-d) describe with greater specificity the ingredients in a product, but have nothing to do with the certification of a producer or handler. *See e.g.* 7 C.F.R. 205.2 (definition of “certified” and “certified operation” do not refer to labeling); 205.2 (definition of “organic” means “produced in accordance with the Act and regulations”); 7 U.S.C. 6510(a)(4)(permitting organic certification to handlers that add not more than 5% non-organic ingredients to products). This can only mean that the requirement that the products be certified by an accredited agent is the touchstone of eligibility and the particular labeling category into which a particular product may fall is legally irrelevant.

Accordingly, when Congress used the phrase “100% organic products” it imposed a requirement that a person’s entire product line must be certified as organically produced and handled under the OFPA, and it *did not* refer to the labeling provisions that merely distinguish between the organic products bearing various percentages of organic ingredients. This conclusion is significantly bolstered by the OFPA because Congress *did not command adoption* of the labeling categories later adopted in the NOP rule, but instead explicitly determined, for instance, that organic products may have up to 5% non-organic ingredients and be just as organic as those products with all organic ingredients. *See* 7 U.S.C.A. § 6510(a)(4). Thus when Congress refers to producing and marketing “100 per cent” organic products, it clearly intends that every product the person markets be within the jurisdictional purview of the OFPA but not within a particular labeling category because the labeling categories *do not exist in the statute*. Most importantly, Congress did not intend to restrict the exemption to only those persons that choose to label products as “100% organic.”

III. Conclusion

For the foregoing reasons CROPP Cooperative respectfully requests that the Secretary amend its Proposed Rule to follow the well settled commodity by commodity approach when determining eligibility for exemptions to ensure that the relief provided by Congress is as widely available as was intended and further amend the Proposed Rule by affording relief to certified organic fluid milk processors as is consistent with the Exemption statute’s plain meaning and intent of Congress.

Respectfully submitted,



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BEFORE THE UNITED STATES DEPARTMENT OF AGRICULTURE

Washington, D.C. 20250-0237

In the Matter of

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**Docket Number:
FV-03-900-1PR**

Proposed Rule to Exempt Organic Producers
and Marketers From Assessments for
Market Promotion Activities
Under Marketing Order Programs

COMMENTS OF CROPP COOPERATIVE

Respectfully Submitted,

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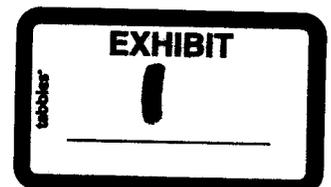


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RE: Docket Number FV-03-900-1PR

Proposed Rule to Exempt Organic Producers and Marketers From Assessments for Market Promotion Activities Under Marketing Order Programs; Federal Register, Volume 68, Number 231, Page 67381 (December 2, 2003)

CROPP Cooperative respectfully submits these comments to the AMS regarding the above referenced docket and USDA's proposed rule implementing the Section 10607 of the 2002 Farm Bill.

CROPP Cooperative's "Organic Valley" label is the nation's largest farmer-owned certified organic brand. The Cooperative's membership includes nearly 600 organic family farms in 16 states. The Cooperative produces an extensive line of refrigerated dairy products, eggs, juices, produce and meat, all of which are certified organic. The Cooperative's total revenues were in excess of \$155 million in 2003. Membership in the Cooperative is limited to qualified certified organic farmers. To qualify for membership, the farmer must be engaged in the production of certified organic agricultural products, meet the quality standards of the Cooperative, bear the risk of production, and reside in a region served by the Cooperative. The focus of the Cooperative is to provide certified organic products recognized by consumers as a trusted food source supporting family farms, humane treatment of farm animals, sustainable agricultural production, and environmental protection.

CROPP Cooperative believes that in order to ensure that the intent of Congress to exempt certified organic farmers from assessment on their products is met, the rule as proposed must be amended in accordance with the following points.

SUMMARY

- The definitions appearing in the Federal Agriculture Improvement and Reform Act of 1996 (“FAIR Act”)¹ and the Organic Foods Production Act (“OFPA”)² must be used to implement Section 10607 of the Farm Security and Rural Investment Act (“Exemption statute”)³ to comport with Congressional intent.
- Persons eligible under the Exemption statute are exempt from all assessments under generic commodity promotion laws rather than partially exempt as proposed by the Secretary.
- A certified organic producer that produces and markets 100 percent organically the particular commodity governed by the commodity promotion program to which the exemption would apply, is eligible for an exemption.
- A certified organic producer who produces 100 percent organically the particular commodity governed by the commodity promotion program to which the exemption would apply qualifies for the exemption without regard to whether a “first handler” receives and markets that same commodity bearing an organically produced label or disposes of it in the conventional marketplace.
- A person that produces the same program crop organically and conventionally may not market both the organic and nonorganic products directly to consumers and obtain the exemption unless the Secretary concludes such a limitation would impermissibly conflict with the FAIR Act as discussed herein and the OFPA’s approval of “split operations.”
- First handlers under the FAIR Act, and not a commodity marketing board, should be responsible for determining the eligibility of a certified organic producer to receive an exemption.
- The proposed method of calculation of the rate of exemption from assessment, and its implementation is too complicated and burdensome and should be simplified.

¹ Pub. L. 104-127 codified at several places in the U.S. Code.

² Pub.L. 101-624, Title XXI, §2102 Nov. 28, 1990, 104 Stat. 3935 codified at 7 U.S.C. §6501 *et seq.*

³ Pub.L. 107-171 is codified at in several places in the U.S. Code.

The intent of Congress was to bar all assessments that might be imposed under generic commodity promotion laws on commodities originating from certified organic farms. The Exemption statute unambiguously exempts from imposition of an assessment every certified organic producer that markets to a “first handler” or that “produces and markets” a certified organic commodity directly to consumers. In the case of a certified organic producer selling program commodities to a “first handler” for marketing purposes, in no event may those commodities or products sold to the first handler be subject to an assessment.

Because the definition of “produce” in the proposed rule is different from either the FAIR Act and the OFPA, and unnecessarily combines the role of producers and handlers, it defeats implementation of the exemption Congress adopted and imposes new eligibility criteria that are far more difficult to meet than Congress intended. The proposed rule should be clarified to ensure that when a “first handler” takes possession of a certified organic commodity for the purpose of “marketing” it under the FAIR Act, the Exemption statute’s clause that the person not “produce any conventional or non-organic products” cannot apply to such a “first handler.” Moreover, it is legally irrelevant whether that “first handler” sells the product in the organic or conventional market place. The terms of the OFPA and the FAIR Act, to which the Exemption statute is an amendment, are binding and to the extent the proposed rule ignores or conflicts with these statutes, it requires amendment.

Moreover, the Secretary’s proposal to leave *completely unaltered* the assessment authority of marketing boards over organic products, and to ignore the exemption mandated by Congress in favor of an expenditure-reimbursement approach nowhere mentioned by Congress, violates the deregulatory agenda underpinning the statute’s plain terms, and gratuitously assumes Congress intended to “paralyze with one hand what it sought to promote with the other.” *Escondido Water Co. v. LaJolla Indians*, 466 U.S. 765, 777 (1984) citing *American Paper Institute, Inc. v. American Electric Power Service Corp.*, 461 U.S. 402, 421 (1983) (quoting *Clark v. Uebersee Finanz-Korporation, A.G.*, 332 U.S. 480, 489 (1947)).

When an agency rule conflicts with authorizing statutes, it may be invalidated on procedural or substantive grounds. See 5 U.S.C. § 706(2) (a reviewing court shall set aside agency action, findings, and conclusions found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”). The following analysis is submitted to guide the Secretary’s implementation of the Exemption statute and seeks to ensure an outcome that comports with the statute’s plain meaning and Congressional intent.

I. Introduction

On Tuesday, December 2, 2003, the Agricultural Marketing Service of USDA opened Docket Number FVO3-900-1PR to implement Section 10607 of the Farm Bill of 2002 and fixed a 30-day comment period. *See Fed. Register, Volume 68, Number 23, p. 67381* (hereinafter “proposed rule”). The time for comment submission was subsequently enlarged up to and including February 2, 2004. *See Fed. Register, Volume 68, No. 249, Page 75148* (December 30, 2003) The proposed rule addresses exemptions for organic entities from assessments under marketing orders regarding fruits and vegetables, and anticipates a second proposed rule addressing assessments paid *inter alia*, to the National Dairy Promotion and Research Program and the National Fluid Milk Processor Promotion Program. *See Proposed Rule* at 67382 (noting FAIR Act covers “16 national research and promotion programs” that “will be addressed at a later date” and listing programs including dairy).

A. The 2002 Farm Bill Demonstrates Congressional Intent to Treat Organic Commodities as a Separate and Distinct Class of Products.

The 2002 Farm Bill amended Section 501 of the FAIR Act. The instant docket arises from Section 10607, entitled Exemption of Certified Products From Assessments, herein referred to as the “Exemption statute.” In addition to Section 10607, the 2002 Farm Bill contains several initiatives by Congress that support the development of organic production methods and domestic and international markets for organically produced and handled agricultural commodities.

- Organic Agriculture Research and Extension Initiative. *See* §7218
- Organic Production and Market Initiatives. *See* §7407
- International Organic Research Collaboration. *See* §7408
- Report on Producers and Handlers of Organic Agricultural Products. *See* §7409
- National Organic Certification Cost-Share Program. *See* §10606

Each of the foregoing amendments adopted by Congress in 2002 demonstrates two key emerging features of U.S. agricultural policy:

- continued Congressional recognition of and support for the organic production methodology, and,
- continued Congressional recognition that organically produced and handled agricultural commodities constitute a separate and unique market

that is characterized by vibrant competition and is best served by a deregulatory, pro-competition legal framework.

B. Congress Recognized a Separate and Distinct Organic Marketplace when it Adopted the OFPA in 1990.

Organic agricultural commodities transact in a legally distinct marketplace defined by Congress. *See* 7 U.S.C. §6501 *et seq.* (Organic Foods Production Act of 1990); *see also Pringle v. USA*, 1998 U.S. Dist. Lexis 19378 (awarding higher disaster benefits to organic farmers based on the higher value of the organic crop and finding the organic market distinct and a special end use).

The Organic Foods Production Act of 1990 was enacted,

- (1) to establish national standards governing the marketing of certain agricultural products as organically produced products.

7 U.S.C. §6501(1). In order to clearly distinguish generic agricultural commodities from organic agricultural commodities Congress preempted the field and forbid the use of the term “organically produced” unless it meant,

an agricultural product that is produced and handled in accordance with this chapter.

7 U.S.C. §6502 (14). Products not meeting the standards set forth in the OFPA may not be,

[S]old or labeled as an organically produced agricultural product.

7 U.S.C. §6504; *see also* 7 U.S.C. §6505 (compliance requirements); *accord* 7 C.F.R. Part 205 (National Organic Program); 7 C.F.R. §205.100 (What has to be certified); 7 C.F.R. §205.102 (Use of the Term Organic) To ensure the borders of the separate market for organically produced products are maintained, Congress imposed a civil penalty of up to \$10,000 for selling or labeling generic agricultural commodities or products as organically produced. *See* 7 U.S.C. §6519(1) (Violations of chapter, Misuse of Label) 7 C.F.R. §205.100(c)(Penalty for misuse of organic in sale or labeling). Congress recognized in 1990 that consumers had established a separate market for organic products because an organic product is a unique agricultural commodity compared to its non-organic, or conventional counterpart.

1. **Generic Commodity Promotion Laws are Enacted for Specific Commodities, and the Exemption Statute Treats Organic Commodities as a Specific and Distinct Class of Products.**

The Secretary must implement the Exemption statute using the statutory provisions that established the assessment regime from which Congress granted exemption, and the OFPA, the statute creating the separate organic marketplace that delimits the exemption. *See e.g. Erlenbaugh v. United States*, 409 U.S. 239, 244 (1972) (“individual sections of a single statute should be construed together” because the canons of construction assume “that whenever Congress passes a new statute, it acts aware of all previous statutes on the same subject”); *Clark v. Uebersee Finanz-Korporation, A.G.*, 332 U.S. 480, 488 (1947)(same); *Markham v. Cabell*, 326 U.S. 404, 410-411 (1945)(same); *Ex parte Public National Bank*, 278 U.S. 101, 104 (1928)(same).

Commodity promotion laws are generally, “designed to maintain or expand markets and uses *for that commodity*.” *See generally* U.S. CODE, TITLE 7, CHAPTER 101, Agricultural Promotion) To minimize the market distorting influence of these statutes, Congress has consistently adopted commodity specific marketing order statutes, *see e.g.* TITLE 7, SUBCHAPTER II (Canola and Rapeseed); TITLE 7, SUBCHAPTER III (kiwifruit); TITLE 7, CHAPTER 90 (Mushrooms); TITLE 7, CHAPTER 91 (Limes); 47 U.S.C. §7414(e)(Activities and Budgets requiring each board submit a budget for “promotion, research, or information *relating to the commodity covered by the order*.”), and the Department’s regulations have faithfully implemented those statutes on a commodity by commodity basis. *See e.g. generally* 7 C.F.R. Chapter IX, Parts 900-999 (fruit and vegetable marketing orders; regulations issued commodity by commodity).

As the *Glickman* Supreme Court in *Glickman v. Wileman Bros. and Elliot Inc.*, 521 U.S. 457, 461 (1997) found, the commodity-specific programs serve the economic interests of the producers of each program commodity and are “paid from funds collected pursuant to the marketing order.” *See Id.*; *see also e.g.* 7 U.S.C. §7416(a)(requiring assessments be paid to specific marketing board) The commodity by commodity approach maximizes “the producers’ common interest in disposing of their output on favorable terms” while minimizing the extent to which “economic regulation...has displaced competition.” *Glickman*, 521 U.S. at 462 In certain cases, Congress has also restricted marketing orders “to the smallest regional production areas. . . practicable,” §608c(11)(b), thus disclosing its general policy of minimizing the market distorting impact of the intervention. The proposed rule acknowledges the commodity by commodity structure of the statutes and existing rules, providing,

[T]he FAIR Act amendment covers 28 marketing organic programs established under the Act.” * * * These marketing order programs allow for promotion activities designed to assist, improve, or promote the marketing, distribution or consumption of the *commodity covered under the marketing order program*. (emphasis added)

Proposed Rule, at p. 67382.

C. The Exemption Statute is a De-regulatory Enactment that Removes Assessments on Organic Commodities Because No Benefit Attaches to Organic Producers from Generic Commodity Promotion Programs.

Relying on the distinction between certified organic and generic commodities it created with the 1990 OFPA, Congress amended the FAIR Act by exempting certified organic products from all assessments arising from generic commodity promotion laws. The policy behind the Exemption statute recognizes that organic producers and consumers *do not benefit* from non-organic commodity promotion programs. *See e.g. Glickman v. Wileman Brothers and Elliot Inc.*, 521 U.S. 457, 461 (1997)(citing 7 U.S.C. §602(1) and noting price-fixing regulations benefit only those “producers in a particular market”). Accordingly, Congress found the existing federal promotion laws manipulate the markets and prices of the nonorganic commodities, and do not “maintain or expand markets” for organic products. *Id.*

The Exemption statute is best understood as a pro-competition statement by Congress, that seeks nothing less than to exempt organic producers from “the policy of collective” marketing under the Agricultural Marketing Agreement Act of 1937 (AMAA). *Glickman*, 521 U.S. at 461 (1997)(citing AMAA and implementing regulations as “a species of economic regulation that has displaced competition in a number of discrete markets”). Congress has previously replaced regulation with competition in other market sectors, and the Exemption statute is no different. *See e.g.* 47 U.S.C. § 251(c)(introducing competition in formerly monopolistic telecommunications markets, requiring incumbent local exchange carriers to share their own facilities and services with new entrants in their markets); 47 U.S.C. §309(j)(3)(B)(directing FCC to “promot[e] economic opportunity and competition” through spectrum auctions).

Because of the lack of economic benefit of generic commodity promotion programs to the organic producer and consumer, Congress acted to relieve them from all assessments under its generic commodity promotion laws. *See e.g. Glickman*, 521 U.S. at 461 (marketing orders “serve the economic of the cooperative producers”).

SPECIFIC COMMENTS

I. **Congress Granted Certified Organic Producers a Complete Exemption from Assessments but the Proposed Rule Grants only a Partial Exemption From Assessments and thus Conflicts with Congressional Intent.**

Congress adopted the Exemption statute, entitled Exemption of certified organic products from assessments, explicitly stating and intending a qualified person:

[s]hall be exempt from the payment of an assessment under a *commodity promotion law* with respect to any agricultural commodity that is produced on a certified organic farm. (emphasis added)

See 7 U.S.C. 7401(e) The Secretary's proposed rule provides:

The marketing order's committee or board would compute the assessment rate for any person approved for an organic exemption.

While Congress mandated eligible persons "shall be exempt from payment" the Secretary, by stark contrast, proposes eligible persons shall continue payment of assessments. The Secretary's proposal is in direct conflict with the statutory language

The proposed rule characterizes marketing order programs as,

promotion activities designed to assist, improve, or promote the marketing, distribution, or consumption of the commodity covered under the marketing order program.

Proposed Rule at p. 67382 and eligible persons as,

exempt from paying assessments for market promotion, including paid advertising.

Id. at 67383. The proposed exemption is thus limited to assessments ultimately expended for "promotion" activities and would not reach assessments for "non marketing promotion expenditures." *Proposed Rule* at 67382.

The Secretary's construction of the Exemption statute conflicts with the plain meaning of a "commodity promotion law" as defined in the FAIR Act and used by Congress in the Exemption statute.

(a) Commodity promotion law defined

In this section, the term "commodity promotion law" means a Federal law that provides for the establishment and operation of a

promotion program regarding an agricultural commodity that *includes a combination of promotion, research, industry information, or consumer information Activities*, is funded by mandatory assessments on producers or processors, and is designed to maintain or expand markets and uses for the commodity (as determined by the Secretary)[emphasis not in original]

See 7 U.S.C. §7401(a). The statutory definition is unambiguous: assessments pay for “promotion, research, industry information, or consumer information activities.” *See also* 7 U.S.C. §7414(c)(6)(requiring market boards to submit annual budgets including “probable cost of each promotion, research and information activity”).

[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

Chevron, 467 U.S. at 842-43 The Secretary’s proposed rule is inconsistent because “commodity promotion law” is the precise term used by Congress in the Exemption statute and is the source of the liability from which organic producers are to be exempted. The intent of Congress could not be more clear.

A. The Plain Meaning of “Exempt from Payment” Does Not Allow for Continued Payment of Assessments.

As the Supreme Court has noted, common words should be given their plain meaning because they are “not difficult to understand” and especially when there is no evidence Congress was trying to use “some specialized term of art.” *See e.g. Branch v. Smith*, (2003)(O’Connor, J., dissenting)(citing Webster’s Dictionary). According to Black’s Law Dictionary, “exempt” means,

To relieve, excuse, or set free from a duty or service imposed upon the general class to which the individual exempted belongs.

Blacks Law Dictionary at p. 571 (6th Ed.) Interestingly, in a reference that is directly on point for the instant matter, Black’s also defines “words of exemption” as referring to,

[A] maxim of law that words of exemption are not to be construed to import any liability.

The Secretary’s refusal to fully “relieve, excuse, or set free” eligible certified organic products from assessment, thrusts the eligible organic farmer right back into the “general class” from which Congress had removed him. Although the proposed rule appears to reduce the existing assessment obligation, this reduction is a chimera because it is subject to the vagaries of the marketing board’s annual budgetary process. *See* 7 U.S.C. 7414(c)(6)(requiring market boards to submit annual budgets including “probable

cost of each promotion, research and information activity”) Notwithstanding that Congress did not adopt or intend a reduction in assessments imposed, it surely did not authorize a mere reduction subject to the discretion of a marketing board. In fact, it is conceivable that the relief could be eliminated by any marketing board as early as next year through a simple change in its budget.

Moreover, to the extent the Secretary purports to be construing or interpreting the Exemption statute, the complicated calculus for *imposing* an assessment on products coming from certified organic farms has turned Congress’ words of exemption into the vehicle for imposing a new liability that is more complicated than the one organic producers currently adhere to and one that will be determined annually by 28 different marketing boards. Thus the proposed rule imposes the very fiscal liability from which Congress exempted the eligible certified organic farmer.

B. The Proposed Rule Creates an Assessment Reimbursement Scheme that does not Remove a Marketing Board’s Authority to Impose Assessments as was Mandated by Congress.

The exempt rate would be computed by dividing the committee’s or board’s estimated non-marketing promotion expenditures by the committee’s or board’s estimated total expenditures for the same assessment period, as approved by the Secretary, and applying that percentage to the assessment rate applicable to all persons for the assessment period. Within 30 days following the applicable assessment period, the committee or board would re-compute the assessment rate for persons exempt under the section, based on the actual expenditures incurred during the assessment period. The exempt person would pay an additional assessment or be reimbursed or credited by the committee or board for the amount overpaid.

See Proposed Rule at 67383 The proposed rule substitutes the foregoing language for Congress’ use of:

[S]hall be exempt from the payment of an assessment under a commodity promotion law with respect to any agricultural commodity that is produced on a certified organic farm (as defined in section 6502 of this title).

Congress intended an exemption, not an assessment-reimbursement scheme. Exempt persons are subject to the “assessment rate applicable to all persons” reduced only to the extent the subject marketing board’s “non marketing promotion expenditures” do not equal the total board expenditures. *Id.* Under this approach, the sole benefit to an “exempt person” is the possibility of receiving a credit or reimbursement. The proposed rule not only fails to mandate the marketing boards exempt organic producers, it permits the board to arbitrarily fix the reach of the “exemption” based on its own priorities as

reflected in its budgets. If a board chooses to switch its entire budget away from promotion, and to other authorized activities, as it may under the FAIR Act, Congress' use of "exempt from payment of an assessment" is rendered a nullity. See e.g. 7 U.S.C. §7412(9)(defining market "order" to include "research" and "information"); 7 U.S.C. §7412(13)(defining "research"); 7 U.S.C. §7414(e)(Activities and Budgets requiring each board submit a budget for "promotion, research, or information relating to the commodity covered by the order.") *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987)("[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one.")

Authorizing a marketing board's budgetary decisions to substitute for the "exempt from payment" language is redundant of the existing provisions regarding the board's authority over its own budget and is an impermissible construction. See, e.g., *Kungys v. United States*, 485 U.S. 759, 778 (1988 (noting it is a "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant."); *Colautti v. Franklin*, 439 U.S. 379, 392 (1979); *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307-308 (1961) Additionally, it submits a mandate to "exempt from payment" to the arbitrary and unfettered discretion of the applicable marketing board. This approach fails to give meaning to every clause of the statute and construing "exempt from payment" to mean payment with a possible, partial reimbursement, renders the word "exempt" insignificant, if not wholly superfluous. See e.g. *United States v. Menasche*, 348 U.S. 528, 538-539 (1955) The Secretary should not treat statutory terms as surplusage, especially when the term "occupies so pivotal a place in the statutory scheme." *Duncan v. Walker*, 533 U.S. 167, 168 (2001) As proposed, the rule not only fails to give full effect to the statutory language, it leaves open the possibility of sapping all meaning from the words Congress chose.

Because this proposed implementation arises from the Secretary's rejection of the definition of "commodity promotion law" as used in the Exemption statute and appearing in the FAIR Act, it conflicts with the Secretary's prior reliance on the FAIR Act's existing definitions. See e.g. 7 C.F.R. 900.2 (general definitions section for procedures to formulate marketing orders and requiring the rules thereunder utilize the "the terms as defined in the Act"); 7 C.F.R. 900.51(definitions section for petitions to modify marketing orders and requiring the rules thereunder utilize the "the terms as defined in the Act"); 7 C.F.R. 900.81 (definitions section for certain fruit and vegetable marketing orders and requiring the rules thereunder utilize the "the terms as defined in the Act"); 7 C.F.R. 900.101 (definitions section requiring the rules thereunder utilize the "the terms as defined in the Act")Such a reading would constitute a new, previously unarticulated construction of the FAIR Act entitled to no *Chevron* deference because it represents a sharp break with prior interpretations of the statute in question and presents no "reasoned analysis" to justify the departure. See *Motor Vehicle Mfrs.v. State Farm Insurance*, 463 U.S. 29, 42 (1983).

II. Congress Intended Agricultural Commodities from Certified Organic Farms Not be Subject to Assessments. The Secretary's Discretion under the Exemption Statute is Limited to Promulgating Regulations Implementing the Exemption Adopted in the Exemption Statute and any Final Rule must be Consistent with the FAIR Act and the OFPA.

The Exemption statute provides:

(e) Exemption of certified organic products from assessments

- (1) Notwithstanding any provision of a commodity promotion law, a person that produces and markets solely 100 percent organic products, and that does not produce any conventional or non-organic products, shall be exempt from the payment of an assessment under a commodity promotion law with respect to any agricultural commodity that is produced on a certified organic farm (as defined in section 6503 of this title)⁴

By contrast, the proposed Rule provides:

Under this proposal, a new subpart would be added in 7 CFR part 900 General Regulations *to specify the criteria* for identifying persons eligible to obtain an assessment *exemption for market promotion*, including paid advertising; procedures for persons to apply for an exemption; procedures for calculating the assessment exemption; and other procedural details for the applicable marketing orders. (emphasis not in original)

Proposed Rule, at 67382.

Comparing the Exemption statute with the proposed rule reveals two significant departures from the plain meaning of the statute: the rule offers to “specify the criteria” for exemption and changes Congress’ “shall be exempt from payment of an assessment” to mean shall be “eligible to obtain an assessment exemption for market promotion.” The proposed rule fails to track the Exemption statute and thus fails to implement the intent of Congress.

As in all statutory construction matters, the Secretary must begin with the language of this statute, and the controlling statutory regime into which this amendment fits. *See e.g. Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)(noting the first step “is to determine whether the language at issue has a plain and unambiguous meaning” citing *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240 (1989)). The eligibility criteria for the organic exemption are established by Congress in the Exemption statute and are easily implemented using the definitions of the FAIR Act and the OFPA. *North Dakota v. United States*, 460 U.S. 300, 312 (1983)([a]bsent a clearly expressed legislative

⁴ 7 U.S.C. §7401(e)(1)

intention to the contrary, [statutory] language must ordinarily be regarded as conclusive.”) (quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

A. The Secretary is Not Authorized to Adopt or Create New Eligibility Criteria.

The Exemption statute unambiguously amended 7 U.S.C. §7401 of the subchapter entitled Commodity promotion and evaluation to exempt “certified organic products from assessment” under this subchapter. *See* 7 U.S.C. §7401(e)(Exemption of certified products from assessments) In addition to eliminating assessments on certified organic products, the enactment authorized the Secretary to adopt regulations carrying the force of law solely “concerning eligibility and compliance for an exemption.” *See* 7 U.S.C. §7401(e)(2)(“Regulations”). No other delegation was made.

Under the plain meaning rule of statutory construction demonstrates the Exemption statute is not ambiguous and the substantive eligibility criteria appearing therein must be implemented. The Exemption statute also contains the key “compliance” criteria, incorporating by explicit reference the relevant organic terms from the OFPA. Thus the Secretary’s discretionary authority is limited to promulgation of regulations “concerning” the eligibility and compliance criteria Congress placed in the statute, not “specify the criteria” as the proposed rule contends. *See e.g. United States v. Mead Corp.*, 533 U.S. 218, 229 (2001)(deference to agency depends on extent to which agency fills gap left by Congress, where there is no gap, there is no discretion to exercise). Accordingly, the Secretary is not charged with creating out of whole cloth the eligibility or compliance criteria. An

[A]gency's interpretation of the statute is not entitled to deference absent a *delegation of authority* from Congress to regulate in the areas at issue. (emphasis by court)

Motion Picture Ass'n. v F.C.C., 309 F.3d 796, 798 (D.C. Cir. 2002); citing *Ry Labor Executives Ass'n. v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994)(*en banc*)(“*Chevron* deference is warranted only when Congress has left a gap for the agency to fill pursuant to an express or implied delegation of authority to the agency.”) (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984). As in the *Motion Picture Ass'n* case, there is no delegation for altering the criteria Congress fixed in the Exemption statute.

The Exemption statute is not ambiguous and the Secretary’s duty is to confer the full benefit intended by promulgating a regulation that specifies the procedural and administrative aspects of implementing the mandated exemption. The delegation was for the limited purpose of ensuring the mandated benefit is properly and timely conferred. Altering the benefit intended by Congress by enlarging the Department’s limited role, or through unnecessary manipulation of the eligibility requirements fixed by Congress,

renders the final regulation inconsistent with the Exemption statute's purpose and language.

B. The Exemption Statute is Part of the FAIR Act, and Cites the OFPA and Must be Interpreted Using the Definitions in the those Acts.

The relevant definitions in the FAIR Act are codified at 7 U.S.C. §7401. The *in pari materia* rule of statutory construction requires that “individual sections of a single statute should be construed together.” *See e.g. Erlenbaugh v. United States*, 409 U.S. 239, 244 (1972) A “person that produces and markets solely 100 percent organic products” if sold “directly to consumers” is a “first handler” by operation of law under the FAIR Act. 7 U.S.C. §7412(5)(defining producer as a first handler when he “markets the agricultural commodity directly to consumers”) If that person instead sells to another person who takes possession for marketing purposes only, that seller is a “producer” under the FAIR Act. 7 U.S.C. §7412(11). Using these definitions, as is required under the canons of statutory construction, the Exemption statute is easily parsed and its implementation path clarified. Moreover, nothing in the 2002 Farm Bill amendment to the FAIR Act suggests Congress intended to reject the existing distinction between “producer” and “first handler.” In fact, the Supreme Court has repeatedly noted that it,

necessarily assumes that whenever Congress passes a new statute, it acts aware of all previous statutes on the same subject.

Erlenbaugh, at 244; *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987)(omission of a preexisting definition of a term in new statutory provision does not necessarily indicate Congress’ intent to reject that definition); *Russello v. United States*, 464 U.S. 16, 23 (1983).

C. The Proposed Rule’s Definition of “Produce” Conflicts with the Definitions in the FAIR Act and the OFPA.

The proposed rule provides:

“[P]roduce” means to grow or produce food, feed, livestock, or fiber or to receive food, feed, livestock, or fiber, or to receive food, feed, livestock, or fiber, and *alter that product* by means of feeding, slaughtering, or processing. Under this proposed rule, handlers, and processors and producers acting as handlers may be eligible for exemption if they meet the definition of “produce” under this rule. (emphasis not in original)

See Proposed Rule at p. 67382.

The proposed definition of “produce” unnecessarily combines the roles of the “producer” and the “first handler” as set forth in the FAIR Act. Under the FAIR Act, the two distinct roles collapse into one another *only when the producer sells directly to a consumer*. Thus the proposed definition is inconsistent with the FAIR Act. By removing the limiting condition of direct sales to consumers, the proposed rule artificially restricts the relief afforded by the Exemption statute by imposing additional eligibility criteria nowhere authorized by Congress. Moreover, the approach imposes hardships on potentially eligible certified organic producers and handlers by imposing a requirement that each “alter” the program commodity. It is entirely unclear what purpose this word serves in implementing a complete exemption for eligible persons. The word “alter” does not appear in the Exemption statute, however the OFPA defines the term “process” and to the extent the Secretary believes alteration of the subject commodity is consistent with Congressional intent, the terminology should be harmonized with that appearing in the OFPA.⁵

1. The Proposed Definition of “Produce” Violates the Rules of Statutory Construction and is Entitled to No *Chevron* Deference.

The proposed definition of “produce” not only conflates two distinctly different entities under both the OFPA⁶ and the FAIR act, it adds the requirement that an eligible person “alter that product.” This does not appear in the Exemption statute and is unnecessary to implement the statute as written, and is contrary to the rules of statutory construction.

It is well settled that reading out of a statutory subchapter its related definitions, is “an entirely unacceptable method of construing statutes.” *See Natural Resource Defense Council v. EPA*, 882 F.2d 104 (D.C. Cir. 1987) citing 2A Sutherland, *Statutes and Statutory Construction* §§ 46.05, .06 (C. Sands rev. 4th ed. 1984). The proposed Rule defies “the cardinal principle of statutory construction that courts must give effect, if possible, to every clause and word of a statute,” *U.S. v. Taylor*, 529 U.S. 362 (2000), because it ignores the definitions appearing in the FAIR Act that are part of the same subchapter as the Exemption statute. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988)(“a court must look to the structure and language of the statute as a whole.”); *Sullivan v. Everhart*, 494 U.S. 83, 88 (1990); *accord National Soft Drink Association v. Block*, 721 F.2d 1348, 1352 (D.C. Cir. 1983); *National Insulation Transportation Committee v. ICC*, 7683 F.2d. 533, 537 (D.C. Cir. 1982); *see generally* Frankfurter, *Some Reflections on the Reading of the Statutes*, 47 Column L.Rev. 527, 533, 538 (1947).

⁵ 7 U.S.C. §6502 (17)(“The term “processing” means cooking, baking, heating, drying, mixing, grinding, churning, separating, extracting, cutting, fermenting, eviscerating, preserving, dehydrating, freezing, or otherwise manufacturing, and includes the packaging, canning, jarring, or otherwise enclosing food in a container.)

⁶ Although commenters herein believe the FAIR Act definitions are most on point, it should not be ignored that the OFPA also distinguishes between producers and handlers.

Additionally, by the unprecedented inclusion of handlers in the definition of “produce” and adding a product alteration requirement, the rule sweeps too broadly and creates a definition that is over-inclusive and frustrates the availability of the mandated exemption. It also departs from the vast majority of the marketing order statutes adopted by Congress that utilize the same or substantively similar definitions of “person,” “first handler” and “producer.” *Compare* 7 U.S.C. §6102 (definitions same for mushroom marketing order); 7 U.S.C. §6202 (definitions nearly identical for lime marketing order); 7 U.S.C. §6302 (definitions nearly identical for soybean marketing order). The rule also departs from USDA’s reliance on the existing definitions in its regulations as well. *See e.g.* 7 C.F.R. §905.1-905.18 (definitions); 7 C.F.R. §906.1—906.16 (definitions for orange and grapefruit marketing orders); 7 C.F.R. §915.1-915.12 (definitions for south Florida avocados); 7 C.F.R. §916.1-916.15 (definitions for California nectarines). Accordingly, departure from the statute’s definitions and the agency’s long settled approach to these definitions would involve a significant change in the agency’s interpretation of a statutory provision without a “reasoned analysis” and would receive no *Chevron* deference. *See Motor Vehicle Mfrs.v. State Farm Insurance*, 463 U.S. 29, 42 (1983); *International Brotherhood of Electrical Workers v NLRB*, 814 F.2d 697, 712 n.65 (D.C. Cir. 1987); *Oil and Chemical & Atomic Workers International Union v. NLRB*, 806 F.2d 269, 273-74 (D.C. Cir. 1986).

D. The Proposed Rule is Overly Complicated and Creates Eligibility Hurdles for Producers and Handlers not Intended by Congress.

A producer under the FAIR Act may produce many different commodities but becomes by operation of law a “first handler” only as to those agricultural commodities sold directly to the consumer. *See* §7412(5)(producer who sells to consumers directly “shall be considered to be the first handler with respect to the agricultural commodity produced by the producer.”). The Exemption statute should be implemented as all other commodity promotion statutes are, on commodity by commodity basis. *See also* 7 U.S.C. §7401(b)(Congressional findings that repeatedly limit the reach of generic commodity promotion programs to the “covered commodities” and commodities “covered by the law”); 7 U.S.C. 7401(b)(4)(findings respecting the “commodity covered by the law”); (b)(6) (same); (b)(7)(findings noting promotion programs are intended to expand market “for that commodity”).

All commodities not sold directly to consumers by a farmer are by operation of law sold to a “first handler.” When a commodity is sold for marketing purposes, the “first handler” is not a producer. Such “first handlers” do not farm and do not produce agricultural commodities.

The OFPA definitions support the FAIR Act’s commodity by commodity approach because a certified organic farm may be “a farm, or portion of a farm” thus permitting a person to engage in production of “organic” and “nonorganic” agricultural commodities on the same farm. *See* 7 C.F.R. 205.2 (“Split operation” means “[a]n operation that produces or handles both organic and nonorganic agricultural products.”).

Likewise a certified organic handling operation means “any operation, or portion of any handling operation” and permits the handling of both “organic” and “nonorganic” products. Thus, it is the nature and legal status of the agricultural commodity that is the touchstone of eligibility under Congress’ approach because Congress and the Secretary have already determined a “split-operation” produces certified organic products. To construe the Exemption statute to the contrary violates the statutory construction principles discussed above.

1. A “person that produces and markets solely 100 percent organic products” is a First Handler under the FAIR Act with Regard to that Commodity and Only That Commodity.

The first clause of the Exemption statute mandates a person shall be exempt from assessment if that person “produces and markets solely 100 percent organic products.” 7 U.S.C. §7401(e)(1) If that producer’s farm is certified under the OFPA, any agricultural commodity that is sold directly to a consumer qualifies that producer for exemption as a “first handler” under the Exemption statute because the FAIR Act and the OFPA must be read together. *See FAIC Sec., Inc. v. United States*, 768 F.2d 352, 363 (D.C. Cir. 1985)(“[T]hese two statutes are *in pari materia* and must be construed together.”)

To meet the dictates of the first clause of the Exemption statute it is irrelevant that the producer also sells *other* commodities that are not certified organic because the FAIR Act’s commodity by commodity approach controls. It is also irrelevant if the producer markets some of that same certified organic commodity to a “first handler” under the FAIR Act because the Exemption statute simply treats the certified organic producer that sells to a “first handler” as a producer. The use of a marketing channel other than direct sales was not intended by Congress to be a bar to eligibility. Provided only that the agricultural commodity is from a certified organic farm, the producer is marketing “100 percent” organic products.

2. “100 percent organic” means Nothing More than Produced on a Certified Organic Farm and Certified Organic Farms Include “Split-Operations.”

This is confirmed upon examining the National Organic Program rules appearing at 7 C.F.R. Part 205. *See e.g.* 7 C.F.R. §205.301 (Product Composition authorizing label to read “100% organic” when the “raw or processed agricultural product....contain[s] (by weight or volume, excluding water or salt) 100% organically produced ingredients”); *See* 7 C.F.R. §205.303(1) (Packaged products labeled “100% organic” or “organic”) (on packaged products, “100 percent organic” is synonymous with “organic”); *see* 7 C.F.R. §205.307 (rules regarding labeling of containers the same for “100% organic” and “organic” products); *see* 7 C.F.R. §205.308 (rules regarding labeling for nonpackaged products the same for products claiming “100% organic or organic”).

Moreover, the “solely 100 percent organic products” requirement has nothing whatsoever to do with whether or not the certified organic farmer operates a “split operation.” A certified organic farm means “a farm, or portion of a farm” as defined by Congress in 7 U.S.C. §6502(4). As appearing in the Secretary’s National Organic Program, the “one hundred percent” requirement in the Exemption statute refers to the labeling of the commodity, not the farm. The only conceivable application of the “100 percent” requirement that would bar eligibility for a certified organic farmer for the exemption arises when a producer that has a “split-operation,” and produces and markets the same commodity on both the nonorganic portion of his farm and the organic portion, *and* sells the nonorganic commodity directly to consumers. Even this outcome is a strained construction of the Exemption statute because it appears to violate 7 U.S.C. §7401 (Rule of Construction).

Section 7401 of the Fair Act provides:

Nothing in this subchapter provides for the control of production or otherwise limits the right of the any person to produce, handle or import an agricultural commodity.

Construing the Exemption statute in a manner that conflicts with the OFPA’s authorization of split-operations, would constitute an unnecessary limitation on the “right of a person to produce, handle or import an agricultural commodity” by punishing the split-operator. Congress intended the Exemption statute exempt “any agricultural commodity that is produced on a certified organic farm (as defined by section 6502 of this title)” and by referencing the OFPA explicitly *did not* limit such exemption in the event of approved split operations. Such an outcome would create an additional conflict with the OFPA because under certain circumstances, even a farmer that does not operate a split-operation, may be compelled to market products from his organic farm in conventional sales channels. *See e.g.* 7 U.S.C. 6506(b)(2)(discretion to adopt provisions regarding “federal or state emergency” spray programs); 7 C.F.R. §205.2(definition of emergency pest or disease treatment program); 7 C.F.R. 205.238(c)(7) (barring organic livestock producer from withholding healthcare to maintain organic status of animal; mandating diversion to conventional market); 7 C.F.R. §205.290 (Temporary Variances)(listing conditions under which suspension of requirements may occur); 7 C.F.R. §205.101(a)(“exemptions); 7 C.F.R. §205.2(a)(definition of “drift”); 7 C.F.R. §205.272 (prohibiting commingling of organic products with “nonorganic products” and prohibited materials).

Thus if one of the aforecited exceptions applies under the OFPA, the producer would not be in violation of clause one of the Exemption statute. Reading the Exemption statute consistently with the OFPA and the FAIR Act’s other terms, as long as that certified organic commodity, whether marketed directly to a consumer or marketed to a “first handler,” comes from a certified organic farm, the producer is marketing “100 percent” organic products and the dictates of clause one are satisfied and the producer is not barred from receiving an exemption.

3. The Phrase “does not produce nonorganic or conventional products” Means Products that are not Produced on Certified Organic Farms. Organic Products from Split-Operations do not Transgress this Provision Because they are 100 percent Certified Organic Products.

Although perhaps obvious, the OFPA’s definition of “organically produced” clarifies Congress’ use of the phrase “nonorganic or conventional” in the Exemption statute. “Nonorganic” means simply agricultural commodities not produced and handled in accordance with the OFPA. *See* 7 U.S.C. §6502(5) (definition “organically produced”) Additionally, because the OFPA mandates in some instances that products produced on certified organic farms *may not be transacted under the organic label*, Congress clearly intended to focus on the fact that the product was produced on “a certified organic farm” rather than focusing on the sales channel through which the product was ultimately marketed. *See e.g.* 7 C.F.R. 205.238(c)(7)(barring organic livestock producer from withholding healthcare to maintain organic status of animal; mandating diversion to conventional market).

4. The Requirement that a Person “does not produce any conventional or nonorganic products” Does Not Apply to “First Handlers” that Take Possession Solely for the Purpose of Marketing under the FAIR Act.

The second clause of the Exemption statute requires that the person that “produces and markets solely percent organic products” directly to consumers may not “produce any conventional or non-organic products” and remain eligible for an assessment exemption. The use of the word “and” demonstrates Congress intended the two clauses be read conjunctively. Clearly then, by grammar, logic and the canons of statutory construction, the second clause of the Exemption statute modifies its first clause, and applies *only* to a producer that markets directly to consumers. *See e.g. AT&T v. Iowa Utilities Board*, 525 U.S. 266, 409 (2000) citing *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)(“Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise.”) Moreover, as discussed above, it applies *only* to the those agricultural products sold directly to consumers and for which that producer is considered the “first handler” under the FAIR Act. If the producer chooses to sell nonorganic products to a first handler rather than a consumer, under the FAIR Act he is not subject to the Exemption statute’s limiting second clause.

A first handler that “takes possession of a commodity from a producer for marketing” is not subject to the second clause at all. The factual predicate for applying the limiting second clause is absent. It makes no sense to conclude that Congress intended a “first handler” that produces nothing, would be bound by a provision applicable to those that produce. *See United States v. Kirby*, 7 Wall. 482, 486 (1869)(“All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence”). This

simple reading of the Exemption statute also demonstrates again that the proposed rule's definition of "produce" is burdensome, conflicted and unnecessary.

5. Split Operators are Not Eligible for an Exemption only when they Produce the Same Program Commodity Both Organically and Conventionally and Sell Both Versions Directly to Consumers.

The Exemption statute's second clause does not apply simply because a producer operates a "split operation." Congress clearly intended the Secretary use the statutory definition of "certified organic farm" and split operations are explicitly approved. *See* 7 U.S.C. §7401(e)(1) citing 7 U.S.C. §6502 (definition of organic farm); *See* 7 C.F.R. 205.2 ("Split operation" means "An operation that produces or handles both organic and nonorganic agricultural products.").

Although not a model of clarity, construing this clause consistently with the OFPA and Congress' explicit citation to the OFPA in the Exemption statute, demonstrates that the second clause may limit eligibility if certified organic producers market the *same* commodity directly to consumers in both organic and nonorganic forms. However, a split operator may avoid this limitation on eligibility by declining to sell its nonorganic products directly to consumers. As noted above, if sold to a "first handler," that producer escapes the limitation. This construction gives maximum effect to Congress' intention that products from certified organic farms be exempt from assessments. In this circumstance a narrowing construction of the Exemption statute's second clause is consistent with Congressional intent, rather than interferes with it.

Applying this construction: if a certified organic farmer produces all of his Washington apricots organically, then he is eligible for the exemption under that marketing order. If that farmer operates a split operation and produces non-organic honey (not governed by the commodity promotion law) and non-organic meat, he is still eligible for the exemption on the program crop. Additionally, if that farmer must divert an animal or a crop product to the conventional market in order to comply with the organic rules as discussed above, that would not constitute a disqualifying sale because such a construction would impermissibly penalize the farmer for compliance with the National Organic Program's rules. It would be absurd to conclude that Congress intended a farmer would lose the entitlement to an exemption *when in full compliance with the Secretary's organic program*.

Finally, it should be obvious that Congress did not intend to bar eligibility for the exemption if a certified organic product is transacted in the conventional marketplace. In that situation the product remains an organic product and would not run afoul of the limited bar on production and direct sale of nonorganic products. The fact that the certified organic product does not transact in the organic marketplace is irrelevant as to its organic nature at the time it was produced.

To the extent that the proposed rule's definition of "produce" sweeps into the purview of the second clause in the Exemption statute, any "first handler," it is clearly in

conflict with the statutory provisions cited above and does not serve the intent of Congress. The Secretary cannot expand the second clause to reach “first handlers that receive for the purpose of marketing” by adoption of an unprecedented definition of “produce.” The Exemption statute does not remotely suggest this intent, nor is alteration of the product relevant to its role as Congress determined it under the FAIR Act. As stated throughout this comment, the role of the first handler should be to assess the qualifications of the producer and ensure compliance with the eligibility criteria in the Exemption statute and implement the exemption by declining to deduct any assessments from payments to certified organic producers.

III. The Proposed Rule Creates an Unworkable, Overly Burdensome and Expensive Mechanism for Calculating and Administering the Exemption Statute.

To accommodate the strained reading of the Exemption statute, the proposed rule sets out an unworkable system of estimating, and re-calculating the assessment rates for a particular producer.

The exempt rate would be computed by dividing the committee's or board's estimated non-marketing promotion expenditures by the committee's or board's estimated total expenditures for the same assessment period, as approved by the Secretary, and applying that percentage to the assessment rate applicable to all persons for the assessment period. Within 30 days following the applicable assessment period, the committee or board would re-compute the assessment rate for persons exempt under the section, based on the Actual expenditures incurred during the assessment period. The exempt person would pay an additional assessment or be reimbursed or credited by the committee or board for the amount overpaid.

See Proposed Rule at 67383

Moreover, the proposed rule requires the eligibility of a person for the proposed partial exemption be determined by each marketing board for each commodity for which relief is sought. While this respects the commodity by commodity approach approved by Congress, it departs from the typical approach under existing marketing promotion programs of having the handler that is required to remit the assessment act as the fact finder regarding the existence and extent of assessment. *See e.g. 7 U.S.C. 7414(c)*.

The rule proposes to require an application to determine eligibility for the exemption for each assessment period, and it is suggested this will be on an annual basis. After paying an assessment based on an *estimated* rate of assessment, an *actual* assessment will be calculated and the organic entity will then receive either an additional assessment, a reimbursement or a credit. This approach creates significant paperwork for organic entities and may frustrate the fiscal relief that Congress intended when it provided this Section in the Farm Bill. In all cases, exemption will require eligibility

filings, record keeping, some accounting and tax treatment and a need to keep track of the estimated versus actual expenditures of the marketing board as well as review of the board's calculation of the assessment rate.

In short, this a burdensome approach to a statutory provision that proposed to exempt organic entities from a regulatory burden. As noted above, the proposed rule has turned a narrow authorization to adopt regulations implementing the exemption into a basis for imposing an new assessment. In what can only be described as a manifest deviation from the plain meaning of the Exemption statute, and in a manner that exceeds the rulemaking jurisdiction of the Secretary under this statute as well as enmeshes every marketing board affected by the proposed rule in an arbitrary and unworkable assessment and collection scheme.

IV. Certified Organic First Handlers, rather than Generic Commodity Marketing Boards, Should be Responsible for the Determination of which Producers are Eligible for an Exemption Based on the Handler's Legal Duty to Maintain Records Sufficient to Demonstrate Compliance with the OFPA and its FAIR Act Obligations.

Under the proposed rule, new subpart would be added to 7 C.F.R. part 900 General Regulations detailing in part that,

[T]he person would submit an application for exemption to the applicable committee or board. The application would be reviewed by the committee or board to determine whether the applicant is eligible for an assessment exemption. If the application is disapproved, the marketing order committee or board will notify the handler of the reasons for disapproval.

See Fed. Reg. Vol. 68 at p. 67382. This proposal is awkward and unworkable for several reasons.

First, the Exemption statute contains eligibility criteria related to organic certification of farms and handlers. Involving the generic commodity marketing board in the evaluation of the organic certification status of a person regarding the commodity under the board's jurisdiction embroils the board in matters for which it has no particular experience or expertise and could easily lead to unnecessary conflicts with the findings of the Secretary's certifying agents. *See* 7 U.S.C. §6502(3) ("certifying agent" means "any person (including private entities) who is accredited by the Secretary as a certifying agent for the purpose of certifying a farm or handling operation as a certified organic farm or handling operation in accordance with this chapter."); *see also* 7 C.F.R. 205.103 (recordkeeping requirements of certified operations) Given the existence of variances and exceptions to the organic rules, the marketing board would likely seek to rely on the certifying agent's information in any event. The duplication of roles merely adds expense without benefit and should be eliminated.

Second, it alters the existing approach selected by Congress, that generic commodity board or committees implement assessment regimes relying in the first

instance on jurisdiction over handlers. *See e.g.* 7 U.S.C. 7416(a)(1)(assessments paid by first handlers); 7 U.S.C. 7414(i)(Books and Records of persons covered by order (requiring handler maintain adequate records to “ensure compliance with the order and regulations”). This approach is well settled in the existing rules as well. *See e.g.* 7 C.F.R. 906.34 (assessments by handlers; Texas citrus); 7 C.F.R. 915.41 (assessments by handlers; Florida Avocados); 7 C.F.R. 916.41 (assessments by handlers; California nectarines) There is no corresponding authorization for such boards over the records of certified organic producers.

Third, it unnecessarily duplicates the paperwork for certified organic producers who must already maintain records necessary for their certification, and handlers who must maintain records demonstrating that certified organic products handled maintain their organic integrity and presumably *both* entities must submit paperwork to the marketing board or committee.

The simple solution is to have the handler, who will be operating under the organic standards, require documentation of organic certification, and verification that all of the particular commodity was organic. This qualification would be ongoing, as the handler will continue to require certification from the producer of the producer’s organic status. The standard audit process for all payment of fees can be applied to determine that the handler has properly assessed or exempted its producers. Under the OFPA, 7 U.S.C. §6519 and the implementing regulations, any person making a false statement to the Secretary or her agent under the OFPA is civilly liable. Thus, the producer would be held accountable for any false information regarding the collection or payment of any fees, as well as any false claim that led to erroneous repayment.

Congress chose to have handlers be responsible to the marketing boards for remitting assessments under generic commodity laws. *See* 7 U.S.C. §7416 (a)(Assessments authorized); §7416(b)(Collection) Clearly, Congress intended, and the existing marketing promotion programs reflect, that the handler is the responsible legal entity for determining both who pays, and how much is paid.

Handler for purposes of the proposed rule means,

Any person who, by the terms of a marketing order or marketing agreement, is subject thereto, or to whom a marketing order or marketing agreement is sought to be made applicable.

7 C.F.R. 900.81 (definitions for marketing orders and marketing agreements) The general and existing policy at USDA is to have the handlers of the commodities subject to marketing orders remit and bear the consequences of compliance with the board’s program.

The proposed rule in this docket fails to observe existing policy and thus constitutes a new construction of Subchapter II, Issuance of Orders for Promotion, Research, and Information Activities Regarding Agricultural Commodities and would not

be entitled to *Chevron* deference. The difference between the proposed policy and the existing one can readily be seen by comparing a sampling of the existing approach. *See e.g.* 7 C.F.R. 900.2 (general definitions section for procedures to formulate marketing orders and requiring the rules thereunder utilize the “the terms as defined in the Act”); 7 C.F.R. 900.51 (definitions section for petitions to modify marketing orders and requiring the rules thereunder utilize the “the terms as defined in the Act”); 7 C.F.R. 900.81 (definitions section for certain fruit and vegetable marketing orders and requiring the rules thereunder utilize the “the terms as defined in the Act”); 7 C.F.R. 900.101 (definitions section requiring the rules thereunder utilize the “the terms as defined in the Act”).

Because handlers, even under the Secretary’s proposed rule, remain the front-line entity regarding collection of assessments, and will have to maintain the necessary records to justify the amount of assessment, rate of exemption, and determination of refund or credit, it only makes sense that it should evaluate the producer’s eligibility for any exemption. Given the data and records that must be maintained by the handler,

[T]he general rule of statutory construction that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits,

suggests the handler is in the best position to implement the Exemption statute. *See NLRB v. Kentucky River Community Care Inc.*, 523 U.S. 706, 711 (2001) citing *FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948).

Respectfully submitted,



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APPENDIX A

SUGGESTED AMENDMENTS TO THE PROPOSED RULE

Proposed Language

The proposed rule should be clarified using the following three suggestions, or similar language, that clearly implements the eligibility criteria adopted by Congress in the Exemption statute.

Any person that produces and markets directly to consumers an agricultural commodity produced on a certified organic farm, and that does not produce and market directly to consumers any of that same commodity that the person produces conventionally or in a non-organic manner, shall be treated as a first handler and shall be exempt from payment of an assessment under a commodity promotion law respecting that commodity.

Any person that produces an agricultural commodity produced on a certified organic farm, and that does not produce and market directly to consumers, shall be exempt from payment of an assessment under a commodity promotion law respecting that commodity.

Any first handler that buys or takes possession of agricultural commodities produced on a certified organic farm, for the purpose of marketing, shall be exempt from payment of an assessment under a commodity promotion law respecting that commodity.

APPENDIX B

The following definitions from the FAIR Act and the OFPA should be utilized.

Definitions

- “agricultural commodity” means,
 - (A) agricultural, horticultural, viticultural, and dairy products;
 - (B) livestock and the products of livestock;
 - (C) the products of poultry and bee raising;
 - (D) the products of forestry;
 - (E) other commodities raised or produced on farms, as determined appropriate by the Secretary; and
 - (F) products processed or manufactured from products specified in the preceding subparagraphs, as determined appropriate by the Secretary⁷

- “first handler” means:

[T]he first person who buys or takes possession of an agricultural commodity, from a producer for marketing. If a producer markets the agricultural commodity directly to consumers, the producer shall be considered to be the first handler with respect to the agricultural commodity produced by the producer.⁸

- “market” means:

to sell or to otherwise dispose of an agricultural commodity in interstate, foreign, or intrastate commerce.⁹

- “producer” means,

⁷ 7 U.S.C. §7412(1)

⁸ 7 U.S.C. §7412(5)

⁹ 7 U.S.C. §7412(8)

any person who is engaged in the production and sale of an agricultural commodity in the U.S. or who owns, or shares the ownership and risk of loss of the agricultural commodity.¹⁰

Because the Exemption statute also refers to “organic products” and “certified organic farm” Congress inescapably intended that these terms have the meaning it set forth in the OFPA.

- “certified organic farm” means a farm, or portion of a farm, or site where agricultural products or livestock are produced, that is certified by the certifying agent under this chapter as utilizing a system of organic farming as described by this chapter.¹¹
- “certified organic handling operation” means any operation, or portion of any handling operation, that is certified by the certifying agent under this chapter as utilizing a system of organic handling as described under this chapter.¹²
- “organically produced” means an agricultural product that is produced and handled in accordance with this chapter.¹³
- “split operation” means “An operation that produces or handles both organic and nonorganic agricultural products.”¹⁴

¹⁰ 7 U.S.C. §7412(11)

¹¹ 7 U.S.C. §6502(4)

¹² 7 U.S.C. §6502(5)

¹³ 7 U.S.C. §6502(14)

¹⁴ 7 C.F.R. Part 205.1 (implementing the definition of “certified organic farm” and “certified organic handling operation”)