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May 20, 2004

Ms. Angela C. Snyder
Office of the Deputy Administrator, Poultry Programs
Agricultural Marketing Service
U.S. Department of Agriculture
1400 Independence Avenue S.W.
STOP 0256, Room 3932-South
Washington, D.C. 20250

Re: Comments on Proposed Rule to Exempt Organic Producers From Assessment by
Research and Promotion Programs, **Docket No. PY-02-006, 69 Federal Register 22690-
22702, April 26, 2004.**

Dear Ms. Snyder:

The proposed rule seeks to implement the Congressional Mandate of Section 10607 of the Farm Security and Rural Investment Act of 2002 (Public Law 107-171) - known as the 2002 Farm Bill. Simply stated, the 2002 Farm Bill exempts any person who produces and markets solely 100 percent organic products from paying assessments into any Federal research and promotion program. It does not apply to programs authorized by State law.

This proposed rule is required by the statute. In order to implement the statute the Secretary must promulgate amendments to all of the 16 Federal research and promotion programs. With respect to domestic producers, the proposed amendments seem to fairly and simply implement the law. They set forth a simple procedure for an organic producer to apply for and obtain a certificate of exemption. However, when extending the ability to obtain an exemption to imports, the proposed rule extends beyond the plain meaning of the law, both in the case of the 2002 Farm Bill and in the case of the Organic Foods Production Act of 1990 (7 U.S.C. 6502).

It is clear that the 2002 Farm Bill applies only to a person who both produces and markets solely organic products. The relevant part of the law is set forth below with emphasis added:

"(e) EXEMPTION OF CERTIFIED ORGANIC PRODUCTS FROM
ASSESSMENTS.-

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(1) **IN GENERAL.**-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 nonorganic 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 2103 of the Organic Foods Production Act of 1990 (7 U.S.C. 6502))."

The law does not apply to a person who imports a product.

Further, a review of the Organic Foods Production Act that is referenced in the 2002 Farm Bill shows the absence of a basis for exempting importers. The statute (7 U.S.C. 6501) clearly sets forth its purposes:

It is the purpose of this chapter-

- (1) to establish a national standards governing the marketing of certain agricultural products as organically produced products,
- (2) to assure consumers that organically produced products meet a consistent standard, and
- (3) to facilitate interstate commerce in fresh and processed food that is organically produced.

The statute does not refer to international commerce, only interstate commerce. Moreover, the statute is largely devoted to defining what constitutes organic farming in the United States. It would establish a national organic production program (7 U.S.C. 6503), national standards for organic production (7 U.S.C. 6504), and allow for State organic certification programs (7 U.S.C. 6507). The statute does refer to imported products once in the compliance requirements section (7 U.S.C. 6505). In this section it provides that imported agricultural products may be sold or labeled as organically produced if such products had been produced and handled under an organic certification program that provides safeguards that the Secretary determines are at least equivalent to U.S. standards.

However, this one reference to imports does not change the definition of producer as it appears in the 2002 Farm Bill or in the statutes authorizing the 16 national research and promotion orders, including the Hass Avocado Promotion, Research and Information Order.

For example, the Hass Avocado Order and its authorizing statute define "producer" as a person engaged in the business of producing Hass avocados in the United States for commercial use. The term "importer" is defined to mean any person who imports Hass avocados into the United States under both the authorizing statute and the Order.

This distinction is a key one, central to the administration of the program. In avocados, as in other programs, the assessment for the program is deducted from the sales proceeds of the producer by the handler at the point of sale. It is the handler's responsibility to check off or deduct the assessments and remit them to the national boards. Hence the term check-off program, which is commonly applied to these programs.

In the case of imports, it is not possible for handlers to check off or deduct assessments. The reach of the U.S. law does not extend to producers and handlers in other nations. Thus, the law is applied to importers who are under U.S. jurisdiction. In avocados, as in other commodities, the U.S. Customs Service deducts the assessments when an importer secures the release of Hass avocados from Customs.

Thus, the assessable transaction is the purchase of the commodity from the producer in the domestic market, while the assessable transaction in the case of imports is when the importer clears the product through Customs.

Based on the definition of "produce," an importer assessed at the time of entry, could "process" the product once it is in the United States and then qualify for the exemption. This is an unlawful expansion of the authority in the 2002 Farm Bill amendment.

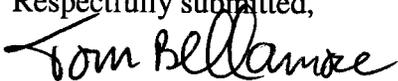
Nothing in the 2002 Farm Bill or in the Organic Foods Production Act changes the fundamental difference between domestic producers and importers. Nothing in either statute changes the definition of producer. The importer is not a producer. Moreover, the law requires that to qualify for an exemption a person must be one who both produces and markets 100 percent organic products, and who does not produce any nonorganic products.

The attempt in the proposed rule to extend the right to an exemption to imports only introduces confusion and possible future litigation into the process. Its attempt to redefine the word "produce" is confusing. "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 other product by means of feeding slaughtering, or processing (emphasis added)."

Thus, USDA's proposed rule attempts to redefine producer to include processors. This is without foundation in the law and without precedent. Moreover, it only would introduce confusion and legal uncertainty into the process. The assessable transaction occurs when imports clear Customs. If an importer then processes avocados or any other product, the assessment will have already been paid. Thus, the issue becomes moot. The AMS cannot attempt to distinguish between organic and nonorganic product at the point of entry based on whether the product may be later processed and labeled organic. It would be an administrative nightmare for Customs, which might refuse to cooperate.

Thus, the proposed rule should be modified to remove reference to imports. It is without any legal basis and would be impossible to administer.

Respectfully submitted,



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California Avocado Commission