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Certification Decision Making and Authority: Options for Enforcement

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I. Summary of OTA position

The Organic Trade Association filed a response on Dec. 14, 1998 to Issue Paper 3 that contained a legal brief that basically supports the previously filed OTA position of April 30, 1998 regarding authority of certification decision making by private and state certifiers. This is available on the OTA website (www.ota.com), and provides a substantial argument in favor of the ability of private certifiers to provide necessary due process.

Basic Premises:

1. OFPA grants the Secretary broad authority to authorize private accredited certifiers to:
  - take basic enforcement actions - the OFPA states that NOP shall "provide for appropriate and adequate enforcement procedures, as *determined by the Secretary* to be necessary and consistent with this chapter." (6506(a)(7)) .
  - Section 6506(a)(11) also states that the NOP shall "*require* such other terms and conditions as may be *determined by the Secretary* to be necessary."
  - implement the certification programs as agents (6503 d).  
Attorney Robert Uram points out that "Implement" means "to carry out, to give practical effect to and ensure the actual fulfillment through concrete measures." *Webster's New Collegiate Dictionary*.
  - authorize Removal of the organic label when prohibited materials or unacceptable residues found: section 6511(c)(2).
  - Section 6520 provides for an expedited administrative appeal from an adverse action taken by a certifying agent. This shows that the Congress expected private certifying agents would take actions--such as termination or suspension--that would adversely affected a certified party.
  
2. Due Process can be provided by private certification systems.
  - The USDA has taken the position that due process cannot be met in a system that gives a certifying agent the authority to suspend or revoke a certification.

- Due process can be met fully through the system OTA has suggested. The OTA position as filed April 30, 1998 provided for the following steps based on the proposed rule section 205.217-218:
  - i. Annual renewal: if certifier does not receive adequate requested information of certified parties, a notice of non-compliance is issued as follows.
  - ii. A certifier provides written notice of non-compliance to a certified operation, containing description of violation, evidence, and dates for compliance.
  - iii. If operation fails to cure the deficiencies in the required time, an additional inspection or review will be conducted. If found to be in compliance, the operation will receive a notification of this result.
  - iv. If the review or inspection determines the operation is still deficient, a written notice of determination (termination or suspension) is sent. (USDA only allowed for a *recommendation* to the Administrator)
  - v. Administrator is informed of determination by certification agent. Certified operation is offered the option of a prompt hearing before an administrative law judge to contest the decision. Product cannot be marketed as organic pending outcome of appeal.

### 3. Key aspects: of due process

- neutral and unbiased decision making, (to be delivered by accredited certification agents. the accreditation process is needed to establish protocols)
- written notice of decisions to operations
- opportunity to be heard. (by Administrative Law Judge, in post termination hearing)

4. The degree and type of due process required in a property rights issue depends on the case involved. OTA legal counsel Robert Uram cites several cases where post-termination hearings have been held as adequate, not only in cases of health and safety, but in more mundane cases of withdrawal of eligibility of social security benefits, or the suspension of a horse trainer's license. The interests of protection of consumers from fraud, protection of organic label integrity, protection of farmers from unfair competition, and efficiency of the government functioning constitute a worthy case for post-termination hearings.

## II. Current models

States and private certifiers currently differ in their enforcement practices.

### 1. Existing state operated certification program

Example: Washington state:

- a. sends notices of correction – describes violation, what corrective action must be taken, timeline for compliance, and consequences. This is considered an internal department action, and does not have an appeals process.
- b. If compliance is not achieved, sends Notices of Intent - this triggers a required hearing before an administrative law judge, who makes the decision about outcome: either
  - decertification, or
  - imposing fines, or
  - cease and desist (stop sale).

- c. Embargo authority- (through Food Drug and Cosmetic Act for misbranding) or cease and desist order may be used in emergencies, generally for health and safety reasons, and could be used before ALJ hearing is complete.
  - d. Decision by ALJ can be appealed in civil court
2. Private certification program – example Oregon Tilth Certified Organic
- a) investigates alleged violations
  - b) Certification Administrator or Certification Committee (CC) determines whether or not violation occurred
  - c) CC determines severity of violation: CA sends notice and requirements for compliance, including timeline for minor infractions
  - d) sends notice of decertification for major violations, and describes process for appeal. OTCO operates a separate, though internal adjudication committee.
  - e). After 30 days, to allow for appeals, will publish the decertification notice in its newsletter, notify Dept. of Ag.
3. State organic program that does not offer certification services  
Example: Minnesota State Statute - (implemented 1985)
- a) MN Statute *MSs31.95* states, "Certification for producers and handlers must be renewed annually."
  - b) "The department must be notified in writing by the designated certification organization of all certifications and de-certifications by the first of each month."
  - c) "If the certification committee determines that an applicant is ineligible for certification, a certified letter stating reasons for ineligibility must be sent to the applicant. The decision may be appealed under part 1556.0217."
  - d) "Certification must be revoked for a violation...The certified producer or handler must be notified by registered mail of the decision and the specific reasons for the revocation. The decision may be appealed.."
  - e) "if an applicant wishes to contest a determination made by the designated certification organization, a letter of appeal must be filed with the certification committee... The burden of proof of injustice rests with the applicant filing the appeal."

### III. Discussion

The private certifier does not currently have the ability to prevent sale, order embargoes, or levy fines. Thus the only enforcement has been the ending of the contractual relationship between applicant and certifier and the termination of certification status.

Private certifiers are being asked to operate as federal agents delivering a federal license, without the benefit of being federal employees or a reduction of liability for their private certification process. They are being asked to adhere to a requirement for administrative hearing before certification can be terminated or suspended.

If the private certifier is delegated as a federal agent, delivering a federal license that is protected as a property right, it has been suggested that other enforcement options are available. However, Kathleen Merrigan states in her draft position dated 12/08/98 on Issue Paper 3 on behalf of the Wallace Institute,

that she believes the federal government has limited ability to implement embargoes or stop sale orders, even in emergency situations, but would need to rely on state authority to accomplish this. She suggests the importance of public notice as a deterrent to fraud and to induce compliance, and sees the private certifiers role as only that of investigators who would turn over all evidence to states and NOP for enforcement and impartial decision making.

Certainly not all certification actions should, or will result in enforcement type of actions. There needs to be a distinction between compliance violations that warrant less serious actions (such as incomplete records, or failure to pay fees); and the more serious issues of mislabeling and fraud, or violation of standards. If certifiers are to be only investigators, then they are not decision makers capable of determining the degree of violation, and hence the type of response that is warranted.

In the OTA model proposed in part I, step iv is the notification of termination of certification. A possible alternative would be the notification of suspension of the right to use the organic label, while an opportunity for an administrative hearing is offered. This would only be effective if accompanied by means to ensure the label was not being misused. It has been suggested that a system of graduated fines could be offered to reduce the need for ALJ hearings. It is not clear that private agencies would have any authority to levy fines, unless this was stated as part of a private certification contract.

Public notification, as suggested by the NOP would help deter misuse of an organic label, but a stop sale order from the NOP or state agency would serve as a stronger backup and could be sought during the period of suspension. Washington state does have this option and can rely on the use of emergency product cease and desist or embargoes, but does not levy fines until after the ALJ hearing. The Minnesota statute has allowed for the successful prosecution of serious fraud cases.

#### **Conclusion:**

If private certifiers can be granted the authority as envisioned under the proposed OTA model, that would seem to be the best way to integrate current private and public systems.

Private certifiers would benefit from the use of warnings that if the first notice of non-compliance is not met, the suspension of label use or notification of termination would be sent to federal or state authorities.

The opportunity for a prompt post-termination administrative law judge hearing must be provided within a specified, narrow time frame. After the hearing further actions - as fines, embargoes, or stop sales would then be initiated by appropriate state or federal authority.

If the private certifier can require the removal of label use, and this decision is supported by state and NOP actions, a workable partnership may be achievable.

Several questions merit further discussion by the NOSB:

1. How will states and NOP enforce a stop sales order or prevent misuse of label when accredited agent recommends suspension or termination?
2. Who holds liability for accredited private certification decision? (errors and omissions)
3. Can fines be levied by a private certifier if they are designated as federal agents?