



**The Proposed Rule for Promotion Assessment Exemption Misses the Mark:
Comments of the Organic Trade Association on
Docket Number FV03-900-1PR,
68 FR 67381-5
Tuesday, December 2, 2003**

*Submitted by
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February 2, 2004*

Introduction

The Organic Trade Association (OTA) thanks the Agricultural Marketing Service for this opportunity to comment, and for providing an additional 30 days to comment. OTA especially thanks AMS for creating a proposed rule, a moderately revised version of which would be workable, based on legislation that was inspired more by the need for promotion order reform as the need for marketing order reform, and OTA looks forward to commenting on an AMS promotion order proposed rule in due time.

OTA notes that Section 10607 of was included as a compromise between, on the one hand, a detailed proposal endorsed by OTA to create an organic promotion order pooled from existing promotion orders, and on the other hand, the need to expedite the main purpose of that proposal. OTA has long believed that the major selling point of the organic producer is the method of production, and so the organic producer is not well served by contributing to promotion orders or promotion programs under marketing orders. The intent of the 2002 Farm Bill was to relieve 100% organic producers from these promotion assessments.

Comments

General Comments

1. The proposed rule as presented is overly burdensome on the 100% organic producer. It is USDA's responsibility to see that no 100% organic producer is assessed for commodity promotion purposes. This can be done more simply than the process outlined in the proposed rule (see "*Comments focused on the proposed 7 CFR 900.700(c)*" below).

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2. This rule implements an exemption from assessment and must not require a producer payment followed by a refund. If the operator provides an affidavit (see Comment 10, below) from a USDA-accredited certifying agent that shows the operation has been 100% organic during the course of an assessment period, the Board must not assess the producer. On the other hand, if a producer provides an affidavit demonstrating that the commodity has been 100% organically produced during the assessment period, for which the producer has already paid in full, not having an affidavit at the time of payment, the Board must grant a refund of any promotion assessment money paid by the operator during that assessment period. See Comment 21 under “*Comments focused on the proposed 7 CFR 900.700(d)*”, below.

3. Additionally, the proposed rule fails to implement Section 10607 in at least one case. In an example given in the rule, a handler who does not process cannot exempt a producer from paying for the promotion portion of an assessment under a marketing order. In light of Section 10607, which exempts 100% organic producers from promotion assessments, all handlers collecting promotion assessments should be required to recognize that 100% organic producers are exempt from assessment and not collect any promotion assessment money from such producers. This exempt status must be recognized where valid regardless of whether the handler (in this case, the collector of the promotion assessment) is a processor. Handlers who pay marketing order assessment checks to USDA are working *on behalf of* producers. Therefore, it should not matter whether a handler involved in promotion assessments is also a producer. The point is not who collects the assessment, the point is that no assessments should be made on 100% organic producers, whether by the Board or through a handler.

4. In 900.700(b) and 900.700(c), USDA seems to be implying that 100% organic producers are not exempt from promotion assessments until they are “approved”. As the certification body for an organic operation’s organic system plan, the accredited certifying agent (ACA) is the only competent authority to decide whether an operation is 100% organic, which is the sole determinant of a producer’s exemption from promotion assessments. The Board may only reject an affidavit (see Comment 10, below) on procedural grounds.

5. Handlers often handle product from both organic and conventional sources. The handler should not be required to be 100% organic; the exemption only applies to the organic commodity, and the handler, as an assessment collector, must exempt 100% organic producers. Therefore, the handler cannot be required to only handle organic commodities.

6. The term “handler” is not consistent with 7 CFR 205, the regulation that defines producers affected by this proposed rule. As this rule only applies to producers covered in 7 CFR 205, USDA should consider using language consistent with that regulation, or at least clarify the relation of the definitions of “producer” and “handler” in the two regulations. In this comment, the terms “producer” and “handler” is used with the definition provided in 7 CFR 205.2.

Comments focused on the proposed 7 CFR 900.700(a)

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7. The portion of administrative overhead allocated to promotion assessment administration should also be included in the calculation of the portion of assessment used for promotion for the purpose of exempting 100% organic producers from promotion assessments.

Comments focused on the proposed 7 CFR 900.700(b)

8. The two instances of the word “handler” in this subsection should be changed to “producer” in order to be consistent with the usage of the term “handler” in Section 10607 and 7 CFR 205, the regulation defining producers affected by this regulation. Alternately, the word “handler” could be changed to the words “producer or handler” or “producer/handler”; or, the word handler could simply be defined to include 100% organic producers.

9. The term “100% organic producer” applies only to the commodity being assessed. Therefore, the words “any conventional or non-organic products” should be changed to “any conventional or non-organic products under the marketing order”. Otherwise, producers could not market any non-agricultural, non-organic products such as sand and gravel or wood, or agricultural products such as honey, not covered by the marketing orders listed in (a), and still retain their assessment exemption.

Comments focused on the proposed 7 CFR 900.700(c)

10. The words “application” and “certification” should both be replaced with “affidavit” in order 1) to clarify that 100% organic producers are exempt from such assessment; and 2) to avoid confusion with the term “certification” as used in 7 U.S.C. 6502 and 7 CFR 205.

11. Throughout this section, the proposed rule appears to state that producers must petition the Board for the exemption, and that the Board makes the decision. OTA urges USDA to state explicitly that a Board need only receive an affidavit from the competent authority, an ACA, in order for the Board to be required to exempt the producer from assessment. There is no need for a 100% organic producer to be recognized twice as being 100% organic, and the Board has no means of verifying this status other than through the organic system plan already reviewed and inspected by the ACA. Therefore, the Board must simply recognize the affidavit signed by the ACA as proof of a producer’s 100% organic status and entitlement to an exemption from promotion assessments and take the necessary and appropriate actions to ensure that such producers are not assessed for promotion activities under the applicable marketing orders.

12. The proposed rule seems to be implying that 100% organic producers are not exempt from promotion assessments until they are “approved” after submitting an “application”. OTA reminds USDA that 100% organic producers are exempt from promotion assessments. As the approving body for an organic operation’s organic system plan, the accredited certifying agent (ACA) is the only competent authority to verify that an operation is 100% organic, which is the sole determinant of a producer’s exemption from promotion assessments. If a Board is given authority to reject an affidavit

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verifying 100% organic producer status (see Comment 11, below), it may only do so on procedural grounds.

13. The words “disapproved” should be replaced by “not received in order”, and “disapproval” should be replaced by “the affidavit not being in order”. The Board has no authority to approve

or disapprove 100% organic producers submitting affidavits; such producers are exempt, and it is up to the Board to take appropriate action to see that such producers are not assessed for promotion activities under the applicable marketing orders.

14. Requiring an annual “re-certification” affidavit is overly burdensome for producers changing from 100% organic status to a non-100% organic status. Producers should simply be required to notify the Board of any change in their 100% organic status within 30 days of such a change.

15. The burden is on the Boards, via USDA ACAs, not to assess exempt producers for promotion. The burden must not be on the producers. The rule should say, handlers who charge assessments to producers must not assess 100% organic producers.

16. Please note that in 7 CFR 205, certified handlers have no necessary relation to certified producers, except as part of an audit trail.

Comments focused on the proposed 7 CFR 900.700(d)

17. After the words “estimated total expenditures”, delete the words “approved by the Secretary”. This phrase is unnecessary. OTA notes that it is up to USDA not to assess 100% organic producers; if USDA questions someone’s status, the burden is on USDA to prove otherwise.

18. OTA notes that 100% organic producers may not be assessed for promotion activities, and agrees that a calculation must be performed before the producer is assessed for other marketing activities under the marketing order, so that the producer is not required to pay for promotion activities. This calculation should be an estimate based on the previous year’s promotion-related expenses.

19. If a producer does not agree that the assessment rate is fair, based on the calculation of promotion expenses, the producer must be accorded the right of due process, to be exercised through appeal to the National Appeals Division.

Comments focused on the proposed 7 CFR 900.700(e)

20. OTA agrees that after an assessment period, the Board should recalculate the actual expenses, leading to either an exempt person paying additional money or being reimbursed or credited by the committee or board for the amount overpaid.

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21. If a producer does not agree that the assessment rate is fair, based on the re-calculation of promotion expenses, the producer must be accorded the right of due process, to be exercised through appeal to the National Appeals Division.

Comments focused on the proposed 7 CFR 900.700(f)

22. The word “immediately” should be changed to the words “within 30 days”. The producer should be accorded the same consideration as the Board. Of course, the date the producer becomes ineligible does not change, but requiring immediate notification is overly burdensome.

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