

**Formal Recommendation by the
National Organic Standards Board (NOSB)
to the National Organic Program (NOP)**

Date: October 28, 2010

Subject: Clarifying the Limitations of 205.101(b)

Chair: Daniel G. Giacomini

The NOSB hereby recommends to the NOP the following:

Rulemaking Action
Guidance Statement X
Other

Statement of the Recommendation (Including Recount of Vote):

This recommendation asks the Program to articulate their interpretation of existing regulations with respect to specifying those handling activities that are inside and outside the scope of § 205.101(b), thereby implicating handling operations undertaking those activities and their eligibility or ineligibility, respectively, for exclusion from mandatory organic certification. The recommendation is attached. Committee vote was 4 yes, 0 no, and 1 absent. Board vote was 12 yes, 1 no, and 1 abstain.

Rationale Supporting Recommendation (including consistency with OFPA and NOP):

Miles commented that he thought this recommendation was very useful and the NOP will act on it.

NOSB Vote:

| | | | | |
|---------------------------|--------------|-----------------------------|------------------|-------------------|
| Moved: John Foster | | Second: Steve DeMuri | | |
| Yes: 12 | No: 1 | Abstain: 1 | Absent: 0 | Recusal: 0 |

**National Organic Standards Board
Compliance, Accreditation, and Certification Committee
Clarifying Limitations of § 205.101(b):
Recommended Guidance Toward Reducing Fraud in the Organic Marketplace**

June 28, 2010

Introduction

The organic market is nearing its first decade of existence under full implementation of the National Organic Program; many positive features stand out as contributing to a more sustainable, healthy environment as a function of the legislation and regulations we as an industry operate under, being the beneficiaries of a confident consumer base who choose to support the common goals of the organic community: producers, processors, distributors, retailers, and consumers. Having said that, we recognize a gap in the long supply chain from producers to consumers providing opportunities to game the system and create an uneven playing field, providing cause for skepticism about the organic integrity of the industry at large.

Since the inception of the NOP the activities of many traders and distributors have been considered to be excluded under § 205.101(b). This was also the case in many pre-NOP private organic standards, which served to provide a starting point and inertia for the current system. That starting point was focused around the activities of distributors of packaged, finished goods.

Uncertified brokers, distributors and traders dealing in organic goods lack the regular oversight of organic certification agents and the NOP. Chief among our concerns is the misrepresentation and sale of non-organic goods sold with an organic claim, often using an otherwise valid organic producer certificates to support the sale. This is most often reported in organic commodity crops such as grains, soybeans, and hay or in livestock and not limited to a particular geographic region of the United States. This appears to be facilitated by the frequently opaque relationship between seller, transporter, and buyer where the transporter takes some form of title to the goods and sells to multiple buyers. The degree to which these business relationships are prevalent or problematic outside of the US is unknown.

While we see value and benefit in making changes in the relevant regulatory language to require certification for distributors, brokers, and traders, we recognize that this is lengthy, arduous task that will require additional development and effort to be successful. Fortunately, we find that language already exists in the regulation to provide ample oversight of many activities currently conducted without the benefit of organic certification and concomitant enforcement activity, and without even the record keeping provisions required for exempt operations under § 205.101(c).

Regulatory Citations Background

§ 205.101(b) provides for the following:

- (1) A handling operation or portion of a handling operation is excluded from the requirements of this part, except for the requirements for the prevention of

commingling and contact with prohibited substances as set forth in § 205.272 with respect to any organically produced products, if such operation or portion of the operation only sells organic agricultural products labeled as “100 percent organic,” “organic,” or “made with organic (specified ingredients or food group(s))” that:

- (i) Are packaged or otherwise enclosed in a container prior to being received or acquired by the operation; and
- (ii) Remain in the same package or container and are not otherwise processed while in the control of the handling operation.

Discussion

While this language supports the continued allowance for exclusion of finished product brokers, traders, and distributors of finished, packaged goods—whether wholesale ingredients or retail products—***it does not support exclusion of unpackaged agricultural commodities*** such as grain, soybeans, hay, or livestock, which are not generally packaged or enclosed in a container prior to being received by the broker, trader or distributor and, if they are, generally do not stay in that container for the duration of the handler’s activities.

Hay or cattle are not packaged at all and so clearly do not meet the provisions of § 205.101(b)(1)(i). While some may argue that enclosure in a bulk container constitutes a ‘package’, we find this argument unconvincing; nonetheless, bulk soybeans, pulses and grains are typically received by truckers, traders or distributors from one container (e.g. silo, bulk trailer, rail car) and transferred to another container (e.g. rail car, bulk trailer, silo) at some point in the transaction. Accordingly, even if a truck trailer or rail car were to be considered ‘packaging’, many if not most transactions would fail to meet the provisions found in § 205.101(b)(ii). Several other commodities and goods are often sold, brokered, and traded in a similar fashion; transactions of all commodities not consistent with the provisions in § 205.101(b)(1) are not subject to the exclusion allowed under this part.

Recommendation

The CACC recommends that the National Organic Program issue guidance clearly articulating the limitations of § 205.101(b)(1) and the need for handling operations involved in the activities described above to immediately seek organic certification or be subject to appropriate enforcement activity. We see no reason to allow a grace period for such certified operators since the regulations are clear and presently in effect.

We provide the following language as an option for the Program when issuing such public notice:

“This notice is provided to inform the general public and interested parties that the National Organic Program (NOP) staff has determined that the limitations to the applicability of § 205.101(b) have not been adequately observed and that a number of uncertified handlers have been operating in a manner inconsistent with 7 CFR Part 205 and the National Organic Program.

Handling operations selling or otherwise representing commodities such as grains, soybeans, hay, or cattle and commonly referred to as brokers, traders, or distributors of those commodities, *are not excluded from the requirements of 7 CFR Part 205*, including but not limited to organic certification, *unless* such an operation only sells organic agricultural products labeled as “100 percent organic,” “organic,” or “made with organic (specified ingredients or food group(s))” that:

- (i) Are packaged or otherwise enclosed in a container prior to being received or acquired by the operation; and
- (ii) Remain in the same package or container and are not otherwise processed while in the control of the handling operation.

Hay is typically sold or transported in bales of various sizes and configurations on trailers without packaging; cattle are sold on the hoof in trailers. These activities are inconsistent with § 205.101(b)(1)(i). Brokers, traders or distributors of such organic goods are therefore required to be certified organic operators, maintaining product segregation and records sufficient to verify compliance with OFPA 1990 and 7 CFR part 205, the National Organic Program.

Commodities such as grains and soybeans are typically not packaged and are received from one container or vessel and transported in another container or vessel; this is inconsistent with § 205.101(b)(1)(ii). Brokers, traders or distributors of such organic commodities are therefore required to be certified organic operations, maintaining product segregation and records sufficient to verify compliance with OFPA 1990 and 7 CFR part 205, the National Organic Program.

Handlers currently engaged in brokering, trading or distribution activities in a manner inconsistent with § 205.101(b) are not in compliance and may be subject to penalties and fines as per § 205.100(c)(1).”

Committee Vote

Motion: John Foster Second: Barry Flamm
Yes: 4 No: 0 Abstain: 0 Absent: 1