

**FORMAL RECOMMENDATION BY THE
NATIONAL ORGANIC STANDARDS BOARD (NOSB)
TO THE NATIONAL ORGANIC PROGRAM (NOP)**

Date: 11/05/2009

Subject: Clarification of Voluntary Retail Certification

Chair: Jeff Moyer

Recommendation

The NOSB hereby recommends to the NOP the following:

Rulemaking Action: _____
Guidance Statement: X
Other: _____

Summary Statement of the Recommendation (including Recount of Vote):

Because of consumer confusion around voluntary retail certification, and the lack of clear guidance that exists for retailers seeking to market this certification to consumers, the CACC developed this guidance recommendation, which strives to identify key areas that need clarification, as well as define the role of NOP, ACAs and retailers in improving the marketing and implementation of USDA organic retailer certification. This recommendation also strives to improve consumer understanding of the distinction between “organic” and “certified organic” retailers.

NOSB Vote: Motion: Joe Smillie Second: Bea James

Yes - 12 No - 1 Abstain - 0 Absent - 2

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

Because there is little guidance in the rule and in OFPA specifically for retailers seeking voluntary certification, and because retailers that have opted for voluntary retail certification deserve to have a clear understanding of the regulations as it applies to retail certification, the CACC believes that by providing more detailed guidance retailers will consistently and collectively deliver the organic message to the consumer. Ultimately, this will encourage more retail certification in the market place, and deliver a logical and consistent understanding of USDA organic certification for everyone. Further action will need to be made on this recommendation, however, the CACC is requesting the support of the NOP to develop more detailed guidance.

Response by the NOP:

**National Organic Standards Board (NOSB)
Compliance, Accreditation & Certification Committee (CACC)**

Guidance Recommendation
Clarification of Voluntary Retail Certification
August 31, 2009

I. Introduction

In the winter of 2009 the NOSB CACC submitted a discussion document regarding voluntary retail certification to provoke a dialogue regarding the need for clear guidance for retailers. Public comments to the discussion document brought up several points:

1. The validity of retailers being certified as handlers under the rule.
2. Lack of guidance on the marketing of voluntary retail certification to maintain consistent use of the USDA organic seal throughout a retail store or chain.
3. The need for clear guidance so retailers know exactly what is expected of them, including but not limited to a comprehensive organic system plan throughout all departments of a retail store.

In this guidance document the CACC will explore primarily points 1 and 2. This guidance document focuses on retailers, and offers a variety of questions and points at the end of the document for consideration to further strengthen voluntary retail certification. The CACC is seeking public response to help answer many of the issues brought up in this document.

II. Background

(Addressing pt. I.) April 4, 2008 on the NOP web site Q and A section a public commenter asked: "May a retail operation be certified? The NOP responded with the following: "Under the NOP regulations, retail operations are generally considered an excluded entity and, therefore, do not have to be certified. However, a retailer may voluntarily become certified for the products for which it handles in accordance with the NOP regulations. And if a retailer has an in-store bakery or delicatessen which processes products that are sold as organic, that portion of the retail operation must be certified as a handling operation in order to sell, label, or represent those products as organic."

Then most recently in August of 2009, the NOP modified their answer to the following: "... And if a retailer has an in-store bakery or delicatessen which processes products that are sold as **certified** organic, that portion of the retail operation must be certified as a handling operation in order to sell, label, or represent those products as **certified** organic."

The addition of the word "certified" is intended to clarify that if a retailer labels a product as "certified organic" then they must be certified. But, retailers are generally not using the word 'certified' as part of their organic claim to a product because they are either exempt or excluded under 205.101. The mere act of calling a product 'organic' to the consumer means that the product is certified and has gone through oversight and inspection. Organic products coming out of any other processing facility would not be allowed to be labeled as organic unless certified by a third party inspector. Why should a retail establishment be any different?

However, exempt retailers are subject to penalties and fines if found to be out of compliance and must maintain good organic handling practices. *"No retailer, regardless of this exclusion and the exceptions found in the definitions for "handler" or "handling operation," may sell, label, or provide market information on a product unless such product has been produced and handled in accordance with the Act and these regulations. Any retailer who knowingly sells or labels a product as organic, except in accordance with the Act and these regulations, will be subject to a civil penalty of not more than \$10,000 per violation under this program.*
December 21, 2000 FR (page 80552-80553)

The CACC acknowledges that retailers have voluntarily sought and achieved legitimate organic handling certification, and the certifiers that supported and inspected these retailers were accredited by the USDA NOP to perform such inspection and issue these organic handling certificates to the retailers that act in compliance of the rule.

III. Regulatory Citations

§ 205.100 What has to be certified.

(a) Except for operations exempt or excluded in §205.101, each production or handling operation or specified portion of a production or handling operation that produces or handles crops, livestock, livestock products, or other agricultural products that are intended to be sold, labeled, or represented as “100 percent organic,” “organic,” or “made with organic (specified ingredients or food group(s))” must be certified according to the provisions of subpart E of this part and must meet all other applicable requirements of this part.

(b) Any production or handling operation or specified portion of a production or handling operation that has been already certified by a certifying agent on the date that the certifying agent receives its accreditation under this part shall be deemed to be certified under the Act until the operation's next anniversary date of certification. Such recognition shall only be available to those operations certified by a certifying agent that receives its accreditation within 18 months from February 20, 2001.

(c) Any operation that: (1) Knowingly sells or labels a product as organic, except in accordance with the Act, shall be subject to a civil penalty of not more than 3.91(b)(1)(xxxvii) of this title per violation.

§ 205.101 Exemptions and exclusions from certification.

(a) Exemptions.

- (1) A production or handling operation that sells agricultural products as “organic” but whose gross agricultural income from organic sales totals \$5,000 or less annually is exempt from certification under subpart E of this part and from submitting an organic system plan for acceptance or approval under §205.201 but must comply with the applicable organic production and handling requirements of subpart C of this part and the labeling requirements of §205.310. The products from such operations shall not be used as ingredients identified as organic in processed products produced by another handling operation.
- (2) A handling operation that is a retail food establishment or portion of a retail food establishment that handles organically produced agricultural products but does not process them is exempt from the requirements in this part.
- (3) A handling operation or portion of a handling operation that only handles agricultural products that contain less than 70 percent organic ingredients by total weight of the finished product (excluding water and salt) is exempt from the requirements in this part, except:
 - (i) The provisions for prevention of contact of organic products with prohibited substances set forth in §205.272 with respect to any organically produced ingredients used in an agricultural product;
 - (ii) The labeling provisions of §§205.305 and 205.310; and
 - (iii) The recordkeeping provisions in paragraph (c) of this section.
- (4) A handling operation or portion of a handling operation that only identifies organic ingredients on the information panel is exempt from the requirements in this part, except:
 - (i) The provisions for prevention of contact of organic products with prohibited substances set forth in §205.272 with respect to any organically produced ingredients used in an agricultural product;
 - (ii) The labeling provisions of §§205.305 and 205.310; and
 - (iii) The recordkeeping provisions in paragraph (c) of this section.

(b) Exclusions.

(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.

(2) A handling operation that is a retail food establishment or portion of a retail food establishment that processes, on the premises of the retail food establishment, raw and ready-to-eat food from agricultural products that were previously labeled as “100 percent organic,” “organic,” or “made with organic (specified ingredients or food group(s))” is excluded from the requirements in this part, except:

- (i) The requirements for the prevention of contact with prohibited substances as set forth in §205.272; and
- (ii) The labeling provisions of §205.310.

§ 205.270 Organic handling requirements.

(a) Mechanical or biological methods, including but not limited to cooking, baking, curing, heating, drying, mixing, grinding, churning, separating, distilling, extracting, slaughtering, cutting, fermenting, eviscerating, preserving, dehydrating, freezing, chilling, or otherwise manufacturing, and the packaging, canning, jarring, or otherwise enclosing food in a container may be used to process an organically produced agricultural product for the purpose of retarding spoilage or otherwise preparing the agricultural product for market.

(b) Nonagricultural substances allowed under §205.605 and nonorganically produced agricultural products allowed under §205.606 may be used:

- (1) In or on a processed agricultural product intended to be sold, labeled, or represented as “organic,” pursuant to §205.301(b), if not commercially available in organic form.
- (2) In or on a processed agricultural product intended to be sold, labeled, or represented as “made with organic (specified ingredients or food group(s)),” pursuant to §205.301(c).

(c) The handler of an organic handling operation must not use in or on agricultural products intended to be sold, labeled, or represented as “100 percent organic,” “organic,” or “made with organic (specified ingredients or food group(s)),” or in or on any ingredients labeled as organic:

- (1) Practices prohibited under paragraphs (e) and (f) of §205.105.
- (2) A volatile synthetic solvent or other synthetic processing aid not allowed under §205.605: Except, That, nonorganic ingredients in products labeled “made with organic (specified ingredients or food group(s))” are not subject to this requirement.

§ 205.310 Agricultural products produced on an exempt or excluded operation.

(a) An agricultural product organically produced or handled on an exempt or excluded operation must not:

- (1) Display the USDA seal or any certifying agent's seal or other identifying mark which represents the exempt or excluded operation as a certified organic operation, or
- (2) Be represented as a certified organic product or certified organic ingredient to any buyer.

(b) An agricultural product organically produced or handled on an exempt or excluded operation may be identified as an organic product or organic ingredient in a multi-ingredient product produced by the exempt or excluded operation. Such product or ingredient must not be identified or represented as “organic” in a product processed by others.

(c) Such product is subject to requirements specified in paragraph (a) of §205.300, and paragraphs (f)(1) through (f)(7) of §205.301.

§ 205.311 USDA Seal.

(a) The USDA seal described in paragraphs (b) and (c) of this section may be used only for raw or processed agricultural products described in paragraphs (a), (b), (e)(1), and (e)(2) of §205.301.

(b) The USDA seal must replicate the form and design of the example in figure 1 and must be printed legibly and conspicuously:

(1) On a white background with a brown outer circle and with the term, “USDA,” in green overlaying a white upper semicircle and with the term, “organic,” in white overlaying the green lower half circle; or

(2) On a white or transparent background with black outer circle and black “USDA” on a white or transparent upper half of the circle with a contrasting white or transparent “organic” on the black lower half circle.

(3) The green or black lower half circle may have four light lines running from left to right and disappearing at the point on the right horizon to resemble a cultivated field.

§ 205.400 General requirements for certification.

A person seeking to receive or maintain organic certification under the regulations in this part must:

(a) Comply with the Act and applicable organic production and handling regulations of this part;

(b) Establish, implement, and update annually an organic production or handling system plan that is submitted to an accredited certifying agent as provided for in §205.200;

(c) Permit on-site inspections with complete access to the production or handling operation, including noncertified production and handling areas, structures, and offices by the certifying agent as provided for in §205.403;

(d) Maintain all records applicable to the organic operation for not less than 5 years beyond their creation and allow authorized representatives of the Secretary, the applicable State organic program's governing State official, and the certifying agent access to such records during normal business hours for review and copying to determine compliance with the Act and the regulations in this part, as provided for in §205.104;

IV. Discussion

Retailers have successfully implemented Organic System Plans (OSP) to achieve their certification. Although the rule gives very little guidance specifically for retailers, most have managed to create successful OSP's that maintain organic status of products handled at retail. These OSP's include comprehensive regulatory processes as outlined throughout CFR Part 205 such as §205.103 Record keeping by certified operations, §205.270 Organic handling requirements, §205.271 Facility pest management practice standard and §205.272 Commingling and contact with prohibited substance prevention practice standard.

Maintaining these regulations require additional training and education for all staff on an ongoing basis, and little assistance is offered from the certification agencies, the NOP or industry organizations for retailers invested in organic certification. Because of this lack of guidance stores vary in consistent OSP's for compliancy, therefore consistent messaging to the consumer.

The USDA organic certification seal and labeling of organic in general is used in association with products that are certified. The NOP assures consumers that the organic agricultural products they purchase are produced, processed, and certified to consistent NOP standards. There are clear guidelines for the labeling requirements based on the percentage of organic ingredients in a product, but there are no clear guidelines for how a certified retailer should market the USDA organic seal, and communicate organic certification of a 'store'. Retailers are being certified for good organic handling practices, which are an excellent final step in maintaining the integrity of organic products that are sold, but retailers need more guidance on marketing the USDA organic seal since it is associated with products in the consumer's eyes, not a store facility.

Voluntary retail certification can be confusing to a consumer. Consumers wonder “what does organic certified store’ mean? Is this store made of organic materials? Are all the products I buy here organic? The retailers’ OSP usually do not include marketing processes of the USDA organic seal, and many certifiers lack guidelines for how they should market the seal throughout the store and throughout special promotions. Some retailers that commit to certifying their entire store are also losing credibility of the messaging because competitive stores that certify only one department might market that their entire store is certified. This not only dilutes the understanding of retail certification for the consumer who might shop both locations and see different organic merchandising and marketing messages, but it also creates an unfair advantage for the store that has committed to certifying their entire store.

Guidance Document Recommendation:

(Addressing pt I. 2&3) In order to ensure consistent application of the USDA organic seal at retail, the CACC proposes the following questions that need consideration for developing guidance on Marketing Voluntary Retail Certification. In this guidance document the CACC recommends that the responsibilities for providing impetus toward improved use of marketing USDA organic retailer certification be divided among the NOP, ACA’s and retailers for insuring the greatest oversight to consumer understanding.

A. NOP role in promoting marketing of USDA seal for certified organic retailers

- (a) Inform ACA’s during training and education sessions proper enforcement guidelines for the marketing of USDA Organic Voluntary Retail Certification. Considerations for marketing guidelines could include:
 - (a) Develop marketing standards for retail and add to USDA Organic Labeling and Marketing Information document. Find at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3004446&acct=nopgeninfo>
 - (b) Develop guidelines for marketing and merchandising that uses the USDA organic seal for certified organic retailers including but not limited to:
 - i) What can be disclosed when one or all departments are certified.
 - ii) Appropriate external claims of organic certification using the USDA name and/or seal in PR marketing including web-sites, radio, TV, newspaper, newsletters, magazine, flyers and all other media related outlets and/or promotional activities that include USDA organic retail certification.
 - iii) Appropriate internal claims of organic certification using the USDA name and/or seal the in store signage (on shelf point of purchase, in store billboards, signs attached to the outside of a store, in store flyers, etc) in a certified department vs. a non-certified department.
 - iv) Development of guidelines for proper use of bulk labels generated from scales. Retailers that have programmable scales should not be making certified organic store/department claims on their scale labels for products that are not organic.
 - v) Proper application (when and where) of the accredited certifying agents name in marketing collateral.
 - (b) Develop department-specific marketing procedures for maintaining organic systems including:

Deli & Bakery-

- (a) The Q&A response from the NOP (noted in the background section) regarding certification of bakeries and deli’s is inconsistent with current practices at retail. Some non-certified deli’s and bakeries are labeling products as organic (salads, breads, prepackaged prepared foods) and although they are usually not using the USDA organic seal, consistent use of products labeled as organic should apply. Because these departments are handling and processing according to § 205.270 the CACC is asking if they should be certified?

According to § 205.101 (b) a handling operation that is a retail food establishment or portion of a retail food establishment that handles organically produced agricultural products but does not process

them is exempt from the requirements, but these departments are indeed handling and processing. More clarification from the NOP is needed on this issue so that the industry has fair and consistent rules for products labeled as organic. Should deli's or bakeries that process and handle in a retail establishment be allowed to make organic claims on the label if they are not a certified organic retail department? What is the advantage for a retail deli or bakery to become certified if labeling claims are not much different than a non-certified retailer?

- (b) Should certified organic deli's/bakeries market prepared organic foods according to the NOP organic labeling requirements? Including:
 - i) '100 percent organic' must contain (excluding water and salt) only organically produced ingredients
 - ii) 'Organic' must consist of at least 95% organically produced ingredients (excluding water and salt). Any remaining product ingredients must consist of non agricultural substances approved for the National List.
 - iii) Processed products that contain at least 70% organic ingredients can use the phrase "made with organic ingredients" and list up to three of the organic ingredients or food groups on the principal display panel.
- (c) What is the proper use of the accredited certifying agent name in deli signage collateral? Should the certifying agents name be included on all signs in the deli case and on grab and go products marketed as organic or made with organic? 205.303(b)(2) and 304(b)(2), require that the certifier be identified.
- (d) Should all deli products manufactured on site at a certified organic retail deli and sold in the prepared foods case or the grab and go case have ingredient decks reviewed by the certifier prior to labeling?

Bulk Foods

- (e) Marketing guidelines for consumers in the bulk department regarding the cleaning and merchandising of scoops used for organic bulk foods to prevent comingling with non-organic bulk foods.
- (f) Information marketed in the bulk foods department for the customer restricting refilling bulk bins with product that was bagged to prevent comingling.

Grocery

- (g) How does a grocery department that has all prepackaged organic products market the advantage of retailer certification when comingling is limited? Should a grocery in aisle department that has all prepackaged product qualify for retailer certification?
- (h) Should grocery bags, billboards, in store signs and other marketing collateral have the USDA organic seal as the main marketing message? This is confusing for the consumer if there is not additional marketing information regarding the meaning of having the USDA organic seal on the marketing collateral, which should include the name of the certifier, as required under 205.303 and 304. Marketing collateral that insinuates that the entire store is certified should not be allowed if only one, not all, departments are certified.

Dairy/Frozen

- (i) Many deli departments merchandise their pre-cut and wrapped cheeses in the dairy department. Sometimes the cheeses come with the manufacturers' stickers that have their logo and organic labeling information. These labels are being applied to chesses cut and wrapped in the store. Can pre-cut cheeses be labeled as organic if they are being cut and processed in a department that is not certified?

B. ACA’s role in enforcing guidelines for marketing voluntary retail certification

- (a) The CACC recommends certification agencies work with industry experts (i.e. OTA, IOIA, NOP) to develop mandatory training and education courses for retailers planning to become certified organic.
- (b) If a retailer opts for certification, should certifiers inspect all departments (including departments outside of the one being inspected for certification) for compliance of marketing the USDA organic seal and/or all organic labeling? This would help check products that are produced in a certified department and cross merchandised in a separate department.
- (c) Should certifiers require retailers to include marketing plans/programs as part of their OSP?
- (d) Can certifiers require retailers to ask for sign-off from their certifier for all marketing of USDA organic labeling to assist with consistent messaging?

C. Retailers role in improving marketing of voluntary retail certification

- (a) Should retailers attend at least one mandatory NOP, OTA, IOIA, ACA, NASOP, or other accredited agency training workshop on Voluntary Retail Certification?
- (b) Certified organic retailers generally do their own internal audits in between inspections. Should the internal audits include marketing of anything using the USDA organic seal or the word “organic” for certifiers to then review at inspection time?
- (c) Should retailers include a SOP (standard operating procedure) for how they will market their organic retail certification to consumers in their OSP for certifiers to monitor?

COMMITTEE VOTE:

The CACC moves to accept this guidance document for receiving comment from the NOP and the public.

Moved: Bea James

Second: Barry Flamm

Yes: 6

No: 0

Abstain: 0

Absent: 0