

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

Date: August 17, 2005

Subject: The Listing of Certifying Agent's name on Packaged Products

Chair: Jim Riddle
(sign)

Recommendation

The NOSB hereby recommends to the NOP the following:

Rulemaking Action:	<u>X</u>
Guidance Statement:	<u>X</u>
Other:	<u>X</u>

Statement of the Recommendation (including Recount of Vote):

The NOSB recommends that the term “otherwise manufacturing” be understood to include: creation of labels, formulation of products, and procuring ingredients for products.

The NOSB recommends the following responses to questions submitted by the NOP:

Response to Question 1

- 1. Based on the scenario presented and the requirements contained in the NOP regulations, which ACA is “required” to be identified on the label of the packaged product, “Certifier X” or “Certifier Y?” Please provide your rationale.*

The scenario states that the retailer “has been voluntarily certified by an USDA accredited certifying agent”. Yet the example further states that the retailer provides the labels used to label the packaged products.

If the retailer is participating in the creation of the product in such a way as to be considered “otherwise manufacturing”, then the retailer is no longer within the exemption offered in 205.101(a)(2) of the regulation. The retailer is thus required to participate in certification. Therefore, it would be required that Certifier X be listed on the final packaging.

If, the retailer in this scenario is exempt retailer that is voluntarily certified, they may volunteer to be the “final handler”. If so, Certifier X would be identified on the label as they are now responsible for the voluntary certification of the retailer. If the retailer does not volunteer for this role, then Certifier Y would be represented as they are responsible for the manufacturer who remains “final handler”.

Response to Question 2

2. *Can a final retail establishment that does not process agricultural products be considered a handler under the definition of “handler” contained in the NOP regulations? Please provide your rationale.*

Yes, under the provisions stated in the preamble of the regulation that allow for operation of voluntarily participate in certification, operations that are not mandated for certification under the regulation may take on this responsibility and participate in the rights associated with that certification.

Response to Question 3

3. *Can a final retail establishment that does not process agricultural products be certified as an organic handler under the NOP regulations?*

Yes, again the preamble allows for voluntary participation of entities that are not required to become certified. Based on the fact that retailer function in a capacity “to sell” organic products, these certifications are considered that of a handler.

Further, the NOSB endorses the adoption of the previous NOSB recommendation for rule change (Addendum A) adopted by the NOSB on October 7, 2001. This recommendation further clarifies the role of the final handler and certifier indicated on the final product label.

Board vote – August 16, 2005:

8 Yes, 3 No, 2 Abstain, 1 Absent

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

Rationale provided in text of recommendation below.

Response by the NOP:

Updated 2/25/05

**NOSB Handling/CAC Committees Recommendation
Listing of Certifying Agent's name on Packaged Product
Adopted by the National Organic Standards Board
August 16, 2005**

Introduction

The USDA National Organic Program (NOP) has requested the NOSB to provide recommended guidance concerning an issue related to the listing of a Certifying Agent's name on a packaged product. The NOP can review and distribute this recommendation to accredited certifying agents and post on the NOP website.

Background

The following scenario has been presented to the National Organic Program (NOP) for clarification:

A retail establishment has been voluntarily certified by an USDA accredited certifying agent (ACA), "Certifier X," to sell organic products. The certified retail establishment contracts with a certified organic handling operation, certified by "Certifier Y," to manufacture organic products for distribution by the retail establishment. The organic products that are produced by the contracted handling operation are also packaged and labeled by the handling operation. However, the labels used to label the packaged products are supplied to the contracted handling operation by the certified retail establishment. The certified retail establishment does not perform any processing function for this product during its manufacture.

In order to address the scenario, the Certification Accreditation and Compliance Committee determined that there are fundamental concepts that must be defined. First, the rule specifically gives exemption from the requirements of certification for "retail" operations. However, retail operations are not defined by the regulation. Secondly, the NOP provides for "Voluntarily Certified", but it must be clarified as to the requirements and rights of entities that are granted this certification.

Further, the committee endorses the adoption of the previous NOSB recommendation for rule change (Addendum A) adopted by the NOSB on October 7, 2001. This recommendation further clarifies the role of the final handler and certifier indicated on the final product label.

Defining Retail:

Section 205.101(a)(2) of the rule states:

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.

Section 205.2 defines processing as:

Cooking, baking, curing, heating, drying, mixing, grinding, churning, separating, extracting, slaughtering, cutting, fermenting, distilling, eviscerating, preserving,

dehydrating, freezing, chilling, **or otherwise manufacturing** and includes the packaging, canning, jarring, or otherwise enclosing food in a container.

The committee recommends the following clarification regarding the term “otherwise manufacturing”: the creation of labels, formulation of products, procuring ingredients for products, etc. The retailer in the example provided becomes a retail operation which processes and therefore is required to be certified. The retailer becomes liable for product claims and process or systems used to create said product and assume full liability and responsibility.

Voluntary Certification:

The 2 December 2000, Federal Register (page 80552) states:

This regulation establishes several categories of exempt or excluded operations. An exempt or excluded operation does not need to be certified. However, operations that qualify as exempt or excluded operation can voluntarily choose to be certified. A production or handling operation that is exempt or excluded from obtaining certification still must meet other regulation requirements contained in this rule as explained below.

As is indicated, voluntary certification is offered to entity that opt to participate in certification in a situation in which the regulation does not mandate certification. Since retailers are exempt under 205.101 (a)(2), participation in the NOP certification program is considered voluntary. However, as a participant, applicants for voluntary certification are responsible for compliance with all requirements of the program. 205.400 Likewise, ACAs that provide voluntary certification are liable for their decision to grant voluntary certification. 205.404

The regulation requires that products making an organic claim (100% organic, organic, or made with organic ****) disclose the name of the “final handler” on the ingredient panel. 205.303(b)(2), 205.304(b)(2). The regulation defines “handler” to mean:

Any person engaged in the business of handling agricultural products, including producers who handle crops or livestock of their own production, except such term shall not include final retailers of agricultural products that do not process agricultural products.

The regulation further defines “Handle” to be:

To sell, process, or package agricultural product, except such term shall not include the sale, transportation, or delivery of crops livestock by the producers thereof to a handler.

Clearly, the regulation has provided leniency for retailers regarding the obligation for certification. However, the NOP has also given entities that are not required to pursue certification the ability to volunteer for certification.

Since the retailer does “handle” organic products by their effort “to sell”, a retailer may apply for voluntary certification as an organic handler. Since this retailer takes on the responsibility of the regulation and is certified by an ACA to those requirements, and since the retailer is a handler, it is then reasonable to state that the retailer may voluntarily become the final handler.

Specific Questions

Sections 205.303 (b) (2) and 205.304 (b) (2) of the NOP regulations state that “On the information panel, below the information identifying the handler or distributor of the product and preceded by the statement, "Certified organic by...," or similar phrase, **identify the name of the certifying agent that certified the handler of the finished product**: Except, That, the business address, Internet address, or telephone number of the certifying agent may be included in such label.”

1. Based on the scenario presented and the requirements contained in the NOP regulations, which ACA is “required” to be identified on the label of the packaged product, “Certifier X” or “Certifier Y?” Please provide your rationale.
2. Can a final retail establishment that does not process agricultural products be considered a handler under the definition of “handler” contained in the NOP regulations? Please provide your rationale.
3. Can a final retail establishment that does not process agricultural products be certified as an organic handler under the NOP regulations?

Recommendations

The Certification, Accreditation and Compliance Committee recommends that the term “otherwise manufacturing” be understood to include: creation of labels, formulation of products, and procuring ingredients for products.

The CAC Committee recommends the following responses to questions submitted by the NOP:

Response to Question 1

4. *Based on the scenario presented and the requirements contained in the NOP regulations, which ACA is “required” to be identified on the label of the packaged product, “Certifier X” or “Certifier Y?” Please provide your rationale.*

The scenario states that the retailer “has been voluntarily certified by an USDA accredited certifying agent”. Yet the example further states that the retailer provides the labels used to label the packaged products.

If the retailer is participating in the creation of the product in such a way as to be considered “otherwise manufacturing”, then the retailer is no longer within the exemption offered in 205.101(a)(2) of the regulation. The retailer is thus required to participate in certification. Therefore, it would be required that Certifier X be listed on the final packaging.

If, the retailer in this scenario is exempt retailer that is voluntarily certified, they may volunteer to be the “final handler”. If so, Certifier X would be identified on the label as they are now responsible for the voluntary certification of the retailer. If the retailer does

not volunteer for this role, then Certifier Y would be represented as they are responsible for the manufacturer who remains “final handler”.

Response to Question 2

5. *Can a final retail establishment that does not process agricultural products be considered a handler under the definition of “handler” contained in the NOP regulations? Please provide your rationale.*

Yes, under the provisions stated in the preamble of the regulation that allow for operation of voluntarily participate in certification, operations that are not mandated for certification under the regulation may take on this responsibility and participate in the rights associated with that certification.

Response to Question 3

6. *Can a final retail establishment that does not process agricultural products be certified as an organic handler under the NOP regulations?*

Yes, again the preamble allows for voluntary participation of entities that are not required to become certified. Based on the fact that retailer function in a capacity “to sell” organic products, these certifications are considered that of a handler.

Committee vote:

Yes – 4; No – 0; Abstention – 0; Absent – 1

Board vote:

Yes – 8; No – 3; Abstention – 2; Absent – 1

**Addendum A - Proposed Change Recommended to the
NOSB by the Accreditation Committee
July 10, 2001
Adopted by the NOSB, October 7, 2001**

Note: The following recommendation received one public comment, which supported it. Consequently, it is being submitted unchanged.

Subpart D – Labels, Labeling, and Market Information

The word “certified” should be inserted in the following three sections of Subpart D:

1. Section 205.303(b): Agricultural products in packages described in Sec. 205.301(a) and (b) must: ... (2) On the information panel, below the information identifying the certified handler or distributor of the product and preceded by the statement, “Certified organic by ***,” ...;
2. Section 205.304(b): Agricultural products in packages described in Sec. 205.301(c) must: ... (2) On the information panel, below the information identifying the certified handler or distributor of the product and preceded by the statement, “Certified organic by ***,” ...; and,
3. Section 205.306(b)(1): Livestock feed products described in Section 205.301(e)(1) and (e)(2) must: (1) On the information panel, below the information identifying the certified handler or distributor of the product and preceded by the statement, “Certified organic by ***,” ...

Rationale:

Under the rule as written, companies that commission the production and handling of organic products do not have to be certified if they do not physically “handle” products. The processing operations that manufacture the products must be certified, however. For the sake of this discussion, companies, such as private label operations, who commission such products will be referred to as “commission merchants”. Handlers who manufacture products for such operations will be called “co-packers”.

As stated, co-packers must be certified, but commission merchants are excluded from certification under 205.101(b)(1), since they do not physically “handle” or package the products. This overlooks the fact that many commission merchants control significant information needed to assess the audit trails of co-packers. In many instances, commission merchants order ingredients, obtain organic certificates, retain invoices and sales records, and control the wording of product labels.

Under the current rule, the name of the certifying agent must appear on the label. There is nothing in the rule, however, that requires that the name of the final handler appear on the label along with the name of the certifying agent. If the final handler is a co-packer who manufactures for a private brand or retailer, the name of the private brand or retailer (commission merchant) will appear on the label along with the name of the certifying

agent, even though the private label company or retailer is not certified. There is no connection to the certified handler who manufactured the product. The product is not traceable back to the certified operation that manufactured it. The audit trail is not complete.

The proposed change would require that name of the certified handler appear on the product label. The effect of this change would be that either the name of the certified manufacturer (co-packer) would appear on the label, or else the private brand company (commission merchant) would choose to get certified. Either way, the audit trail would be intact. A product could be tracked back to its point of manufacture. Parties identified on product labels would be part of the certification loop. In addition, the name of the certifying agent would be used in conjunction with the name of a company that it certified.

The proposed change is consistent with the intent of the OFPA, which states in 2106(a)(1)(B), "No person may affix a label to, or provide other market information concerning, an agricultural product if such label or information implies, directly or indirectly, that such product is produced and handled using organic methods, except in accordance with this title." This statement presumes that operations that label products as organic must comply with the NOP, including being certified by an accredited certifying agent.

The December 21, 2000, Federal Register, on page 80581, 3rd column, in the Labeling discussion under Exempt or Excluded Operations, states:

"Any such operation that is exempt or excluded from certification or which chooses not to be certified may not label its organically produced products in a way which indicates that the operation has been certified..."

This same intent should cover private label commission merchants. If a non-certified commission merchant places only its own name on a product, along with the name of the certifying agent (and optionally the USDA Organic Seal), the product is certainly labeled to imply that "the operation" (i.e., the commission merchant) has been certified.

The name of the certified operation should appear on final consumer product labels because:

- This was the intent of the OFPA, requiring certification and full disclosure;
- This labeling requirement was assumed, but not discussed, during the rule-making process;
- All other regulatory systems require that the registrant or certified operation appear on the product label, including FDA drug, EPA pesticide, and State feed and fertilizer programs; and
- This will help solve problems that are now appearing in organic labeling and in audit trails.

The proposed change will help assure a successful National Organic Program in several ways:

- Consumer confidence will be protected because there will be clear certification;

- Most of the current tracking problems will be avoided because the audit trail will be clear;
- Regarding commissioned products, the label will either identify the certified operation that packaged the product, or the private labeler can choose to be certified;
- Exemptions and exclusions from certification will remain in place and these operations will not be required to be certified; and
- Enforcement agents and the public will be able to verify the integrity of the product through either the certified operation or the certifying agent and perform their functions more easily.