



The Cornucopia Institute

October 5, 2020
Dr. Jennifer Tucker
National Organic Program
USDA-AMS-NOP
1400 Independence Ave SW
Room 2642-So., Ag Stop 0268
Washington, DC 20250-0268

**Re: Docket: AMS-NOP-17-0065-0001
Federal Register No. 2020-14581**

National Organic Program (NOP); Request for Comment on Strengthening Organic Enforcement

The following comments are submitted to you on behalf of The Cornucopia Institute, whose mission is, in part, to support economic justice for family-scale farming.

These comments are numbered to address the applicable sections in the proposed rule. For sections that are omitted, Cornucopia has no comment at this time.

1—Applicability and Exemptions for Certification

The Cornucopia Institute supports requiring certification of operations that handle organic products under the proposed rule's new definition. Narrowing the exemptions from certification is necessary to improve traceability in the organic supply chain.

However, clarification as to the applicability and scope of the proposed rule is needed in the following areas.

- ⇒ The regulations should require organic certification of storage facilities that temporarily hold both conventional and organic agricultural products. Whether certification is required for such facilities under the proposed rule is unclear.

AMS proposes exempting from organic certification operations that only store agricultural products, but do not process or alter such agricultural products.

In the explanatory text, AMS states that storage operations claiming the exemption *must not* label/relabel, combine, *split*, containerize, pack/repack, treat, sort, open, enclose, or otherwise alter the organic products they handle.

The revised definition of “handle” in § 205.2 does not include the term “splitting.” A storage facility that houses both conventional and organic agricultural products must “split” its space to ensure physical separation of conventional and organic agricultural products in its facility.

It is well established that commingling organic and conventional products is a common method used to perpetrate fraud. As in the case of organic grain fraud, commingling often occurs in storage facilities. To further the purpose of protecting organic integrity, AMS should require storage facilities that house both conventional and organic agricultural products be certified.

2—Imports to the United States

The Cornucopia Institute supports the compulsory use of NOP Import Certificates, regardless of an imported product’s country of origin. The compulsory use of the NOP Import Certificates can be used to capture the organic status, record quantity or weight of products, and identify exporters and importers associated with a particular shipment.

However, the proposed regulation fails to ensure organic integrity in the following ways and should be revised accordingly.

- ⇒ *The proposed rule fails to provide assurances that documents will be reviewed at US ports of entry.* Moreover, the rule’s explanatory text explicitly states that NOP Import Certificates do not have to accompany a shipment when it arrives at a US port.

The explanatory text regarding Import Certificates is not conjectural, nor is it qualified, which makes it fair to infer that AMS intended the statements to create binding legal consequences. To avoid confusion or inconsistent application of a requirement set out in the preamble, the regulation itself should be clear.

In the proposed regulation, the text of the rule is silent regarding a timeframe in which the exporter can upload an NOP Import Certificate to Custom and Border Control’s Automated Commercial Environment (ACE) system. However, the proposed rule’s explanatory text explicitly establishes 10 calendar days *after the shipment enters the US* in which the exporter can upload the NOP Import Certificate.¹

In the explanatory text, AMS explains that it is requiring organic imports that pass through US ports of entry to be *associated with*, but not *accompanied by* an NOP Import Certificate. According to AMS, the 10-day period is based on existing trade filing timeframes in ACE and on concerns that requiring NOP Import Certificates may slow trade.

Allowing organic products to enter the US without an NOP Import Certificate assures fraudulently labeled organic products will enter the US market. Allowing organic products to enter the US without verification of authenticity fails to rectify the enforcement deficiencies outlined in the USDA’s Office of Inspector General (OIG) September 2017 report.

¹ Because explanatory texts are authored by governmental agencies, courts are more inclined to give deference to an agency’s view of the rule’s meaning and application. Therefore, agencies should avoid using explanatory text to make statements of general applicability that are intended to have legal effect or create binding substantive standards.

In its report, the OIG concluded that the USDA, “was unable to provide reasonable assurance that ... required documents were reviewed at U.S. ports of entry to verify that imported agricultural products labeled as organic were from certified organic foreign farms.”

AMS’s regulation, as it explains in the proposed rule’s explanatory text, leaves the organic authenticity of imported organic products unverified at US ports.

- ⇒ *The rule should clarify the precise timeframes in which verification or organic documentation will be available for review.* Also of concern are the delays articulated by NOP in its July 2018 response to the OIG’s report. As described in the NOP’s response to the OIG, the NOP Import Certificate will be tied to CBP Entry Form 7501. According to the NOP, the information included on the Entry Form 7501, including an “organic” designation, typically appears in the ACE system 30 days after the imported product is delivered in the US.

The 10-day timeframe in which an exporter can upload the Import Certificate plus the 30-day timeframe in which the information tied to CBP Entry Form 7501 will allow fraudulent organics to continue to enter distribution channels in the US.

The proposed rule does not mention the 30-day delay associated with “message sets” tied to Form 7501. We respectfully request clarification on the precise timeframes in which verification or organic documentation will be available for review. It is unclear whether NOP still anticipates the 30-day delay it outlined in its response to the OIG.

- ⇒ *The regulations should require inspection of phytosanitary certificates at all US ports and borders to ensure agricultural products were not fumigated or irradiated before arrival.* In the explanatory text, AMS also discusses future harmonization with sanitary and phytosanitary data systems. This harmonization is essential as phytosanitary certificates are essential documents in determining whether the organic product has been treated with prohibited inputs. Ad hoc, post-entry review of documents associated with a shipment will not stop fraudulent imports from penetrating US borders.
- ⇒ *In the absence of verification of organic authenticity at US borders and ports, cease and desist and stop sale authority are the only measures that prevent fraudulently labeled organic products from entering the US market.*

The NOP has previously stated that it is not clear that it has the authority to issue and enforce Cease and Desist notices for businesses if they fraudulently label organic products. To the extent the Organic Food Productions Act, and other governing laws, do not provide the NOP with this authority, the NOP should propose necessary provisions and amendments to enabling legislation that would authorize these critical regulatory amendments.

In sum, NOP Import Certificates and other shipping documents must be available in ACE *when the shipment arrives at US ports*. Otherwise, the rule fails to provide for enhanced inspection protocols at US ports, which has been a major impetus for regulatory reform.

Once fraudulently labeled organic products enter the US market, there appears to be no regulatory avenue by which NOP can stop the sale and verify authenticity. Therefore, verification of organic authenticity at US ports is absolutely critical.

3—Labeling of Nonretail Containers

The Cornucopia Institute supports the inclusion of additional information on nonretail containers but recommends revising the regulation to *require* that information, rather than making it optional.

⇒ *AMS should require, rather than make optional, that nonretail containers display necessary information.* Specifically, the container display should include: the name and contact information of the certified producer of the product, or if processed, the last certified handler that processed the product.

Cornucopia recommends making this display mandatory, rather than an option, because this information is necessary for inspectors and certification agencies to conduct trace-back and supply chain audits.

⇒ *The proposed regulation should require nonretail containers to display a special handling instruction to prevent fumigation.* Cornucopia recommends including the instructions “do not fumigate” on all nonretail containers. This provision is necessary to prevent fumigation with prohibited substances when organic products cross borders.

⇒ As currently drafted, the proposed regulation would not apply to large nonretail containers used to transport or store organic products such as trailers, tanks, railcars, shipping containers, grain elevators, vessels, cargo holds, barges, etc.

Because bulk containers hold massive quantities of product, the impact of fraudulently labeled products could significantly compromise organic integrity in the market place. Cornucopia disagrees that it is impractical to label large nonretail containers. Bulk transport and storage have been used to move and house fraudulently labeled organic products, notably in the context of organic grain.

Cornucopia also recommends that AMS require labeling of large nonretail containers with the words “do not fumigate.”

4—On-Site Inspections

The Cornucopia Institute supports codifying a requirement for certifying agents to conduct a minimum of 5% of the operations it certifies. However, clarification is needed in the following areas.

⇒ *While requiring certifying agents to conduct a minimum number of unannounced inspections is an important measure to detect fraud, this requirement should not relieve NOP of its own enforcement obligations to initiate inspections and testing.*

The Deputy Administrator is authorized under § 205.403(2)(iii), to mandate inspections and testing. In circumstances where operations or products are highly suspect, the NOP must initiate inspections and testing on its own accord.

For example, where documented or highly suspicious cases of fraud exist, as is the case with imported grain, the NOP should require inspection and testing of all bulk shipments presented for

entry at ports, docks, or border crossings of the US until the risk of fraudulent activity has been contained.

Additionally, AMS should clarify how certifying agents should use risk assessments in determining which operations to select for unannounced inspections. Such factors could include an operation's history of non-compliances, if an operation is located in a high risk region where fraud is prevalent, or if an operation is in a trade involving high-risk products whose organic status is easily manipulated or has been historically misrepresented. The NOP should also relay any such information to certifying agents that suggests an operation or product is high risk so that this can be included in the certifying agent's risk assessment.

7—Paperwork Submissions to the Administrator

While the Cornucopia Institute supports requiring that certifying agents maintain current data in the Organic INTEGRITY Database, clarification is needed as to precisely what information will be stored in the Organic INTEGRITY Database and available to the public.

The content of the notices must remain accessible to the public, if not through the Organic INTEGRITY Database, then when requested. For example, the public should have access to content including but not limited to the underlying facts giving rise to revocations and suspensions. AMS notes that the organic industry and consumers can use the Organic INTEGRITY Database to “obtain data for investigation and enforcement.” It is unclear what information or the level of detail to which the public will have access.

While the public currently has access to these documents pursuant to the Freedom of Information Act, these documents should be no less available to the public if housed exclusively with the certifying agent. The availability of these documents is especially concerning in the case of foreign certifying agents which may operate under different laws.

The proposed rule also removes the requirement that certifying agents submit to the Administrator any notices of denial of certification, notification of noncompliance, notification of noncompliance correction, notification of proposed suspension or revocation. Relieving certifying agents of paperwork submissions should not deny the public the critical information NOP currently collects.

- ⇒ *The rule should require certifying agents to report aggregate production area certified by crop and location to the Organic INTEGRITY Database. Without this information there are no means to accurately calculate organic acreage and/or yield estimates on a country-by-country basis.*

8—Personnel Training and Qualifications

The Cornucopia Institute supports the proposed rule's minimum qualifications and training requirements for inspectors and persons who perform certification review activities. However, the rule does not specify minimum qualifications for NOP personnel who provide essential duties in administering and enforcing the organic regulations.

- ⇒ *The proposed rule should require that the NOP employ a sufficient number of qualified and adequately trained personnel, with the necessary skill and experience, to implement and enforce the organic regulations.*

The proposed rule should also require NOP personnel to maintain the necessary knowledge and skills related to all aspects of organic production, import and export requirements, auditing practices, and investigative techniques.

- ⇒ *The proposed rule should require the NOP to provide conflict of interest training for its employees and those of certifying agents.* Decision-making power and access to information and influence are invitations for corruption and are present when individuals move from employment between government agencies, certifiers, and certified entities. Proper training can minimize the likelihood of conflicts of interest that facilitate fraud in circumstances where personal and professional relationships converge based on prior relationships.

9—Oversight of Certification Activities

The Cornucopia Institute supports the requirement that certifying agents notify the NOP of the opening of any office performing certification activities.

- ⇒ *Clarification is needed as to why the rule allows the certifying agent 90 calendar days after the opening of an office to notify the NOP.* Requiring a certifying agent to notify the NOP of its intention to add another office before it opens that office would enhance oversight and reduce opportunities for fraud. Certifying agents located abroad have opened and closed offices and added locations in high risk areas. Additionally, there have been instances where certifying agents have opened new locations and hired personnel that were previously employed by operations the certifying agent certifies. To help ensure the office was not opened to facilitate fraud and that it is able to perform certification activities in accordance with US law, the certifying agent should notify the NOP before opening a new location.

10—Accepting Foreign Conformity Assessment Systems

The Cornucopia Institute believes there are increased risks associated with agreements where other countries' governments oversee the implementation of NOP certification.

- ⇒ *Factors of political instability and corruption must be considered when AMS considers requests by countries for equivalence and recognition agreements.* A foreign government's control system can be comprised by political instability and corruption which render it unable to ensure the country's ability to accredit certifying agents and enforce standards. Where political instability and/or corruption are pervasive, a foreign government cannot be entrusted to accredit certifying agents.

11—Compliance – General

The Cornucopia Institute supports the proposed rule's clarification that AMS can pursue enforcement actions against uncertified parties for which AMS has evidence of OFPA violations. Regardless of certification status, actions taken against these parties should be made public.

12—Noncompliance Procedure for Certified Operations

The Cornucopia Institute supports amending §§ 205.100 and 205.662 to clarify that a person who is responsibly connected to an operation that violates the OFPA or the USDA organic regulations may be subject to suspension of certification or ineligibility to receive certification and may be subject to fines or imprisonment.

- ⇒ The identity of responsibly connected persons who are ineligible for certification, suspended from certification, and/or convicted of crimes for violating the USDA organic regulations should be available to the public in the Organic INTEGRITY Database. This will enable certified operations and certifying agents to readily identify persons ineligible for employment and avoid conflicts of interest.

13--Mediation

Although The Cornucopia Institute recognizes the value of mediation as a means of dispute resolution between certifying agent and certified operation, we request clarification about the effect of confidentiality provisions often attendant to mediation.

- ⇒ These concerns relate to the confidentiality provisions that often govern alternate dispute resolution. To the extent mediation is used by certifying agents and certified operations, the rule should make clear that mediation cannot be cloaked in confidentiality so as to deny the public access to notices issued to certified operations or to settlement agreements.
- ⇒ As discussed above, the proposed rule also relieves certifying agents of the obligation to submit notices of noncompliance, revocation, and suspension to AMS. As a practical matter, the rule appears to allow the NOP to completely abdicate responsibility for maintaining these documents and vest the control solely with certifying agents. Therefore, it is critical that the rule makes clear that the public is equally entitled to information about investigations and enforcement actions, regardless of how the dispute is resolved or where the related documents reside.

16--Grower Group Operations

The Cornucopia Institute encourages AMS to consider size caps for grower groups. The utility of grower groups is to allow multiple producers to participate in the organic marketplace where it would otherwise be costly and/or logistically challenging. Without size caps, the potential for abuse by industrial scale operations to consolidate market share increases substantially. Without size caps, the very intent of the rule could be subverted to the detriment of smaller scaled producers.

Sincerely,



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The Cornucopia Institute