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| September 10, 2020

NOP Proposed Rule: Strengthening Organic Enforcement

Comment deadline is October 5, 2020

DEAR PCO CERTIFIED OPERATORS, MEMBERS AND INSPECTORS,

As most, if not all, of you are aware, last month the United States Department of Agriculture (USDA) Agricultural Marketing Service (AMS) published a proposed rule to amend the USDA organic regulations to strengthen oversight and enforcement of the production, handling and sale of organic agricultural products, with a 60-day comment period. The comment deadline is October 5, 2020, at 11:59pm ET. See below for additional resources and instructions to submit comments.

PCO sent out a detailed letter last month briefly explaining all of the topics that are covered in this proposed rule (there are 20 topics!). The National Organic Program (NOP) states time and again that during these open comment periods, they want to hear directly from certified organic operators. We urge you to take the time to submit comments. This letter details the areas we feel will have the biggest impact on PCO and on our certified operations. These areas are:

- Applicability and Exemptions from Certification
- Imports to the United States
- Labeling of Nonretail Containers
- Personnel Training and Qualifications
- Supply Chain Traceability and Organic Fraud Prevention
- Additional amendments considered but not included in this Proposed Rule

For all of these topics, NOP is seeking answers to specific questions listed in each section below. As you think about how to comment, providing answers to these questions is a good place to start. Another approach is to consider and comment on whether or not NOP's intent (included in the explanation to each section) is achieved by the proposed changes to the regulatory language. Lastly, you may want to consider the time and cost to implement these changes.

Instructions for Submitting Comments: Comments must be received by 11:59PM ET October 5, 2020, and must reference the docket number AMS-NOP-17-0065. Submit written comments online via www.regulations.gov/document?D=AMS_FRDOC_0001-2099, or by mail to Jennifer Tucker, Deputy Administrator, National Organic Program, USDA-AMS-NOP, 1400 Independence Ave. SW, Room 2642-So., Ag Stop 0268, Washington, DC 20250-0268; (202) 260-9151 (fax).

Please contact me if you have any questions. Best,

Kyla Smith
Certification Director



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Applicability and Exemptions from Certification

AMS proposes amending §§ 205.2 and 205.100-101 of the USDA organic regulations to clarify the applicability of the regulations and limit the types of operations excluded from organic certification.

It is clear that the NOP's intent is to require organic certification for more types of operations based on the type of activity they conduct and this activity's level of risk in the supply chain. When commenting, consider if this intent is clear regarding the types of operations that would require certification, be exempt from certification, and if you agree with the NOP's justification.

The specific questions NOP is seeking comment on are:

- Are there additional activities that should be included in the proposed definition of handle (i.e., are there additional activities that require certification)? Are there any activities in the proposed definition of handle that should be exempt from certification?
- Are there specific activities not included in the proposed rule that you believe should be exempt from organic certification?
- Are there additional requirements that exempt handlers described in this proposed rule should follow?
- Activities at ports may present a threat to the integrity of organic products due to the multiple types of handling activities performed in these locations. It is common for independent operations to perform specific physical handling activities within a port (e.g., loading, unloading, or transfer of packaged, unpackaged, or bulk organic product). The proposed rule would require certification of these operations, who are often contractors. What other activities performed at ports should require certification and why?

Imports to the United States

AMS proposes amending the USDA organic regulations by adding a new section (§205.273) discussing the use of the National Organic Program Import Certificate.

In this section, there are several required timelines and responsibilities for when and from whom the import certificate must be requested, completed by, and uploaded into the ACE system. When commenting, consider these timelines, along with the responsibilities, and how they align with your business practices.

The specific questions NOP is seeking comment on are:

- Is the 30-day timeframe for certifying agents to review and issue an NOP Import Certificate appropriate? Why or why not?
- How could the mode of transportation and frequency of shipments affect the use of the NOP Import Certificate?

Labeling of Nonretail Containers

AMS proposes amending § 205.307 to add new requirements for the labeling of nonretail containers.

In this section, there are two NEW pieces of information in addition to the currently required lot #: 1) a statement identifying the product as organic; and 2) the name of the certifier that certified either the producer of the product, or, if the product is processed, the last handler that processed the product. The NOP states in the explanatory text that these new requirements don't apply to large nonretail containers (e.g. trailers, tanks, railcars, shipping containers, grain elevators/silos, vessels, cargo holds, freighters, barges). However, this isn't clearly stated in the regulatory text.



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Additionally, as proposed, the name and contact information of the certified producer of the product, or, if the product is processed, the last handler that processed the product would not be required. When commenting, consider the impact of including these additional items on a nonretail label and if including these pieces of information increases traceability and transparency of a product through the label and audit trail documentation.

The specific question NOP is seeking comment on is:

- AMS seeks comment regarding the proposed amendments to the labeling of nonretail containers, specifically whether or not the certified operation that produced or last processed the product must be listed (i.e., not optional) on all nonretail container labels.

Personnel Training and Qualifications

AMS proposes amending § 205.501 to specify minimum qualifications, training and expertise requirements for inspectors and persons who perform certification review activities.

In this section, NOP outlines the expectation that inspectors and reviewers obtain 20 hours of continuing education annually. This section also requires that inspectors have a minimum of 1 year of field-based experience related to both the scope and scale of operations they will inspect before assigning inspection responsibilities. When commenting, consider your experiences with inspectors and review staff and if these minimum requirements would have added in those experiences. You may also want to consider the cost associated with implementing additional training requirements and how these costs will impact inspector, certifiers and certified operations.

The specific questions NOP is seeking comment on are:

- Is the 20 training hours a year an appropriate amount of continuing education for organic inspectors and certification review personnel?
- Should organic inspections be evaluated on-site more frequently than once every three years?
- Should any other types of knowledge, skills, and experience be specified?

Supply Chain Traceability and Organic Fraud Prevention

AMS proposes amending §§ 205.103, 205.201, 205.501, and 205.504 to require certified operations and certifying agents to develop improved recordkeeping, organic fraud prevention, and trace-back audit processes to be able to trace product back to the source (i.e. origin).

According to the explanation of this section, NOP intends to clarify who is responsible for each element of product traceability, with the goal of full supply chain traceability. It is stated that:

- certified operations are responsible for traceability within their operation, back to their suppliers, and forward to their customers
- certifying agents are responsible for tracing products along the supply chain back to their origin and assessing the traceability efforts of operations.

When commenting you may want to consider, if these increased recordkeeping requirements help prevent fraud, along with the time and cost associated with these requirements.

The specific questions NOP is seeking comment on are:



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- Does the proposed definition of *organic fraud* encompass the types of fraudulent activities you witness in the organic supply chain?
- Should certifying agents be required to perform a minimum number of trace-back audits each year?
- Should more specific fraud prevention criteria be included in the regulation?

Additional amendments considered but not included in this Proposed Rule

AMS considered, but did not include in the proposed rule, the following topics:

- Packaged Product Labeling: Considers terminology that should be used to describe private-labeled organic products as well as a revision to the labeling regulations to specify the certified operation and certifying agent that should be listed on the retail label for private-label packaged products.
 - The specific questions NOP is seeking comment on are:
 - For private-label packaged products, which certified operation(s) should be listed on the retail label (brand name/distributor, contract manufacturer, or both)?
 - Which certifying agent(s) should be listed?
 - Should the certifying agent listed on a label always be the certifying agent of the certified operation listed on the label (i.e., should the certifying agent match the operation)?
 - Should listing contract manufacturers on labels be mandatory? Should it be optional?
 - What terminology should be used to describe private-labeled organic products?
 - What terminology should be used to describe the operations involved in packaged product or private labeling (e.g., brand name manufacturer, contract manufacturer, and distributor)?
- Expiration of Certification: Considers an annual expiration of certification (vs. expiration of the certificate) if the operation does not submit fees and update its certificate of operation.
 - The specific questions NOP is seeking comment on are:
 - How might annual expiration of certification improve organic integrity?
 - What are the limitations of requiring expiration of certification?
 - What minimum requirements must be met before renewing certification?
 - Could an operation with unresolved adverse actions renew certification?
 - Would a grace period be appropriate for operations that failed to renew by the expiration date? If so, what length grace period would be appropriate?
 - What process should exist for an operation to regain organic certification should it allow its certification to expire?
 - Should certifying agents notify certified operations of their upcoming expiration of certification?
- Fees to AMS and Oversight of Certifying Agent's Fees: Considers OFPA and its allowance for NOP to include fees from producers, certifying agents and handlers, and points to the role of AMS to periodically review the fees for accreditation and accreditation services and oversee the NOP fees that certifying agents and others charge for their service.
 - The specific questions NOP is seeking comment on is:
 - AMS is seeking public comment on how fees in NOP could strengthen testing and enforcement across all stakeholders to ensure that NOP keeps pace with the rapid growth and better serves the industry.



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Resources

- Full text of the Strengthening Organic Enforcement (SOE) proposed rule can be found at www.govinfo.gov/content/pkg/FR-2020-08-05/pdf/2020-14581.pdf, or contact the PCO office for a hard copy.
- Visit the NOP's Strengthening Organic Enforcement webpage at www.ams.usda.gov/rules-regulations/strengthening-organic-enforcement-proposed-rule for additional resources, such as a side-by-side comparison of the current regulations and the proposed rule.