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## “Organic” Certification: An Overview of the Legal Framework

In 1990, Congress passed the Organic Foods Production Act (OFPA), 7 U.S.C. §§ 6501–6522, “to establish national standards governing the marketing of certain agricultural products as organically produced products.” OFPA, enacted as part of the 1990 Omnibus Farm Bill, authorized the Secretary of Agriculture to establish regulations, administered by the Agricultural Marketing Service (AMS) within the U.S. Department of Agriculture (USDA), for certifying products as organic under the National Organic Program (NOP). *Id.* § 6503. The Secretary may also authorize states to operate their own programs with requirements equivalent to or more restrictive than the federal program. *Id.* § 6507. This In Focus summarizes the organic certification framework and highlights some proposed regulatory changes.

### What Qualifies as “Organic”?

“Organic” may be used to describe products produced and handled (1) “without the use of synthetic chemicals,” except as permitted by law; (2) on land to which prohibited substances have not been applied in the three years before harvest; and (3) “in compliance with an organic plan” approved by a certifying agent. *Id.* § 6504.

### Eligible Products

All products within the statutory definition of “agricultural product” may obtain organic certification. This definition encompasses raw and processed products, and products derived from livestock for human or livestock consumption. Livestock includes “cattle, sheep, goats, swine, poultry, equine animals used for food or in the production of food,” fish, and “other nonplant life.” *Id.* §§ 6502(1), (11); 7 C.F.R. § 205.2.

### Describing a Product as “Organic”

The term “organic” may be used to describe or label products in four configurations: (1) “100 percent organic”; (2) “organic”; (3) “made with organic (specified ingredients or food groups)”; and (4) by designating specific ingredients as “organic” if the product contains less than 70% organic material. 7 C.F.R. § 205.301.

“100 percent organic” refers to products consisting entirely of organically produced ingredients. “Organic” refers to products that contain at least 95% organically produced products by weight or fluid volume, excluding water and salt. The remaining 5% must be (1) organically produced ingredients, “unless not commercially available in organic form,” or (2) “nonagricultural substances or nonorganically produced agricultural products produced consistent with the National List.” “Made with organic (specified ingredients or food groups)” refers to products with at least 70% organically produced ingredients; the remaining 30% must meet other production requirements. Products with less than

70% organic material may use the term “organic,” but may apply it only to specific ingredients, not the entire product (e.g., “organic” may precede each organically produced ingredient in a list of ingredients). *Id.* §§ 205.303–205.309. Labels for “100% organic” and “organic” products may also use the USDA organic seal. *Id.* § 205.311.

### “Organic” and Bioengineering Claims

Under OFPA, an “organic” certification for products with 70% to 100% organic content allows producers and handlers to “make a claim regarding the absence of bioengineering in the food,” including “non-GMO” and “not bioengineered.” 7 U.S.C. § 6524. To make these claims, the products must not be produced with methods “to genetically modify organisms or influence their growth and development by means that are not possible under natural conditions or processes and are not considered compatible with organic production.” 7 C.F.R. §§ 205.2, 205.105(e).

### Designating Prohibited Substances

Producers and handlers of organic products cannot use prohibited substances in their operations. *Id.* § 205.400. The Secretary, on recommendation from the National Organic Standards Board (NOSB), designates these substances on the National List, which itemizes all permitted synthetic substances and prohibited natural substances. 7 U.S.C. § 6517; 7 C.F.R. §§ 205.600–205.607. The NOSB consists of fifteen individuals designated by the Secretary. 7 U.S.C. § 6518(b). Prohibited substances may be permitted if they (1) would not harm human health or the environment; (2) are necessary in the operation due to unavailability of natural substitutes; *and* (3) are consistent with organic farming and handling. *Id.* § 6517(c); 7 C.F.R. § 205.600(b). Natural substances may be prohibited if they harm human health or the environment and their use would be “inconsistent with organic farming or handling.” 7 U.S.C. § 6517. When the NOSB considers recommendations for the National List, it assesses how the substances may interact with other materials used in farming systems; the substance’s toxicity; probability of environmental contamination; effects on human health and the agroecosystem; existence of alternative substances; and compatibility with sustainable agriculture. *Id.* § 6518(m). The NOSB must obtain scientific evaluations of the relevant substances before making final recommendations. *Id.* § 6518(k).

### Certifying Organic Plans

Operations seeking to describe their products as organic typically must obtain certification of an organic plan. These plans must outline how the operations will comply with all regulatory requirements. First, the plans must show how the operations will avoid prohibited substances, primarily by listing the materials and operational or monitoring

procedures they intend to use. *Id.* § 6506(a); 7 C.F.R. § 205.201. Second, the plans must meet commodity-specific requirements. For example, farms seeking to certify crops as organic must provide for pest and erosion control, practice crop rotation, and implement other practices to protect soil conditions. 7 C.F.R. §§ 205.202–205.206. Organic livestock producers must keep animals “under continuous organic management from the last third of gestation or hatching” by using organic feed and establishing procedures to address animal health and pasture conditions. *Id.* §§ 205.236–205.240.

### Review of Proposed Plans

A certifying agent reviews the proposed plans and conducts onsite inspections. Inspections are used to verify that an operation seeking approval is capable of or is complying with program requirements. *Id.* § 205.403. Certifying agents are officials or private entities the Secretary authorizes to conduct these reviews. They must possess “sufficient expertise in organic farming and handling techniques as determined by the Secretary” and apply for accreditation. Their applications must demonstrate their capacity to comply with all requirements, and must attest that they will comply with recordkeeping, conflict of interest, and other administrative provisions. 7 U.S.C. § 6514(b); 7 C.F.R. § 205.501. Agents also have an obligation to employ third parties (e.g., inspectors) and annually review their performance “to correct any deficiencies in certification services.” 7 C.F.R. § 205.501(a). The Secretary may suspend agents’ accreditations for noncompliance. 7 U.S.C. § 6515(i); 7 C.F.R. §§ 205.510(e), 205.665.

The Secretary’s decisions on proposed organic plans must be in writing and any denial must state the reasons for rejection. If an agent declines to approve a plan, a producer or handler may try to correct the deficiencies, request mediation, or file an administrative appeal. 7 C.F.R. §§ 205.402–205.405. An adverse decision may be challenged in the federal district courts. 7 U.S.C. § 6520(b).

### Exemptions from Certification Requirements

Certain entities are exempt from certification. Operations with less than \$5,000 in annual gross agricultural income from organic sales need not apply for certification, although they must adhere to certain production, handling, and labeling rules. Some handling operations, including retail food establishments, are exempt if they deal with only specified types of products, such as products with less than 70% organic ingredients or prepackaged products. However, they must comply with labeling and recordkeeping requirements, among others. *Id.* § 6505(d); 7 C.F.R. § 205.101.

### Certification of Imported Products

OFPA allows imported products to use “organic” on products sold in the United States if the Secretary determines the products were handled and produced in accordance with safeguards and guidelines “that are at least equivalent” to those applicable to U.S. products. 7 U.S.C. § 6505(b). AMS’s regulations stipulate that imported products must generally be certified in accordance with the

same rules as for U.S.-produced and handled products. 7 C.F.R. § 205.300(c).

Foreign certifying agents in the exporting countries may conduct the certification process. The Secretary may accredit foreign certifying agents in several ways. First, they may be designated in the same manner as U.S.-based agents. Second, the Secretary may determine that their qualifications are equivalent to those required under U.S. law. Third, the Secretary may recognize their authority if the agent was acting under an equivalency agreement. *Id.* § 205.500. Such agreements allow products certified in accordance with another country’s standards to be sold in the United States as “organic” and vice-versa. The United States has equivalency agreements with Canada, the European Union, Japan, the Republic of Korea, Switzerland, and Taiwan. The United States also has recognition agreements with India, Israel, and New Zealand, which allow these governments to certify that their agents meet U.S. accreditation standards for purposes of certifying imports to the United States.

### Enforcement of Certification Requirements

An organic operation’s failure to comply with the regulations may lead to suspension or revocation of certification as well as civil or criminal penalties. *Id.* § 205.660. A person who knowingly sells or labels products as organic not in accordance with the regulations may be subject to a civil penalty of up to \$964 for a first offense or of at least \$1,872 for subsequent offenses. A person who makes a false statement to the Secretary, a state official, or certifying agent may be imprisoned for up to five years, fined, or both. 7 U.S.C. § 6519(c); 7 C.F.R. § 205.100(c).

### Proposed Regulatory Changes

On August 5, 2020, AMS issued a proposed rule to amend its regulations, primarily to address enforcement. 85 Fed. Reg. 47,536. For example, the proposed rule would require certifying agents to perform unannounced inspections on 5% of the operations they review and prohibit certification of operations where such inspections are infeasible. It would also require agents to inspect all operations annually; complete supply chain audits; and issue certificates only from USDA’s electronic database. The proposed rule would impose experience and training requirements on inspectors and certification review personnel, and seeks to address concerns about improperly certified imports. For instance, it would require imports to be linked to an NOP import certificate or equivalent data source (e.g., third-party export system) and require shipping or storage containers to list certain data, including the appropriate organic designation (e.g., 100% organic) and certifying agent. It would also codify USDA’s practice for determining that a foreign country’s certification program is equivalent to U.S. standards.

If Congress seeks to revise the NOP standards or practices that currently apply, or that might apply if the proposed regulations take effect, it could consider adding greater statutory detail to the certification standards for domestic and/or imported products. Congress could also consider whether to change or supplement AMS’s enforcement authorities and resources to strengthen the NOP.

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