

**Date:** October 5, 2020

**Docket:** AMS-NOP-17-0065

**Re: Strengthening Organic Enforcement Proposed Rule – Labeling of Nonretail Containers**

Thank you for this opportunity to provide comment on the United States Department of Agriculture (USDA) Agricultural Marketing Service (AMS) National Organic Program (NOP) Proposed Rule on Strengthening Organic Enforcement. The Organic Trade Association is submitting individual comments on each topic in the proposed rule to help NOP in its process of finding and navigating our positions and recommendations. We have also submitted all of our comments bundled into a single PDF including a cover letter. This comment addresses Section #3: Labeling of Nonretail Containers.

**Summary of the Organic Trade Association’s (OTA) Positions and Recommendations**

- OTA supports mandatory organic identification on nonretail containers, and recommends the regulations allow flexibility for operators to use alternative abbreviations or indicators of a product’s organic status.
- OTA does not support the proposed rule that designates the name of the certified operation as optional. OTA recommends mandatory identification of the certified operation and the certifier on nonretail containers.
- OTA recommends a regulatory revision to improve consistency in identifying which operation and certifier should be displayed on nonretail containers.
- OTA supports the ongoing requirement to display traceability information such as lot numbers on nonretail containers.
- OTA recommends that implementation of these requirements provides flexibility for organic operations in displaying mandatory information on nonretail containers in a manner that is adaptable to the wide variety of nonretail containers while still ensuring that the information is immediately accessible.
- OTA recommends that NOP develop additional guidance to support common understanding and consistent implementation of the requirement that nonretail containers “*must display*” the mandatory information listed in §205.307.
- OTA recommends the implementation of the proposals in this section (with OTA requested revisions and recommended guidance) within two years after publication of the final rule.

## **Background**

*Nonretail container* is currently defined in the NOP Regulations as “Any container used for shipping or storage of an agricultural product that is not used in the retail display or sale of the product.” Nonretail containers are used to ship or store either packaged or unpackaged organic products, and may include the following: produce boxes, totes, bulk containers, bulk bags, flexible bulk containers, harvest crates and bins, boxes, crates, cartons, and master cases of wholesale packaged products. *Labeling* is currently defined in the NOP Regulations as “All written, printed, or graphic material accompanying an agricultural product at any time or written, printed, or graphic material about the agricultural product displayed at retail stores about the product.”

## **NOP Questions**

1. ***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.***

OTA supports mandatory identification of the certified operation on nonretail containers in addition to the name of the operation’s certifier. OTA does not agree with the proposed rule text that designates the operation name as optional. The name of the certifier alone is not sufficient to match the physical product to the corresponding organic certificate and other supporting documentation. Please see OTA Positions below for more information about our position on identification of the certifier and the certified operation on nonretail containers.

## **OTA’s Positions and Recommendations**

- **OTA supports mandatory organic identification on nonretail containers, and recommends the regulations allow flexibility for operators to use alternative abbreviations or indicators of a product’s organic status.** Identification of organic products as organic is essential and should not be optional in any scenario. Organic identification is critical as a baseline requirement for any and all documentation, labels, and other related items for an organic product and its supply chain. (*See also OTA Comments on Supply Chain Traceability & Fraud Prevention*)

Organic identification is important at all steps of the supply chain, but is especially important on nonretail containers used to ship product from a certified operation, given the expectation that such product will be transferred and/or repackaged. Organic identification is currently

optional on nonretail containers, creating challenges to track organic supply chains and connect physical product to corresponding organic certificates and other supporting documentation. Having products that are organic but not labeled as such creates a vulnerability in the organic supply chain that can be addressed through mandatory organic identification requirements. It also creates opportunities for misidentification and mishandling of organic products during transport or other movement throughout the supply chain. As described in the preamble, the NOP's goal for organic products to be immediately identified as organic is to prevent misidentification or mishandling of organic products, to reduce risk of having organic integrity compromised by treatment with a prohibited substance during border crossings or commingling with conventional product during transport, storage, and handling.

The organic identification requirement is needed to meet the goals described above while being practical for operations to implement. As written, the proposed rule would require nonretail labels to display the full text of the organic status of the product: "100 percent organic," "organic," or "made with organic (specified ingredients or food group(s))," as applicable, to identify the product. However, such level of detail will impose an undue burden on organic operations that is unnecessary to meet the overall goals of immediate organic identification. Lengthy text may not be able to fit on existing containers or labeling materials, and could result in increased costs and resources to adjust labeling information and associated logistics. It would also prevent operations from using generic shipping and storage containers that don't currently contain this level of detail. The proposed rule will already require that full organic identification (with the full text of the organic status of the product) is available on audit trail documentation (See SOE Section #18: Supply Chain Traceability & Fraud Prevention).

The regulations should allow nonretail labels to use alternative abbreviations or indicators of a product's organic status. Many operations are already using short-hand abbreviations (100% OG, OG, and MWO) instead of entire status descriptions, and these abbreviations have proven effective in immediately identifying products as organic. This amount of flexibility will support organic operations in adapting organic identification to their organic systems. Also, this will ensure consistency with SOE Section #18: Supply Chain Traceability & Fraud Prevention, which allows for abbreviations and alternative indicators. The Preamble states (emphasis added): *"This proposed action is not intended to limit an operation's flexibility to use alternative abbreviations or indicators of a product's organic status on nonretail labels or other recordkeeping. This may include use of abbreviations such as "MWO" (i.e., "made with organic"), ORG (i.e., "organic"), color designations, or other tracking systems that are used internally within a certified organic operation to denote a product's organic status."*

The current regulations read "identification of the product as organic." This is the exact text that currently appears in the regulations for nonretail containers. We recommend using this same language, and only moving it from an optional piece of information to a mandatory piece of information. This language should be sufficient to achieve the intended goal of immediate identification of organic. We recommend that guidance is also developed to support consistent implementation of the alternative abbreviations or indicators of a product's organic status that are allowed.

→ **Recommendation:** Revise §205.307(a) to allow flexibility for operators to use alternative abbreviations or indicators of a product’s organic status. Develop guidance that explains the options for how to identify products as certified organic and clarify that such identifications can use alternative abbreviations or indicators of a product’s organic status. **See OTA’s requested revisions in Table 3 below.**

- **OTA does not support the proposed rule that designates the name of the certified operation as optional. OTA recommends mandatory identification of the certified operation and the certifier on nonretail containers.** NOP explains in the preamble that the purpose of identifying the certification agency is to provide a point of contact to verify the organic status of the product. We acknowledge that the additional benefit of identifying the certification agency is to connect physical product to the corresponding organic certificate. Both the operation name and the certifier name are needed to efficiently and successfully match the physical nonretail container of organic products with its corresponding organic certificate and other associated documentation. The name of the certifier alone is not sufficient to match the physical product to the organic certificate because an organic certifier has many operations that they certify. The only way that listing the certifier will have value is if the certifier operation name is also listed. We support flexibility in how the operation name and certifier name are communicated on labeling of nonretail containers, e.g. logos or abbreviations can be sufficient for achieving the goals of providing a point of contact to verify organic status of the product and to match the physical product to its organic certificate.

→ **Recommendation:** Revise §205.307 to designate the operation’s name as mandatory and not optional on nonretail containers. **See OTA’s requested revisions in Table 3 below.**

- **OTA recommends a regulatory revision to improve consistency in identifying which operation and certifier should be displayed on nonretail containers.** The regulations should be clear and consistent in how it describes *which operation and which certifier* need to be identified on the nonretail container. We recognize concerns with referring simply to the “last handler” given the proposed expansion of the definition of handler under SOE Section #1: Applicability and Exemptions from Certification. OTA had made a suggestion in our pre-rule comments in 2018 to identify *the last certified organic operation that handled the product*. However, the proposed rule will require certification of brokers and traders under the revised definition of *Handle*. Therefore, the last certified handler could be the broker who is facilitating trade of the product but is not processing or otherwise taking financial or physical ownership of the product. The broker may or may not be the appropriate point of contact for nonretail containers of organic products.

The proposed rule would require identification of the certifying agent that certified **the producer of the product, or, if processed**, the certifying agent that certified the **last handler that processed the product**. NOP provides these specific examples in the preamble:

- *“If a product is not processed between production and sale, then the certifying agent of the producer must be listed on the nonretail container label;*
- *If a product is processed after production, then the certifying agent of the processor must be listed on the nonretail container label;*
- *If a product is processed sequentially by different operations (A, B, and C) after production, then only the certifying agent of the last processor (operation C) must be listed on the nonretail container label; and*
- *The certifying agents of operations that handle, but do not process, organic products after production do not need to be listed on the nonretail container label.”*

We have identified concerns with the proposed rule that may present challenges for implementation across all nonretail containers.

- Depending on where in the supply chain the nonretail container is being labeled, it may not be evident if the product has been processed earlier in the supply chain. Certain activities listed in the definition of processing are not readily evident, such as drying, freezing, or chilling. The proposed rule may unintentionally create inconsistencies by dictating labeling requirements based on whether these activities have or have not occurred in the supply chain.
- Handlers that do not process may still have a legitimate reason to be listed on the label as they are the responsible party and/or legal owner of the product, e.g. in the case of contract processing/manufacturing.

We also identify these alternative options that are currently used in the NOP Organic Regulations.

- Current regulations for labeling of nonretail containers at §205.307(a)(1): The name and contact information of the certifying agent which certified **the handler which assembled the final product**
- Current regulations for labeling of nonretail containers at §205.307(a)(5): The seal, logo, or other identifying mark of the certifying agent that certified **the organic production or handling operation that produced or handled the finished product**.
- Current regulations for retail labels at §205.303(b)(2): 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** and may display the business address, Internet address, or telephone number of the certifying agent in such label.

OTA recommends adopting the current language in §205.303(b)(2) regarding “**the handler or distributor of the product**” for the purposes of identifying a certified operation and its certifier on nonretail containers. This option supports consistency in which the certified operation and certifier are required to be identified on all labeling throughout the supply chain including nonretail containers and retail labels. The choice of either handler or distributor should be determined by whichever entity is the most appropriate point of contact. In all cases, the certifying agent displayed on the nonretail container should be the certifying agent of the certified operation displayed on the nonretail containers. The name of the handler or distributor and its certifying agent should also match the information reported in the Organic Integrity Database. This approach provides a transparent direct route for identifying the appropriate point of contact, connecting the physical product to its organic certificate, and supporting product traceability.

→ **Recommendation:** Revise §205.307 to specify that the handler or distributor of the product and the name of its certifier should be displayed on nonretail containers. *See OTA’s requested revisions in Table 3 below.*

- **OTA supports the ongoing requirement to display traceability information such as lot numbers on nonretail containers.** We agree that this information remains a critical element to identify on organic products to facilitate traceability of the organic productions throughout the supply chain. Organic integrity and fraud prevention are greatly enhanced when traceability data is combined with organic identification, and the name of the certified operation and certifier that connect the physical product to organic certificates and audit trail documents.
- **OTA recommends that implementation of these requirements provides flexibility for organic operations in displaying mandatory information on nonretail containers in a manner that is adaptable to the wide variety of nonretail containers while still ensuring that the information is immediately accessible.** There is a huge variety in the types of nonretail containers that are used for organic products throughout many different organic supply chains worldwide. Every type of container presents unique considerations for how it can be labeled. Each nonretail container will have different considerations for how/where the mandatory information is able to be displayed. It is important that operators are able to display the mandatory information in a manner that is most effective and useful to the parties that will interact with the container at any particular point in the supply chain.

OTA recommends that implementation of the requirement that nonretail containers “*must display*” the mandatory information listed in §205.307 is reflective of the range of NOP regulatory definitions of *label* and *labeling*. It has been current practice for operations to consider this to mean that the mandatory information in §205.307 (currently only lot numbers, if applicable) are displayed directly on the container itself rather than in a document accompanying the container. However, it is notable to consider the range of regulatory definitions for

“labeling” and “label.” **Labeling** is defined as (emphasis added): “*All written, printed, or graphic material accompanying an agricultural product at any time or written, printed, or graphic material about the agricultural product displayed at retail stores about the product.*” **Label** is defined as (emphasis added): “*A display of written, printed, or graphic material on the immediate container of an agricultural product or any such material affixed to any agricultural product or affixed to a bulk container containing an agricultural product, except for package liners or a display of written, printed, or graphic material which contains only information about the weight of the product.*” (See also OTA’s comments on Exemptions from Certification regarding a request for guidance on the type of labeling that needs to be certified.).

**In order to provide maximum flexibility for a wide range of nonretail containers while staying within the regulatory boundaries, implementation of these requirements must avoid overly prescriptive display requirements, and honor the definition of labeling that includes any material accompanying the product at any time.** In many cases, the mandatory information in §205.307 can be displayed on or affixed to the immediate container. In many other cases, the practicalities of labeling or affixing information to nonretail containers may present challenges that are overcome by providing the information on materials accompanying product such that the information is immediately accessible.

The preamble describes scenarios where labeling on certain types of nonretail containers is impractical. In these scenarios, NOP explains that the information can instead be provided in documentation that is associated with and traceable to the container. The Preamble states, (emphasis added): “*Section 205.307 does not apply to large nonretail containers that are associated with a mode of transportation or storage, such as trailers, tanks, railcars, shipping containers, grain elevators/silos, vessels, cargo holds, freighters, barges, or other method of bulk transport or storage. As labeling of these types of large containers may be impractical, they do not need to be labeled with the information described in §205.307. However, this information must be evident in documentation associated with and traceable to the container, to ensure that organic integrity is maintained during transport, storage, and handling.*” Such impracticalities extend to many other types of nonretail containers. For example, individual harvest containers, totes or wagons used to bring produce or grains from the field into the pack house or grain elevator. Individually labeling these short-term or temporary on-farm transportation containers can be impractical. Impracticalities also exist for operations that are labeling nonretail containers that contain only sealed packages of fully labeled final retail products. For example, master cases or shipping cases of labeled packaged organic product wherein the packaged product within the container has all of the required label elements. However, distinguishing regulatory applicability based only on whether an activity is “impractical” would be difficult to implement consistently across operations and certifiers.

- **OTA recommends that NOP develop additional guidance to support common understanding and consistent implementation of the requirement that nonretail containers “*must display*” the mandatory information listed in §205.307.** Guidance is an opportunity to support implementation of regulatory requirements that are not one-size-fits all, because it can explain options for complying with the regulations in situation-specific scenarios. Guidance can support operations in applying the NOP regulations to any scenario of container/product combinations in a manner that the mandatory is readily accessible such that the goals of this SOE Proposed Rule are achieved.

OTA recommends that the guidance specifically address how the nonretail container labeling provisions should apply to containers of packaged versus unpackaged products, or sealed or unsealed containers (*See OTA’s comments on Exemptions from Certification regarding a request for guidance on the definition of “packaged.”*). We also recommend that the guidance include increased flexibility for nonretail containers that are only being used to store or move product on-site within a single certified operation (e.g. containers that are not being shipped or otherwise transferred outside of the operation to another operation in the supply chain). We also recommend that in cases where space is limited on physical containers, the display of organic identification and traceability information are prioritized as the most important labeling elements.

➔ **Recommendation:** Develop guidance to support common understanding and consistent implementation of nonretail container labeling requirements in manner that is adaptable to the wide variety of nonretail containers while still ensuring that mandatory information is immediately accessible.

- OTA supports the implementation of the proposals in this section (with OTA requested revisions and recommended guidance) within two years after publication of the final rule. An extended implementation period is necessary to allow operations time to develop and implement new labeling systems for nonretail containers that includes new mandatory information.



**Table 3: OTA’s Requested Revisions to the Proposed Rule and Recommendations for Guidance**

Action & Section	Proposed Rule Text compared with Current Rule Text (strikethrough removed text; underlined new text)	Revisions and/or Guidance needed to implement OTA’s Positions and improve the quality, clarity or utility of the proposed rule
205.307 Revise title	Labeling of nonretail containers <del>used for only shipping or storage of raw or processed agricultural products labeled as “100 percent organic,” “organic,” or “made with organic (specified ingredients or food group(s)).”</del>	
205.307(a) Revise	<p>205.307(b)(a) Nonretail containers used to ship or store <del>raw or processed agricultural product labeled as containing certified organic ingredients</del> product must display the following:</p> <p><u>(1) The term, “100 percent organic,” “organic,” or “made with organic (specified ingredients or food group(s)),” as applicable, to identify the product;</u></p> <p><u>(2) The statement, “Certified organic by * * *,” or similar phrase, to identify the name of the certifying agent that certified the producer of the product, or, if processed, the certifying agent that certified the last handler that processed the product; and</u></p> <p><u>(3) The production lot number of the product if applicable, shipping identification, or other information needed to ensure traceability.</u></p>	<p><b>Revision needed</b> to allow flexibility for operators to use alternative abbreviations or indicators of a product’s organic status. See OTA’s Position on <b><u>organic identification</u></b>.</p> <ul style="list-style-type: none"> <li>Revise §205.307(a)(1) to read “identification of the product as organic.” This is the exact text that currently appears in the regulations for nonretail containers. We recommend using this same language and only moving it from an optional piece of information to a mandatory piece of information.</li> </ul> <p><b>Revision needed</b> to designate the operation’s name as mandatory and not optional on nonretail containers. See OTA’s Position on <b><u>identification of the certified operation</u></b>.</p> <ul style="list-style-type: none"> <li>Move operation name from paragraph (b) to paragraph (a) so that is becomes mandatory information.</li> </ul>

		<p><b>Revision needed</b> to clarify which operation and certifier must be identified. See OTA’s Position on <b><u>which operation and certifier</u></b> should be displayed.</p> <ul style="list-style-type: none"> <li>Revise §205.307 to specify that the handler or distributor of the product and the name of its certifier should be identified on nonretail containers.</li> </ul> <p><b>Guidance needed</b> to explain the options for how to identify products as certified organic and clarify that such identifications can use alternative abbreviations or indicators of a product’s organic status. See OTA’s Position on <b><u>organic identification</u></b>.</p> <p><b>Guidance needed</b> to support common understanding and consistent implementation of the requirement that nonretail containers must display mandatory information in manner that is adaptable to the wide variety of nonretail containers while still ensuring that the information is immediately accessible. See OTA’s Position on <b><u>flexibility for organic operations</u></b> in their labeling of nonretail containers with mandatory information.</p>
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**OTA Requested Revision:**

205.307(a) Nonretail containers used to ship or store certified organic product must display the following:

(1) Identification of the product as certified organic ~~The term, “100 percent organic,” “organic,” or “made with organic (specified ingredients or food group(s)),” as applicable, to identify the product;~~

(New) The name of the handler or distributor of the product

~~(2) The name of the certifying agent of the handler or distributor of the product. The statement, “Certified organic by \* \* \*,” or similar phrase, to identify the name of the certifying agent that certified the producer of the product, or, if processed, the certifying agent that certified the last handler that processed the product; and~~

(3) The production lot number of the product, shipping identification, or other information needed to ensure traceability

205.307(b)  
 Revise

~~205.307(a)(b) Nonretail containers used only to ship or store raw or processed agricultural product labeled as containing certified organic ingredients~~ product may display the following terms or marks:

~~(1)(3)~~ Special handling instructions needed to maintain the organic integrity of the product;

~~(2)(4)~~ The USDA seal. Use of the USDA seal must comply with 205.311

~~(3)~~ The name and contact information of the certified producer of the product, or if processed, the last certified handler that processed the product;

~~(4)(5)~~ The business address, website, and/or name and contact information of the certifying agent which certified the handler which assembled the final product.

~~(2)~~ Identification of the product as organic;

**Revision needed** to designate the operation’s name as mandatory and not optional on nonretail containers. See OTA’s Position on **identification of the certified operation**.

- Move operation name from paragraph (b) to paragraph (a) so that it becomes mandatory information.

**Revision needed** to clarify which operation and certifier must be identified. See OTA’s Position on **which operation and certifier** should be displayed.

- Revise §205.307 to specify that the handler or distributor of the product and the name of its certifier should be identified on nonretail containers.

**OTA Requested Revision:**

(3) The ~~name and~~ contact information of the ~~handler or distributor of the product certified producer of the product, or if processed, the last certified handler that processed the product.~~



On behalf of our members across the supply chain and the country, the Organic Trade Association thanks the National Organic Program for your commitment to protecting organic integrity.

Respectfully submitted,

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cc: Laura Batcha  
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