



October 11, 2017

Ms. Michelle Arsenault
National Organic Standards Board
USDA-AMS-NOP
1400 Independence Avenue, SW
Room 2642-So., Ag Stop 0268
Washington, DC 20250-0268

Docket: AMS-NOP-17-0024

RE: Compliance, Accreditation and Certification Subcommittee – Excluded Operations in the Supply Chain (Proposal)

Dear Ms. Arsenault:

Thank you for this opportunity to provide comment on the Compliance, Accreditation and Certification Subcommittee's (CACs) Proposal to build upon the scope and applicability of the National Organic Program's (NOP) existing guidance on "Certification Requirements for Handling Unpacked Organic Products (NOP 5031)." Consistent with NOP 5031, the scope of this proposal is directed at the *exclusions* provided for in § 205.101(b) of the regulations. It does not apply to *exempt* operations as described under § 205.101(a), nor does it apply to handling operations that are retail establishments.

Summary

The Organic Trade Association¹ (OTA) is extremely supportive of NOSB's efforts to address the critical issue of organic fraud and we are generally in support of this proposal. We strongly believe that a regulatory modification to limit the types of operations that may be excluded from certification is imperative, but in addition we also support the important role guidance and training have in strengthening and clarifying the regulations. We believe that some operations handling unpacked products may be unaware or unclear on the requirements to be certified. **Updating and re-releasing guidance, intrinsically, should have benefits if widely publicized.** The subcommittee's proposed revision to make clear that the exclusion from certification only applies to operations that are handling packaged and labeled product should further limit the number of entities in the organic value chain that remain uncertified. The additional recommendations on guidance, training and certifier oversight are equally critical to addressing the problem.

Acknowledging that this is one of many actions that must be taken to adequately address organic fraud, OTA supports passing the proposal at this meeting. We believe the greatest benefit of revisiting NOP 5031 is to bring greater attention to its existence and elevate the need for certifiers and industry to follow it. Going forward, we encourage NOSB to work on identifying the types of operations that *must be*

¹ The Organic Trade Association (OTA) is the membership-based business association for organic agriculture and products in North America. OTA is the leading voice for the organic trade in the United States, representing over 9,500 organic businesses across 50 states. Our members include growers, shippers, processors, certifiers, farmers' associations, distributors, importers, exporters, consultants, retailers and others. OTA's mission is to promote and protect organic with a unifying voice that serves and engages its diverse members from farm to marketplace.

certified via a modification to the regulations along with any additional guidance that may be needed within NOP 5031 or beyond.

We offer the following more detailed comments:

The CACS is proposing a revision to NOP 5031 with the intent to further strengthen organic integrity in the supply chain. Specifically, CACS is proposing to further clarify that a handling operation² is *excluded* from certification if:

- It only handles³ organic products that are enclosed in a package or container;
- The products remain in the same package or container for the entire period handled; and
- *The package or container is labeled as “organic. When labeled as “organic,” products must also contain the “certified organic by” certifier statement and name the handler and ingredient list (if applicable).*
- It does not process organic products.

The italicized sentence is the recommended change along with a revision that would make clear that produce operations handling unlabeled, unenclosed produce in a non-retail environment must be certified.

IMPORTANT CLARIFICATION: The scope of NOP 5031 and the CACS proposal are specific to **excluded** operations as described in § 205.101(b). Throughout the discussion portion of the proposal as well as in the recommendation itself, the term “exempt” is used. We believe this was an oversight and the term “excluded” was intended. The distinction is important because the provisions for an “exempt” operation are not the same as the provisions for an excluded operation, and they each apply to completely different types of operations and activities.

The *exclusions* described in the organic regulations apply to 1) a handling operation or portion of a handling operation that is only selling NOP certified products that are packaged or otherwise enclosed in a container prior to being received, and remain in the same package/container and are not otherwise processed while in control of the handling operation; and 2) a handling operation that is a retail food establishment that processes NOP certified raw and ready-to-eat food on the premises of the retail food establishment.

The *exemptions* apply to 1) production and handling operations selling less than \$5,000 gross in organic sales; 2) a handling operation that is a retail food establishment handling but not processing organically produced products; 3) a handling operation that only handles agricultural products that contain less than 70 percent organic ingredients; or 4) a handling operation that only identifies organic ingredients on the information panel.

Further, the scope of NOP Guidance 5031 specifically states that it does not apply to handling operations that are retail food establishments. To the best of our understanding, the proposal put forth by CACS is

² *Handling operation.* Any operation or portion of an operation (except final retailers of agricultural products that do not process agricultural products) that receives or otherwise acquires agricultural products and processes, packages, or stores such products.

³ *Handle.* To sell, process, or package agricultural products, except such term shall not include the sale, transportation, or delivery of crops or livestock by the producer thereof to a handler.

intended to address excluded operations only, as described in § 205.101(b)(1), and applies to all accredited certifying agents, certified organic handlers and non-certified handlers of certified organic products. Consistent with the scope of 5031, it carves out retail food establishments.

Organic fraud cannot be tolerated and everyone has role in preventing it

The discovery of verified import fraud and the results of the Office of Inspector General (OIG) audit of NOP clearly call for changes to improve import verification and the integrity of the global organic supply chain. From OTA's view, fraud cannot be tolerated in the organic system, inside or outside of the United States. Anytime there is fraud anywhere in the organic system, it threatens the value of the organic chain, and hurts organic farmers wherever they farm. The oversight of foreign organic suppliers and the enforcement of organic standards must be rigorous and robust. The integrity of the organic certification process and the commitment to compliance and enforcement are the lifeblood of the organic industry, and ensure a level playing field for U.S. organic farmers. Therefore, strong action is needed to improve the effectiveness of controls throughout the organic product supply chain.

To adequately address the situation, several approaches are needed. Everyone has a role, and both the private and the public sector must engage. OTA is proactively working on several fronts to address the situation, and we are engaged in strategies ranging from legislative action to private sector initiatives. An immediate action we took was to convene a member task force to develop an industry best practices guide to use in managing and verifying global organic supply chain integrity. The purpose of the Guide is to provide businesses engaged in the organic trade with a risk-based approach for developing and implementing a written organic fraud prevention plan to assure the authenticity of organic products by minimizing vulnerability to organic fraud and mitigating the consequences of occurrence. The Guide, as adopted by businesses engaged in organic trade, will become the industry standard reference for achieving integrity across complex organic supply chains.

Given the CACS proposal for the fall 2017 meeting, the task force is also taking time to provide feedback on the three questions in the proposal and provide additional examples for "template of clarification." See page 5.

A modification to the organic regulation is needed more than guidance

In addition to the key role industry plays in protecting organic integrity and the work to develop a best practices guide, OTA has been pursuing legislative changes for the next Farm Bill to give NOP the tools it needs to prevent fraud. Our direction was shaped by a survey we conducted through which over 500 organic stakeholders communicated that a top priority is a stronger program to increase the transparency and tracking of international trade. The feedback from members helped shape our Farm Bill priorities around creating healthy organic markets with a focus on NOP and trade oversight.

As a result, on September 28, 2017, Representative John Faso (R-NY) introduced the Organic Farmer and Consumer Protection Act, which would make significant strides to improve the oversight of global organic trade, create a level playing field for American organic farmers, and establish a better system to ensure the integrity of organic. Bipartisan co-sponsors of the bill include Reps. Rodney Davis, Chairman of the House Agriculture Subcommittee on Horticulture (R-IL), Michelle Lujan Grisham, Ranking Member of the House Agriculture Subcommittee on Horticulture (D-NM), Glenn Grothman (R-WI), Lisa Blunt Rochester (D-DE), and Darren Soto (D-FL).

The **Organic Farmer and Consumer Protection Act (OFCPA)** provides support and necessary funding for NOP to keep pace with industry growth and to carry out compliance and enforcement actions in the U.S. and abroad. It strengthens the emphasis on the NOP's authority and capacity to conduct investigations to keep organic markets strong; it invests in technology and access to data to improve tracking of international organic trade; and it helps provide the necessary information to ensure a transparent marketplace.

Specifically, the legislation does the following to modernize the global oversight system:

1. Authorizes funding for the National Organic Program to keep pace with organic industry growth;
2. Provides one-time funding for technology systems to modernize and improve international trade tracking systems and data collection;
3. Improves effective oversight, robust investigations, and enforcement across the entire supply chain.
4. Directs coordination and provides access to available cross-border documentation systems administered across other federal agencies and departments;
- 5. Requires USDA to close regulatory loopholes by mandating that uncertified entities, such as ports, brokers, importers and online auctions, become certified;**
6. Requires USDA's National Organic Program to issue an annual compliance report to Congress, which would include domestic and overseas investigations and actions taken.

Most relevant to the CACS proposal is point #5, which calls for a modification to the regulations to limit the type of operations that are excluded from certification under 7 CFR §205.101. The language in the marker bill reads:

MODIFICATION OF REGULATIONS ON EXCLUSIONS FROM CERTIFICATION. –
Not later than 1 year after the date of the enactment of this Act, the Secretary of Agriculture shall issue regulations to limit the type of operations that are excluded from certification under section 205.101 of title 7 Code of Federal Regulations, and any other corresponding sections.

We bring this legislative action to the attention of NOSB because of the obvious and important intersection it has with NOP's request to NOSB to provide recommendations on improving the oversight and control procedures to verify organic claims for imported products.

OTA generally supports the CACS proposal to amend NOP 5031

On August 10, 2017, NOP released a memorandum requesting that NOSB provide recommendations on improving the oversight and control procedures that are used by AMS, certifiers, and operations to verify organic claims for imported organic products. The memo states that AMS will provide information and reports to guide and assist NOSB in this work.

OTA appreciates the proposal put forth for the fall 2017 meeting. We believe it's a good start and likely the first recommendation of more to come. NOP Guidance 5031 is an important piece of work that stemmed from the knowledge that certain non-certified brokers, distributors, and traders lack the regular oversight of ACAs and NOP, opening the door for conventional products to be mislabeled as organic. The guidance was released in January 2014 with the intent to clarify that only operations that receive and

distribute products in the same container – without reopening, relabeling or otherwise processing them – are excluded from the certification requirements of the regulations.

In NOSB's recommendation to NOP in 2010, NOSB stated that handlers of unpackaged organic products, such as grain, soybeans, hay, milk, and livestock, are not excluded from certification unless they meet these criteria. Seven years later, OTA remains concerned that the clarification contained in the existing guidance has not reached many operations or may be poorly understood. For example, we do not see how any port that engages in unloading and loading organic grain can go uncertified. Our understanding of the regulation and corresponding guidance is that certification should be required. We're also unclear on how an uncertified broker can buy, sell and direct movement of certified organic product in open top bins or totes from a certified organic farmer to an uncertified retailer using an uncertified transportation company. OTA advocates for regulatory change and guidance that that does not allow either of these situations.

CACS is asking the following questions:

1. What negative impact might there be on the trade and movement of organic product with these clarifications?

- **Response:** Overall, any negative impact should be minimal. Operations that understand the regulations as written, with the clarification of existing guidance, are already certified. Those operations that are not certified are either unaware that they are required to do so, or are deliberately and unlawfully circumventing certification. We believe release of revised guidance will help address both situations, but again, ultimately a regulatory change is needed. We expect the guidance will have an impact on operations that will need to become certified or change their labeling practices. Either way, time and cost will be involved. However, we do not view this as a negative impact. We believe that ultimately everyone in the organic supply chain should be certified. The positive impact the guidance may have in decreasing the number of entities that are not certified far outweighs any negative impacts there might be.

2. What economic impact might there be based on these clarifications?

- **Response:** Operations that have avoided certification with the intent to deceive, or operations that were unclear on the requirements to be certified will either exit the market or get certified. If the fraudulent operations exit, the total supply of product is decreased by the amount of fraudulent product on the market and the price received by legitimate operators will increase. To actually quantify the economic impact requires knowing 1) the supply of legitimate organic product; 2) the supply of fraudulent organic product; and 3) the total demand for organic product. Operations that have not gotten certified out of ignorance will have to pay for certification, raising their costs to those of competitors who are already certified. The net effect in the latter case will be negligible, with the additional cost passed on to downstream buyers. We assume that the economic impact for an operation that didn't need to be certified previously (due to the broader application on the exclusion clause) will increase, as they will now have extra costs. This may cause an increase in the cost of products.

3. What impact will these clarifications have on maintaining organic integrity?

- **Response:** OTA believes that ultimately the entire value chain needs to be certified to have integrity. Exemptions were established where the amount of product sold was insignificant in the market place or the operation was selling a product retail to consumers. The exclusions in

the regulation are largely outdated given the size and significance of the organic industry. We support the guidance because it provides an opportunity to re-release existing guidance that is likely overlooked and it could decrease the number of uncertified operations in the supply chain, and there will be a more visual representation of “organic” on product passing through an excluded operation. This, in turn, will support all efforts to maintain organic integrity.

As stated earlier, to adequately address the situation, we believe a modification to the regulations to limit the types of operations that are excluded is needed and that work is in progress. A bigger question that needs to be addressed is fraud perpetrated by certified organic operators. This brings us full circle back to private sector supply chain best practices, increasing NOP's authority and capacity to conduct investigations to keep organic markets strong, investments in technology and access to data to improve tracking of international organic trade, access to available cross-border documentation systems administered across other federal agencies and departments, and regular reporting to Congress on investigations and actions taken.

Template for clarification - OTA has added to the subcommittee’s template for clarification starting with #8. We have also flagged a few subcommittee examples that create more confusion than clarity. However, we expect a template can be worked out through the NOP rulemaking process. Overall, a template will be very helpful in guidance. Below the chart we have included comments on areas in need of further clarification and/or topics we would like NOSB to look at.

#	Handling Action of operation	Product already enclosed in a container	Product already labeled as organic?	Does operation need to be certified	Example
1	Package a product	n/a	n/a	Yes	Bakery making bread
2	Package a product	n/a	n/a	Yes	Labeling blank cans of already packed soup
3	Sell a product (Note, further clarification is needed – see below)	No	No	Yes	Brokering Grains (whether or not taking physical possession) or Fruit distributor where fruit is in open trays and fruit itself is not stickered
4	Sell a product	Yes	No	Yes	Distributor of enclosed product that is not specifically labeled as organic.
5	Sell a product (Note, further clarification is needed – see below)	No	Yes	*No, but still comply with 205.272	Fruit distributor where fruit is in open trays and fruit itself is stickered
6	Sell a product	Yes	Yes	*No, but still comply with 205.272	Distributor of packed and organically labeled product in discreet enclosed containers.
7	Transit a product	n/a	n/a	*No, but still comply with 205.272	Operations that load and unload unlabeled products would need to be certified as required under #4. However, the operation transporting would not require certification.
8	Handle a product	Yes and No	Yes and No	Yes	Port of entry/exit loading and

					unloading packaged and unpackaged products.
9	Store a product	Stored in open produce totes	Yes	Yes	Storing certified organic produce in a cooler. Product is received in open top bins and placed directly in coolers. No labeling or packaging
10	Selling a product	Yes	Labeled as organic but does not include the certifier statement	Yes	Wholesaler that is selling organic apples delivered to the distribution center in cardboard totes with lids. The apples are stickered “organic” but do not include the certifier statement.
11	Sell a product	?	Yes, on the immediate container of the product	?	Fruit distributor where fruit is in open trays and fruit itself is not stickered, however the fruit trays are labeled as organic with the certifier statement.
12	Handle a product	No	Yes	? Is this handling or processing?	Produce department of retail operation is receiving boxes of lettuce. In the prep room they are trimming and washing the lettuce prior to arranging in the produce display. Above the lettuce a store generated sign reads “Organic Lettuce” alongside the USDA seal.
13	Handle a product	Yes	Yes	??	Bulk department of retail operation is receiving bags of certified organic grain. They are opening the bags and emptying into bulk grain bins. Store generated labels are created that included “certified organic grain,” the USDA seal, and the name of the supplier.

*See clarification #1

Areas in need of further clarification

OTA requests that NOSB further explore the following topics/ issues:

1. Does the regulation, as written, require excluded operations as described in 205.101(b)(1), to follow the requirements for the prevention of contact with prohibited substances and commingling as set forth in §205.272 as well as the labeling provisions of § 205.310??
 - NOP 5031 explicitly states that all handling operations, whether certified or not, must prevent commingling with non-organic products and contact with prohibited substances. It also states that handlers must maintain adequate documents. OTA agrees, and we believe this is generally understood to be the case. However, these additional requirements in the regulation apply only to **exempt** operations and **excluded retail food establishments**. A close read of section 205.101 does not apply the requirements of § 205.272, the labeling provisions of § 205.310 or the “records to maintained” to excluded operations as described in 205.101(b)(1). OTA believes that all three should apply to **any** exempt or excluded operation described under 205.101. The

existing regulation as written narrowly and inconsistently applies these requirements, and it has created confusion for ACAs and certified operations for many years. There is a standard practice to apply these requirements. However, we don't believe it's fully supported by the regulation.

2. OTA requests clarification on example #3 in the "Template for Clarification"
 - In example #3, the fruit is sold in an open tray and the fruit is not stickered. The template clarifies that the fruit distributor needs to be certified. It is unclear whether the fruit tray is labeled as organic (with certifier statement) and whether the fruit tray is considered an "enclosed container." Based on existing guidance and the proposal, it appears that the fruit distributor would not need to be certified provided the fruit tray is labeled. However, we're unclear on whether the open fruit tray is considered an "enclosed container."
3. OTA requests further guidance on the term "enclosed in a container."
 - The regulations exclude operations that are selling products that are "packaged or otherwise enclosed in a container." NOP Guidance 5031 states that fruit and vegetable wholesalers that package or label containers of certified organic produce for sale as organic must be certified. What if wholesalers are moving and selling produce containers (wholesale containers such as open trays, open bins or totes) but they are not packaging or labeling product? In **example #5**, in the template for clarification, a fruit distributor is selling fruit in *open* trays, and the fruit is stickered presumably with an "organic" label and the "certified by" statement. The clarification is that the fruit distributor does not need to be certified. Given that the distributor is selling fruit in "open trays," we are unclear why the operation would not need to be certified given that the fruit is not "enclosed in a container."
4. Should NOP Guidance 5031 incorporate handling operations that are retail food establishments that *process* agricultural products? Currently it carves out **all** retail food establishments.
 - NOP Guidance 5031 states that the guidance does not apply to handling operations that are retail food establishments. The definition of 'handling operation' gives exception to final retailers of agricultural products **that do not process** agricultural products. Most retail food establishments include a "portion of the handling operation" that process agricultural products. Processing is defined 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. OTA believes further guidance is needed to clarify when retail establishments should be certified. See example #12 and #13.

OTA encourages NOSB to further explore the certification requirements for retail establishments and to consider the NOSB recommendation submitted to NOP in 2014 on clarification and guidance on retail compliance and certification. The recommendation that was unanimously passed remains unaddressed by NOP.

5. Increased oversight and enforcement action for **input fraud** remain critical
 - An additional type of fraud the organic sector must continue to address is the willful misrepresentation of the compliance status of inputs used in organic production and handling. These may involve fertilizers, pesticides, feed additives, or animal drugs used by producers

that contain substances prohibited by § 205.105. They may also include the willful misrepresentation of non-organic ingredients that are adulterated so that they do not meet their standard of identity or do not meet the annotations on § 205.605 or fail to meet the requirements for non-organic ingredients that are referenced in § 205.301(f). Enforcement actions against fraudulent practices for these inputs are not authorized under the Organic Foods Production Act, and USDA does not have direct jurisdiction over the regulations of inputs sold to organic producers and handlers. Instead, the responsibility is put on the certified parties to document the compliance of the inputs, with verification done by Accredited Certifying Agents (ACAs) that are accredited by the USDA's National Organic Program and Materials Review Organizations (MROs) that act under contract from the ACAs.

Two specific fraud cases in 2011 involved the deliberate addition of synthetic liquid nitrogen fertilizers to products represented as compliant with the USDA organic standard. The U.S. Department of Justice convicted the suppliers who sold the products for mail fraud, but the case took years to gather evidence and prosecute, with thousands of certified organic acres having a prohibited substance applied. Another case involved the concealment of a prohibited inert ingredient in a technical grade active ingredient (TGAI) used to formulate a pesticide product claimed to meet USDA organic standards. The case involved civil action between the EPA registrant and an MRO. The case was eventually settled in the MRO's favor and the EPA issued a "stop sale" order against the company for misbranding and false claims. Again, that was after organic farmers used the product in good faith.

Other cases may involve falsified affidavits for feed and food additives. With the growing volume of feed and food additives produced using excluded methods and the rapidly changing technology involved in their production, it has become difficult to find primary sources that comply with the standard. An affidavit signed in good faith one year may not hold up to scrutiny the next.

Enforcement action for input fraud involves cooperation with multiple jurisdictions and reliance on fraud laws other than the Organic Food Production Act for prosecution. Many states do not forbid fertilizers prohibited for organic production to be labeled as "Organic" fertilizers. Feed additives are also regulated at the state level. The EPA has jurisdiction over pesticides and checks label claims for organic production to be compliant with the USDA Organic standard, but misrepresenting pesticides that don't have a label claim is a low enforcement priority, particularly with pesticides that are exempt from registration under FIFRA §25(b). The U.S. Food and Drug Administration regulates food additives and animal drugs. Thus, fraudulent claims would need to be prosecuted under the Food, Drugs, and Cosmetic Act. However, uses and applications that are prohibited under the USDA Organic regulation are not necessarily in violation of the FD&CA, putting these inputs in a legal gray area.

Given the situation, increased oversight of material review and USDA accreditation of MROs remain central to the solution. OTA has long advocated for NOP accreditation of MROs and we continue to urge further action on the unanimously passed NOSB 2011 recommendation to NOP that supports a new Material Scope for NOP accreditation and requires accreditation of MROs. Unfortunately, this recommendation has not been adequately addressed by NOP. We

recognize the revised NOP Policy 11-4 aims to improve the process for harmonizing how material review decisions are accepted across the sector, but we continue to believe this action falls short of the oversight and enforcement that is needed because it does not provide NOP with legal authority over MROs. OTA understands that the larger problem of grain fraud from Eastern Europe is under the spotlight and input fraud is likely low on everyone's priority list. However, the vulnerability for input fraud is high and its prevention is equally essential to the health and well-being of the organic sector. OTA is emphasizing the need for NOSB to include input fraud in its deliberations moving forward.

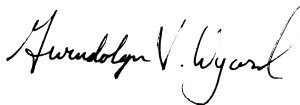
In closing, OTA supports the subcommittee's recommendation to approve this proposal on excluded methods in the supply chain. We agree that NOP will be able to make any needed modifications to the recommendation based on the comments received when NOP publishes draft guidance.

In addition to the proposed revisions to NOP 5031, we are also extremely supportive of the subcommittee's recommendation to NOP to, with a strong emphasis on #4:

1. Provide in the guidance additional examples of operations that need to be certified and those excluded (aka template);
2. Provide additional training to certifiers and certified handlers on proper ways to verify that organic certification documents of purchased products matches product as labeled when purchased from a non-certified operation, including training on how to audit to this requirement;
3. Provide additional guidance to certified handlers and certifiers on proper audit trail documentation for purchases of unpackaged, unlabeled product from certified operations that will sufficiently connect sale, receipt, and integrity of unlabeled product; and
4. Include in the accreditation audit of certifiers a verification that this policy is properly interpreted by the certifier.

On behalf of our members across the supply chain and the country, OTA thanks the National Organic Standards Board for the opportunity to comment, and for your commitment to furthering organic agriculture.

Respectfully submitted,



Gwendolyn Wyard
Vice President, Regulatory and Technical Affairs
Organic Trade Association

cc: Laura Batcha
Executive Director/CEO
Organic Trade Association