



September 30, 2013

Ms. Michelle Arsenault
National Organic Standards Board
USDA-AMS-NOP
1400 Independence Avenue, SW
Room 2648-So., Ag Stop 0268
Washington, DC 20250-0268

Docket: AMS-NOP-13-0049

RE: CAC Subcommittee – Guidance on Retail Certification and Compliance

Dear Ms. Arsenault:

Thank you for this opportunity to provide comment on the Compliance, Accreditation, and Certification Subcommittee's (CACS) Discussion Document on Voluntary Retail Certification Requirement Clarification and Guidance. The Organic Trade Association (OTA¹) greatly appreciates the efforts being made to follow up on the 2009 NOSB guidance recommendation on "Clarification of Marketing for Voluntary Retail Certification," and we support the development of NOP Guidance.

OTA has been a leader in providing training and resources on retailer best practices since prior to the implementation of the NOP standards. In 2004, in association with the International Organic Inspector's Association (IOIA), OTA published a training manual entitled *Good Organic Retailing Practices* (GORP). The publication was widely distributed, and has provided great assistance to many retail establishments. Since the time of its publication, the organic sector has matured and the number of retailers selling organic products has significantly increased. We have also seen a significant increase in the number of retailers that have voluntarily become certified operations.

Given the exceptional maturation and growth of the organic retailer sector, OTA agrees that there is a need for additional education, training and oversight to ensure that organic integrity is maintained and labeling claims are accurate. We also agree that guidance from NOP is the next best step to achieving greater clarity and consistency.

Through a series of questions, CACS is asking for input in two areas:

1. Issues that need more clarity so that everyone has a better understanding of compliance; and

¹ Organic Trade Association (OTA) is the membership-based business association for organic agriculture and products in North America. Its members include growers, shippers, processors, certifiers, farmers' associations, distributors, importers, exporters, consultants, retailers and others. OTA's Board of Directors is democratically elected by its members, and its mission is to promote and protect the growth of organic trade to benefit the environment, farmers, the public and the economy (<http://www.ota.com/>).

2. Detailed information that would enable a more consistent process of review and accreditation by accredited certifying agents, NOP, and retailers.

We have answered the specific questions included in the discussion document below, and have emphasized the sections in the rule that need clarification. In summary:

OTA encourages and supports the following outcomes of NOP Guidance on Retailer Certification and Compliance:

- Increased education and training opportunities for retail establishments whether they are certified or non-certified operations.
- Increased awareness and visibility of the regulatory requirements that apply to non-certified retailers. While retail establishments may be exempt or excluded from certification, they still must comply with certain provisions of the regulations, such as commingling & contamination prevention, record-keeping, and labeling.
- Increased NOP monitoring and oversight of retail establishments.
- Consistent and compliant organic practices and messaging throughout the retail sector.
- Increased consumer understanding and trust of organic claims.

OTA has identified the following sections of the regulations as the key areas where NOP clarification is needed:

- Section 205.101(a) and (b) - The requirements for an “exempt²” retail establishment vs. the requirements for an “excluded³” retail establishment are not clear.
 - Are **exempt** retailers required to comply with the commingling and contamination prevention standard (§ 205.272) and/or the labeling provisions (§ 205.310) of the NOP regulations? The regulation under exemptions and exclusions (§ 205.101) only specifies that exempt retailers maintain records as detailed under § 205.101(c), while **excluded** operations are subject to § 205.272 and § 205.310.

Furthermore, are excluded operations required to comply with the record requirements of § 205.101(c)? The regulation specifies that records are to be maintained by “exempt” operations, but an “excluded” operation is not mentioned. In other words, the regulations appear to require the following:

- Exempt retailers are required to maintain records as detailed under § 205.101(c).
 - Excluded retailers are required to comply with the commingling and contamination prevention standard and comply with the labeling provisions of § 205.310.
- Can an exempt or an excluded retail establishment handle or process NOP certified products and then sell the products off-site? For example, can the products be handled or processed on-site of the retail establishment, but then sold as “organic” at a farmers’

² An exempt retailer is a handling operation that is a retail food establishment or portion of a retail food establishment that handles organically produced agricultural products but does not process them.

³ An excluded retailer that is a handling operation that is a retail food establishment or portion of a retail food establishment that processes, on the premises of the retail food establishment, raw and ready-to-eat food from agricultural products that were previously labeled as “100 percent organic,” “organic,” or “made with organic (specified ingredients or food group(s))”

market? Or can the products be processed on-site and then sold through web-based retail sales? The regulation is clear that excluded retail establishments must process “on the premises of the retail food establishment.” The regulation is not clear about “where” the sale of the product must occur.

- Sections 205.308, 205.309 and 205.310 – Labeling requirements:
 - Can an exempt non-certified retail establishment “handle” a product and then display the USDA seal or represent the product as “certified” organic? In other words, can they handle a product (either transfer the product from a container to a display case, or, transfer from the product from the original container to a store container (i.e., bulk flour bin)) and then transfer the information from the original container/label to the store display label?

OTA offers the following answers to the CACS Discussion Questions:

Issues 1 & 2: Who does the 205.101(a)(2) exemption apply to? Who does the 205.101(b)(2) exclusion apply to?

First and foremost, the exclusion and exemption apply to “retail food establishments” as defined in the regulation:

Retail Food Establishment. A restaurant; delicatessen; bakery; grocery store; or any retail outlet *with an* in-store restaurant, delicatessen, bakery, salad bar, or other eat-in or carry-out service of processed or prepared raw and ready-to-eat-food.

The exemption and exclusion provided for retail food establishments must be taken into account together, and in the context of the entire regulation. A retail food establishment or portion of a retail food establishment that handles organically produced agricultural products **but does not process** them is *exempt* from the requirements in this part. However, a retailer that processes raw and ready-to-eat food on its premises is *excluded*.

When retail food establishments process raw or ready-to-eat organic products off-site to be sold in their stores or sold to other businesses, this qualifies as “processing” that is neither exempt nor excluded. Under the regulations, these processors must be certified.

What is a retailer who “handles but does not process?” “Handling” is commonly understood to mean the operator is handling certified organic products in a fashion that does not transform the product from the original form as it arrived. For example, cutting or drying apples would transform the raw apple into a sliced apple or a dried apple. These handlers are typically repackaging or displaying certified organic product, but they are not transforming the product through processing activities. In other words, they are not conducting any of the activities described in the definition of “processing” except for “packaging.”

However, as pointed out in the discussion document, the definition of “handle” includes “process.” Thus technically according to the definition in the NOP regulations, a handler could be conducting processing activities and be considered a “handler.” In the context of whether a retail food establishment needs to be certified, the designation between a handler and a processor becomes arbitrary because, in either case, an exemption or exclusion will apply. The key activities that dictate whether a retail food establishment must be certified are: 1) WHERE the handling/processing activity is taking place (on-site or off-site); and 2) how the certified organic products are labeled.

NOP CLARIFICATION NEEDED: The distinction between an exempt retail establishment that only “handles” and an excluded retailer that “processes” is important because it determines what sections of the regulation still apply, despite the exemption/exclusion from certification. This is an area where clarification is needed.

The exemption provided for a retailer who only handles (§ 205.301(a) (2)) does not include an “exception” as does the exclusion for a retailer that “processes.” A retailer that processes is excluded from the requirements in the regulations except for: 1) commingling and contamination prevention; and 2) the labeling provisions of § 205.310. Exempt operators on the other hand, while exempt from certification, are required to: 1) maintain records that prove that ingredients identified as organic are certified organic; and 2) verify quantities produced from such ingredients. The regulations do not specify that the retailer must comply with the commingling and contamination prevention standard or the labeling provision. OTA requests clarification from NOP on this issue.

What is "raw and ready to eat?" Does this group of products include all fresh meat, bulk groceries, etc.? An example of “raw” would be cut and packaged raw meat. An example of “ready to eat” would be cooked meat in the deli. Another example is coffee. Roasted coffee beans would be “raw” while coffee would be “ready to eat (drink).” Yes, it does include all fresh meat, bulk groceries, etc., provided the products are originally NOP certified.

Does this exemption apply to brick and mortar retailers who package products under the exemption, then sell them on websites and mail them to off-site customers? The regulations appear to allow for website sales provided the products are packaged on-site and are not represented as “certified organic.” However, this is an area that may exceed the intent of the rule. Although it’s not clearly spelled out, the definition of a “retail food establishment” suggests “on-site” handling/processing of products that are sold directly to the consumer as an eat-in or carry-out service.

Does it apply to retailers who only operate online? No the exemption or exclusion for a retailer does not apply, because the definition of a retail food establishment specifies a retail outlet with an in-store component (i.e., bakery, restaurant, etc.) that prepares or processes raw and ready-to-eat-food. However, there is another section of the rule that provides an exclusion for handling operations that sell organic products that are: 1) packaged or otherwise enclosed in a container prior to being received or acquired by the operation; and 2) remain in the same package or container and are not otherwise processed while in the control of the handling operation. These types of operations are commonly referred to as traders or brokers and typically conduct online or web-based sales.

Does this exemption apply to farms that may process and/or package products on farm, then sell them at a farmers’ market? No, because the farm itself is not a retail food establishment/retail outlet. The farmers’ market is the retail outlet, and it’s not owned or a part of the farm.

What about selling such products at the farm gate? Yes, if the farm is certified organic and has an on-site retail outlet with an in-store eat-in or carry-out service of processed or prepared raw and ready-to-eat-food.

Does this exemption apply to farms that may process and/or package products on the farm and then sell these goods via web-based sales? It’s possible, but again this is an area where clarification is needed. The farm portion, at very least, would need to be certified organic. The web-based sales would be the retail “outlet” for the farm that conducts on-site packaging and/or processing. Therefore, the handling portion of the farm would be the “handling operation that is a retail food establishment”

selling its products **directly to the consumer** through a website. Viewed in such a way, the handling portion of the business would be excluded under § 205.101(b) (2). The web-based sales are analogous to the on-site store, **except** the exchange of the product from the retail outlet to the consumer is not taking place on-site. An argument could also be made that sales must take place direct to the consumer for consumption on-site or sold direct in-store for carry-out service. Ultimately, the regulation is not clear and practices vary.

NOP CLARIFICATION NEEDED: The regulation is clear that excluded retail establishments must process “on the premises of the retail food establishment.” The regulation is not clear about “where” the sale of the product must occur. Currently there are many retail establishments operating as exempt or excluded operations that are handling and/or processing certified organic products on-site and then selling the products online. Is this activity covered under the exemptions and exclusions provided? If so, how can they be labeled?

Issue 3 - Under what conditions is a retailer exempt from certification? A retail establishment is exempt from certification when it meets the following three conditions:

1. Handling and/or processing take place on the premises of the retail establishment;
2. The retail establishment does not represent itself as a certified organic operation;
3. If the retail establishment is repackaging or creating products and marketing the products under its own label, the products must also be labeled in compliance with §205.301.

With the example used in the discussion document (retail establishment handling olive oil), it appears the retail establishment meets the conditions of an excluded operation, and for all in-store activity they are compliant with the regulations. As mentioned earlier, sales on the website are questionable because the service extends to off-site consumers. Clarification is needed.

Issue 4 - To what extent can a retailer process foods without certification? When a retail food establishment processes raw or ready-to-eat organic products off-site (vs. on the premises) to be sold in its stores or sold to other businesses, this qualifies as processing that is neither exempt nor excluded. Under the regulations, these processors must be certified. Otherwise, processing can occur without certification provided the products are labeled in accordance with the applicable labeling provisions.

Does all repackaging constitute processing? Yes. What about simple repackaging, such as placing figs in plastic containers and affixing stickers to them? Technically, according to the NOP definition of processing, simple repackaging is viewed as processing, therefore it needs to take place on-site.

Is there a way the “on premise” exclusions in section 205.101(b)(2) can be defined and made easier to understand so that there can be more consistency for retailers?

Guidance could specify that “on premise” means “on-site” at the same physical location as the retail establishment.

Issue 5 - May non-certified exempt retailers make a “certified organic” claim for products processed in-store? For an example: Is simply stacking and merchandizing produce such as vegetables or fruit, considered to be “handling” or can this be considered to be “processing”? Is this exempt? Stacking and merchandizing produce such as vegetables or fruit, is typically considered “handling” and could be exempt. As packaging is not involved, this does not meet the definition of processing. Certified products that are processed (transformed using processing activities specified in the NOP definition of “processing”) by the store should be labeled as “organic” rather than “certified

organic.”

Certified organic products that are transferred from a box to a display case or from a bag into a bulk bin can be labeled with the same information as provided on the original container or shipping documents, as described in the NOP regulations at section 205.308. For example, "If the product is prepared in a certified facility, the retail display, labeling, and display containers may use: the USDA seal; and the seal, logo, or other identifying mark of the certifying agent ..."

NOP CLARIFICATION NEEDED: There appears to be some contradiction between sections 205.308, 205.309 and 205.310 of the regulations, all of which together address how products at the point of retail can be labeled, and how products produced on exempt and excluded operations can be labeled.

As we have explained above, § 205.308 could be read to mean that a product produced in a certified facility can be displayed in a retail display using the USDA seal and identifying mark of the certifying agent. There is some confusion, however, about whether “prepared in a certified facility” would apply to the retailer that is handling or processing the product, in which case the retailer would need to be certified in order to display the USDA seal or make reference to certification. Furthermore, § 205.310 states that an agricultural product produced or handled in an excluded or exempt operation must not display the USDA seal or represent the product as certified organic.

The current and common practice at non-certified exempt retail establishments is to handle certified organic products and transfer from a box to a display case or from a bag into a bulk bin the same information as provided on the original container. For example, a bag of certified organic flour would be transferred to a bulk bin and the bulk bin label would display “certified organic flour. “ It may also display the USDA seal. We believe this practice is compliant, as supported by section § 205.308 of the regulations. However, clarification is needed.

Issue 6 - What are the guidelines for making a “Certified Organic Retailer” claim?

Note that some retailers are certified for a specific department, and some for many departments and product categories. Can a store that only has a single department certified claim to be a “certified organic retailer?” An entire retail establishment may be certified or a portion of the retail operation may be certified. This is analogous to a portion of a farm being certified, or to a processor that is producing both organic and non-organic products in one facility. How a retail establishment markets its certification is really no different than the how a food processor would market the certification of its facility. Certified retailers should comply with all applicable sections of the regulations (commingling/contamination prevention, labeling, composition, and record-keeping requirements), just like any other certified handler. **While consumers may associate the USDA seal with a product, behind every product is a facility, and it’s the certification of the facility that allows for the USDA seal to be used on the product.**

An important message that should be emphasized in guidance that could help inform marketing information and reduce consumer confusion is that retail certification does not imply that every product in the establishment is certified. The retailer is being certified for the **handling** of organic products, and the organic claims made on products and ingredients. The use and placement of the term “organic” will dictate which sections of the regulations are applicable, and the way in which they can market the certification of their establishment.

In all cases, the certified retail operation must maintain the organic integrity of the ingredients and products they are handling, and comply with composition and labeling requirements, including

labeling materials used to market the company.

Issue 7 – How can we help foster consistency between “all” retail operations, certified or not? How can we ensure consistency between how ACAs and NOP look at retail operations to ensure that they are in compliance? OTA supports the development of educational courses for retailers, and supports the collaboration between certifiers and industry experts. Consistency can be greatly fostered by placing increased focus and attention on compliance and certification for retail establishments through guidance, education, monitoring, and enforcement. The best approach is for NOP to create guidance that can then be used as the foundation for creating additional educational, training, and marketing materials for ACAs, certified retailers, and non-certified retailers. NOP and State Programs should also budget for market surveillance and enforcement of exempt and excluded operations.

Issue 8 – How can we communicate in a consistent and easy-to-understand manner what NOP’s expectations are to the various retail operations, whether they are brick and mortar, sell at farmers’ markets, farm stands, or sell using online sales methods, to ensure that they are better informed, and thus helping to ensure that they each have been properly communicated with and have been made aware of what is expected of them as an organic retail operation.

This can be done through NOP Guidance and increased education and marketing. It’s critical that retailers understand the requirements and their obligation to comply with the NOP regulations. With this understanding often comes a desire to become a certified retailer because of various benefits certification may offer. Regardless, the most important outcome of NOP guidance would be to generate an increased understanding of retailer certification and compliance, which will result in improved practice, consistent certification and enforcement, and increased consumer education and confidence.

Please note that OTA has established an internal Task Force that will be following the work of the CACS and NOP on this topic through to its completion. OTA will be updating its resources, including our *GORP Training Manual*, on retail practices accordingly and developing additional materials and resources to assist retailers across the supply chain. We offer our support, and we look forward to continued collaboration.

Issue 9 – Is there anything else we could/or should look at? What are the inconsistencies that are currently aiding in creating confusion among retailers, ACAs, or with the consumer? Suggestions on how these can be brought into a more balanced base for consistency purposes?

OTA fully supports voluntary certification of exempt and excluded operations, but our real concern is for the operations that are NOT certified. Retail operations that choose to become certified take the time to educate themselves on the requirements of being certified, and generally learn and comply as a function of the certification process. The operations that need the most guidance, trainings, and enforcement are the ones NOT certified.

In conclusion, OTA offers our experience, and our assistance in the development of a guidance document and additional training materials as needed. We ask that CACS carefully consider the comments received, and keep the following in mind during the development of a final recommendation:

- Clear NOP guidance for retail establishments should apply to all types of retail operations making organic claims (i.e., stores, restaurants, online retailers, catering businesses, street vendors, etc.).

- Exempt and excluded retail operations handling organic products and making organic claims, should be doing so in accordance with the Act and regulations. The operations that need the most guidance, trainings, and enforcement are the ones that are NOT certified.
- Retail establishments that process raw or ready-to-eat organic products **off-site**, to be sold in their stores or sold to other businesses, are neither exempt nor excluded. Under the regulations, these processors must be certified.
- NOP Guidance should remain general and focus on the requirements of good handling practices and representation of the organic labeling claims being made throughout the establishment. This type of guidance will then apply to any type of retail outlet. Additional industry guidance or training such as *OTA's Good Organic Retail Practices (GORP)* manual may be used for additional instruction provided the information is consistent with final NOP Guidance and the existing regulations.
- Certified and non-certified retailers must maintain the organic integrity of the ingredients and products they are handling, and comply with the labeling requirements of the regulation, which includes all labeling materials used to market the company.
- Marketing materials for certified retail establishments should focus on the handling of organic ingredients and products. The use and placement of the term “organic” will dictate which sections of the regulations apply to the operation, and the way in which they can market the certification of their establishment.

Again, 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,



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