



February 17, 2015

Docket Clerk, Marketing Order and Agreement Division, Fruit and Vegetable Program  
Agricultural Marketing Service  
U.S. Department of Agriculture  
1400 Independence Avenue, SW  
STOP 0237  
Washington, DC 20250-0237

Re: Proposed Rule regarding Exemption of Organic Products From Assessment Under a Commodity Promotion Law: AMS-FV-14-0032-0038 (Jan. 15, 2015) (Federal Register Number 2015-00540) (79 Fed. Reg. 75006 et seq.)

Dear Docket Clerk:

Thank you for the opportunity to provide comments on the Proposed Rule regarding the Exemption of Organic Products From Assessment Under a Commodity Promotion Law (Proposed Rule). The Organic Trade Association (OTA) is pleased to see that AMS moved quickly to release this rule. As AMS notes, moving with speed to finalize this rule is appropriate due to the clear and unambiguous mandate issued by Congress in the Farm Bill (with strong bipartisan support). OTA is pleased to see this rule that will provide a broader exemption to certified producers, handlers, marketers, feeders, seed stock producers, exporters, and importers of “organic” and “100 percent organic” products, and appreciates the opportunity to provide clarifying comments.

OTA is the membership-based business association for organic agriculture and products in North America. It is the leading voice for the organic trade in the United States, representing over 7,000 organic businesses across 49 states. 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. OTA’s mission is to promote and protect the growth of organic trade to benefit the environment, farmers, the public and the economy.

**Background**

OTA appreciates the significant work AMS has done in putting out this rule for review. OTA has long advocated for full resources to AMS, so that it can carry out its important mandate, which enables the continued growth of the agricultural sector, and the organic sector in particular.

Clear and unambiguous language authorizing the expansion of the organic assessment exemption from marketing orders and research and promotion programs was included in the 2014 Farm Bill. This is, of course, not the forum for relitigating the policy debate over whether or not to exempt organic operations from marketing orders and commodity research and promotion orders – that policy debate was conducted in the appropriate body (Congress), and overwhelmingly passed with a bipartisan roll call vote in the House Agriculture Committee, a unanimous voice vote in the Senate Agriculture Committee, and on the floors of both the House and Senate. The appropriate policy determinations have been made, and comments relitigating that

policy debate should be, respectfully, disregarded. Now is the time for implementation of the exemption mandate – and this is the forum for public comments on that implementation.<sup>1</sup>

The Farm Bill language expanded the exemption to any agricultural commodity that is certified as “organic” or “100 percent organic” as defined by the National Organic Program (NOP), regardless of whether it is part of an operation that is also involved in conventional or nonorganic agricultural commodities (of the same or any commodity). It also required the Secretary of Agriculture to promulgate regulations implementing the expanded exemption.

Given the clarity in the language, it is important to move quickly to implement Congress’ will. We appreciate AMS’ recognition of this need, in the speed with which the agency put out a proposed rule, and its accurate designation as “non-significant”. The economic impact of the Proposed Rule, while important for organic operations that have been paying into commodity research and promotion orders for years (as AMS indicated in the Proposed Rule) is not significant to any of the existing commodity research and promotion orders.

This exemption is of great importance to the organic community, which USDA Secretary Tom Vilsack acknowledged as a distinct commodity class that merited consideration across the Department in his 2013 guidance. Organic producers, handlers, processors, marketers and importers want to use their money to promote the growth of the organic sector, and Congress clearly agreed with that as a policy determination. This expanded exemption will allow the organic sector – the fourth-largest food and feed commodity in the United States – to choose to focus their resources on marketing, research, promotion and information activities that *do* benefit organic. We appreciate USDA’s estimate that this expanded exemption could lead to an additional approximately \$1.1 million from marketing orders, and \$13.6 million from research and promotion programs, exempted and remaining in the hands of organic operations each year.

We appreciate your recognition, in the Proposed Rule, that this expansion of the organic assessment exemption would have a net beneficial economic impact on as many as 10,211 exempted organic operations that is not disproportionate as between small or big entities.

### **General Comments**

OTA has a number of general comments that we believe will clarify the Proposed Rule when it is finalized. We appreciate your consideration of the following comments:

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<sup>1</sup> This is also not the forum for comments regarding a potential organic research and promotion order – something authorized by a separate Congressional mandate, not covered by the Proposed Rule published in the Federal Register, and not a reality at this date. While it is true that the 2014 Farm Bill authorized USDA to consider an application for a research and promotion order by the organic sector, that has not happened – and if it does, USDA will draft a Proposed Rule and open a Notice and Comment period covering that. It is important not to lose sight of what is relevant for comment under this Federal Register Notice – and that is the Proposed Rule exempting organic operations from marketing orders and commodity research and promotion orders. Comments regarding a possible organic research and promotion order should, respectfully, be disregarded.

Moreover, we urge USDA and AMS to move appropriately to finalize this Rule regarding an exemption, without regard to a potential application for an organic research and promotion order. An application for an organic research and promotion order, should it be applied, would be separate from the exemption rulemaking, and the timelines for the two should not be connected. That would be contrary to the clear mandate from Congress.

*Application to existing and future marketing orders and research and promotion programs*

The statutory language included in the 2014 Farm Bill expanded the organic assessment exemption for existing marketing orders and research and promotion programs, as well as for any future marketing orders and research and promotion programs. The Proposed Rule language is clear that USDA is proposing revisions to the regulations affecting the 23 marketing order programs established under the Agricultural Marketing Agreement Act of 1937, and to the orders and/or rules and regulations of the 22 existing research and promotion programs.

However, the Proposed Rule is not clear that it would require any future marketing order or research and promotion program orders, rules and/or regulations to also include complete organic assessment exemption language.

OTA proposes the inclusion of language clarifying that for any future marketing order and research and promotion program, language must be included in the orders, rules and/or regulations effectuating the full organic assessment exemption.

OTA proposes the inclusion of the following language under “Proposed Rule” on page 75008:

“USDA is proposing revisions to the general regulations affecting the 23 marketing order programs, as well as any future marketing order program, established under the AMAA. In addition, USDA is proposing similar amendments to the orders and/or rules and regulations of the 22 research and promotion programs, as well as any future research and promotion program.”

*Application to split operations as well as certified “organic” and certified “100 percent organic”*

The Farm Bill language expanded the organic assessment exemption from marketing orders and research and promotion programs to all “organic” and “100 percent organic” products, as defined by the NOP, regardless of whether the product is produced, handled, marketed, or imported by a person who also produces, handles, markets or imports conventional or nonorganic agricultural products, of the same or different agricultural commodity.

While this is clear in areas of the Proposed Rule, it is not clear in the introductory sections on marketing order programs (see page 75008) and research and promotion programs (see page 75009). On those pages, the expansion to include split operations is discussed, but the expansion to include “organic” and “100 percent organic” is not.

OTA proposes the inclusion of language on those pages to clarify that, for both marketing orders and research and promotion programs, the organic assessment exemption is expanded to split operations, as well as to cover products that are certified “organic” or “100 percent organic”.

OTA proposes the inclusion of the following language under “Marketing Order Programs” on page 75008:

“This proposal would modify the organic assessment exemption eligibility criteria contained in § 900.700. The requirements contained in that section would be revised to allow organic products that are certified to either the “organic” or “100 percent organic” standard (as defined by the NOP) to be eligible for the exemption. The requirements contained in that section would be further revised to allow organic operations that are split operations to apply for and receive an assessment exemption on their organic products... [continue as is]”

OTA proposes the inclusion of the following language under “Research and Promotion Programs” on page 75009:

“Under this proposal, the eligibility criteria for obtaining an organic assessment exemption, as contained in each of the research and promotion orders, plans, and/or regulations, would be revised. The requirements for such an exemption would be modified to allow organic products that are certified to either the “organic” or “100 percent organic” standard (as defined by the NOP) to be eligible for the exemption. The requirements for such an exemption would be further modified to allow split operations to apply for and receive an assessment exemption on their organic products... [continue as is]”

*Application to all research and promotion program activities, and all research and promotion (including paid advertising) activities in marketing orders*

OTA appreciates that federal marketing orders have a broader authority than research and promotion programs – that is, they can not only fund research and promotion, but also quality and standardization activities within a commodity. Therefore, we understand that AMS had the responsibility, in writing this proposed rule, to carefully delineate which funds within a marketing order would be subject to the organic exemption, and which would not. It is clear that the intent of the Farm Bill, and of AMS, was to exempt all marketing order funds that go to all research and promotion activities – but OTA believes that should be clarified in the rule language. OTA proposes the inclusion of the following language under § 900.700 on pages 73014 et seq.:

“(a) This section specifies criteria for identifying persons eligible to obtain an exemption from the portion of the assessment used to fund research or promotion under a marketing order and the procedures for applying.... .the term “research or promotion” means production research, marketing research and development projects, and marketing promotion, including paid advertising designed to assist, improve, or promote the marketing, distribution, or consumption of the applicable commodity.”

“(b) ...exempt from the portion of the assessment applicable to research and promotion, including paid advertising, provided that:”

“(b)(5) ...with the other authorized activities under such part or parts other than research and promotion, including paid advertising.”

“(d)(1) ...by dividing the committee’s or board’s estimated non-research and promotion expenditures by the committee’s or board’s estimated total expenditures.... .The committee’s or board’s estimated non-research and promotion expenditures shall include the direct costs of research and promotion and the portion of the committee’s or board’s administrative and overhead costs (e.g., salaries, supplies, printing, equipment, rent, contractual expenses, and other applicable costs) to support and administer the marketing promotion activities.”

“(d)(2) If a committee or board does not plan to conduct any research and promotion activities in a fiscal year... .as long as no assessments for such fiscal year are used for research and promotion projects, or the administration of projects funded by a previous fiscal period’s assessments....”

“(d)(3) ...the portion of the assessment rate applicable to research and promotion for persons....”

*Information-gathering and reporting burden as light as possible*

OTA will comment on specifics regarding the information-gathering and reporting below. Here, we note and appreciate AMS' intent to impose minimal costs on exempted entities, in terms of filing an exemption application and maintaining records needed to verify exemption status. In particular, we appreciate the agency's desire to amend existing forms required to be submitted annually, rather than to create any additional reporting burdens. This is aligned with USDA's "sound and sensible" approach, designed to remove barriers, streamline processes, and make participation in USDA initiatives more accessible, attainable, and affordable for all operations.

*Consistency across all marketing orders and research and promotion programs*

OTA will comment on specifics regarding particular language included in the Proposed Rule below. Here, we note the importance of consistency across all marketing orders and research and promotion programs, with respect to the expanded organic assessment exemption. It is always important to be consistent in definitions, requirements, and other language within an agency – and here, where some organic operations may be subject to many marketing orders and research and promotion programs, there is great value in implementing the expanded exemption mandated by the 2014 Farm Bill consistently throughout. It would be unduly burdensome to create different requirements for the same organic assessment exemption to apply from marketing order to marketing order, or research and promotion program to research and promotion program.

*Annual reapplication*

Proposed language for marketing orders and each research and promotion order requires that an organic operation reapply annually for the exemption. OTA believes that this creates an undue burden on the organic operation, and that there is a more streamlined and efficient way to determine continued eligibility for the organic exemption.

The organic exemption is tied to the existence of a valid organic certificate – which would be produced with the initial application for exemption. Organic certificates are valid until revoked or relinquished, and NOP maintains a list of valid certificates that is updated annually. Therefore, the most efficient and streamlined method by which marketing orders and research and promotion orders can determine continued eligibility for the organic exemption would be for NOP to issue a revoked or relinquished list to the marketing order and research and promotion committees or boards each year.

This is fully aligned with the Farm Bill requirement that "[t]he Secretary shall approve the exemption of a person under this subsection if the person maintains a valid organic certificate issued under the Organic Foods Production Act of 1990 (7 U.S.C. 9501 et seq.)." Moreover, this sort of intra-agency coordination regarding organic is precisely what the Secretary intended in his 2013 Guidance encouraging the various entities within the Department of Agriculture to work together in support of organic agriculture.

This will also help to address a concern raised by the United Soybean Board. The USB argues that the Proposed Rule requires insufficient documentation to verify what portion of a split operation's products are produced as organic, and therefore eligible for the exemption. However, the NOP requires that certified organic operations fully segregate their organic and non-organic products, and maintain documentation that is regularly audited to that effect. By engaging NOP in the process of determining eligibility (and continued eligibility), this concern will be assuaged.

## Specific Comments

OTA appreciates the opportunity to make a number of more specific comments, which we hope will be helpful to the agency as it moves this Proposed Rule to final.

- *Definition of “split operations”*

The Proposed Rule is not consistent throughout in its definition of “split operations”, and OTA encourages the agency to adopt one definition of “split operation” throughout. In the “Summary” section, the Rule states that the exemption shall apply “regardless of whether the person requesting the exemption also produces, handles, markets, or imports conventional or nonorganic products.” (See page 75006.) Later, under “Who is eligible for exemption under a marketing order?”, the Proposed Rule says the exemption shall apply “regardless of whether the commodity subject to the exemption is handled by a person that also handles conventional or nonorganic agricultural products of the same commodity as that for which the exemption is claimed.” (See page 75009.) And the section “Who is eligible for exemption under a research and promotion program?” does not include language on split operations. (See page 75010.)

Later, under “Analysis of Marketing Order Programs”, the Proposed Rule states that the exemption shall apply “regardless of whether the handler is a split operation” (see page 75011), and under “Analysis of Research and Promotion Programs”, it states that the exemption shall apply “regardless of whether the agricultural commodity subject to the exemption is produced, handled, marketed, or imported by a person that also produces, handles, or markets conventional or nonorganic products” (see page 75012).

The specific regulatory language included for § 900.700 (for marketing orders) and for each research and promotion program reads that the exemption shall apply “regardless of whether the agricultural commodity subject to the exemption is handled by a person that also handles conventional or non-organic products of the same agricultural commodity as that for which the exemption is claimed”. (See page 75015 [marketing orders], 75016 [dairy, fluid milk], 75017 [cotton], 75018 [mango, potato], 75019 [raspberry], 75020 [watermelon], 75021 [honey], 75022 [Christmas tree], 75023 [popcorn, peanut], 75024 [softwood lumber, blueberry], 75025 [Hass avocado], 75026 [soybean, sorghum], 75027 [paper and paper-based packaging], 75028 [pork, egg], 75029 [beef], and 75030 [lamb].) In addition, there is no language regarding split operations in the regulatory language governing the mushroom research and promotion order. (See page 75020).

To resolve these inconsistencies – and the potential for inconsistent interpretation and confusion throughout – OTA proposes that the following language be included in each of the aforementioned places:

“...regardless of whether the agricultural commodity subject to the exemption is produced, handled, marketed, or imported by a person that also produces, handles, markets, or imports conventional or nonorganic products of the same or any agricultural commodity as that for which the exemption is claimed.”

- *Eligibility for exemption under a research and promotion program*

The section entitled “Who is eligible for exemption under a research and promotion program?” states that “persons who are subject to an assessment under a designated research and promotion program, who maintain a valid organic certificate, and who *handle* any assessable agricultural commodities that are certified as “organic” or “100 percent organic” (as defined in the NOP) would be eligible for an organic assessment exemption...” (italics added) (See page 75010.) The language later says that the various research and promotion programs assess producers, handlers, manufacturers, processors, and importers; and “[a]ny of the entities obligated to pay

assessments under one of the aforementioned programs is eligible for an organic assessment exemption.” (See page 75010.)

In the interest of clarity, OTA proposes that the language be revised to read:

“persons who are subject to an assessment under a designated research and promotion program, who maintain a valid organic certificate, and who produce, handle, manufacture, process, or import any assessable agricultural commodities that are certified as “organic” or “100 percent organic” (as defined in the NOP) would be eligible for an organic assessment exemption...”

- *Consistency with respect to treatment of imports*

Imports are not assessed under marketing orders, and are only authorized to be assessed under certain research and promotion programs. Currently, imports may be assessed in research and promotion programs governing beef, blueberries, cotton, avocados, dairy products, honey, lamb, mangoes, mushrooms, peanuts, pork, potatoes, sorghum, watermelon, soft wood lumber, and raspberries. Currently, imports may not be assessed in research and promotion programs governing eggs, fluid milk, soybeans, and popcorn.

For all of the reasons articulated above that support consistency across regulations, OTA proposes consistent language across all research and promotion programs that are authorized to assess imports with respect to imports. There are at least two inconsistencies in the Proposed Rule that we suggest correcting below. First, all discussion of imports must include reference to products certified under NOP, or in compliance with an equivalency arrangement. Second, all discussion of imports must include reference to Harmonized Tariff Schedule (HS) codes. Although not all countries currently have equivalency arrangements, and not all products currently have HS codes, it is important for the regulatory language to be responsive to both current and future conditions – such as additional equivalency arrangements or HS codes.

OTA proposes that the following language be included under “Who is eligible for exemption under a research and promotion program?” on page 75010:

“Persons who are importing organic products either under an NOP “organic” or “100 percent organic” certificate, or in compliance with a U.S. equivalency arrangement established by NOP pursuant to OFPA and the NOP regulations would also be eligible for an organic assessment exemption.”

OTA also proposes that in the regulatory language governing each of the research and promotion programs referenced above in which imports may be assessed, the following language be included:

“An importer who imports products that are eligible to be labeled as “organic” or “100 percent organic” under the NOP, or are in compliance with a U.S. equivalency arrangement established by NOP pursuant to OFPA and the NOP regulations, may be exempt from the payment of assessments on those products. Such importer may submit documentation to the Board and request an exemption from assessment on certified “organic” or “100 percent organic” products on an Organic Exemption Request Form (Form AMS-15) at any time initially, and annually thereafter on or before July 1, as long as the importer continues to be eligible for the exemption. This documentation shall include the same information required of producers in paragraph (c) of this section. If the importer complies with the requirements of this section, the Board will grant the exemption and issue a Certificate of Exemption to the importer. If Customs collects the assessment on exempt product that is identified as “organic” by a number in the Harmonized Tariff Schedule, the Board must reimburse the exempt importer the assessments paid upon receipt of such assessments from Customs. For all other exempt organic product for which Customs

collects the assessment, the importer may apply to the Board for a reimbursement of assessments paid, and the importer must submit satisfactory proof to the Board that the importer paid the assessment on exempt organic product. The Board will also issue the importer an alphanumeric number valid for 1 year from the date of issue. This alphanumeric number should be entered by the importer on the CBP entry documentation. Any line item entry of “organic” or “100 percent organic” products bearing this alphanumeric number assigned by the Board will not be subject to assessments. Any importer so

exempted shall continue to be obligated to pay assessments under this part that are associated with any imported agricultural products that do not qualify for an exemption under this section.”

- *Exemption submission requirements for assessed producers*

Under the proposed rule, AMS outlines requirements for obtaining an exemption from assessment for organic producers. OTA feels that these requirements are reasonable and that all organic producers will be able to provide the required information without undue burden. However, the proposed rules are inconsistent in defining how an organic producer would demonstrate validity of the exemption to the entity responsible for collecting and remitting the assessment on behalf of the producer (first handler, processor, etc). We urge AMS to ensure that there is clarity across all research and promotion programs as to how organic producers demonstrate their exemption to the entity responsible for collecting and remitting the assessment to the Board.

- *Board action on exemption application*

The specific regulatory language included for § 900.700 (for marketing orders) and for each research and promotion program is inconsistent with regard to the timeframe within which the relevant Board must act on an exemption application. For all of the reasons articulated above that support consistency across regulations, OTA proposes consistent language across all marketing orders and research and promotion programs with respect to Board action on exemption applications.

OTA proposes the following language be included in the regulations governing every marketing order and research and promotion program:

“If the person complies with the requirements of this section and is eligible for an assessment exemption, the committee or board will approve the exemption request and provide written notification of such to the applicant within 30 days. If the application is disapproved, the committee or board will provide written notification of the reason(s) for such disapproval within the same timeframe.”

- *Effective date of exemption*

The specific regulatory language included for § 900.700 (for marketing orders) and for each research and promotion program is inconsistent with regard to the effective date for each exemption. For all of the reasons articulated above that support consistency across regulations, OTA proposes consistent language across all marketing orders and research and promotion programs with respect to the effective date of the organic assessment exemption.

OTA proposes the following language be included in the regulations governing every research and promotion program:

“The organic assessment exemption is effective immediately upon issuance of this language, and the relevant revised form(s) are also immediately available. To apply for an assessment exemption, a producer, handler, manufacturer, processor, or importer shall submit a request to the Board on an Organic Exemption Request Form (Form AMS-15) at any time during the year initially, and annually thereafter on or before July 1, as long as the person continue to be eligible for the exemption.”

OTA proposes the following language be included in the regulations governing all marketing orders:

“The organic assessment exemption is effective immediately upon issuance of this language, and the relevant revised form(s) are also immediately available. To apply for an assessment exemption, a handler, shall submit a request to the Board on an Organic Exemption Request Form (Form FV-649) at any time during the year initially, and annually thereafter on or before July 1, as long as the person continue to be eligible for the exemption.”

- *Agricultural commodities produced and marketed under an organic system plan, but not sold, labeled, or represented as organic*

The proposed language for some (but not all) of the research and promotion program regulations includes a section regarding agricultural commodities produced and marketed under an organic system plan, but not sold, labeled, or represented as organic. (*See, e.g.,* section (i) on page 75016.) This is important language, and OTA appreciates AMS’ diligence in including it. It furthers the intent of Congress that, without exception, if a product is produced as organic, it is eligible for an exemption from assessment under marketing orders and research and promotion programs. It is also sensible, because it ties eligibility for exemption to how the product was produced – where the increased costs and investment are – rather than how the product is sold.

The Proposed Rule includes examples of reasons why a product that was produced or marketed under an organic system plan might be sold as conventional. These include lack of demand for organic products, isolated use of antibiotics for humane purposes, chemical or pesticide use as the result of State or emergency spray programs, and crops from a buffer area as described in 7 CFR part 205. While most of these are appropriate examples, because their occurrence would not impact the product’s organic certification, one is included erroneously. When antibiotics are used, even in isolated instances or for humane purposes, the animal and its products are removed from organic certification. Therefore, when antibiotics are used, a product should no longer qualify for the organic assessment exemption. Inclusion of the use of antibiotics for humane purposes as an example of why an organic commodity might not be sold as organic is inaccurate and should be removed from the regulatory language.

For all of the reasons articulated above that support consistency across regulations, OTA proposes consistent language across all marketing orders and research and promotion programs with respect to the treatment of agricultural commodities that are produced and marketed under an organic system plan, but not sold, labeled, or represented as organic.

OTA proposes the following language be included in the regulations governing marketing orders and all research and promotion programs:

“Agricultural commodities produced and marketed under an organic system plan, as described in 7 CFR 205.201, but not sold, labeled, or represented as organic, shall not disqualify a producer from exemption under this section. Reasons for conventional sales include lack of demand for organic products, chemical or pesticide use as the result of State or emergency spray programs, and crops from a buffer area as described in 7 CFR part 205, provided all other criteria are met.”

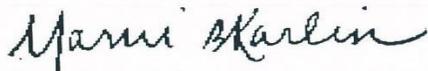
A commenter argues that this is problematic, because it would give organic producers who sell in the non-organic market a competitive advantage over conventional producers who remain mandated to pay into the relevant commodity research and promotion order. However, this misunderstands the economics of organic production. Organic producers face increased costs and investment in production that they incur even if they must sell some of their product into the non-organic market. The exemption does not grant them a competitive advantage when they have already incurred increased costs – and now are selling their product at the lower conventional price.<sup>2</sup>

**Conclusion**

OTA appreciates the opportunity to provide comments on the Proposed Rule regarding the Exemption of Organic Products From Assessment Under a Commodity Promotion Law (Proposed Rule). We are pleased to see this rule that will provide a broader exemption to certified producers, handlers, marketers, feeders, seed stock producers, exporters, and importers of “organic” and “100 percent organic” products, and appreciates the opportunity to provide clarifying comments that will make the rule operate more effectively.

Once again, on behalf of our members across the supply chain and the country, OTA thanks AMS for the opportunity to comment on its Proposed Rule.

Respectfully submitted,



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Organic Trade Association

CC: Laura Batcha  
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<sup>2</sup> That comment also expresses concern that organic producers are not required to inform purchasers of their products that they are claiming the exemption – and this demonstrates a similar misunderstanding of the economics of organic production. The commenter claims that organic producers could continue to charge purchasers as if they were paying a research and promotion order assessment, while keeping that additional amount as profit. However, prices for organic goods include an organic premium, and are not impacted by the payment (or exemption from payment) of a research and promotion order assessment. Thus, whether organic producers pay a commodity research and promotion order assessment or not does not impact price.