

Date: October 5, 2020

Docket: AMS-NOP-17-0065

Re: Strengthening Organic Enforcement Proposed Rule – Supply Chain Traceability and Organic Fraud Prevention

Thank you for this opportunity to provide comment on the United States Department of Agriculture (USDA) Agricultural Marketing Service (AMS) National Organic Program (NOP) Proposed Rule on Strengthening Organic Enforcement. The Organic Trade Association is submitting individual comments on each topic in the proposed rule to help NOP in its process of finding and navigating our positions and recommendations. We have also submitted all of our comments bundled into a single PDF including a cover letter. This comment addresses Section #18: Supply Chain Traceability and Organic Fraud Prevention.

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

- OTA supports adding the new term ‘*organic fraud*’ to the organic regulations to clarify the actions this proposed rule is intended to reduce and to support global communication and overall strategic direction of organic fraud prevention.
- OTA supports the proposed definition of ‘*organic fraud*’ whereas the action taking place is ‘intentional deception’ and the motivation is economic gain. However, OTA recommends that the term ‘illicit’ be removed from and the definition is revised to more clearly encompass the types of fraudulent activities that occur in the organic supply chain.
- OTA supports a requirement to include organic identification on the records maintained by a certified operation.
- OTA supports incorporating the term “audit trail” into the organic regulations at § 205.103(b)(3).
- OTA supports the proposal that certified operations must have procedures and practices to verify suppliers and prevent organic fraud. More specifically, we support a requirement that certified operations develop and implement an organic fraud prevention plan.
- OTA supports a requirement for certifying agents to share information with each other to verify supply chains and conduct investigations.
- OTA recommends adding the term ‘*supply chain traceability*’ to the organic regulations to clearly define a core concept that is integral to the purpose of this proposed rule and used throughout this proposed rule.
- OTA supports the requirement for certifiers to annually conduct risk-based supply chain audits to verify organic status of a product(s) of a certified operation(s) it certifies, back to the source(s). Defining ‘*supply chain traceability*’ will help the clarity of this new requirement.
- OTA supports the proposal that requires certifiers to have criteria and procedures for: (1) identifying high-risk operations and agricultural products to conduct risk-based supply chain audits; and (2) reporting credible evidence of organic fraud to the USDA.
- OTA supports the proposal that all requirements in this section be implemented within one year after the publication of the final rule.

NOP Questions

1. *Does the proposed definition of ‘organic fraud’ encompass the types of fraudulent activities you witness in the organic supply chain?*

No. The definition narrowly focuses on non-organic products being fraudulently labeled as organic products. The clarity of the definition would be improved with additional scenarios and examples such as making false or misleading organic claims or statements, falsifying records, fabricating fraudulent organic certificates and misrepresenting prohibited agricultural inputs as compliant with the Act and the regulations in this part. See our complete comments below.

2. *Should certifying agents be required to perform a minimum number of trace-back audits each year?*

No. OTA does not support establishing a specific number of trace-back audits that a certifying agent needs to conduct, because the number of high-risk operations and products will vary by certifying agent. The number of risk-based supply chain audits conducted should be relative to the number of high-risk operations or products identified by each certifying agent.

3. *Should more specific fraud prevention criteria be included in the regulation?*

As explained in more detail below, it is notable that the proposed rule itself does not provide any detail on what a “robust plan for supply chain oversight and organic fraud prevention should include.” The preamble however includes a helpful explanation and lists specific components that would result in a robust plan, such as a vulnerability assessment to identify weaknesses in the operation’s practices and supply chain and mitigation measures to correct vulnerabilities and minimize risks. OTA recommends additional detail be provided in the rule itself or through guidance and/or training.

OTA’s Positions and Recommendations

- **§ 205.2: OTA supports adding the new term ‘organic fraud’ to the organic regulations to clarify the actions this proposed rule is intended to reduce.** A term and definition are needed to distinguish “intentional acts of fraud” from other actions and/or incidents that may compromise the integrity of an organic product but are not intentional acts for the purpose of economic gain. For example, intentionally labeling and selling a non-organic product as “organic” is a fraudulent act, whereas contamination of an organic product due to an inadequate buffer system is the failure of an Organic System Plan. Both circumstances result in a violation, but the contamination event should not be defined as ‘organic fraud.’ For this reason, and as explained further below, we support a definition wherein “intentional deception for economic gain” is the central action to its meaning.

‘Organic fraud’ is intentional deception for economic gain. In addition to clarifying the actions this proposed rule is intended to reduce, a definition is also needed to support global communication and overall strategic direction. Food fraud is a rapidly evolving topic and regulations and standards are evolving to keep up with these changes in the marketplace, all aimed at protecting the consumer. To assist in communication and understanding among many governments, stakeholders and trading partners globally, there is a need for

harmonization and benchmarking of key terms based on a common and well-recognized terminology framework. From this perspective, it will be most helpful if the definition of **organic fraud** is generally consistent with the most widely accepted definitions for “**food fraud**” that have been published in the past ten years and adopted by governments and private sector fraud prevention programs. Since organic fraud encompasses a wide range of agricultural products, including food and non-food, the scope extends beyond just *food*. However, while there are some unique characteristics to organic fraud, we believe the underlying concepts remain the same, whether it be food fraud, product fraud or organic fraud.

The most well-known and widely accepted definition of food fraud was published by Dr John Spink and Douglas C Moyer of the Michigan State University in 2011 and is:

- *Food fraud is a collective term used to encompass the deliberate and intentional substitution, addition, tampering, or misrepresentation of food, food ingredients, or food packaging; or false or misleading statements made about a product for economic gain. ([Spink and Moyer \(2011\)](#))*

Other published definitions include:

- *Food fraud is deception, using food for economic gain ([Spink, et al 2016](#))*
- *Food Fraud: Any actions taken by businesses or individuals that deceive other businesses and/or individuals in terms of misrepresenting food, food ingredients or food packaging that brings about a financial gain. ([Elliott, 2018](#))*
- *Food fraud “is deception of consumers using food products, ingredients and packaging for economic gain and includes substitution, unapproved enhancements, misbranding, counterfeiting, stolen goods or others.” [GFSI Position on Mitigating the Public Health Risk of Food Fraud \(2014\)](#)*
- Food fraud: illegal deception for economic gain using food (all types of fraud) (CFSA, [2015a](#), [2015b](#); DEFRA, [2014](#); European Parliament, [2013](#); GFSI, 2014; ISO, 2005; ISO, [2011](#); Spink & Moyer, [2011](#)).

In reviewing these terms and definitions, two consistent qualifiers include: 1) deliberate or intentional acts of deception; and 2) economic or financial gain. For this reason, OTA strongly supports the inclusion of “intentional deception” and “economic gain” in the NOP definition of organic fraud. The term “illicit,” however, is an extra and unnecessary term that may create confusion. Organic fraud in of itself is illegal, so it seems unnecessary to qualify economic gain as being unlawful. Organic fraud is simply an intentional act, whereas the motivator is financial or economic gain. To achieve greater harmonization and reduce potential for varying interpretation, OTA suggests striking the term ‘illicit.’

In addition, OTA would like to see a definition that more clearly encompasses the types of fraudulent activities that occur in the organic supply chain. The proposed definition is very general and limits the activity to selling non-organic products as NOP certified. While all

fraudulent activity may generally fall under the umbrella of this description, it would be helpful to provide some examples, particularly ones around falsifying records and making false or misleading claims or statements on records and/or labels. OTA is also concerned that the proposed definition does not encompass agricultural input fraud, when “fertilizer fraud” holds such a prominent place in the organic sector’s history of fraud and continues to present a fraud opportunity.

➔ **Recommendation:** Remove the term ‘illicit’ and revise the definition to more clearly encompass the types of fraudulent activities that occur in the organic supply chain. **See OTA’s requested revision in Table 13.**

- **§ 205.103(b): OTA strongly supports the proposal to include organic identification on records maintained by a certified operation.** To ensure that a product’s status is clear throughout the audit trail, proper identification is needed on both the product label and the corresponding product records. Accordingly, OTA supports the proposed revision to § 205.103(b)(2). We also agree with AMS and support the certified operation’s flexibility to use alternative abbreviations of a products organic status on both non-retail labels and records, including but not limited to “MWO” (i.e., “made with organic”), ORG (i.e., “organic”), color designations, or other tracking systems that are used internally within a certified organic operation to denote a product’s organic status. *(See also OTA Comments on Non-retail Labeling)*
- **§ 205.103(b)(3): OTA supports incorporating the term “audit trail” into the organic regulations.** The regulations define the term ‘*audit trail*.’ However, it is not used in the regulations. The proposal to add this term into the record keeping requirements at § 205.103(b)(3) will help clarify that certified operations are required to maintain audit trail documentation for product handled or produced by the certified operation. This change will help clarify the type and extent of records that a certified operation needs to maintain.
- **§ 205.201(a)(3): OTA strongly supports a requirement that certified operations must describe and implement procedures to verify the organic status of suppliers and products in their supply chain and prevent organic fraud.** It is critical that certified operations implement effective practices to mitigate and prevent organic fraud, and it is necessary that such practices are described in the operation’s Organic System Plan at § 205.201(a)(3) and verified by a certifying agent. Certified operations are uniquely positioned at the front-line of organic fraud prevention and each operation has the ability to carefully assess their supply chains and identify where the gaps and weak points (‘hot spots’) may be to develop appropriate and effective fraud mitigation measures. A requirement for a certified operator to develop and implement an organic fraud prevention plan will be critical to reducing the opportunity for organic fraud. The effectiveness of the plan, however, will depend on the quality of the fraud vulnerability assessment and the corresponding process used to develop, monitor and verify organic fraud mitigation measures. From this perspective and consistent with the requirements of OTA’s organic fraud prevention program, “*Organic Fraud Prevention Solutions*,” we agree with NOP, as explained in the preamble, that a robust plan for supply chain oversight and organic fraud prevention must include the following:

- A map or inventory of the operation's supply chain which identifies suppliers;
- Identification of critical control points in the supply chain where organic fraud or loss of organic status are most likely to occur;
- A vulnerability assessment to identify weaknesses in the operation's practices and supply chain;
- Practices for verifying the organic status of any product they use;
- A process to verify suppliers and minimize supplier risk to organic integrity;
- Mitigation measures to correct vulnerabilities and minimize risks;
- Monitoring practices and verification tools to assess the effectiveness of mitigation measures; and
- A process for reporting suspected organic fraud to certifying agents and NOP.

The critical components of an organic fraud prevention plan, as listed above, are in fact requirements of OTA's fraud prevention program. It is notable, however, that the proposed rule itself does not include any of this detail and therefore NOP's expectation for what a "robust plan for supply chain oversight and organic fraud prevention would include" may not translate into practice.

OTA thanks NOP for citing OTA's *Organic Fraud Prevention Solutions* as a private sector program developed for organic operations to help detect and prevent organic fraud. Our program, in fact, was designed to train and help certified operations conduct a quality organic fraud vulnerability assessment and develop an appropriate and effective organic fraud prevention plan. We look forward to working with certified organic operations and collaborating with certifying agents to support this new requirement.

- **§§ 205.501(a)(13) and 205.504(b)(4): OTA supports the proposed requirement for certifying agents to share information with each other to verify supply chains and conduct investigations, and to have procedures for doing so.** Certifying agents must share information with one another to facilitate trace-back audits, investigations, and verification. The system simply will not work otherwise. OTA is sensitive to the need to maintain strict confidentiality with respect to certifying agents' clients and not disclose business-related information to third parties that are not involved with the regulation or certification operations. For enforcement purposes, however, we fully support a requirement that certifying agents must exchange any compliance-related information that is credibly needed to investigate an operation to determine compliance with the organic regulations.
- **§ 205.501(a)(21): OTA supports the proposed requirement for certifiers to annually, conduct risk-based supply chain audits to verify organic status of a product(s) of a certified operation(s) it certifies, back to the source(s).** The proposed rule would require that certifying agents develop and maintain procedures and criteria for identifying which operations and products among those it certifies are at high risk for organic fraud, and accordingly conduct supply chain audits on a sample of operations and products which it determines to be high-risk. OTA strongly supports this new requirement. We also recognize that the process of developing and ranking risk-assessment

criteria will be a challenging, time intensive process that will evolve over time. Certifying agents will need good access to and awareness of market trends, enforcement actions and other applicable socio-economic and geo-political considerations, all relevant to fraud risk.

- **§ 205.504(b)(7): OTA supports the proposal requiring certifiers to have 1) criteria to identify high-risk operations; 2) procedures to conduct risk-based supply chain audits; and 3) procedures for reporting credible evidence of organic fraud to USDA.** We recommend that certifying agents also have procedures in place to identify high-risk operations and agricultural products for the purpose of identifying the appropriate use of unannounced inspections to meet or exceed the minimum number of unannounced inspections required by each certifying agent. OTA requests this requirement be added to the proposed requirements for unannounced inspections at § 205.403(b). See OTA’s comments on On-site Inspections, Topic #4. We have included the revision in Table 13 below as well. *See also our comments on Grower Group Operations.*

Table 13: OTA’s Requested Revisions to the Proposed Rule and Recommendations for Guidance

Action & Section	Proposed Rule Text	Revisions and/or Guidance needed to implement OTA’s Positions and improve the quality, clarity and utility of the Proposed Rule
Add new term 205.2	<i>Organic Fraud:</i> Intentional deception for illicit economic gain, where non-organic products are labeled, sold, or represented as “100 percent organic,” “organic,” or “made with organic (specified ingredients or food group(s)).”	<p>Revision needed: OTA supports the adding the term “Organic Fraud” to the organic regulations, however we recommend some minor revisions to:</p> <ul style="list-style-type: none"> • 1) further harmonize the definition to assist in communication and understanding among many governments, stakeholders and trading partners; and • 2) ensure that the definition includes examples to help convey the meaning and ensure that it covers all types of fraudulent activities that are witnessed in the organic supply chain.
<p>OTA Requested Revision: <i>Organic Fraud:</i> Intentional deception, for illicit economic gain <u>using the USDA organic label.</u> <u>Organic fraud includes but is not limited to labeling, selling, or representing</u> nonorganic products as “100 percent organic,” “organic,” or “made with organic (specified ingredients or food group(s)),” <u>deliberately making false or misleading organic claims or statements, falsifying records, fabricating fraudulent organic certificates and misrepresenting agricultural inputs as compliant with the Act and the regulations in this part.</u></p>		

Revise 205.103(b) (2)	Fully disclose all activities and transactions of the certified operation in sufficient detail as to be readily understood and audited, <u>including identification in records of products as “100% organic,” “organic,” or “made with organic (specified ingredients or food group(s)),” as applicable;</u>	Support: OTA supports the added requirement to include organic identification on the records maintained by a certified operation.
Add 205.103(b)(3)	Include audit trail documentation for product handled or produced by the certified operation;	Support: This change will help clarify the type and extent of records that a certified operation needs to maintain. The regulations define audit trail, but until now, it is not used within the regulations.
Revise 205.201(a) (3)	A description of the monitoring practices and procedures to be performed and maintained, including the frequency with which they will be performed, to verify that the plan is effectively implemented. <u>This must include a description of the monitoring practices and procedures to verify suppliers in the supply chain and organic status of products received, and to prevent organic fraud, as appropriate to the certified operation’s activities.</u>	Support: OTA strongly supports the proposed requirement that certified operations must include, in the OSP, a description of the monitoring practices and procedures to verify suppliers in the supply chain and organic status of products received, and to prevent organic fraud.
OTA Requested Revision: None		
Revise 205.501(a) (10)	Maintain strict confidentiality with respect to its clients under the applicable organic certification program and not disclose to third parties (except for the Secretary or the applicable State organic program’s governing State official or their authorized representatives) any business-related information concerning any client obtained while implementing the regulations in this part, except: except as provided for in §205.504(b)(5); : <u>(i) For information that must be made available to any member of the public, as provided for in §205.504(b)(5);</u> <u>(ii) For enforcement purposes, certifying agents must exchange any compliance-related information that is</u>	Support: no concerns.

	<p><u>credibly needed to certify, decertify, or investigate an operation, including for the purpose of verifying supply chain traceability and audit trail documentation; and (iii) If a certified operation’s proprietary business information is compliance-related and thus credibly needed to certify, decertify, or investigate that operation, certifying agents may exchange that information for the purposes of enforcing the Act, but the information in question still retains its proprietary character even after it is exchanged and all of the certifying agents that are involved in the exchange still have a duty to preserve the confidentiality of that information after the exchange.</u></p>	
<p>Revise 205.501(a) (13)</p>	<p>Accept the certification decisions made by another certifying agent accredited or accepted by USDA pursuant to §205.500. <u>Certifying agents must provide information to other certifying agents to ensure organic integrity or to enforce organic regulations, including to verify supply chain integrity, authenticate the organic status of certified products, and conduct investigations;</u></p>	<p>Support: OTA strongly agrees this proposed revision is necessary in order to accomplish full supply chain traceability.</p>
<p>Redesignate as 205.501(a)(23); add new paragraph (21)</p>	<p><u>Annually, conduct risk-based supply chain audits to verify organic status of a product(s) of a certified operation(s) it certifies, back to the source(s).</u></p>	<p>Revision needed: OTA supports the requirement for certifying agents to conduct risk-based supply chain audits to verify organic status of product(s) of a certified operation(s) it certifies, back to the source(s). However, the meaning of the term “source” is not clear.</p> <p>The preamble clarifies this term to mean “farm,” or the source at “any step in the supply chain.” To improve the clarity of the proposed requirement, we recommend a minor revision that will capture the explanation provided in the preamble.</p>

		<p>New term and definition needed: OTA supports adding the term ‘<i>supply chain traceability</i>’ to the organic regulations to clearly define a core concept that is integral to the purpose of this proposed rule and used throughout this proposed rule.</p>
<p>OTA Requested Revision: Annually, conduct risk-based supply chain audits to verify organic status of a product(s) of a certified operation(s) it certifies, back to the source(s) <u>at any step in the supply chain</u>.</p> <p>OTA Requested Revision (NEW term – supply chain traceability): Add a new term to §205.2 - <i>Supply Chain Traceability</i>. The ability to identify and track a product (including its location, history, and organic nature) along its entire supply chain, from source to consumption, and/or “backwards “from consumption to source. A supply chain audit assesses supply chain traceability for specific products, verifying whether records show all movement, transactions, custody, and activities involving the products.</p>		
<p>Revise 205.504(b) (4)</p>	<p>A copy of the procedures to be used for maintaining the confidentiality of any business-related information as set forth in §205.501(a)(10); <u>sharing information with other certifying agents and for maintaining the confidentiality of any business-related information as set forth in §205.501(a)(10);</u></p>	<p>Support: OTA agrees that sharing information with other certifying agents and maintaining confidentiality is critical and that written procedures are necessary.</p>
<p>Add 205.504(b) (7)</p>	<p><u>A copy of the criteria to identify high-risk operations and products; and procedures to conduct risk-based supply chain audits, as required in §205.501(a)(21); and procedures to report credible evidence of organic fraud to the Administrator.</u></p>	<p>Support: OTA supports the proposal requiring certifiers to have criteria for (1) identifying high-risk operations and agricultural products; and procedures to conduct risk-based supply chain audits, and procedures for (2) reporting credible evidence of organic fraud to the USDA.</p> <p>Recommendation: OTA recommends that a similar requirement for apply to the assessment of unannounced inspections and grower groups. <i>See the suggestion for unannounced inspections below as well as our comments on On-site Inspections and Grower Group Operations.</i></p>

OTA Requested Revision: See suggested revision under “On-site (Unannounced) Inspections, 205.403(b).

205.403(b) - Unannounced inspections. (1) A certifying agent must, on an annual basis, conduct unannounced inspections of a minimum of five percent of the operations it certifies, rounded up to the nearest whole number. (2) A certifying agent must have criteria for identifying high-risk operations and agricultural products to conduct risk-based unannounced inspections beyond the 5% minimum as needed and in response to complaints and investigations. ~~(2)~~ (3) Certifying agents must be able to conduct unannounced inspections of any operation it certifies and must not accept applications or continue certification with operations located in areas where they are unable to conduct unannounced inspections.

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

Respectfully submitted,



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