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May 12, 2006

Mr. Mark Bradley
Associate Deputy Administrator
Transportation & Marketing Program
National Organic Program
1400 Independence Ave, SW
Room 4008—So., Ag Stop 0268
Washington, DC 20250

Re: Proposed Revisions to National Organic Program Rules Based on *Harvey v. Johanns* and 2005 Amendment to Organic Foods Production Act; Docket No. TM-06-06-PR

Dear Mr. Bradley,

The Food Marketing Institute¹ (FMI) is pleased to respond to the U.S. Department of Agriculture's (USDA's) proposed rule to amend the National Organic Program (NOP) regulations to reflect the modifications necessitated by the *Harvey v. Johanns* decision and the 2005 amendments to the Organic Foods Production Act (OFPA). 71 Fed. Reg. 24820 (April 27, 2006). As discussed more fully below, FMI urges USDA to restore the NOP regulations to their pre-*Harvey* status to the fullest extent permitted by law and are pleased to see that, in many respects, USDA's proposed amendments accomplish this goal.

However, we are concerned about the proposed amendment to 7 CFR 205.606, under which nonorganically produced agricultural products would only be permitted for use in “made with” organic food products if the nonorganic ingredient was both listed on the National List and commercially unavailable. As discussed more fully below, this approach is contrary to OFPA and USDA's regulations, which were carefully constructed and negotiated over a decade among various interested parties. Accordingly, we urge USDA to permit the use of nonorganically produced agricultural products in “made with” organic foods in compliance with USDA's current regulations, which do not require both inclusion on the National List and commercial unavailability.

¹ FMI conducts programs in research, education, industry relations and public affairs on behalf of its 1,500 member companies — food retailers and wholesalers — in the United States and around the world. FMI's U.S. members operate approximately 26,000 retail food stores with a combined annual sales volume of \$340 billion — three-quarters of all retail food store sales in the United States. FMI's retail membership is composed of large multi-store chains, regional firms and independent supermarkets. Its international membership includes 200 companies from 50 countries.

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Background

The Organic Food Production Act (OFPA) sets up a tiered system with respect to the regulation of food products that may be eligible for some form of ‘organic’ claim, as well as handling and production practices that must be followed. In furtherance of the Act’s goals, Section 6505 generally requires any person who chooses to sell or label an agricultural product as organically produced to produce and handle the product in accordance with standards established under OFPA.² 7 USC 6505(a)(1). Nonetheless, paragraph (c) of this section includes important exemptions from the OFPA requirements for processed foods. In relevant part, processed food products that contain at least 50 percent organically produced ingredients by weight are not subject to the same general statutory requirements as foods with 95 percent or more organic content; processed foods with at least 50 percent organic content are permitted to use the word “organic” on the principal display panel, provided such use is consistent with the rules that USDA (in conjunction with all interested parties) separately developed and codified in the NOP regulations. 7 USC 6505(c)(1).

In this regard, Section 205.301 of the NOP regulations sets forth the product compositions that are associated with each ‘tier’ of claim: 100% organic; organic; ‘made with’ organic ingredients; and products for which organic ingredients may be identified in the ingredient line. Section 205.301(f) sets out important requirements for products that are labeled either ‘100% organic’ or ‘organic’, including the prohibition that products that bear these claims are not permitted to be produced with nonorganic ingredients when the organic form is available. 7 CFR 205.301(f)(4). This requirement is often referred to as the ‘commercial availability’ requirement.

Section 205.301(c) of the NOP regulations defines the composition of products that may be labeled with a “made with organic (specified ingredients or food groups).” Specifically, multi-ingredient agricultural products may be sold, labeled or represented to be ‘made with’ organic ingredients, provided that the products contain at least 70 percent organically produced ingredients which are produced and handled pursuant to the organic production and handling requirements of subpart C, which are applicable to products that bear “100% organic” or “organic” claims. 7 CFR 205.301(c). Notably, *Section 205.301(c) specifically precludes the ‘made with’ products from having to comply with the commercial availability requirement; therefore, under USDA’s own regulations, ‘made with’ products are permitted to contain nonorganic ingredients, even when the organic form is commercially available.*

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Notably Section 6512 of OFPA broadly permits the use of production or handling practices that are not prohibited or otherwise restricted under OFPA, unless USDA determines that such practice would be inconsistent with the applicable organic certification program. 7 USC 6512.

Discussion

At issue here is the proposed amendment of Section 205.606, which currently states as follows:

The following nonorganically produced agricultural products may be used as ingredients in or on processed products labeled as ‘organic’ or ‘made with organic (specified ingredients or food group(s))’ only in accordance with this section. Any nonorganically produced agricultural product may be used in accordance with the restrictions specified in this section and when the product is not commercially available in organic form.

In the *Harvey* decision, the Circuit court directed USDA to declare that Section 205.606 does not establish a blanket exemption to the National List requirements for nonorganic agricultural products that are not commercially available. While we certainly urge the Agency to follow the direction of the court, USDA has taken the court’s direction too far. Indeed, USDA proposes to amend the regulation to read as follows:

Only the following nonorganically produced agricultural products may be used as ingredients in or on processed products labeled as ‘organic’ or ‘made with organic (specified ingredients or food group(s))’ only in accordance with any restrictions specified in this section and only when the product is not commercially available in organic form.

The proposed amendment would improperly restrict the use of nonorganically produced agricultural products to only those listed in Section 205.606, which is clearly contrary to the intent and language of Section 205.301(c). *Accordingly, we strongly urge USDA to issue a final rule that recognizes the validity of OFPA and the carefully negotiated and constructed regulatory scheme that specifically allows the use of nonorganically produced agricultural products in processed food products that bear ‘made with’ organic ingredient claims pursuant to Section 205.301(c).*

* * *

We appreciate the opportunity to comment on USDA’s important proposal to amend the NOP regulations and urge the Agency to modify the final rules to permit the use of nonorganically produced agricultural products in products that bear a ‘made with’ organics claim. This result is consistent with OFPA and required by the regulatory construct.

Sincerely,

/S/

Deborah R. White
Vice President &
Associate General Counsel,
Regulatory Affairs