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National Organic Program
USDA-AMS-NOP
1400 Independence Ave. SW
Room 2642-So., Ag Stop 0268
Washington, DC 20250

October 5, 2020

Re: National Organic Program: Strengthening Organic Enforcement; Docket No. AMS-NOP-17-0065

Thank you for the opportunity to provide comments on the proposed rule to amend certain sections of the U.S. Department of Agriculture (USDA) organic regulations. We appreciate your work on this matter and understand that the proposed amendments are designed to improve integrity across the organic supply chain through more consistent oversight and increased transparency. These comments contain our feedback regarding the proposed rule, including:

- (1) FMI supports the proposed provisions related to the retail operation exemptions, including the proposals to maintain the retail exemptions and expand the definition of retail operation to include virtual sales to consumers;
- (2) FMI opposes the proposed revisions to the definition of "handle" to the extent the revised definition would require organic certification for companies, including retailers, whose brand name is identified on the label of a private-label product, but that do not manufacture or process the product in any way;
- (3) FMI supports maintaining the exemption from certification for entities that merely store, hold, and transport organic products;
- (4) FMI supports the proposed changes to clarify that the percentage of organic ingredients is calculated based on the time of formulation; and
- (5) FMI requests a compliance period of two years to allow sufficient time for entities selling organic products to assess the changes to the organic regulations, obtain organic certification if needed, and make any necessary changes to product labels.

We also provide responses, below, to the agency's questions regarding private label products.





About FMI

As the food industry association, FMI works with and on behalf of the entire industry to advance a safer, healthier and more efficient consumer food supply chain. FMI brings together a wide range of members across the value chain — from retailers that sell to consumers, to producers that supply food and other products, as well as the wide variety of companies providing critical services — to amplify the collective work of the industry. More information about our organization is available www.FMI.org.

Our data shows that today's shoppers bring a broader, more sophisticated range of criteria with them when shopping for groceries than ever before. As part of this criteria, selection of organic products continues to rise as an attribute that consumers look for when selecting a primary store.¹ Additionally, 81% of shoppers consider transparency to be important or extremely important when polled, and almost one-half of shoppers (48%) say providing certifications, such as USDA organic, is an indication that a brand or manufacturer is being transparent.² As such, organics are an important market segment for our members.

Exemptions for Retail Operations

FMI supports the proposed provisions related to the retail operation exemptions, including the exemptions for (1) retailers that sell but do not process organic foods, and (2) retailers that engage in on-site processing of foods previously certified and labeled for sale as organic. As the NOP notes in the preamble, the statute expressly exempts the first category of retailers that sell but do not process organic foods. 7 U.S.C. § 6502.

With respect to the second category, FMI believes it is wholly appropriate to retain this exemption. Examples of the types of processing that occur on-site at a retail store is a retailer that cuts and packages organic fruit, or assembles a parfait made with organic yogurt, granola, and fruit. We believe that the limited processing operations in which most retailers are engaged related to organic foods can be managed by the existing requirements that such retailers comply with the requirements for organic labeling and prevention of comingling and contact with prohibited substances.

¹ U.S. Grocery Shopper Trends, FMI – The Food Industry Association (2020).

² Transparency Trends: Omnichannel Grocery Shopping from the Consumer Perspective, FMI – The Food Industry Association and Label Insights (2020).





Recordkeeping Requirements for Exempt Retailers that Process On-Site Products Previously Certified as Organic

We oppose the proposal to require retailers that engage in on-site processing of organic foods to keep records of the quantities received, sold, or produced from such organic products. While this proposed requirement sounds reasonable in theory, and is reasonable in the context of a packaged food manufacturing operation, it would be incredibly burdensome to implement at the retail level. These records would need to be managed every single day at every single store location, and retailers are simply not set up to keep these types of records for the foods they process in-store. Stores would need to hire additional employees to manage these records every day. As an example, a shipment of organic produce might be split among three warehouses, from which it is sent to 1,000 retail stores. To keep records of the quantities that go to each store and then into each finished product, and matching each finished product to the originating lot code, would involve a tremendous burden that amounts to a traceability requirement that is not tied to food safety.

We do not believe the enormous burden this would entail is justified by any benefits. And indeed, it does not appear the agency's economic analysis took into account the additional proposed recordkeeping burdens on retailers. We are not aware of situations where the limited processing activities that occur at retail stores pose a risk to organic integrity. Retailers typically have agreements in place with organic suppliers that the product supplied will be organic, and the manufacturer in turn is a certified operation. A requirement that the retailer go beyond this by tracing quantities of individual ingredients and foods would not add meaningfully to organic integrity. FMI urges the NOP to revisit its cost-benefit analysis of the proposed rule to ensure it sufficiently captures the costs that exempt retailers would incur from the additional proposed recordkeeping requirements. We do not expect the benefits will outweigh the costs of this proposal, and therefore strongly urge the NOP not to finalize it.

In the alternative, in the event the NOP nevertheless moves forward with the proposed recordkeeping requirement related to quantities of organic ingredients/products, we ask the agency to recognize the records can be (1) kept centrally and (2) made available to the certifying agent upon request. Many retailers do not keep paper records of the quantities of product that go from the warehouse to the store. This information can be printed but would not be meaningful to a certifying agent, as the digital form would be difficult to understand to someone not familiar with it.





The NOP also proposes a new recordkeeping requirement for retailers that process previously-certified organic foods onsite to “demonstrate that agricultural products identified as organic were organically produced and handled.” We believe this requirement could be met by establishing a practice of verifying that the label on the product or ingredient identifies it as “organic”, if it will be used in a finished product labeled with the term “organic,” and we ask the NOP to expressly confirm this point. Aside from the label statement that identifies the product as “organic”, retailers would have no other practical way to independently verify whether a product was in fact organically produced and handled. That obligation rests with the organic grower or processor and its certifying agent. We therefore ask the NOP to make clear that confirming based on the label that the product or ingredient is certified organic would be sufficient to satisfy the proposed recordkeeping requirement.

Virtual Sales

We also support the NOP proposal to expand the definition of retail operation to encompass virtual sales, thereby clarifying that online retailers that sell but do not process organic foods are similarly exempt from certification. This proposed change recognizes the changing nature of food sales to consumers, particularly as online sales have grown during the COVID-19 pandemic.

Exemption for Storage and Transportation

FMI supports maintaining the exemption from certification for entities that merely store, hold, and transport, including loading, unloading, and receiving, organic products. This exemption appropriately recognizes that such activities do not pose a risk to organic integrity.

Definition of “Handle” As Applied to Private-Label Products

FMI opposes the proposed revisions to the definition of “handle” to the extent that the revised definition would require organic certification for companies whose brand name is identified on the label of a private-label product, but that do not manufacture or process the product. In many cases these entities do not touch the product, except at the retail level if the brand name company is also a retailer, so these entities’ operations pose no risk to the organic integrity of the product. Moreover, the NOP has pointed to no information or data that would suggest that any of the activities of private label brand name companies represent a vulnerable point in the organic supply chain.



The NOP states in the preamble that under the proposed rule, both entities in a private label arrangement, i.e., the operation that produced/processed the organic product (the “contract manufacturer”) and the operation that sells the product under its own label (the “brand name” or “distributor”) would require certification. The NOP appears to be taking the view that the private label brand owner would be required to obtain certification because it is an operation that “handles” (sells) organic products. The NOP does not address how the exemption for retail operations that do not process organic foods would factor into the assessment for a retailer that is the brand name distributor of an organic product but does not manufacture the product.

We fail to see why organic certification would be necessary or justified for a private label branded company, particularly given that their operations are so similar to that of an exempt retailer that sells, but does not process, organic foods. The operations in which the private label brand name company engages do not pose a risk related to the organic integrity of the food. In many cases the private label brand name company merely (1) licenses its brand name for use on the product, (2) contracts for the manufacture of the product with a certified organic operation that makes the product elsewhere; and (3) sells the product at retail. It does not process or even label the product. The activity of selling the product at retail should be covered by the existing retail exemption for retailers that sell but do not process organic products. The licensing and contracting with a contract manufacturer are essentially business arrangements and do not affect in any way the organic status of the food.

In some cases, the private label brand name company may also distribute the product, such as by facilitating trade, transport, or movement of goods. The NOP has appropriately recognized that mere transportation and storage of pre-packaged foods, with no processing, does not pose a risk to organic integrity and therefore should remain exempt. Similarly, the storage and transportation activities of a private label branded company should be exempt. In all cases, the private label manufacturer that makes the product is certified as an organic operation and that is sufficient to ensure organic integrity.

Importantly, it does not appear the NOP considered the additional cost of organic certification to private label brand owners in its economic analysis. And the questions the NOP poses with respect to private label arrangements in the preamble, discussed further below, suggest that the NOP does not have a sense for the prevalence of these agreements or how many entities could be affected by the proposal. Third-party



manufacturing arrangements are common, and without having insight into the proportion of organic products that are produced under such arrangements it would not be possible to assess the costs of certification.

For these reasons, we ask the NOP to make clear in the final rule that private label brand name companies that do not manufacture or process the product are not subject to organic certification. Finally, in the event the NOP nevertheless moves forward with the proposed provisions as related to private-label organic products, we note that it is not clear whether a private label brand name company would be expected to be certified at the corporate level, as these companies would only be engaged in exempt activities at the store and warehouse locations, including selling at the retail level, storing, and transporting organic products.

Labeling of Organic Products Produced Under a Private Label Manufacturing Arrangement

The NOP has not proposed any changes related to the labeling of retail packages, but in the preamble, has posed a number of questions on the labeling of such products, specifically as related to private label manufacturing arrangements. We provide responses to each question below.

1. For private-label packaged products, which certified operation(s) should be listed on the retail label (brand name/distributor, contract manufacturer, or both)?

FMI response: Only the brand name/distributor company should be required to be listed on the retail label. Requiring the contract manufacturer to be disclosed would entail a requirement to disclose confidential commercial information. As suggested by the name “private label,” the private label contract manufacturing arrangements between companies are considered trade secrets and confidential commercial information. Requiring the disclosure of the contract manufacturer on the label would run contrary to the provisions in the Organic Food Production Act recognizing the importance that certifying agents maintain confidentiality of certified organic operations.³

Further, requiring multiple entities to be identified on the product label would require valuable real estate that is not currently available on most labels, without providing any benefit to consumers. In fact, if there were two companies listed on the label,

³ 7 U.S.C. § 6515(g).



consumers could be confused about which company they should contact with any questions about the product. And if the contract manufacturer is changed, or if multiple contract-manufacturers are used, this would necessitate a change to the labels, which would impose unnecessary cost. The organic regulations should remain consistent with the Food and Drug Administration (FDA) labeling regulations, which provide that the label must identify the manufacturer, packer, or distributor, and do not require the manufacturer to be identified. 21 CFR 101.5(a).

2. Which certifying agent(s) should be listed?

FMI response: Only the certifying agent of the contract manufacturer should be required to be listed. As discussed above, FMI opposes a proposed requirement that would require a brand name company in a private label manufacturing arrangement to be certified as an organic operation.

3. Should the certifying agent listed on a label always be the certifying agent of the certified operation listed on the label (*i.e.*, should the certifying agent match the operation)?

FMI response: No; it is appropriate for the certifying agent to match the manufacturer, but not match the brand name/distributor company identified on the label. This approach appropriately recognizes that the manufacturer, but not the brand name company, must be certified.

4. Should listing contract manufacturers on labels be mandatory? Should it be optional?

FMI response: It should not be mandatory. As discussed above, the identity of the contract manufacturer in a private label manufacturing arrangement is confidential commercial information and cannot be required to be disclosed.

5. What terminology should be used to describe private-labeled organic products?

FMI response: The preamble discusses private-label manufacturing arrangements but does not discuss situations where a national brand owner may use contract-manufacturers or third-party manufacturers for the production and manufacture of organic products. We see no basis to distinguish between this situation and a "private label brand" manufacturing arrangement. Any references to this category of products should encompass both products produced under a private-label manufacturing



agreement and also national brand owners that use contract-manufacturers or third-party manufacturers. These products could be described as “products produced under a private-label or contract-manufacturing arrangement.” In either case, the entity subject to certification should be the manufacturer or producer of the food, not the brand owner.

6. What terminology should be used to describe the operations involved in packaged product or private labeling (*e.g.*, brand name manufacturer, contract manufacturer, and distributor)?

FMI response: “Brand name/distributor” and “contract manufacturer,” are appropriate terms. The company whose brand name appears on the label sometimes distributes the product, but not always.

Labeling of Non-Retail Containers

Currently, non-retailer containers, such as those used for shipping and storage, only need to bear a production lot number. The proposed rule would require the addition of a statement identifying the product as organic and the name of the certifying agent that last certified the producer (for raw products) or the last handler that processed the product (for processed products). We suspect that in many cases there may be limited value in adding this labeling information with respect to protecting organic integrity. For example, printing this information on a case, when the individual package already has the name/logo of the certification agency, does not seem to provide a meaningful benefit.

Requirement for NOP Import Certificates

Organic certification and renewal of certification of producers and manufacturers is done once a year. To require that NOP import certificates be made available for every shipment of imported organic product poses a significant burden and has the potential to disrupt business supply, particularly when the certification remains valid for one year. The provision could also be deemed as protective of domestic producers and manufacturers, since there is no equivalent requirement for domestically produced organic foods shipped domestically to be associated with an NOP import certificate, and this burden falls only on imported products. It does not appear that the NOP has considered less burdensome alternatives.



Calculating the Percentage of Organically Produced Ingredients

FMI supports the proposed changes with respect to how to calculate the percentage of organic ingredients in a multi-ingredient organic product, which would clarify that the calculation should be performed at the time of formulation, regardless of whether additional processing occurs after formulation. We agree with the agency that this change would simplify the calculation in some instances, and therefore support the proposed change.

Implementation Date

AMS proposes that the new requirements would become effective ten months after the effective date of the final rule (one year after publication of the final rule in the Federal Register). We do not believe this time period is sufficient, particularly considering that many entities not currently required to be certified would potentially be required to obtain certification. Further, in the event a company concluded it no longer wanted to represent its products as organic, it would need to revise labels. We ask AMS to provide a two-year compliance period following publication of the final rule, as we believe this would provide sufficient time for entities to obtain certification or revise labels, if needed. This is comparable to the amount of time that the NOP provided as part of the original organic final rule issued in 2000.⁴

The need for more time is particularly critical for private label products. The private brand industry is unique and strives to provide consumers with quality products at a significant savings. Unlike national brands, private brand manufacturers do not invest considerable resources in advertising and label modifications, which gives them the ability to provide lower priced products on which some consumers rely. Infrequent label changes permit private brand manufacturers to purchase packaging in bulk to minimize costs. To reduce significant waste and minimize disruption, FMI believes AMS should provide a two-year compliance date for the changes to the organic regulations. Consumers rely on private label alternatives as a viable money-saving option and FMI believes a compressed compliance time frame will result in higher prices and significant waste of current packaging inventories, which is in conflict with a number of government and food industry initiatives to reduce food waste.

⁴

65 Fed. Reg. 80548 (Dec. 21, 2000) (becoming effective October 21, 2002).





Conclusion

FMI thanks the NOP for the opportunity to submit comments. Our members are committed to playing an appropriate role in ensuring the integrity of products labeled as organic, and we thank the agency for considering our input.

Please do not hesitate to contact FMI with any questions at sbharris@fmi.org or 202-220-0614.

Sincerely,

A handwritten signature in dark ink that reads 'Stephanie Harris'.

Stephanie Harris
Chief Regulatory Officer & General Counsel

