

April 4, 2018

Ms. Michelle Arsenault
National Organic Standards Board
USDA-AMS-NOP
1400 Independent Ave., SW
Room 2648-S, Mail Stop 0268
Washington, D.C. 20250-0268

Re: Meeting of the National Organic Standards Board

Docket # AMS-NOP-17-0057

Dear National Organic Standards Board Members:

The following comments are submitted to you on behalf of The Cornucopia Institute, whose mission is to support economic justice for family-scale farming.

COMPLIANCE, ACCREDITATION AND CERTIFICATION SUBCOMMITTEE

Import Oversight– Discussion Document

INTRODUCTION/SUMMARY

On May 12, 2017 *The Washington Post* ran an investigative story illustrating serious flaws in the organic certification program at the USDA. These flaws have undermined confidence in the organic label and revealed the source of the staggering economic losses suffered by our domestic organic grain farmers at the hands of unscrupulous competitors.

Subsequently, on July 18, 2017, The Cornucopia Institute submitted a Citizen’s Petition requesting that the NOSB promulgate, on an expedited basis, certain remedial actions that the USDA could undertake to address the infiltration of fraudulent organic imports into the United States market. There has been no response to the Petition from the USDA to date, and those recommendations are again incorporated in this comment by reference.

The urgent need for regulatory reform was confirmed in a September 2017 critical report issued by the USDA’s Inspector General, following a thirteen-month audit of the National Organic Program. The Inspector General’s findings confirmed the lax controls at U.S. ports were failing to prevent fraudulently labeled products from entering the U.S. market while creating an “unfair economic environment for U.S. organic producers.”

It is imperative, now more than ever, that the NOSB develop recommendations requiring stringent enforcement of existing regulations and develop additional regulatory oversight procedures. While this deliberation is taking place the NOSB should recommend that the NOP engage, immediately, in emergency rulemaking on an interim basis. This comment addresses the following questions the NOSB posed on import oversight:

1) Role of document in an organic supply chain with a focus on imports.

There are a number of documents created or utilized to import agricultural commodities. These documents are created by multiple parties, including, but not limited to the following: export government, U.S. government, exporter, importer, shipping company, and third parties. Some of the documents are sales contracts, pro forma invoices, commercial invoices, customs invoices, inspection certificates, insurance certificates, phytosanitary certification, sanitary certificates, health certificates, fumigation certificates, certificate of origin, packing lists, bills of lading, waybills, export permit/licenses, and import permit/licenses. These documents may or may not record the organic status of the shipment, since organic verification documents like organic certificates or transaction certificates are issued in addition to these other documents.

Questions:

a) *Should it be a requirement that the organic status of a product be recorded on all documents including those listed above? How would this increase organic integrity? What impact would this have on the industry?*

- The organic status of a product should be required on any document presented at U.S. ports and borders for inspection and on any document required to accompany a shipment under any federal regulation. These documents include customs invoices, inspection certificates, phytosanitary certifications, health certificates, fumigation certificates, certificates of origin, and import permit/licenses.
- Additionally, organic status must be required on shipping documents, such as the bill of lading. Requiring the organic status on the bill of lading will help identify organic shipments that have been fumigated or irradiated and must then subsequently be marketed as conventional.
- Organic import certificates, which are traceable to the product's origin, should be required for all organic imports (regardless of whether the shipment originates from a country with which the United States has an equivalency agreement). Requiring an organic certificate reduces or eliminates the risk that a conventional product will subsequently be labeled organic.
- To the extent a product's organic status is required and verified throughout the supply chain, the likelihood of document alteration during shipment is minimized. This would relegate certain cases of fraud to requiring a multi-party conspiracy to execute.
- Increased documentation requirements obligate industry participants to insure paperwork is complete and a product's organic status is recorded properly. This should not substantially increase industry workload.

- b) *Which documents (listed above or in addition) are necessary to verify an import supply chain? How well do these documents serve to prevent fraud?*
- The phytosanitary certificate is critical in ensuring the organic product has not been treated with a prohibited input and should be required to accompany every shipment.
 - The phytosanitary certificate can be a more reliable indicator of a shipment's origin. For example, products shipped through Turkish free-trade zones could be improperly documented as of Turkish origin when the country of origin is, in fact, another country. Phytosanitary certificates can help verify the true country of origin.
 - The regulations should require inspection of phytosanitary certificates at all U.S. ports and borders.
 - Customs documents should indicate if agricultural products were fumigated or irradiated.
 - Fumigation documents for all agricultural commodities should include a notice that the products cannot be marketed as organic if the product was fumigated or irradiated. This requires systems in place for quick communication between APHIS and the NOP and, in some cases, for the relabeling of boxes, twist ties, or packaging.
 - All importers, brokers, traders, and buyers of imported organic products should be required to verify through customs documents that a product was not fumigated or irradiated.
- c) *Some imported products change hands once or several times while in transit. How do these documents appropriately trace and verify the organic status of the products for the ultimate importer?*
- The regulations must require not only that the documents accompany the shipment, but also that every party in the supply chain involved in importing the product verifies that the documents indicate the product's organic status.
- d) *Different documents in the import supply chain are issued by different parties. Are some documents or issuing parties (like export governments) more reliable than others? Should these documents be required?*
- All documents issued by a foreign government indicating a product's organic status should be required as a condition of entry into the United States. Consignees and/or the entity taking possession of the organic product should be required to verify the existence of these documents and that the product's

organic status is indicated on the documents. In particular, phytosanitary and health certificates should accompany every import of an agricultural product.

e) *Should the use of organic tariff codes (when they exist) be required when organic products fall under those codes? If so, should failing to use an organic tariff code negate the organic status of the imported product? Should the U.S. government be working actively to vastly increase the number of organic tariff codes? What impact would these changes have on the industry?*

- Yes, organic tariff codes should be required, and failing to do so should negate the organic status of the imported product if the importer is afforded the opportunity to correct inadvertent errors and then refuses. Fines should accompany errors based on tonnage of the imported product.
- HS codes provide a means to verify organic authenticity through data reconciliation and also provide a means to track organic shipments.
- Yes, the U.S. government should work to increase the number of tariff codes to aid in product tracking and for collecting accurate and complete data on imported products. This data can help reconcile acreage-in-production data and yields as reported by foreign governments, which can indicate areas of fraud.
- To the extent industry participants are not familiar with HS codes, they would need to familiarize themselves with their use and proper documentation.

2) Role of imports in the organic supply chain.

Several international organic standards, like those of the EU or Japan, require the certification of importers, regardless of their interaction with organic products. Similarly, U.S. government regulations like FSMA have special requirements for importers of record as the first U.S. entity taking some level of responsibility for the imported product.

Questions:

a) *Should importers of organic products be required to be certified regardless of how they handle a product? What impact would this have on the industry?*

- The regulations should require that importers of organic products be certified, even if they do not take physical possession of the product.
- As facilitators of organic shipments, importers should not escape regulatory requirements and penalties that accompany certification and should be subject to the same certification requirements and penalties for regulatory violations.

- b) *The organic control system relies on a process that generally checks the organic status of a product one step back to the last certified operations. Should importers be held to a stricter standard of documentation or other forms of communication to verify the organic status of products being imported into the U.S.? What additional requirements should be placed on importers given their critical spot in the supply chain? What impact would this have on the industry?*
- Importers should be required to conduct complete audit trace backs for each organic product and verify the certification status of each entity in the supply chain.
 - The documentation requirements on importers are reasonable, as they occupy a unique position in the supply chain often as the initiator and facilitator of the import. Fairness dictates that certification and heightened responsibilities be placed on parties standing to gain financially from importing organic products.
- c) *What documents or system should be developed for an importer to verify the organic status of a shipment?*
- The United States should implement an electronic system like the European Union's Trade Control and Expert System (TRACES) and investigate how block-chain technology can be used to protect organic integrity.
 - An electronic system which requires importers, processors, and traders to enter their transactions in real time increases transparency. The system will allow a trader to do business only if the trader confirms the data of previous traders are logged into the system.

3) Role of uncertified operations in the supply chain.

The current regulations exempt several types of operations from organic certification based on how products are handled. Operations may be involved in the import supply chain but not be certified—for example, brokers and traders who do not take possession, but take ownership, of a product are not required to be certified. Similarly, transport operations and customs brokers who are involved in the logistical transport or clearance of shipments are not required to be certified. CBP licenses private entities known as “customs brokers” serve a unique role in ensuring imports meet the documentation/regulatory requirements for import into the U.S.

Questions:

- a) *What are examples of uncertified handlers in import or domestic supply chains? Should these operations be certified or not, what additional value would this bring, and what impact would this have on the industry?*

- See Response to 3(b)
- b) *Should operations that take ownership of products or operations that market, but don't own, products be required to be certified? What impact would this have on the industry, and how would this improve supply chain integrity?*
- Many importers, traders, brokers, and handlers who do not take possession of an organic product are not required to be certified under current regulations. If an entity is involved in importing organic products, the regulations should require certification, which would trigger the verification requirements and penalties for violations under the current regulations. Certification of all parties involved in importing organic products is critical.
- c) *What role do customs brokers play in the organic control system? How could customs brokers be further engaged with organic integrity through regulation or other means? What impact do uncertified customs brokers have on the organic control system?*
- Customs brokers offer expertise in the import clearing process with information such as the use of HS codes, trade arrangements, taxes, quotas, and tariffs.
 - Customs brokers could be further engaged by offering expertise in the area of organic import codes, equivalency and recognition agreements, and documentation and inspection requirements specifically applied to organic imports.
 - Certification of brokers could help promote organic integrity by encouraging specialized expertise in the area of organics specifically related to documentation requirements and customs clearance.

4) Global and national organic crop acreage information.

Several data points are required by the USDA, either as part of annual reporting requirements, or to populate the Organic Integrity database. A piece of information not required is acreage and yield information at the production level.

Questions:

- a) *Would including production acreage and yield information in the Organic Integrity database serve to strengthen global organic control systems? If so, how would this information be used?*
- Production acreage and yield data provide valuable information to show whether a country's exports are supported by the acreage and yield data. This

information would be used to flag high-risk areas where yields exceed realistic quantities given a country's reported organic acreage.

- b) *Is acreage and/or yield information currently being accumulated by certifiers? What concerns do certifiers have in collecting and communicating the information to the NOP?*
- Requiring certifiers to collect production acreage and yields would assist the NOP in compiling this data, which promotes organic integrity by allowing the NOP to evaluate production acreage and reported yields and then identify discrepancies.
- c) *Is both acreage and yield information important?*
- Yes, fraud cannot be readily identified through production data if the acreage is not included. Realistic yields cannot be determined without knowing the acreage.
- d) *Should acreage and yield information be proprietary to the operations and not communicated? What would be the impact be of sharing the information with certifiers and ultimately the NOP and public (thru the Organic Integrity database)? If privacy and other concerns prevent publishing individual information, would aggregate data be helpful and at what level of aggregation (state, county, etc.).*
- Aggregate data would be valuable as high-risk areas and countries could be identified and flagged for investigation. An operation's organic acreage and yield data should be publically available unless the operation can demonstrate reasons confidentiality is warranted. This might be justifiable in some kind of small production of highly specialized crop where one producer might be responsible for a major percentage of world production. But for common commodities, like corn, soy, wheat, and more there could be no justification for recognizing acreage in production figures as trade secrets.
- e) *Are there other means to accurately calculate organic acreage and/or yield estimates on a country-by-country basis?*
- The USDA should investigate the use of trade agreements to incentivize all countries from which organic imports originate to develop tracking mechanisms to report acreage and yield data to FiBL.
- f) *Should these reporting requirements also be required of countries operating under an equivalency agreement?*
- Yes. A term of these equivalency agreements should be reporting acreage and yield data.

g) Can this acreage and yield information be a basis by which certifiers can track the approximate volume of product an entity would be allowed to sell under their organic certificate?

- Yes. An entity should not be allowed to sell more organic product than it is producing unless the entity can verify and explain the data discrepancy.

5) Equivalencies, recognition agreements and certified operation databases (like the Organic Integrity Database).

The NOP-designed and maintained Organic Integrity Database serves as a way to independently and rapidly verify the authenticity of an organic certificate. This database includes all operations certified to USDA organic regulations by an NOP accredited certifier. This database does not include operations in equivalent countries eligible to export to the U.S. as organic nor operations certified to the USDA regulations by a certifier operating under a recognition agreement.

Questions:

a) Should the NOP require foreign governments to maintain a similar database with certified operator data in its equivalency and recognition agreements?

- The U.S. should require all countries from which organic imports originate to collect and report the same information available for operations certified to USDA organic regulations by NOP accredited certifiers.

b) Should this data be required to be integrated into the Organic Integrity Database?

- The USDA should report this information for each country and make the information publically available in the Organic Integrity Database.

c) How would this data serve to strengthen the global organic control system?

- The Organic Integrity Database should be expanded to include information to show circumstances where an entity is de-certified and then re-certified. Settlement agreements and audit results should be posted promptly.
- Organic acreage and yield production are critical components in determining whether reported yields and export data are accurate and should be included in the Organic Integrity Database. When the numbers cannot be reconciled, the USDA should investigate for possible fraud.

6) The role of residue testing to verify bulk shipments of grain.

USDA organic regulations require certifiers, on an annual basis, to sample and test a minimum of 5% of the operations they certify. Testing for residues has been an integral part of some

organic control systems. For example, this is commonly required in Europe and is part of the procedures of the California State Organic Program.

Questions:

a) *Should testing of imports be required? Does testing provide useful information, or is it situational? If situational, please provide situations where it is useful or not useful. What burden would this put on the industry? What party (importer, exporter, other) should be responsible for testing?*

- Testing of imports at U.S. borders and ports should be mandatory for all shipments meeting certain volume thresholds. Additionally, and regardless of a volume, testing should be mandatory where the country of origination is associated with a high risk of fraud or a particular organic commodity has been associated with fraudulent labeling. Importers should be required to notify Customs of incoming shipments meeting designated volume thresholds and/or originating from high-risk areas. Without fail, the USDA, APHIS, and Customs should then coordinate mandatory testing of these shipments.
- All mandatory testing should also be required at the load port and coordinated by the importer. This testing should be performed by a qualified third party, such as, a GAFTA Certified Superintendent. The regulations should require the importer to submit the testing results for customs clearance.
- Random, periodic testing should also be conducted of all shipments of organic products, even if the organic cargo is below designated volume thresholds and/or from countries or regions considered low risk for fraudulent labeling.

b) *Should testing be required if the shipment passes a certain market value or size threshold?*

- Testing should be required of shipments as noted in response to 6(a).

c) *If testing should be completed, what type of testing should be done?*

- Residue and GMO testing should be performed.

7) Verification of organic status is perishable supply chains.

Fresh produce supply chains are unique. Such products cannot be fully packaged due to their nature and requirements for refrigeration, inspection, sampling, and respiration. This makes fresh produce especially vulnerable to cross-contamination and difficult to label and track. Fresh produce transactions often occur very quickly due to their perishable nature.

Questions:

a) *What additional actions can be taken to increase supply chain integrity in fresh produce supply chains?*

- The USDA must coordinate with Customs and APHIS to identify shipments of produce that are fumigated or irradiated. These government agencies must coordinate efforts to flag and stop sale of organic produce that is fumigated or irradiated.
- APHIS and/or Customs should be required to immediately notify the NOP if a shipment is treated with a prohibited substance. The shipment should then be marked and relabeled as non-organic.
- The regulations should require importers to be certified and that these certified entities immediately notify the NOP if a shipment is treated. Requiring the use of organic HS codes will help identify shipments which originated as organic, but because of irradiation or fumigation are converted to conventional.

8) Role of certifier/operation when certifying a commodity in a third country with import controls on the commodity.

Some commodities imported into the U.S. from certain origins may be subject to fumigation or other treatment in order to be imported into the U.S. as a requirement of APHIS, another government agency, or by statute. The Fruits and Vegetables Import Requirements (FAVIR) database lists the requirements for fresh fruits and vegetables, and the Seeds Not for Planting lists several other requirements for non-fruit or vegetable commodities.

Questions:

a) *Should certifiers of operators who are producing commodities subject to import restrictions or mandatory fumigation conduct further assessments to verify a compliant marketing plan is in place for said commodities?*

- Yes, certifiers should conduct additional assessments of operators who produce commodities subject to import restrictions or mandatory fumigation. Certifiers should require documentation from operators verifying the operators are aware of the restrictions, are following protocols, and include their protocols as part of their OSPs.

b) *Is this currently being done by certifiers, and have certifiers operating abroad had this activity verified during NOP accreditation audit?*

- To the extent certifiers are not conducting assessments, the NOP should require that certifiers abroad verify the activities of operators importing

products subject to restrictions and fumigation. A certifier's verification activities should be evaluated as part of the NOP accreditation audit.

c) *Should certified operators importing products from abroad conduct specific assessment related to mandatory fumigations or treatments? Is this currently done by certifier's who are certifying importers?*

➤ See Response to 8(b)

d) *Do certifiers have the expertise, training, and ability to conduct these audits/risk assessments? What additional training would be helpful to certifiers and operators?*

➤ The NOP should provide educational training to certifiers, certified operations, and interested parties on the roles of APHIS and CBPAS, especially on use of the FAVIR database.

➤ In an effort to verify that certifiers and certified operations maintain records that establish the organic integrity of imports, certifiers should:

- Maintain a current list of agricultural products which are required by federal or state law to be treated with fumigation or ionizing radiation and which treatments are prohibited by the organic regulations;
- Provide a list of these commodities to inspectors for use in verifying that an operation has adequate record-keeping practices to ensure a listed commodity was not subjected to a prohibited treatment and subsequently allowed to enter the organic market;
- Require certified operations importing agricultural products into the U.S. to retain and provide upon inspection any communication from U.S. Customs and Border Protection Agriculture Specialists (CBPAS) concerning the pre-clearance process for a shipment; and,
- Require certified importers to provide import permits and the USDA's accompanying instructions, including treatment notices.

9) Additional controls for origins with documented fraud or integrity issues.

It is common in other import regimes for food control or phytosanitary regulations to impose additional requirements from regions with documented issues of fraud. In August 2017, additional control and reporting requirements were imposed by NOP for a set period of time on certifiers of handling operation in regions identified as high-risk. Similar actions have been taken by the EU in regards to the import of certain organic product from some countries.

Questions:

- a) *Should the NOP develop an ongoing system to impose additional requirements on operations doing business in or with countries or regions with documented fraud?*
- Yes, additional requirements should be imposed on operations doing business with at-risk countries or regions. The NOP should identify those regions where fraud is documented or strongly indicated and require certifiers to conduct additional targeted, unannounced testing of organic products originating or transshipped through these countries.
 - Although additional requirements should be imposed on operations doing business with at-risk countries, the NOP cannot rely exclusively on a high-risk designation in exercising its oversight and enforcement authority. Bad actors will adjust international shipping routes to avoid increased scrutiny. While enhanced vigilance is required for at-risk geographic regions, increased and stringent enforcement is required with regard to all imported organic products, regardless of origin.
- b) *Should testing be mandatory for shipments from these regions? If so, where should testing be done?*
- Yes, testing should be conducted at the load port and at the U.S. borders and ports of entry.
- c) *What criteria should be used to identify a region of increased concern? What role do changes in USDA ERS import data play in these evaluations?*
- The following criteria should be used to identify regions of increased concern: documented or strong indicators of organic fraud originating in the region, inconsistent or incomplete trade data on organic products, unstable political and regulatory regimes, history of organized crime in trade, and availability of prohibited inputs.
 - ERS import data should be compared to organic acreage and yield data reported by a country to identify inconsistencies and possible fraud.
- d) *What impact would this have on industry?*
- For industries that engage in trade with high-risk countries, inbound shipments will undergo additional scrutiny.
- e) *Should the NOP develop specific channels of communication with our global organic certification partners, to better identify, track, deter, and prevent fraudulent organic products? Are there examples of this type of communication already present and how could this be improved and implemented?*

- Yes, specific channels of communication should be developed, including the use of integrated electronic data platforms.
- Equivalency agreements should require foreign countries to notify the NOP of any rejected shipments.

10) Fully Supply Chain audits.

Organic control systems currently rely on checking the organic status one step back from the party which products are being purchased or the last-certified operation in the supply chain. The control system makes it difficult to conduct full supply chain audits, from shelf to field, if each operation and certifier is only looking one-step back.

Questions:

- a) *Do fully supply chain audits offer value in ensuring organic integrity? If so, who should conduct these audits, and when?*
 - The regulations should require the certification of importers. Importers should be required to conduct full supply chain audits before the organic product is marketed in the United States.
 - The regulations should require that every entity in the international supply chain involved in importing an organic product into the United States be certified.
- b) *What are the challenges of completing full supply chain audits?*
 - A complete supply chain audit is dependent upon the accessibility and availability of documents identified or collected by every entity in the supply chain. Electronic data bases can eliminate many of these challenges.
- c) *How could the start and end points of a supply chain audit be defined in a systematic and repeatable way (commodity-based, geography-based, other criteria)?*
 - Supply chain audits need to account for the commodity's geographic origin and every step in the supply chain, from farm to port or border.
 - Because complex international supply chains increase opportunities for fraudulent conduct, the NOP must impose stringent audit trail requirements of every entity engaged in importing shipments of organic products. A complete audit trail, which traces imports back to the point of origin overseas, is necessary to combat fraudulent organic imports entering the United States.

d) *What are possible approaches that full supply chain audit could take (desk audits, physical audits, etc.)?*

- Audits should not be limited to any one method, but should always include the required periodic physical audits of operations by certifiers and audits of certifiers by the NOP.

11) **Other areas/questions/opportunities/threats.**

Questions:

a) *What other areas should the NOSB focus on in order to have the greatest impact on strengthening the global organic control system or to deter fraud in an organic supply chain? What are the areas of greatest weakness in the global organic control system, and what can be done to improve them?*

- See Response to 3(c)

b) *What other information would be helpful to inform the NOSB deliberations and work on composing recommendations?*

- See Response to 3(c)

c) *Can the NOP accreditation system play a role in providing consistency in the oversight of both domestic and international certifiers in the area of global trade? Do you have suggestions for specific activities or systems that could be implemented?*

- It is critical that the regulations be amended to require certification of shippers, brokers, distributors, and transportation companies, whether or not they open, reconstitute, repackage, or relabel the organic products. Simply stated, all persons or entities that ship, receive, transport, manage, or direct the movement of organic grain that is presented for entry into the United States must be certified to protect the integrity of the USDA organic label.
- Similarly, requiring certification of the entity that receives any shipment of an organic product, regardless of whether its packaging or handling has been reconstituted or is simply directing the movement of the grain, adds an additional layer of verification before the product enters the United States market. Certification of these receivers, regardless of how the product is maintained and directed throughout the transportation channel, will help identify instances in the supply chain where organic integrity has been compromised.
- Brokers, traders, transporters, or distributors should not be exempt from certification under any circumstance if they engage in transactions involved in importing shipments of organic grain into the United States.

- The USDA must implement protocols and procedures to require testing of shipments of “organic” grain that are presented for import at ports, docks, and border crossings of the United States. To accomplish this task, the USDA should coordinate with the FDA, APHIS, and U.S. Customs to ensure that an appropriate alert system for inbound shipments exists and that inspectors have access to the ports facilities.
- If a load tests positive for pesticide residue, synthetic fertilizer use (by nitrogen isotope testing), or GMOs, the load should be detained, an investigation conducted, and enforcement actions taken.
- The USDA should use programs similar to the TRACES software adopted by the European Union. Effective October 19, 2017, the EU required that all organic imports entering member countries be accompanied by an electronically generated organic import certificate. The electronic certificates track movements of food across the EU.
- An electronic system could also help identify those perpetrators who create fraudulent organic certificates.
- The USDA should also explore the use of block-chain technology and integrated electronic databases to track shipments and verify documentation requirements are satisfied.
- **The USDA must act now and exercise its authority to implement the foregoing actions and stop the flow of fraudulent organic imports into the United States.**