

# IMPLEMENTATION OF NATIONAL AND INTERNATIONAL ORGANIC CERTIFICATION AND LABELING STANDARDS

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## INTRODUCTION

The organic food industry is growing at an astonishing rate. Concern about food safety and the environmental consequences of intensive chemical use in our food production systems is causing a dramatic shift in the way consumers think about food. Toxic residues, water contamination, and infectious diseases are probably at the top of the list, but concerns about soil degradation, industrial farming, loss of farmland to urban development, biotechnology, habitat destruction, animal rights issues, energy consumption, nutritional value, and food distribution systems are also causing consumers to reconsider the choices they make when buying food.

Due to these concerns many consumers are choosing not to purchase conventionally produced and processed foods. They are looking for alternative food products that are perceived to be safer and less damaging to the environment, and organic food is one of the options capturing their interest and purchasing power. In order to understand the value of organic food products, consumers need clearly defined organic certification and labeling standards which mean something, as well as reliable certification processes that will assure the integrity of organic labeling claims.

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Throughout the world, governments are engaging in these issues by passing laws to regulate organic certification and labeling practices. The Organic Foods Production Act (OFPA)<sup>1</sup> addresses these issues in the United States by providing a statutory definition for organic production and handling systems and establishes an organic certification process based on national organic standards. This article examines the development of national organic standards and the organic certification process in the United States. Further, the article discusses the efforts of the international community to establish international organic standards through the Codex Alimentarius Commission (Codex).<sup>2</sup>

### I. THE UNITED STATES NATIONAL ORGANIC PROGRAM

OFPA is a consumer protection law with organic marketing and environmental policy objectives.<sup>3</sup> Its purpose is to assure the public that organically labeled foods meet or exceed minimum federal organic standards.<sup>4</sup> To accomplish this objective OFPA requires the United States Department of Agriculture (USDA) to (1) implement a National Organic Program (NOP) which is responsible for the promulgation and enforcement of national organic standards,<sup>5</sup> and (2) establish a USDA

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<sup>1</sup> Organic Foods Product Act of 1990, 7 U.S.C.A. §§ 6501-6522 (West. Supp. 1997) [hereinafter OFPA].

<sup>2</sup> UNITED NATIONS, FOOD AND AGRICULTURE ORGANIZATION, THIS IS CODEX ALIMENTARIUS, U.N. Doc. E/2/9.95/2500 (1995) [hereinafter Codex]. Codex was established in 1962 by the Food and Agriculture Organization of the United Nations World Health Organization to help develop international nutritional and health standards based on scientific criteria. The World Trade Organization, which is the administrative entity for the General Agreement on Tariffs and Trade (GATT), adopted Codex as a forum for establishing international standards on a wide range of technological, environmental, consumer, and health issues that affect international trade.

<sup>3</sup> 7 U.S.C.A. § 6501 (West Supp. 1997) states the purposes of the act: "(1) to establish national standards governing the marketing of certain agricultural products as organically produced products; (2) to assure consumers that organically produced products meet a consistent standard; and (3) to facilitate interstate commerce in fresh and processed food that is organically produced."

<sup>4</sup> *Id.*

<sup>5</sup> 7 U.S.C.A. § 6503(a) (West Supp. 1997). Although OFPA became effective on October 1, 1993, USDA has not promulgated regulations to implement the National Organic Program [hereinafter NOP]. Lacking federal regulatory guidelines, the organic food industry is currently in a state of anticipation and uncertainty. Pressure on organic producers, manufacturers, and retailers to meet the increasing demand for organic food products in the absence of federal organic certification standards and enforcement mechanisms is increasing the risk of misrepresentation and/or fraud regarding organic certification and labeling claims. Furthermore, exporters of organic products produced and certified in the United States are encountering trade problems

accreditation program to verify the competence of certification organizations doing business in the United States as USDA certifying agents.<sup>6</sup> The NOP will oversee an elaborate regulatory process that involves federal agencies, state agencies, and private certification organizations in the administration and enforcement of national organic standards.<sup>7</sup>

OFPA requires certification of all organically labeled food products by a USDA-accredited certifying agent and prohibits the use of organic labels on food products that have not been certified by an accredited certifying agent.<sup>8</sup> Consequently, producers, processors, distributors, or sellers of organic products in the United States will be affected by OFPA labeling and certification requirements and the NOP.<sup>9</sup> To understand how the NOP was designed to work, it is helpful to view the OFPA regulatory process as a whole.

## II. THE OFPA REGULATORY SCHEME

There are four essential components in the OFPA regulatory process:<sup>10</sup> (1) the NOP; (2) USDA-approved state certification programs;

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because the certified products have not been certified by an accredited certification organization. Until these issues are settled and the NOP is functioning as a regulatory agency, the organic food industry will continue to face confusion about the legality of ongoing marketing activities in the United States and abroad.

<sup>6</sup> 7 U.S.C.A. § 6514(a) (West Supp. 1997).

<sup>7</sup> OFPA requires the U.S. Dep't of Agric. [hereinafter USDA], the U.S. Dep't of Health & Human Services (DHH), and the U.S. Env'tl. Protection Agency (EPA) to work together to establish organic standards and develop the National List. (7 U.S.C.A. §§ 6517(c), 6518(l) (West Supp. 1997)). OFPA allows states to establish USDA approved state certification programs that will share administrative and enforcement responsibilities with the federal government. 7 U.S.C.A. § 6507 (West Supp. 1997). Both state and private certification organizations can apply for USDA accreditation as "certifying agents" of the federal government. 7 U.S.C.A. § 6514 (West Supp. 1997).

<sup>8</sup> Accredited certifying agents are responsible for evaluating farms and handling facilities to determine whether farming and handling operations are in compliance with federal organic standards and certification requirements. 7 U.S.C.A. § 6515 (West Supp. 1997). Producers and handlers who fail to comply with OFPA organic labeling and certification requirements are subject to civil penalties. 7 U.S.C.A. § 6519 (West Supp. 1997).

<sup>9</sup> OFPA provides an exemption from its general certification requirements for certain processed foods, and it also provides an exception to its general certification requirements for small farming operations with less than \$5,000 in income per year. 7 U.S.C.A. § 6505(c),(d) (West Supp. 1997).

<sup>10</sup> These four components are described in 7 U.S.C.A. § 6503 (West Supp. 1997):  
(a) *In General.* The Secretary shall establish an organic certification

(3) the USDA accreditation program; and (4) the National Organic Standards Board (NOSB). This section examines each of these components separately.

#### A. *The NOP*

OFPA generally requires the Secretary of Agriculture (the Secretary) to implement and enforce national organic certification and labeling standards and requirements.<sup>11</sup> The Secretary is specifically required to:

- 1) Establish the NOP.<sup>12</sup>
- 2) Establish a state program approval process.<sup>13</sup>
- 3) Establish an accreditation program.<sup>14</sup>
- 4) Appoint NOSB members.<sup>15</sup>
- 5) Enforce OFPA requirements and establish a USDA appeals process to review all adverse determinations made by the NOP, approved state programs, and accredited certifying agents.<sup>16</sup>

These duties and responsibilities have been delegated to USDA employees in the NOP division of the Agricultural Marketing Service.<sup>17</sup> The NOP is in charge of the regulatory process, and the NOP staff is currently developing federal regulations to carry out these responsibili-

program for producers and handlers of agricultural products that have been produced using organic methods as provided for in this chapter.

*(b) State Program.* In establishing the program under subsection (a) of this section, the Secretary shall permit each state to implement a state organic certification program for producers and handlers of the agricultural products that have been produced using organic methods as provided for in this chapter.

*(c) Consultation.* In developing the program under subsection (a) of this section, and the National List under Section 6517 of this title, the Secretary shall consult with the National Organic Standards Board established under Section 6518 of this title.

*(d) Certification.* The Secretary shall implement the program established under subsection (a) of this section through certifying agents. Such certifying agents may certify a farm or handling operation that meets the requirements of this chapter and the requirements of the organic certification program of the state (if applicable) as an organically certified farm or handling operation.

<sup>11</sup> 7 U.S.C.A. §§ 6503, 6506 (West Supp. 1997).

<sup>12</sup> 7 U.S.C.A. § 6503(a) (West Supp. 1997).

<sup>13</sup> 7 U.S.C.A. §§ 6503(b), 6507 (West Supp. 1997).

<sup>14</sup> 7 U.S.C.A. § 6514 (West Supp. 1997).

<sup>15</sup> 7 U.S.C.A. § 6518(c) (West Supp. 1997).

<sup>16</sup> 7 U.S.C.A. §§ 6506(a)(3),(7), 6519-20 (West Supp. 1997).

<sup>17</sup> USDA/AMS/TMD, 4006 South Building, P.O. Box 96456, Washington, D.C., 20090-6456 (202-720-2704).

ties.<sup>18</sup> When the NOP regulations are implemented they will preempt existing state organic standards laws and regulations giving the NOP broad authority to oversee and enforce national standards in all of the states.<sup>19</sup> However, with USDA approval, states can also assume responsibility for administering and enforcing these federal standards.

### B. State Programs

#### 1. USDA Approval of State Programs

States may administer USDA-approved state organic programs.<sup>20</sup> Before implementing a program each state must demonstrate compliance with NOP standards and requirements by submitting a “plan” to the NOP.<sup>21</sup> If the NOP approves the plan the state program will be authorized to oversee and enforce compliance with federal organic standards.<sup>22</sup> States also must obtain prior approval from the Secretary before making any changes in a program that has been approved by the NOP.<sup>23</sup>

It is important to understand that USDA-approved state programs are not separate and autonomous programs which independently coexist with the NOP. Rather, the programs are an extension of the NOP which is based on a delegation of federal authority to the states.<sup>24</sup>

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<sup>18</sup> The National Organic Standards Board, a USDA-appointed citizen advisory board, submitted detailed recommendations to the NOP proposing regulatory standards and guidelines. The NOP staff is taking these recommendations into consideration as they draft proposed regulations. 7 U.S.C.A. § 6518(k)(1) (West Supp. 1997).

<sup>19</sup> The U.S. Constitution gives the U.S. Congress the authority to pass laws that regulate interstate commerce. U.S. CONST. art. I, § 8, cl. 3. Once Congress takes action to regulate interstate commerce, federal law may supersede state and local laws. U.S. CONST. art. VI, cl. 2.

<sup>20</sup> 7 U.S.C.A. § 6507(a) (West Supp. 1997) states: “*In General.* The governing state official may prepare and submit a plan for the establishment of a state organic certification program to the Secretary for approval. A state organic certification program must meet the requirements of this chapter to be approved by the Secretary.”

<sup>21</sup> *Id.*

<sup>22</sup> 7 U.S.C.A. § 6503(b) (West Supp. 1997).

<sup>23</sup> 7 U.S.C.A. § 6507(c)(2) (West Supp. 1997).

<sup>24</sup> 7 U.S.C.A. § 6503 (West Supp. 1990). 7 U.S.C.A. § 6503 has four subsections, each relating to a specific component of the national organic program. § 6503(a) requires the Secretary to establish “an organic certification program” for all producers and handlers of organic food products. This is the NOP. § 6503(b)-(d) each refer back to § 6503(a) for their point of reference. § 6503(b) states, “In establishing the [national] program under subsection (a) of this section, the Secretary shall *permit* each state to implement a state organic certification program . . .” (emphasis added). This language demonstrates a congressional intent to include state certification programs

Consequently, approved state programs will share responsibility for monitoring and enforcing NOP organic standards and certification requirements, and any enforcement action carried out by the state will be reviewable under a USDA-administered appeals process.<sup>25</sup>

## 2. USDA Approval of Enhanced Standards

With the Secretary's approval, states may also adopt additional organic certification requirements that exceed NOP standards and certification requirements.<sup>26</sup> However, additional state requirements, which are also referred to as "enhanced standards," must meet four basic requirements:<sup>27</sup>

- 1) They must further the purpose of OFPA.
- 2) They cannot be inconsistent with OFPA.
- 3) They must "not be discriminatory towards agricultural commodities organically produced in other states."
- 4) They cannot become effective before they are approved by the Secretary.

Allowing states to implement certification requirements that exceed NOP standards may recreate some of the problems that Congress intended to alleviate by establishing national organic standards and certification procedures. In 1990, when OFPA was passed, states were using independent regulatory standards to verify organic labeling claims and police organic labeling practices. Compliance with inconsistent state regulatory requirements complicated and increased the cost of interstate transactions involving organic products.<sup>28</sup> Congress was also

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under the umbrella of the national organic certification program. It grants discretionary authority to the Secretary to delegate implementation and administrative responsibilities to qualifying states and leads to the conclusion that state organic certification programs are an extension of the national organic certification program.

<sup>25</sup> 7 U.S.C.A. § 6520 (West Supp. 1997).

<sup>26</sup> 7 U.S.C.A. § 6507(b) (West Supp. 1997). Private certification organizations have repeatedly raised the issue of enhanced standards at NOSB public meetings. Many want to be able to use their certification seal to claim standards that are "higher" than NOP standards (if they feel NOP standards are not high enough). Although OFPA expressly allows states to develop additional requirements that exceed NOP certification standards (with USDA approval), OFPA is silent regarding the authority of private certification organizations to do the same. This issue is beyond the scope of this article, but is an important issue that will continue to be controversial.

<sup>27</sup> 7 U.S.C.A. § 6507(b) (West Supp. 1997).

<sup>28</sup> In 1990, several key agriculture states, including California and Texas, had passed legislation establishing legal standards for the labeling of certified organic food products. However, because these laws used different standards, moving organically labeled products across state lines became more difficult, and standards accepted in

concerned about the confusion consumers were experiencing as they tried to make sense of the maze of regulatory standards and conflicting claims made by organic certifiers, growers, and manufacturers.<sup>29</sup> The impact of these conflicting laws on interstate commerce and the lack of consistent certification and labeling standards in the private sector compelled Congress to pass OFPA.

OFPA was designed to stabilize interstate commerce by requiring states and private certifiers to adopt consistent national organic certification standards and procedures. However, out of respect for the right of each state to conserve its natural resources and protect the welfare of its residents, OFPA establishes a balance of federal and state power by allowing states to participate in the administration and enforcement of federal organic standards and set higher standards when appropriate.<sup>30</sup>

### *C. The Accreditation Program*

The third component of the OFPA organic certification process is the accreditation program. OFPA states, “[t]he Secretary *shall* establish and implement a program to accredit a governing state official, and any private person, that meets the requirements of this section as a certifying agent for the purpose of certifying a farm or handling operation as a certified organic farm or handling operation.”<sup>31</sup>

The purpose of the accreditation program is to assure the competence of certification organizations.<sup>32</sup> Accreditation is a screening mechanism to check the qualifications of certification organizations and authorize those who are competent to act as USDA certifying agents.<sup>33</sup> The accreditation program is, therefore, the foundation upon

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one state were not necessarily accepted in another. Furthermore, in 1990 most of the existing organic certification organizations were private organizations that independently developed their own certification standards. Consumers simply could not rely on consistent standards when they purchased products certified by various private certification organizations, and this lack of consistency began to erode consumer trust in the certification process.

<sup>29</sup> *Id.*

<sup>30</sup> 7 U.S.C.A. § 6503(b) (West Supp. 1997).

<sup>31</sup> 7 U.S.C.A. § 6514(a) (West Supp. 1997) (emphasis added).

<sup>32</sup> 7 U.S.C.A. § 6514(b) (West Supp. 1997).

<sup>33</sup> Under OFPA, all organic certification activities must be performed by an accredited certifying agent. 7 U.S.C.A. §§ 6503(d), 6506(a) (West Supp. 1997). Certifiers and producers/handlers who fail to comply with OFPA certification requirements are subject to prosecution and civil penalties up to \$10,000. 7 U.S.C.A. § 6519(c) (West Supp. 1997).

which the entire NOP rests, and it is the key to maintaining integrity in the certification process and public trust in organically certified products.<sup>34</sup>

### 1. Accreditation Standards and Guidelines

The Secretary has discretionary authority to develop the regulatory policies and procedures needed to implement the accreditation program in accordance with statutory guidelines.<sup>35</sup> OFPA describes the general requirements that certification organizations must meet to qualify as an accredited certifying agent.<sup>36</sup> These requirements include:

- 1) Demonstrated ability to implement OFPA requirements.<sup>37</sup>
- 2) Employment of a sufficient number of inspectors.<sup>38</sup>
- 3) Record-keeping requirements involving maintenance, access, and transference of records.<sup>39</sup>
- 4) Specific contractual provisions regarding OFPA compliance, liability insurance for errors and omissions, confidentiality requirements, and conflict of interest rules.<sup>40</sup>

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<sup>34</sup> Because the NOP has not implemented regulations, there is no USDA accreditation program at this time.

<sup>35</sup> 7 U.S.C.A. § 6514 (West Supp. 1997) states:

*(a) In general*

The Secretary shall establish and implement a program to accredit a governing State official, and any private person, that meets the requirements of this section as a certifying agent for the purpose of certifying a farm or handling operation as a certified organic farm or handling operation.

*(b) Requirements*

To be accredited as a certifying agent under this section, a governing State official or private person shall—

- (1) prepare and submit, to the Secretary, an application for such accreditation;
- (2) have sufficient expertise in organic farming and handling techniques as determined by the Secretary; and
- (3) comply with the requirements of this section and section 6515 of this title.

*(c) Duration of designation*

An accreditation made under this section shall be for a period not to exceed 5 years, as determined appropriate by the Secretary, and may be renewed.

<sup>36</sup> 7 U.S.C.A. § 6515 (West Supp. 1997).

<sup>37</sup> *Id.* § 6515(a).

<sup>38</sup> *Id.* § 6515(b).

<sup>39</sup> *Id.* § 6515(c).

<sup>40</sup> *Id.* § 6515(d)-(h).

OFPA accreditation requirements assure two things. First, OFPA rules out the possibility that federal agencies can act as certifying agents because the Secretary can only consider two categories of accreditation applicants: (1) "governing state officials" responsible for the implementation of state programs,<sup>41</sup> and (2) "any private person."<sup>42</sup> This means only state agencies and private entities can become accredited certifying agents.

Second, OFPA puts private certification agents on equal footing with state certification agents.<sup>43</sup> This is important because it reflects the intent of Congress to protect the role of private certifying organizations in the NOP certification process. Maintaining this role is crucial to the public/private partnership that OFPA is based on.

## 2. Public/Private Partnership

OFPA was created in a spirit of partnership between the public and private sectors establishing consistent federal regulatory standards without unduly burdening a developing private industry.<sup>44</sup> Congress

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<sup>41</sup> 7 U.S.C.A. § 6514(a) (West Supp. 1997). "Governing state official" is defined under § 6502(7): "the chief executive official of a State or, in the case of a State that provides for the Statewide election of an official to be responsible solely for the administration of the agricultural operations of the State, such official, who administers an organic certification program under this chapter." For the purposes of section 6514(b), therefore, a "governing state official" is a state official who "administers an organic certification program under this chapter."

<sup>42</sup> 7 U.S.C.A. § 6514(a) (West Supp. 1997). "Person" is defined as "an individual, group of individuals, corporation, association, organization, cooperative, or other entity." 7 U.S.C.A. § 6502(15) (West Supp. 1997).

<sup>43</sup> The NOSB final recommendations highlight the importance of this point and strongly support the role of the private certification community in the federal certification process.

<sup>44</sup> The legislative history of OFPA describes the national organic certification process as a "partnership between government and private organizations" and encourages the use of private organizations as certifying agents to take advantage of the expertise that has already been developed in the private organic industry. The following excerpt from the Senate Committee Report on OFPA reflects the intent of Congress to utilize the expertise of existing private certification organizations:

The organic industry applauded the various legislative efforts to develop national standards but argued that Congress should limit the role of government in certification activities. Rather than reinvent the wheel, the industry argued, a national program should take advantage of the network of private organic certification organizations that exist in nearly every state.

The organic industry, as well as consumer and environmental advocacy organizations, argued that the expertise in organic farming is found at the

recognized that certification expertise had already been developed within the private organic community, and on that basis concluded that the federal government's direct involvement in certification should be minimized to avoid displacement of private industry by government bureaucracy.<sup>45</sup> However, OFPA is a consumer protection law that clearly mandates government oversight of certification activities and the enforcement of organic certification standards,<sup>46</sup> and as such provides a regulatory role for both federal and state government (and private certifying agents) and designates specific responsibilities to each.<sup>47</sup>

Congress deliberately placed the authority to accredit certifying agents exclusively in the hands of the federal government to maintain a balanced public/private partnership within the NOP.<sup>48</sup> To fully appreciate how the accreditation program protects this partnership balance, it is essential to understand the distinction between approved state programs and accredited state certifying agents. Without this understanding, approval of state programs and the accreditation of state certifying agents can be easily confused, giving rise to unnecessary conflict regarding the role of state and private certified agents in the NOP.

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grass roots level—the private farmers and advocates who have been working on their own for years. They argued for the need to limit severely the federal government's discretionary authority and involvement in this industry since the government has little experience in this industry. Some groups even argued that the industry should remain self-regulated.

On February 8, 1990, Senator Leahy introduced S. 2108, a revision of his earlier legislation and one which reflected the advice received by many of these individuals and organizations. *This new legislation proposed a partnership between the government and private organizations in standards setting and certification.* On March 22, 1990, the Subcommittee on Research and General Legislation held a hearing on S. 2108, the Organic Foods Production Act of 1990, which formed the basis for this title.

#### Purposes and Need.

The Organic Foods Production Act combines a national standard for organic labeling, tough enforcement provisions, *a creative use of state and private organic farming programs*, and a national promotion advisory committee and a research program to build a solid foundation for the organic food industry.

S. Rep. No. 357, 101st Cong., 2d Sess. 291 (1990), *reprinted in* 1990 U.S.C.C.A.N. 4656, 4945 (emphasis added).

<sup>45</sup> *Id.*

<sup>46</sup> 7 U.S.C.A. §§ 6503, 6506(a)(3),(7), 6507(c), 6519-20 (West Supp. 1997).

<sup>47</sup> *Id.*

<sup>48</sup> 7 U.S.C.A. § 6514(a) (West Supp. 1997).

### 3. USDA-Approved State Programs

States can assume administrative responsibility for the implementation and enforcement of the NOP through USDA-approved state programs.<sup>49</sup> Approved state programs assume the authority of the federal government to monitor and enforce federal organic production/handling standards and may, with specific USDA approval, establish additional organic requirements that exceed federal standards.<sup>50</sup>

OFPA does not authorize states to administer accreditation programs in conjunction with an approved state program or otherwise. Rather, OFPA expressly requires the Secretary to administer the accreditation program<sup>51</sup> because allowing states to administer the accreditation process would undermine OFPA's partnership balance and create potential barriers to interstate commerce in organic products.

For example, allowing states to administer state accreditation programs would give state certifying agents an unfair competitive advantage over private certifying agents because states would be able to restrict or prohibit the activities of private certifiers by denying or revoking accreditation status. This could put a state in the position of monopolizing the certification industry within the state. Furthermore, states would be able to accredit their own agencies as certifying agents, raising a serious conflict of interest issue (lack of independent third-party verification) that undermines the integrity of the accredited state certification agency and accreditation process.

Allowing states to implement accreditation programs would disrupt and burden interstate commerce by creating potentially inconsistent and duplicative accreditation standards and procedural requirements, which in turn would increase the cost of interstate transactions in the organic industry. OFPA avoids these problems by preempting state authority from establishing and/or administering a state accreditation program.

### 4. USDA-Accredited State Certifying Agents

State agencies may apply to the USDA so that they can become accredited as a certifying agent.<sup>52</sup> This application process is separate and distinct from the application for approval of a state program.<sup>53</sup>

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<sup>49</sup> 7 U.S.C.A. § 6503(b) (West Supp. 1997).

<sup>50</sup> 7 U.S.C.A. § 6507(b) (West Supp. 1997).

<sup>51</sup> 7 U.S.C.A. § 6514 (West Supp. 1997).

<sup>52</sup> *Id.* § 6514(a).

<sup>53</sup> *Id.* § 6514(b).

Even in states with USDA-approved state organic programs, a state agency must submit a separate application to the USDA to become accredited as a certifying agent.<sup>54</sup> States must meet the same accreditation criteria and qualifications as private certification organizations, and once accredited, state certifying agents must function under the same rules and administrative procedures as private certifying agents.<sup>55</sup>

OFPA allows accredited certifying agents to do business in any state.<sup>56</sup> This is an important provision because it protects the interests of private certifying agents in the NOP process. The committee report on the legislative history of OFPA states:

Several state departments of agriculture contacted the committee and said that, while they supported organic certification, they preferred to continue using the system of private third party certification organizations rather than to develop new state programs to undertake this responsibility. Other state departments of agriculture felt strongly that they would like to take over the certification program completely.

The committee decided that a certifying agent may be a state employee or a private entity. In this way the committee hopes to take advantage of the network of existing entities already engaged in certification.

The committee intends to allow more than one certifying entity to certify within a state. For example, in one state the Natural Organic Farmers Association, the Organic Crop Improvement Association, as well as state employees could all be involved in certification.<sup>57</sup>

Maintaining a level playing field between accredited state and private certifying agents is essential to maintain the partnership role of the private sector in the OFPA certification scheme. An independent third-party accreditation system, administered by the NOP, provides a balance needed to preserve this partnership role.

<sup>54</sup> *Id.* § 6514(b).

<sup>55</sup> OFPA makes no distinction between state and private certification agents for the purpose of certifying agent qualifications. 7 U.S.C.A. § 6514(b) (West Supp. 1997) states:

To be accredited as a certifying agent under this section, a governing state official or private person shall—

- (1) prepare and submit, to the Secretary, an application for such accreditation;
- (2) have sufficient expertise in organic farming and handling techniques as determined by the Secretary; and
- (3) comply with the requirements of this section and section 6515 of this title.

<sup>56</sup> 7 U.S.C.A. § 6503(d) (West Supp. 1997).

<sup>57</sup> S. Rep. No. 357, 101st Cong., 2d Sess. 294 (1990), *reprinted in* 1990 U.S.C.C.A.N. 4656, 4948.

## 5. Peer Review

OFPA includes a provision that authorizes a peer review panel (appointed by the Secretary) to assist the USDA in an accreditation process.<sup>58</sup> Peer review will utilize outside certification experts to help the USDA evaluate the qualifications of certification organizations that apply for accreditation. However, the peer review model recommended by the NOSB and supported by many members of the private organic community takes a broader view.<sup>59</sup>

The NOSB views peer review as a means to encourage involvement and participation in the accreditation process by a wide range of "stakeholders."<sup>60</sup> Although there has been a great deal of controversy and disagreement in the private sector regarding proposed peer review models, the NOSB and the organic community at large do agree on a fundamental objective. The objective ensures private sector participation in the development of accreditation policies, standards, and procedures, as well as direct private sector participation in the accreditation decision-making process.

## 6. Is Peer Review Mandatory?

OFPA expressly states that the Secretary must consider a "peer review report" in the accreditation decision-making process, which leads to the conclusion that peer review is a mandatory component of the accreditation program.<sup>61</sup> However, OFPA also states the Secretary

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<sup>58</sup> 7 U.S.C.A. § 6516 (West Supp. 1997).

<sup>59</sup> The NOSB submitted final recommendations on the peer review process to the Secretary in June 1994. These recommendations stress the importance of the peer review process in maintaining a government/private sector partnership, and they support a role for the private sector in deciding both the criteria for evaluating certification organizations and the approval of applicants for accreditation. Although there was considerable disagreement between private sector organizations during public comment sessions at NOSB public meetings concerning the details of regional representation and peer qualifications, there was consensus regarding the role of the peer review in the accreditation decision making process.

<sup>60</sup> Producers, manufacturers, certifiers, consumers, and environmentalists are some of the stakeholder constituencies that have been acknowledged in developing the NOSB peer review recommendations.

<sup>61</sup> 7 U.S.C.A. § 6516 (West Supp. 1997) addresses the peer review process:  
*Section 6516. Peer Review of Certifying Agents.*

(a) *Peer Review.* In determining whether to approve an application for accreditation submitted under Section 6514 of this title, the Secretary shall consider a report concerning such applicant that shall be prepared by a peer review panel established under subsection (b) of this section. (emphasis added).

“may” establish a peer review panel of three or more persons, indicating that the peer review panel may be subject to the discretion of the Secretary, at least in terms of its size.<sup>62</sup>

The NOSB resolved the potential conflict between these provisions by concluding that the two sections mean the peer review process is mandatory, but the Secretary has the discretion to decide the organizational structure of the panel.<sup>63</sup> However, the peer review process continues to be a major point of contention between the USDA and the private sector, and the USDA has publicly opposed the peer review process at NOSB meetings because of cost and logistic problems associated with peer review involvement.<sup>64</sup> At this point, it is unclear how and to what extent the USDA will incorporate a meaningful role for the peer review panel in the accreditation process, but likely it will be smaller and subject to more limitations than many proponents of the peer review model expect.<sup>65</sup>

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(b) *Peer Review Panel.* To assist the Secretary in evaluating applications under Section 6514 of this title, the Secretary *may* establish a panel of not less than three persons who have expertise in organic farming and handling methods, to evaluate the state governing official or private person that is seeking accreditation as a certifying agent under such section. Not less than two members of such panel shall be persons who are not employees of the Department of Agriculture or of the applicable state government.

<sup>62</sup> *Id.*

<sup>63</sup> The NOSB submitted recommendations to the Secretary taking the position that peer review is a mandatory component of the accreditation process. Because 7 U.S.C.A. § 6516(a) (West Supp. 1997) clearly mandates the consideration of a peer review report (which requires the existence of a peer review panel to write it), the use of the word “may” in subsection (b) should be construed to mean that the Secretary has the discretion to establish a peer review panel of three or more persons. This would make subsection (b) consistent with subsection (a) and would also be consistent with the private and public partnership relationship that Congress intended.

<sup>64</sup> The USDA believes that it will be difficult to appoint and pay for a peer review panel that is broadly representative of the organic community and its regional differences. The USDA appears to be reluctant to share decision making authority with the private sector.

<sup>65</sup> If the USDA is receptive to the concept of a peer review panel, the inconsistency between subsections (a) and (b) of 7 U.S.C.A. § 6516 (West Supp. 1997) will be inconsequential. However, if the USDA is not inclined to implement a peer review panel in the federal accreditation program, the private sector may decide to go back to Congress to amend OFPA to make peer review a mandatory component of the accreditation process.

#### D. The NOSB

The NOSB sets the fourth component of the national organic certification program. OFPA requires the Secretary to appoint 15 NOSB members representing farmer, handler, retail, environmental, consumer, scientific, and certifier constituents.<sup>66</sup>

The NOSB has two roles. First, the NOSB is directly responsible for establishing a "proposed" National List of Approved and Prohibited Substances (the proposed National List) that will form the basis for an "established" National List of Allowed and Prohibited Substances (the National List).<sup>67</sup> Second, the NOSB is authorized to make general recommendations to the Secretary concerning the implementation of NOP regulations.<sup>68</sup>

Similar to the accreditation program, the NOSB was specifically designed as a mechanism for private sector participation in the NOP.<sup>69</sup> In its capacity as an advisory board, the NOSB essentially acts as the voice of the private sector. Although NOSB recommendations are generally not binding on the Secretary, the NOSB includes some of the top experts in the organic industry. As such, NOSB recommendations should carry considerable weight.<sup>70</sup>

Presumably, the NOSB will have an ongoing role and will continue to advise the Secretary after the NOP is established and the National List is published. OFPA has a sunset provision that specifically requires the NOSB to review all exemptions and prohibitions on the National List of approved and prohibited substances within five years of

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<sup>66</sup> 7 U.S.C.A. § 6518(b) (West Supp. 1997).

<sup>67</sup> 7 U.S.C.A. § 6517(d) (West Supp. 1997). The National List will become "established" when the NOP publishes the National List as a final regulation. *Id.* § 6517(d)(5). The Secretary has the final authority to decide which substances will be included in the published National List. *Id.* § 6517(a). However, the NOSB plays a crucial role in this decision process because the Secretary cannot add synthetic substances to the National List that are not included in the NOSB proposed National List. *Id.* § 6517(d)(2).

<sup>68</sup> 7 U.S.C.A. § 6518(a) (West Supp. 1997).

<sup>69</sup> *Id.* § 6518(b).

<sup>70</sup> The National Organic Standards Board (NOSB) has submitted detailed, final recommendations to the Secretary, and these recommendations will presumably form a basis for developing the NOP. NOSB recommendations are not binding on the Secretary, but they do represent substantial public input from experts in the field and therefore provide a solid basis for developing standards. NOSB recommendations and information about the NOP can be obtained from the Director of the NOP, USDA/AMS/TMD, 4006 South Building, P.O. Box 96456, Washington, D.C., 20090-6456 (202-720-2704).

publication.<sup>71</sup> Essentially, the National List must be reviewed at least every five years. Because it is an ongoing process (substances will be added to and taken off the National List for many years to come), the NOSB will be needed to evaluate these changes.<sup>72</sup> The NOSB will also be needed to evaluate the ongoing performance of the NOP and provide recommendations as needed to improve the program.

### III. NATIONAL ORGANIC STANDARDS AND THE NATIONAL LIST

The first part of this paper presented an overview of the National Organic Certification Program and closely examined the accreditation and certification requirements in the Organic Food Production Act. This section examines the regulatory standards that will be used to define organic food products. It focuses on the procedural requirements for the development of the National List and discusses the impact that national organic standards will have on the marketing of organic products in the United States.

#### A. Purpose of the National List

OFPA is premised on the fundamental principal that synthetic chemicals should not be used in the production or handling of organic food products.<sup>73</sup> As a result, OFPA generally prohibits the use of synthetic chemicals in organic products.<sup>74</sup> OFPA also prohibits the use of natural chemicals that are dangerous to human health or the environment.<sup>75</sup> Although OFPA bases its definition of "organic" on the prohibition of synthetic chemical use in the production and handling of agricultural products, it does allow for exceptions to this general rule. The National List is the procedural mechanism for establishing these exceptions.<sup>76</sup>

Synthetic chemicals that are determined to be safe for human consumption and the environment may be allowed in the production or

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<sup>71</sup> 7 U.S.C.A. § 6517(e) (West Supp. 1997).

<sup>72</sup> In particular, the NOSB will have to propose the inclusion of any new synthetic substances on the National List before the Secretary can decide whether to include those substances in the published National List. 7 U.S.C.A. § 6517(e) (West Supp. 1997).

<sup>73</sup> The National List is important because it will determine the specific chemical substances that can and cannot be used in the production/handling of organic food products. 7 U.S.C.A. §§ 6517, 6504(1) (West Supp. 1997).

<sup>74</sup> *Id.*

<sup>75</sup> 7 U.S.C.A. § 6517(c)(2) (West Supp. 1997).

<sup>76</sup> *Id.* § 6517(c)(1)(A).

handling of organic products if (1) the synthetic chemical is necessary to the production or handling of the product, and (2) there are no "commercially available" natural substitutes.<sup>77</sup> The intent of the law is to encourage the organic industry to develop feasible natural substitutes for allowed synthetic chemicals.<sup>78</sup> Therefore, each of the allowed synthetic substances included on the National List will be periodically reviewed to determine if it should be taken off the list because the substance is no longer needed or a substitute has become commercially available.<sup>79</sup>

### B. Secretary Has Final Authority

The Secretary has final authority and responsibility for determining which substances will appear on the established National List.<sup>80</sup> However, this authority is subject to the following limitations and restrictions:

- 1) The established National List must be based upon a proposed National List developed by the NOSB.<sup>81</sup>
- 2) The Secretary cannot include exemptions for the use of specific synthetic substances unless those exemptions are contained in the proposed National List developed by the NOSB.<sup>82</sup>
- 3) Substances prohibited by any form of federal regulatory action cannot be included in the National List.<sup>83</sup>
- 4) The Secretary must publish the proposed National List in the Federal Register and seek public comment before establishing a final National List.<sup>84</sup>
- 5) The Secretary must publish the final National List in the Federal Register along with a discussion of public comments.<sup>85</sup>

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<sup>77</sup> *Id.* § 6517(c)(1)(A). The statute also allows for the exemption of active synthetic ingredients in certain categories of substances and synthetic inert ingredients that are not classified by the EPA as being of toxicological concern. *Id.* § 6517(c)(1)(B).

<sup>78</sup> *Id.* § 6517(e). This provision requires reevaluation of every substance included on the National List at least every five years. The purpose of this provision is to determine if the substance should remain or be removed from the National List based on new information or changing circumstances.

<sup>79</sup> *Id.*

<sup>80</sup> The National List is important because it will determine the specific chemical substances that can and cannot be used in the production/handling of organic food products. 7 U.S.C.A. § 6517 (West Supp. 1997).

<sup>81</sup> *Id.* § 6517(d)(1).

<sup>82</sup> *Id.* § 6517(d)(2).

<sup>83</sup> *Id.* § 6517(d)(3).

<sup>84</sup> *Id.* § 6517(d)(4).

<sup>85</sup> 7 U.S.C.A. § 6515(d)(5) (West Supp. 1997).

### C. *The Role of the NOSB*

Congress delegated certain decision-making responsibilities to the NOSB regarding the National List,<sup>86</sup> and it is important to understand why. As previously mentioned, when OFPA was passed in 1990, inconsistent state laws and inconsistent certification standards in the private sector were creating confusion and uncertainty about organic standards and the authenticity of organically labeled products. Interstate transactions in organic products were becoming difficult due to increasing state law trade barriers, concerns about fraud and the misrepresentation of organic products generated consumer demands for accountability, and explosive growth in the organic marketplace which put pressure on state and federal government to regulate marketing activities. OFPA was passed to address these problems by facilitating a regulatory process based on a cooperative relationship between the government and the private sector.

The role of the NOSB ensures private sector participation in the development of national standards. OFPA expressly gives the NOSB the exclusive authority to decide which synthetic chemicals may be included on the National List.<sup>87</sup> Congress did not want to waste limited federal resources "reinventing the wheel" when the private sector could provide these resources and do a better job at making this decision than government agencies with limited experience and expertise.<sup>88</sup>

On the other hand, NOSB members, as representatives of the private sector, have vested interests to protect. Organic farmers need effective pesticides to combat disease and infestations, food manufacturers need processing substances to manufacture food products, and retailers and handlers need substances to prevent spoilage and extend the shelf life of food products. Consumers simply want low cost chemical free food. Balancing these divergent and sometimes competing interests is not easy.

To avoid potential conflicts and to protect the public's interests, OFPA gives the Secretary the final authority to approve the inclusion of substances on the National List.<sup>89</sup> As a result, the NOSB can place synthetic chemicals on the proposed National List, but the Secretary

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<sup>86</sup> 7 U.S.C.A. § 6517 (West Supp. 1997).

<sup>87</sup> The Secretary cannot place a synthetic substance in the National List until the NOSB places the substance in the proposed National List or in proposed amendments to the National List. *Id.* § 6517(d)(2).

<sup>88</sup> 7 U.S.C.A. §§ 6503, 6506(a)(3),(7), 6507(c), 6519-20 (West Supp. 1997).

<sup>89</sup> 7 U.S.C.A. § 6517 (West Supp. 1997).

can remove them.<sup>90</sup> In effect, this creates a balance of power that maximizes the resources of each sector in a partnership effort and ensures responsible and competent decision making.

#### *D. Responsibilities of the NOSB*

The NOSB is an advisory board and is responsible for making recommendations to the Secretary to assist in the implementation of the NOP.<sup>91</sup> As mentioned previously, NOSB recommendations are generally not binding on the Secretary and can therefore be accepted or rejected at the Secretary's discretion. What is unusual about the NOSB as an advisory board is the extent to which the statute gives it specific decision making authority and responsibilities. OFPA charges the NOSB with four specific responsibilities regarding the National List:

- 1) Convening technical advisory panels to evaluate materials considered for inclusion in the proposed National List.<sup>92</sup>
- 2) Reviewing all botanical pesticides used in agricultural production to consider whether any of the substances should be in the list of prohibited natural substances.<sup>93</sup>
- 3) Reviewing and identifying other categories of natural substances to consider whether any should be included on the list of prohibited natural substances.<sup>94</sup>
- 4) Reviewing and determining which synthetic chemical substances will be included on the proposed National List.<sup>95</sup> The decision to include synthetic chemicals on the National List must be based on the technical advisory panel reports and statutory guidelines that provide specific criteria and procedural guidelines.<sup>96</sup>

#### *E. Procedural Requirements Regarding the National List*

OFPA establishes three general procedural requirements that the NOSB must follow in developing the National List:<sup>97</sup>

- 1) The NOSB must review "appropriate sources" (including information from the EPA and the National Institute of Environmental Health Studies) concerning the potential for adverse human and environmental effects of each substance being considered.

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.* § 6517.

<sup>92</sup> 7 U.S.C.A. § 6518(k)(3) (West Supp. 1997).

<sup>93</sup> 7 U.S.C.A. § 6518(k)(4) (West Supp. 1997).

<sup>94</sup> 7 U.S.C.A. § 6518(k)(1),(2) (West Supp. 1997).

<sup>95</sup> 7 U.S.C.A. § 6517 (d)(1),(2) (West Supp. 1997).

<sup>96</sup> 7 U.S.C.A. §§ 6517(c), 6518(k)(3), 6518(l),(m) (West Supp. 1997).

<sup>97</sup> *Id.* § 6517.

- 2) The NOSB must work with manufacturers of substances to obtain a complete list of ingredients to determine whether these substances contain inert materials that are synthetically produced.
- 3) The NOSB must submit to the Secretary the results of evaluations by technical advisory panels and the NOSB of all substances being considered for inclusion in the National List. This report should demonstrate that the NOSB has complied with OFPA's evaluation procedures.

Synthetic substances included in the allowed synthetic substances list must not be harmful to human health or the environment;<sup>98</sup> must be necessary because of the unavailability of whole or natural substitute products;<sup>99</sup> and must be consistent with organic farming and handling.<sup>100</sup> Additionally, these substances must be used in production and contain an active synthetic ingredient in the categories listed in the statute<sup>101</sup> or be used in production and contain synthetic inert ingredients that are not classified by the EPA as inerts of toxicological concern.<sup>102</sup> Natural substances included on the prohibited natural substances list must be harmful to human health or the environment and must be inconsistent with organic farming or handling and the purposes of OFPA.<sup>103</sup>

The NOSB is required to look at seven distinct criteria in the evaluation of each specific substance being considered for inclusion in the proposed National List.<sup>104</sup> Specifically, the NOSB must consider each of the following criteria in the decision process:

- 1) The potential for detrimental chemical interactions when combined with other materials used in organic farming systems.
- 2) The toxicity and mode of action of the substance and its breakdown products or contaminants and their persistence and areas of concentration in the environment.
- 3) The probability of environmental contamination during manufacture, use, misuse, or disposal of the substance.
- 4) The effect of the substance on human health.

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<sup>98</sup> *Id.* § 6517(c)(1)(A)(i).

<sup>99</sup> *Id.* § 6517(c)(1)(A)(ii).

<sup>100</sup> *Id.* § 6517 (c)(1)(A)(iii).

<sup>101</sup> *Id.* § 6517(c)(1)(B)(i).

<sup>102</sup> *Id.* § 6517(c)(1)(B)(ii). Substances that are non-synthetic but are not organically produced may also be included in the National List. *Id.* § 6517(c)(1)(B)(iii).

<sup>103</sup> 7 U.S.C.A. § 6517(c)(2) (West Supp. 1997).

<sup>104</sup> 7 U.S.C.A. § 6518(m) (West Supp. 1997). The established National List must include "an itemization, by specific use or application, of each synthetic substance permitted . . ." This indicates that the board may have to evaluate each substance in the context of each use and application of that substance. 7 U.S.C.A. § 6517(b) (West Supp. 1997).

- 5) The effects of the substance on biological and chemical interactions in the agro-ecosystem, including the physiological effects of the substance on soil organisms (including the salt index and solubility of the soil), crops, and livestock.
- 6) The alternatives to using the substance in terms of practices or other available materials.
- 7) Its compatibility with a system of sustainable agriculture.

Although OFPA requires consideration of each of the seven criteria for each individual substance being evaluated, it does not establish a threshold standard for each criteria. Nor does OFPA require a substance to meet all seven criteria to be approved for inclusion on the National List. Consequently, it appears that the NOSB has the latitude to weigh each criterion in a balance test.<sup>105</sup>

#### *F. Technical Advisory Panels and Reporting Procedures*

The NOSB is required to convene technical advisory panels to provide scientific evaluations of the materials being considered for inclusion on the list.<sup>106</sup> OFPA does not establish any particular qualifications or requirements for members of a technical advisory panel. The law simply states that "such panels may include experts in agronomy, entomology, health sciences and other relevant disciplines."<sup>107</sup> Therefore, NOSB members, USDA employees, or anyone else with scientific or technical expertise can be appointed to advisory panels.

Each evaluation by the technical advisory panel must be based on the seven mandatory criteria as mentioned above to determine whether or not the substance is appropriate for the National List.<sup>108</sup> The NOSB is required to submit to the Secretary, along with the proposed National List or any other proposed amendments to such list, the results of the technical advisory panel evaluation and the NOSB evaluation of all substances considered for inclusion on the National List.<sup>109</sup>

Finally, the NOSB must establish procedures under which persons may petition for an evaluation of a particular substance for inclusion

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<sup>105</sup> In many cases, the NOSB will not have adequate information about a specific substance to apply a given criterion but can nevertheless proceed to evaluate that substance and make a determination, as long as a good faith effort has been made to obtain the information needed to consider all seven criteria in the evaluation process and there is substantial evidence to support the final decision.

<sup>106</sup> 7 U.S.C.A. § 6518(k)(3) (West Supp. 1997).

<sup>107</sup> *Id.*

<sup>108</sup> 7 U.S.C.A. § 6518(m) (West Supp. 1997).

<sup>109</sup> 7 U.S.C.A. § 6518 (l),(3) (West Supp. 1997).

in the National List.<sup>110</sup> The petition process will provide a mechanism for citizens to request the NOSB to add or delete a substance from the National List.

*G. Determining Whether Substances Contain Synthetic Inert Materials*

There has been considerable debate at NOSB public meetings concerning the statutory requirement that the NOSB must review manufacturers' ingredient lists to determine whether the ingredients contain inert synthetic materials. While this could prove to be a colossal task (and there may not be sufficient technical support to help the NOSB make these determinations), OFPA is nevertheless quite clear on this point.<sup>111</sup>

The use of the word "shall" in the section of OFPA that addresses manufacturers ingredient lists imposes a legal duty on the NOSB to evaluate the manufacturers ingredient lists to determine if there are inert synthetic substances present.<sup>112</sup>

Furthermore, assuming that the NOSB does determine that synthetically produced inert materials are contained in a substance being considered, it appears that the NOSB must then determine whether the synthetically produced inert materials meet the exemption guidelines set out in the statute.<sup>113</sup>

Both the NOSB and USDA have expressed reluctance to take on this responsibility because the task is overwhelming. The NOSB can relieve some of the burden of its responsibility to review inert materials by requiring manufacturers to (1) produce adequate ingredient lists, and (2) provide the NOSB with sufficient data to show that the syn-

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<sup>110</sup> 7 U.S.C.A. § 6518(n) (West Supp. 1997).

<sup>111</sup> 7 U.S.C.A. § 6518(l)(2) (West Supp. 1997) states:

REQUIREMENTS:

In establishing the proposed National List or proposed amendments to the National List, the Board shall . . .

- (2) work with manufacturers of substances considered for inclusion in the proposed National List to obtain a complete list of ingredients and determine whether such substances contain inert materials that are synthetically produced. (emphasis added).

<sup>112</sup> *Id.*

<sup>113</sup> This conclusion is based on 7 U.S.C.A. § 6504 (West Supp. 1997), which states that organically sold or labeled products must "have been produced and handled without the use of synthetic chemicals, except as otherwise provided in this chapter . . ." "As otherwise provided" refers to the exemption guidelines in 7 U.S.C.A. § 6517(c) (West Supp. 1997).

thetically produced inert material meets OFPA's guidelines for exemptions.

#### *H. Maintaining the Integrity of the Certification Process*

The success of the NOP will depend, to a large extent, on the integrity of the national organic standards developed by the NOSB and the NOP staff. Weak standards will surely erode consumer confidence in organic products and undermine the NOP. Very strict standards may make it difficult for some organic producers and handlers (particularly food processors and manufacturers) to enter into or expand organic production and marketing activities.<sup>114</sup> Balancing these competing interests will be difficult, but the stability and growth of the organic industry depends on it.

The National List is the centerpiece that will determine the quality and integrity of the national organic standards, and the NOSB will be held accountable for the decisions it makes to include substances on that list. It is therefore essential that the NOSB carry out all of the procedural requirements necessary to comply with the law and develop a defensible record of the decisions being made.<sup>115</sup>

#### IV. INTERNATIONAL HARMONIZATION OF ORGANIC STANDARDS AND CERTIFICATION REQUIREMENTS

This section discusses the efforts of sovereign nations and international non-government organizations (NGOs) to negotiate the harmoni-

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<sup>114</sup> Organic livestock standards are particularly controversial. The Federal Meat Inspection Act, 21 U.S.C.S. § 601 (Law. Co-op. 1996), and the Poultry Products Inspection Act, 21 U.S.C.S. § 451 (Law. Co-op. 1996) require USDA pre-approval of all labels placed on meat products. 21 U.S.C.S. § 607(d) (Law. Co-op. 1996); 21 U.S.C.S. § 457 (c) (Law. Co-op. 1996). The USDA Food Safety Inspection Service (FSIS) is responsible for making these pre-approval labeling determinations, and FSIS has decided not to approve organic labels on meat and poultry products until the NOP has established federal standards through the federal regulatory process. There is no statutory prohibition regarding the labeling of meat products prior to the implementation of USDA national organic standards, and FSIS has not promulgated any regulations establishing this policy. Furthermore, this policy decision by FSIS is not consistent with the general USDA policy of allowing certification labels on other kinds of organically produced food products prior to the implementation of national organic regulatory standards. Consequently, if the NOP is not implemented soon, organic livestock producers (and possibly consumer advocacy organizations) are likely to take legal action to force the issue.

<sup>115</sup> 7 U.S.C.A. §§ 6503, 6506 (West Supp. 1997).

zation of international organic standards through Codex.<sup>116</sup> It also discusses enforcement issues under National Certification Programs and International Trade Agreements.

#### A. *Harmonization of International Organic Standards*

Similar to the United States, nations throughout the world are implementing laws to regulate the production and handling of organic foods. Because these laws differ, a product that is certified organic in one country may not meet the certification requirements of another country. This situation is similar to the interstate commerce conflicts that precipitated the enactment of OFPA.

As a result of inconsistent regulatory standards and the multiple jurisdiction problems that arise in international transactions, international trade in organic products is becoming more complicated and expensive. Consumers are concerned about the integrity and authenticity of organically certified products traded in international markets and in some countries organic regulatory standards are being used to keep foreign organic products out. To address these problems, the Codex Committee on Food Labeling has commenced a negotiation process to reach consensus on international organic standards.<sup>117</sup>

The broad objective of Codex is to "harmonize" scientifically-based regulatory standards that nations promulgate and enforce internally. One goal is to eliminate unfair regulatory trade barriers that rely on health, environmental, or other technological standards that are not widely accepted in the international community. Another goal is to provide reliable scientifically based guidelines in which consumers from every nation can trust. The harmonization of international organic certification standards does not require a uniform approach to the regulation of organic production and handling in every nation, but it does require sufficient commonality in certification standards and procedures to ensure global acceptance of certified organic food products.

#### B. *Equivalency*

The concept of harmonization is based on regulatory "equivalency." Under an equivalency approach, each nation will attempt to meet the baseline regulatory standards that the international community has agreed upon through the Codex process. Each nation will be allowed to evaluate the certification standards and regulatory requirements in

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<sup>116</sup> See Codex, *supra* note 2.

<sup>117</sup> 7 U.S.C.A. § 6504(1) (West Supp. 1997).

the country of origin regarding all imported organic products to make sure that the imported products meet Codex standards and applicable national laws.

National regulatory standards that are consistent with Codex organic standards will theoretically be accepted by every nation because the Codex standards represent international consensus. National regulatory standards that are inconsistent with Codex organic standards may be rejected by other nations. In effect, Codex organic standards will provide a model against which all national organic standards will be measured.

However, it is important to understand Codex standards are not regulations and are not enforceable as such.<sup>118</sup> They are only guidelines that will be used to assess the reasonableness and fairness of national regulatory standards. Although this is an imprecise process that is open to interpretation and controversy, it does allow for differences in points of view and gives nations some degree of flexibility and autonomy to set their own priorities, determine their own interests, and evaluate for themselves the credibility and integrity of imported organic food products.<sup>119</sup> It is a process that relies more on cooperation based on mutual interests than it does on enforcement mechanisms.

### *C. Who Will Enforce National and International Organic Certification Standards?*

Enforcement of organic standards is a critical issue for consumers. Consumers choose organic products (and usually pay more for them than they would pay for the same products produced by conventional methods) based on expectations that organic food is safer and "environmentally friendly." Some consumers, such as the chemically sensitive, rely on the veracity of organically labeled products to avoid chemicals that could seriously jeopardize their health. It cannot be overstated that consumer trust in organic certification and labeling processes is crucial to the success and growth of the organic food industry. Effective enforcement of certification and labeling requirements is essential to maintain that trust.

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<sup>118</sup> *Id.*

<sup>119</sup> For example, OFPA gives the U.S. Secretary of Agriculture the authority to "determine that [imported organic] products have been produced and handled under an organic certification program that provides safeguards and guidelines governing the production of such products that are at least equivalent to the requirements of this chapter." 7 U.S.C.A. § 6505(b) (West Supp. 1997).

Given the extraordinary growth curve in the demand for organic food products and the premium prices that producers routinely get for organic products, there is substantial economic incentive in the food production sector to market food products as organic. Unfortunately, this economic incentive is motivating some producers, food processors, and food retailers to sell uncertified organic products and sometimes misrepresent conventionally produced food products as being organic. They want higher prices without incurring the responsibilities and costs associated with the transition to organic production and handling systems.<sup>120</sup> To minimize fraudulent activity and ensure the integrity and authenticity of organic products, consumers need and demand both reliable certification standards and procedures and effective enforcement mechanisms.

In the United States, enforcement responsibility falls squarely on the shoulders of the Secretary.<sup>121</sup> However, NOP has publicly stated on several occasions that, contrary to the requirements of the law, it does not intend to play an active role in the enforcement process,<sup>122</sup> and intends to place the burden of enforcement on the states and the accredited certifying agents who will evaluate and inspect organic production and handling operations and grant certification status.

#### *D. State Enforcement is Not Enough*

It is doubtful that states will be able to adequately enforce federal certification standards. Some states, like California and Texas, have developed comprehensive and capable organic certification programs that include some measure of enforcement, but the cost of carrying out enforcement activities is very expensive. Whether states will continue

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<sup>120</sup> 7 U.S.C.A. § 6504(1) (West Supp. 1997).

<sup>121</sup> 7 U.S.C.A. §§ 6506(a)(7), 6519 (West Supp. 1997). The Food and Drug Administration (FDA) has traditionally monitored and enforced federal food labeling laws and has general enforcement responsibilities concerning the labeling of all food products that are subject to federal food labeling regulatory requirements. Consequently, USDA shares enforcement responsibilities with the FDA regarding the labeling of organic food products. However, OFPA does not give any guidance on the relationship between USDA and FDA in their respective roles as the guardians and enforcers of organic food labeling standards and requirements. This is a complex issue that has received very little attention in the public discussions and debate surrounding the implementation and enforcement of OFPA, and the issue needs to be addressed. However, it is an issue that is beyond the scope of this article.

<sup>122</sup> NOP staff have verbally stated in NOSB meetings (and two seminars attended by the author) that USDA lacks the financial and human resources needed to carry out enforcement activities.

to invest in the development of adequate enforcement mechanisms is uncertain. However, it is clear that some states do not intend to establish organic certification programs or enforce federal certification standards.<sup>123</sup> These states expect the federal government to carry out these responsibilities, and they are simply not going to invest their limited resources in this effort.

Reliance on a state enforcement system would result in inconsistent enforcement activities from state to state, which would undermine the consistency of organic standards and lower the integrity of certified organic products in the interstate marketplace. Consumers in states with minimal enforcement capacity would not be able to rely on the integrity of organic products to the same extent as consumers in states with highly developed enforcement programs. States can certainly provide tremendous assistance in enforcement, but they cannot carry it alone. Only the federal government can provide the oversight necessary to ensure consistency in enforcement from state to state.

#### *E. Private Certifiers Can Help*

Certifying agents are in a position to closely monitor the production and handling operations that they have certified, and they can therefore provide needed assistance in the enforcement process. Clearly, certifying agents have the responsibility to oversee the implementation of regulatory requirements and report any substantial violation of the law,<sup>124</sup> but they are not “organicops.”

The primary role of the certifying agent is to assist clients in developing and implementing an organic plan that meets regulatory requirements. It is a proactive role that involves confidentiality and requires the building of trust through the encouragement of sustainable farming practices.<sup>125</sup> Policing client activities and enforcing regulatory requirements through sanctions and penalties is not consistent with this interactive and supportive role. Furthermore, private certification organizations do not have the resources or the sovereign authority to enforce the law. They do have expertise in certification processes and they can help the federal government minimize the cost of enforcement by monitoring their clients and the use of certification seals, but their primary role as a consultant and resource should not be compromised by enforcement responsibilities.

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<sup>123</sup> 7 U.S.C.A. § 6504(1) (West Supp. 1997).

<sup>124</sup> 7 U.S.C.A. § 6519(d) (West Supp. 1997).

<sup>125</sup> 7 U.S.C.A. § 6515(g) (West Supp. 1997).

*F. Enforcement of National Standards for Imported Products*

Importation presents its own set of problems and obstacles that must be overcome to stabilize the interrelationship between national certification programs and maintain consumer trust in imported organic products. Clearly, each nation has the sovereign authority to regulate the labeling and sale of organic products within its jurisdiction and use regulations to stop the importation of organic products that do not meet international standards. However, the use of regulatory authority to unreasonably or unfairly stop the importation of bona fide organic products is an unacceptable trade barrier that will interfere with the growth of the international organic industry. Harmonization will hopefully ease these tensions and establish an appropriate balance between the need for regulatory enforcement and free trade by encouraging consistency in national organic laws and regulations without infringing on the sovereign powers of nation states.

OFPA gives the USDA authority to decide whether an imported product has been certified by a competent foreign certification organization according to certification standards that are equivalent to United States certification standards.<sup>126</sup> Given the fact that the USDA lacks the resources needed to implement the NOP and establish an accreditation program to evaluate certification organizations in the United States, it is unlikely that USDA will be able to carry out its responsibility to evaluate foreign certification organizations. This is a serious problem that is being overlooked by the USDA officials and the private sector.

Currently, the USDA is doing virtually nothing to protect United States consumers from misrepresentation and fraud regarding the importation of organic foods produced and certified in other countries. Although many of the organic products being imported into this country are certified by reputable certification organizations, some of these products are certified by unknown entities and others by certification organizations lacking the competence needed to verify organic production and handling operations. If something is not done soon to establish reliable USDA screening processes and effective enforcement procedures to monitor these international transactions, the organic industry will inevitably be faced with a marketing scandal and public relations crisis that could undermine the credibility of the organic certification process.

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<sup>126</sup> 7 U.S.C.A. § 6517 (West Supp. 1997).

## CONCLUSION

Organic certification is not simple.<sup>127</sup> It will take years to get national and international organic certification systems straightened out. We need to develop and nurture organic food production and manufacturing systems because they offer a viable alternative to chemically intensive conventional food production and manufacturing systems that threaten our health and environment. As environmental policy issues become more difficult and more serious in the future, countries throughout the world will be forced to adopt radical agricultural conservation measures. The organic food system has already demonstrated it works, and countries that invest in the development of organic food production and handling systems will be ahead of the game. We cannot afford to waste the opportunities and the benefits that the organic food industry has to offer.

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<sup>127</sup> The National List will be established when it is published as a final NOP rule. *Id.* § 6517(d).