

## EXECUTIVE SUMMARY

### Background of the USDA's Organic Labeling Program

The federal rules authorizing the use of the USDA organic seal on food products are 5 years old, and are the touchstone of mainstream consumer acceptance of organic products. Prior to the availability of the USDA seal, the organic products marketplace languished. The current organic rules are the result of adoption by the USDA of recommendations from a citizen advisory board created by Congress and 10 years of notice and comment rulemaking based on those recommendations. As might be expected with a new federal program as comprehensive as the nearly 500 page organic rule, certain parts of the rules were found to be inconsistent with the statute.

### The Adverse Effect of the June 2005 Court Ruling

The June 2005 court ruling impacted three parts of the federal rules. First, it effectively blocked today's use in organic products of small amounts of harmless substances like baking soda, pectin, ascorbic acid, vitamins and minerals etc. the so-called "allowed synthetics" in processed food products bearing the USDA's organic seal. Second, it required the rules relied upon by small dairy farms to transition to organic management practices be revised with the unintended result that making the change will be significantly more costly after the ruling. Third, it disallowed the procedure implemented by the Secretary's organic certifying agents throughout the country for recognizing the effect of crop disasters and other market distorting events on the commercial availability of organic agricultural products.

The USDA was ordered to vacate and revise the rules by June 2006. Unfortunately, due to crop cycles and the lead time necessary to address existing and new product formulation and labeling requirements that must precede marketing organic products to consumers, the businesses that produce and market the majority of America's organic farm products that today carry the USDA's organic seal will have to drop product lines or re-label them without the USDA seal by the end of 2005. The loss of the USDA organic seal will simply devastate the organic marketplace. To compensate for the lower value consumers place on products not "organic enough" to carry the USDA seal, some companies may reformulate them with less organic content. Some have estimated that up to 90% of the multi-ingredient products that today bear the USDA's organic seal will have to be removed or relabeled without using the USDA seal. The availability of the USDA organic seal was the key goal of the Organic Foods Product Act and everyone relied upon and invested in reliance on the existing rules.

### The Solution is to Clarify the Organic Foods Production Act of 1990

**SUGGESTED LANGUAGE**  
**CLARIFYING THE ORGANIC FOODS PRODUCTION ACT OF**  
**1990**

**I. SECTION 1: HANDLING**

Section 6510 of title 7, United States Code, is amended--

In paragraph (a)(1) after the word "ingredient" add the following:

"not appearing on the National List,"

**II. SECTION 2: NATIONAL LIST**

Section 6517 of title 7, United States Code, is amended--

(1) in paragraph (c)(1) after the word "substances" add the following:

" in organic production and handling operations"

(2) by striking subparagraph (c)(1)(B)(iii) in its entirety.

**III. SECTION 3: EMERGENCY PETITIONS**

Section 6517 (d) title 7, United States Code, is amended by adding a new paragraph (6) as follows:

"(6) Expedited Petitions for Commercially Unavailable Organic Agricultural Products Constituting less than 5% of an Organic Processed Product

The Secretary shall have the authority to develop emergency procedures for designating agricultural products that are commercially unavailable in organic form for placement on the National List for a period of time not to exceed 12 months."

**IV. SECTION 4: ANIMAL PRODUCTION PRACTICES**

Section 6509 of title 7, United States Code, is amended --

AMENDMENTS  
SECTION BY SECTION IN THE OFPA

I. SECTION 1: HANDLING

→§ 6510. Handling

(a) In general

For a handling operation to be certified under this chapter, each person on such handling operation shall not, with respect to any agricultural product covered by this chapter--

- (1) add any synthetic ingredient *not appearing on the National List* during the processing or any postharvest handling of the product;
- (2) add any ingredient known to contain levels of nitrates, heavy metals, or toxic residues in excess of those permitted by the applicable organic certification program;
- (3) add any sulfites, except in the production of wine, nitrates, or nitrites;
- (4) add any ingredients that are not organically produced in accordance with this chapter and the applicable organic certification program, unless such ingredients are included on the National List and represent not more than 5 percent of the weight of the total finished product (excluding salt and water);
- (5) use any packaging materials, storage containers or bins that contain synthetic fungicides, preservatives, or fumigants;
- (6) use any bag or container that had previously been in contact with any substance in such a manner as to compromise the organic quality of such product.
- (7) use, in such product water that does not meet all Safe Drinking Water Act [42 U.S.C.A. § 300f et seq.] requirements.

(b) Meat

For a farm or handling operation to be organically certified under this chapter, producers on such farm or persons on such handling operation shall ensure that organically produced meat does not come in contact with nonorganically produced meat.

## II. SECTIONS 2 and 3: NATIONAL LIST and EMERGENCY PETITIONS

### →§ 6517. National List

#### (a) In general

The Secretary shall establish a National List of approved and prohibited substances that shall be included in the standards for organic production and handling established under this chapter in order for such products to be sold or labeled as organically produced under this chapter.

#### (b) Content of list

The list established under subsection (a) of this section shall contain an itemization, by specific use or application, of each synthetic substance permitted under subsection (c)(1) of this section or each natural substance prohibited under subsection (c)(2) of this section.

#### (c) Guidelines for prohibitions or exemptions

##### (1) Exemption for prohibited substances *in organic production and handling operations,*

The National List may provide for the use of substances in an organic farming or handling operation that are otherwise prohibited under this chapter only if--

(A) the Secretary determines, in consultation with the Secretary of Health and Human Services and the Administrator of the Environmental Protection Agency, that the use of such substances--

(i) would not be harmful to human health or the environment;

(ii) is necessary to the production or handling of the agricultural product because of the unavailability of wholly natural substitute products; and

(iii) is consistent with organic farming and handling;

##### (B) the substance--

(i) is used in production and contains an active synthetic ingredient in the following categories: copper and sulfur compounds; toxins derived from bacteria; pheromones, soaps, horticultural oils, fish emulsions, treated seed, vitamins and minerals; livestock parasiticides and medicines and production aids including netting, tree wraps and seals, insect traps, sticky barriers, row covers, and equipment cleansers;

(ii) is used in production and contains synthetic inert ingredients that are not classified by the Administrator of the Environmental Protection Agency as inert or of toxicological concern; or

(A) the Secretary determines, in consultation with the Secretary of Health and Human Services and the Administrator of the Environmental Protection Agency, that the use of such substances--

(i) would be harmful to human health or the environment; and

(ii) is inconsistent with organic farming or handling, and the purposes of this chapter; and

(B) the specific prohibition is developed using the procedures specified in subsection (d) of this section.

(d) Procedure for establishing National List

(1) In general

The National List established by the Secretary shall be based upon a proposed national list or proposed amendments to the National List developed by the National Organic Standards Board.

(2) No additions

The Secretary may not include exemptions for the use of specific synthetic substances in the National List other than those exemptions contained in the Proposed National List or Proposed Amendments to the National List.

(3) Prohibited substances

In no instance shall the National List include any substance, the presence of which in food has been prohibited by Federal regulatory action.

(4) Notice and comment

Before establishing the National List or before making any amendments to the National List, the Secretary shall publish the Proposed National List or any Proposed Amendments to the National List in the Federal Register and seek public comment on such proposals. The Secretary shall include in such Notice any changes to such proposed list or amendments recommended by the Secretary.

(5) Publication of National List

After evaluating all comments received concerning the Proposed National List or Proposed Amendments to the National List, the Secretary shall publish the final National List in the Federal Register, along with a discussion of comments received.

***(6) Expedited Petitions for Commercially Unavailable Agricultural Products Constituting Less than 5% of an Organic Processed Product***

***The Secretary shall have the authority to develop emergency procedures for designating***  
***products that are commercially unavailable in organic form for placement on the***

## SECTION 4: ANIMAL PRODUCTION PRACTICES

### ■ § 6509. Animal production practices and materials

#### (c)(2) Dairy livestock

A dairy animal from which milk or milk products will be sold or labeled as organically produced shall be raised and handled in accordance with this chapter for not less than the 12-month period immediately prior to the sale of such milk and milk products. *“Provided, that crops and forage from land included in the dairy farm’s organic system plan that is in the third year of organic management may be consumed by that farm’s dairy animals during the 12 month period immediately prior to the sale of organic milk and milk products.”*

TECHNICAL EXPLANATION OF CLARIFICATIONS  
THE ORGANIC FOODS PRODUCTION ACT OF 1990

A federal court ruling in June 2005 invalidated two and altered one of the USDA's existing organic product rules that were adopted in 2001. The rules subject to the court ruling were based on recommendations submitted over a 10-year period by the citizen advisory board created by Congress in 1990 to advise the Secretary on organic matters, the National Organic Standards Board ("Board") and adoption by notice and comment rulemaking of the recommendations. The ruling will negatively affect approximately 90% of the multi-ingredient organic food products on the market today, and projected product sales losses exceed a billion dollars. Due to farm crop cycles and contracting needs based on existing product lines, the requirement of at least two years to innovate new organic food products in advance of marketing, and the constraints arising from altered labeling and advertising plans, the amendments discussed herein are needed in 2005.

The requested statutory changes to the Organic Foods Production Act (OFPA) will:

- Update and clarify the Organic Foods Production Act of 1990 to harmonize it with the USDA's rules adopted in 2001 and reflect the dramatic expansion and development of industry practices as organic products have become accepted by mainstream consumers.
- Protect farmers by stabilizing the market for organic crops so they can continue to grow and sell organic crops that bring a substantial price premium.
- Ratify the USDA's adoption of the recommendations of the Board created by Congress that undertook 10 years of hearings, notice and comment rulemaking and a record comprising nearly 1/2 million public comments.
- Assure continued consumer availability of 90% of today's multi-ingredient organic products by maintaining the requirement that the USDA organic seal may *only* appear on products that contain at least 95% organic ingredients and no more than 5% non-organic ingredients.

## I. ORGANIC HANDLING CLARIFICATION

- **Existing Federal Rule**

Allows handlers and processors of organic products that carry the USDA organic seal to use essential "synthetic" substances, e.g. baking soda, ascorbic acid, pectin, vitamins and minerals etc.

- **The Impact of the Court Ruling**

The Court determined the USDA's allowance of essential synthetics in organic products was inconsistent with the statute, with the effect that approximately 90% of the multi-ingredient organic products on the shelves today may no longer display the USDA organic seal.

- **Proposed Clarification**

Amend 7 U.S.C. §6510 in paragraph (a)(1) after the word "ingredient" add the following:

"not appearing on the National List,"

- **Reasons for Clarification<sup>1</sup>**

Retains in the marketplace the vast array of products that carry the USDA organic seal and encourages new organic product innovation.

Ratifies the USDA's adoption of the recommendations of the Board created by Congress and its 10 year effort to define only those small amounts of essential synthetics that should be allowed in foods that carry the USDA organic seal.

Preserves the organic labeling framework adopted after 10 years of notice and comment rulemaking that consumers and businesses have relied upon and also preserves the automatic sunset after 5 years of any allowed synthetic substance on the National List.

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<sup>1</sup> The National List ("List") is the master list of "allowed synthetic" substances and prohibited natural substances that was created by Congress in 1990, with explicit instructions that the citizen advisory Board it created at the same time was to determine



## II. NATIONAL LIST CLARIFICATION

- **Existing Rule**

The statute requires that each organic product be grown on a certified organic farm, and processed in a certified organic processing facility. The current rules require the Board created by Congress to determine whether a synthetic substance is appropriate for use on the farm during production of crops, or during the processing of crops after harvest.

Allows the USDA organic seal to be used on processed products that are at least 95% organic ingredients and that use small amounts of essential synthetic substances, e.g., baking soda, ascorbic acid, pectin, vitamins and minerals etc.

- **Impact of Court Ruling**

The Court found that Congress had unambiguously authorized the Board to control the List of essential synthetic substances used on the farm in crop and livestock production, but found it failed to authorize the Board to exert the same control over the essential synthetic substances used in handling and processing crops after harvest.

- **Proposed Clarification**

Amend 7 U.S.C. §6517:

(1) in paragraph (c)(1) after the word "substances" add the following:

“ in organic production and handling operations”

(2) Strike subparagraph (c)(1)(B)(iii) in its entirety

- **Reasons for Clarification**

Removes the inconsistency in the statute identified by the Court that allows the Board to approve synthetics for use on the farm, but failed to unambiguously authorize their use in processing after the crop left the farm

### III. EXPEDITED DETERMINATIONS OF COMMERCIAL UNAVAILABILITY OF ORGANIC AGRICULTURAL PRODUCTS THAT ARE MINOR INGREDIENTS (LESS THAN 5%)

- Existing Rule

The Court found the rule *could* allow *ad hoc* determinations by certifying agents that an organic agricultural product/crop is commercially unavailable and *could* authorize the non-organic version of the same agricultural product/crop to be used in a processed product without designating the agricultural product/crop for placement on the National List.

- Impact of Court Ruling

Affirmed the commercial unavailability test, but rejected the *ad hoc* approach to such determinations and required full blown rulemaking for each agricultural product/crop deemed to be commercially unavailable in organic form. In other words, the Court determined the USDA must place the organic agricultural product/crop that is necessary, but unavailable due to crop loss, on the National List.

As applied by the Court, the USDA's existing rule is useless because by the time a rulemaking to place a agricultural/crop product on the List, another crop year will have passed and the agricultural product/crop will likely be commercially available in organic form. It inadvertently eliminates entire products and product lines, for example, when an organic crop is lost to disaster thus rendering that crop commercially unavailable in organic form.

The ruling also fails to account for minor ingredients that do not yet exist in organic form thus inadvertently barring product innovation that would drive the opening of a new market.

- Proposed Clarification

Amend Section §6517 (d) by adding a new paragraph (6) as follows:

“(6) Expedited Petitions

- **Reasons for Clarification**

Eliminates *ad hoc* approach by certifying agents found unacceptable by the Court.

Allows the Secretary to establish by notice and comment rulemaking the necessary procedures for expedited decisions on commercial unavailability determinations thus making the rule function more like crop disaster relief that allows affected multi-ingredient products to substitute minor non-organic ingredients in order to continue to produce and market such products for a year.

Ensures the existing rule that restricts the use of non-organic crops/ingredients to less than 5% of final products is maintained.

Limits the duration of the placement of commercially unavailable (non-organic) crops on the National List to no more than 12 months to reflect a crop-year foundation of the amendment and to accommodate crop disasters as well as the development of new crop sources.

#### **IV. DAIRY HERD ENTRY PROVISION**

- **Existing Rule**

Allows dairy farmers to switch to organic production over a 12 month period using a mixture of organic feed and forage or crops from their own farm if the farmland is also being switched to organic practices and is in the third year of transition.

- **Impact of Court Ruling**

Determined dairy farms converting to organic may not use any conventional feed during the 12 month transition period, and may not use forage or crops from that farm's land until after the land was certified organic.

Dramatically impedes the ability of small dairy farms to transition to organic management practices and thus disproportionately harms family farms.

- **Proposed Clarification**

- **Reasons for Clarification**

Accommodates the statute's existing requirement that the transition to organic certification for land that requires a 3 year transition and the dairy animal transition that takes 1 year.

Allows a certifying agent to work with the farmer to dovetail the timeline for the both the land and dairy herd transition.

Restores the rule recommended by the Board created by Congress that recognizes the economic reality that small farms cannot afford to purchase and feed high-priced organic feed for a year before the milk can be sold as organic unless they can use their own crops and pasture that have been under organic management for at least 2 years.

Supports conversion of small dairy farms to organic by avoiding a four year transition to organic management practices that would be required if the 3 year land transition had to occur before the 1 year transition for the dairy animal could begin.