



Drafting organic Food Regulations: The Case for Incorporating Congressional Intent and Interest Group Commentary

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Drafting Organic Food Regulations:
The Case for Incorporating
Congressional Intent and

Interest Group Commentary

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Food & Drug Law

Drafting Organic Food Regulations:

The Case for Incorporating

**Congressional Intent and
Interest Group Commentary**

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I. Introduction

The past decade has been one of enormous change for the organic food industry. By the late 1980's, the

lack of national uniformity in organic foods and consumer confusion about competing food labels threatened to stunt the growth of the industry.¹ In response to this imminent market failure, Congress acted to bring much needed stability and regulation to organics. Beginning with the enactment of the Organic Foods Production Act of 1990, continuing throughout the recommendation-generating process embodied by the National Organic Standards Board, and culminating in the most recent and currently ongoing stage of the National Organic Program's regulation drafting enterprise, the organic debate has raged constantly for over nine years. The fundamental goal behind all these developments has been the implementation of a system for organic regulation which would ensure customers that they were getting what they paid for: food free from chemical adulteration.

What is at stake is truly amazing. The organic industry now controls a nearly \$4 billion a year market, with sales growth forecast at a fourfold rate during the next decade.² What used to be a market comprised of a small minority of health-conscious Americans is now encompassing the most mainstream of homes; in recognition of this trend supermarkets are even moving away from segregating organic foods.³ Beyond our shores, the organic industry is also thriving, with Europe, Japan, and the other Pacific Rim countries serving as the leading importers of American organic products.⁴ The exponential growth present worldwide in organics is attributable to a general increase in the concern over food safety as well as the success of many international, national, and regional promotional campaigns.⁵

¹Kenneth C. Amaditz, *The Organic Foods Production Act of 1990 and Its Impending Regulations: A Big Zero for Organic Food?*, 52 FOOD & DRUG L.J. 537, 540 (1997).

²Curt Anderson, *USDA to Regulate the Production of Organic Foods for First Time*, DAILY RECORD (BALTIMORE), Dec. 16, 1997, at 9.

³Anon., *No Matter What Shape Regulations Take, Organic Food Industry is Thriving*, FOOD & DRINK WEEKLY, May 4, 1998.

⁴Suzanne Vaupel, *Advising Producers of Organic Crops*, 2 DRAKE J. AGRIC. L. 137, 139 (1997).

⁵Ben Lilliston & Ronnie Cummins, Editorial, *Organic vs. "Organic": The Corruption of a Label*, ECOLOGIST, July 17, 1998, at 195. See generally Vaupel, *id.* at 137-140.

On the production side of the equation, we see that producers have growing incentives to invest in organic foods. While the industry has traditionally been comprised of small businesses with limited individual production capacity which typically could charge exorbitant prices for their goods, thereby passing along the final production expense to consumers, now competitive market forces are taking hold.⁶ The overall production cost for organic food has declined due to the elimination of most chemical inputs and the resultant lowered vulnerability to input price variations.⁷

The scope of the organic debate has embroiled more constituents than simply consumers and producers of organic food. What is fascinating throughout this progression of events is the high level of public discussion and comment which has been generated. At each step along the way various interest groups such as small organic farmers, private organic certifiers, politicians, international community members, large agri-business lobbyists, environmental groups, consumers and general taxpayers have all added their voices to the debate. Complicated with each expression of a differing viewpoint, the USDA and other parties instrumental to the ongoing drafting of regulations for the National Organic Program have the formidable task of coming up with a cohesive, prudent, and enforceable regime for the organic industry.

The original timetable for the implementation of organic regulations has long since been proven to be unrealistic, and this paper will demonstrate that the necessity to quickly resolve this debate and enact substantive regulations is great. Now that we are over nine years into the drafting process, the time has come to finally synthesize the divergent comments into a workable set of regulations. Unfortunately, if the organic industry-

⁶Anon., *supra* note 3.

⁷Vaupel, *supra* note 4, at 150.

observer has learned anything since 1990, it is that the momentum of the USDA's bureaucratic machinery has nearly slowed to a stand-still, and the once polarized constituent groups have become even further polarized and unwilling to compromise. Therefore, the prospects of a successful enactment of meaningful organic regulations anytime in the near future grow dimmer with each passing day.

Recognizing the current state of affairs and hoping to add a unique overview approach to the debate, the purpose of my paper is four-fold. First, I attempt to provide an accurate and comprehensive overview of the substance of the Organic Foods Production Act of 1990, the recommendations of the National Organic Standards Board, and the National Organic Program's Proposed Rule (issued in December, 1997). In addition, I track various interest groups throughout this process and discuss their public reactions to each of these three important stages. My third goal is to synthesize the comments generated by each action and attempt to glean common themes and suggestions for moving forward. Finally, by undertaking a rigorous academic overview of the many divergent and unique voices in the organic debate in this manner, I formulate my own suggestions on how best to advise the USDA to put differences behind it and to move forward. As noted, this field is in a constant state of flux at this point in time, and I intend to generate positive options for the successful enactment of National Organic Program Regulations, which is the goal Congress has been striving for since 1990.

After compiling and evaluating all my research, I reach the fundamental conclusion that if more institutional energy had been invested at each stage of this decade-long process to original congressional intent and to the incorporation of comments and suggestions from all interested and informed parties, the recent Proposed Rule would have been much more acceptable on the whole. One interesting characteristic of this paper is its reliance upon opinion articles and the like which are written by constituents such as small-town farmers and environmentalists. While there have been some legal scholarly pieces written in response to the current

drafting crisis, I chose not to limit myself to simply academic works in researching this paper.

It appears that much of the debate generated after both the enactment of the OFPA and the issuance of recommendations by the NOSB was not effectively analyzed and synthesized into the National Organic Program's Proposed Rule. My options for moving forward, therefore, are driven by a recognition of this fact and my proposal is to simply tap into the vast resources that have made themselves available to the USDA in the form of comments to the Proposed Rule. The currently ongoing revision of the rule should address the common interests and themes expressed in these grass-roots suggestions so that the chances of successful implementation of an organic regulatory regime can finally become a reality.

II. Background and Original Expressions of Congressional Intent

Organics began in the 1960's and 1970's as a response to proliferating chemical use in conventional agriculture.⁸ The actual definition of "organic" food had been much debated throughout the industry's existence. Up until recent efforts to revise the definition, when a product was labeled as certified organic, it simply meant that the producer had undergone an unregulated inspection process. Generally speaking, that certification process began when the grower or processor completed an application that described the farm history or plant operation and other management practices. Inspectors would then visually validate the application information as being correct. Provided that the farm or facility was approved, it was certified for one year and could therefore label its food "organic."⁹

⁸Jeanette Marie Pontacq, Editorial, *Give Organic Farming a Boost*, SAN FRAN. CHRONICLE, March 4, 1998, at A19.

⁹Annie Kirschenmann, *About Certified Organic* (visited Jan. 5, 1999) <<http://www.organic.org/1/aco.html>>.

It is important to note that throughout the history of the organic industry, the focus has been on this overall process of production rather than the actual end-product. Indeed, the hallmarks of traditional organic systems have remained constant: crop rotation and diversification, cooperation with ecological systems and cycles, a focus on net return rather than gross income and yields, and the minimization of external inputs, particularly non-renewable resources.¹⁰ An examination of the congressional history of the Organic Foods Production Act of 1990 reveals that these fundamental principles were also intended to remain constant throughout the required regulations. Congress intended to retain the traditional systems-based approach to organic production that had characterized the industry since its inception. This holistic view is reinforced by language in the Senate Report, which notes that “defining organically grown food based on production materials and a three-year transition period alone is not sufficient. Organically grown food is produced using farming and handling systems that include site-specific farm plans.”¹¹

Against this backdrop of a holistic view of organics, Congress received many petitions to the Committee on this legislation from people across the country calling for a national organic program; a demonstration that the activism we currently see in this debate has been present throughout.¹² Importantly, the actual drafting process of the OFPA of 1990 was formitively shaped by comments received from industry participants.

In 1989, three bills were introduced that contained organic food provisions. The Organic Foods Act introduced by Senator Leahy included a definition, a certification scheme, a promotion program, and a pilot label program. Additionally, the Farm Conservation and Water Protection Act introduced by Senator Fowler and the Conservation Enhancement and Improvement Act introduced by Senator Lugar both included definitions for organic production.¹³ The industry applauded these efforts, but argued that rather than trying to reinvent the wheel, the national program should take advantage of the network of private organic certification

¹⁰John Bell Clark, *Impact and Analysis of the U.S. Federal Organic Food Production Act of 1990 with Particular Reference to the Great Lakes*, 26 U. TOL. L. REV. 323, 324 (1995).

¹¹S. REP. NO. 101-357 (1990), *reprinted in* 1990 U.S.C.C.A.N. 4656.

¹²*Id.*.

¹³*Id.*

organizations that were already in existence.¹⁴ In response to such comments, on February 8, 1990, Senator Leahy introduced S. 2108, a revision and compilation of the earlier efforts which proposed a partnership between government and private organizations in standard setting and classification.¹⁵

A national regulatory scheme was primarily intended by Congress to serve as an equalizing measure for all then-applicable state regulations. In the Senate Report, there is a reported example of the way minor differences in organic milk standards created havoc for the industry. While New Hampshire and Texas required that dairy cows be fed exclusively organic feed, states such as Kansas, Maine, and South Dakota required unmedicated feed, and others such as California and Oregon specified time periods during which certain feed must have been used.¹⁶ Obviously, the practical ability for any member of the organic community—from the farmers through the ultimate consumers—to reasonably discern what the organic milk standards were was slim.

In addition to nation-wide comity, there were a couple of other driving forces behind the OFPA. Congress opined on the benefits of harmonizing standards internationally, and applauded such organizations as the Federation of Organic Agricultural Movements for facilitating the trend.¹⁷ The then-lacking organic livestock regulations were also cited as an example of an area in need of national regulation. Because up until this point the USDA had explicitly prohibited meat and poultry from being labeled as organically produced, there was no incentive for such manufacturers to employ organic methods.¹⁸ In sum, the imposition of a system which would both domestically and internationally align the monetary incentives of producers and consumers of organic food was an overarching congressional objective.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

It is crucial to keep this legislative history as the relevant backdrop throughout this paper's subsequent examination of the Organic Foods Production Act, the National Organic Standards Board, and the newly released National Organic Program's Proposed Rule. It is remarkable to note the transformation that has occurred throughout the past decade in terms of institutional goals and constituent reactions beginning from the 1990 congressional intent baseline outlined above.

III. Reaction to Organic Foods Production Act of 1990

A. Overview of Content

In order to ultimately gain an appreciation of the tumultuous occurrences of 1998 in connection to the National Organic Program Proposed Rule, we must start at the beginning. That commencement is the passage of the Organic Foods Production Act of 1990 (hereinafter referred to as the "OFPA" or "the Act"), which ultimately provides authority for the recent Proposed Rule.¹⁹ In addition, the OFPA establishes the National Organic Standards Board (NOSB) to advise the USDA on all OFPA implementation.²⁰ In spite of constant activity resulting from the mandates of the OFPA, it is striking to note that the regulations which were to be drafted soon after this statute's passage have been on the drawing board for nine years now, violating the strict timeline of OFPA.²¹

Although this statute lacks the detail and precision of the recent National Organic Program Proposed Rule, it

¹⁹USDA, *Glickman Announces Publication of National Organic Program Proposed Rule* (visited Dec. 30, 1998) <<http://www.usda.gov/news/releases/1997/12/0442>>.

²⁰Amaditz, *supra* note 1, at 541.

²¹Clark, *supra* note 10, at 325. Congress had hoped that the regulatory scheme they originally envisioned would be implemented by 1993. 7 U.S.C. 6505(a)(1)(A).

adequately fulfills its purpose of giving the Agricultural Marketing Service (AMS) generally and the Secretary of Agriculture specifically the responsibility for developing and implementing a national organic certification program based on three overarching goals: establishing national standards for the organic industry, assuring consumers of the content of their purchases, and facilitating interstate commerce.²² In a nutshell, OFPA does not undertake defining the word “organic,”²³ yet provides that those who cannot meet the stipulated and forthcoming national standards are barred from making any organic labeling claims.²⁴

1. *Mandated Activities.* Much of the OFPA concerns setting the foundation of a national labeling system.²⁵ In order to gain an Agriculture Department seal, raw products must be 100% organic and processed foods must contain 95% organic ingredients. On the second tier of organic foods, a label reading “made with certain organic ingredients” may be affixed to processed foods containing 50-95% organic content. Finally, those products with less than 50% organic content must specify the organic ingredients contained therein.²⁶

State programs may contain standards that are even more restrictive than the federal program so long as they do not discriminate against organically produced foods from other states.²⁷ Importantly, the drafters of the OFPA appear to condone the presence of more rigid state regulations, since the Act mandates that the USDA must approve any reasonable state plan that meets the enumerated requirements.²⁸ In line with this rigidity of regulations, the drafters also knowingly chose a tough standard for processed food to put an end to consumer confusion, yet allowed for some flexibility by providing the Secretary of Agriculture with

²²USDA, AGRICULTURE FACT BOOK 98, CH. 12 (1998). *See generally* 7 U.S.C. 6501 (1990).

²³Although the term “organic” is not defined by the OFPA of 1990, this statute does effectively grant USDA a monopoly over the use of the word. Lilliston & Cummins, *supra* note 5, at 195.

²⁴Amaditz, *supra* note 1, at 540.

²⁵7 U.S.C. 6505 (1990). Note that in 6505(a)(1)(A), Congress specifies that the domestic products’ label scheme should be implemented by October 1, 1993.

²⁶*See generally* Amaditz, *supra* note 1, at 542-543. *See also* Anderson, *supra* note 2, at 9.

²⁷Amaditz, *supra* note 1, at 543-544.

²⁸The original labeling implementation schedule envisioned by Congress proved to be unworkable. Ideally, after September of 1992 no other label would have been allowed that claimed that a food was in any way organic or organically produced. S. REP. NO. 101-357, *supra* note 11.

some discretion regard the use of the term “organically produced” as it pertains to individual ingredients within a given product.²⁹

Each organic producer must establish a long-term “Organic Farm Plan,” which relies extensively on the notion that a three year transition period is required before products grown in any field can be labeled as organic.³⁰ As defined by the Act, the term “organic plan” means a plan of management of an organic farming or handling operation that has been agreed to by the producer or handler and the certifying agent and that includes written plans concerning all aspects of agricultural production or handling described in the chapter including crop rotation and other required practices.³¹

In considering the proper scope of OFPA, Congress ultimately chose to include record-keeping, enforcement, and international trade provisions. Specifically, OFPA requires all producers, handlers, and processors to keep detailed records of their activities in order to demonstrate compliance with the organic growing process.³² Although certifiers, state agencies, and various federal agencies are endowed with the responsibility of enforcing the OFPA, the Act grants de-certification power exclusively to the certifiers.³³ The Act does include provisions to accommodate imports of organically produced products from third-world countries, and this international aspect of the organic regulations will become crucial when following the development of the National Organic Program throughout the last decade.³⁴ Overall, then, the scope of the OFPA is

²⁹S. REP. NO. 101-357, *supra* note 11.

³⁰Vaupel, *supra* note 4 at 148. Note that the imposition of a three year requirement addresses the process-based focus of the OFPA. The selling of an end-product is but one step in a lengthy organic growing cycle.

³¹7 U.S.C. 6502(13) (1990).

³²Vaupel, *supra* note 4, at 145-147.

³³Vaupel, *supra* note 4, at 144. *See also* AMS, *OFMA Meets with AMS—Will the Rule be Delayed?*, Oct. 26, 1998 (visited Jan. 5, 1999) <<http://web.iquest.net/ofma/ams.htm>>. These materials stress that the need for de-certification arises when a product was once in compliance with federal organic regulations, but has since become in violation of the Act.

³⁴Terence J. Centner & Kyle W. Lathrop, *Differentiating Food Products: Organic Labeling Provisions Facilitate Consumer Choice*, 1 *DRAKE J. AGRIC. L.* 30, 46 (1996).

aptly characterized as fairly far-reaching, although the Act fell short of encompassing petitions such as the one to the FDA to extend OFPA's application to include organic hair and skin care products.³⁵

2. *Exceptions.* Just as crucial to a clear understanding of the OFPA as its basic provisions are the basic exceptions to those rules. The few exceptions which were written into OFPA were the result of intense lobbying efforts by chemical input vendors, federal fund recipients, and the organic industry.³⁶ Recognizing these lobbying activities, it is remarkable to note that the very forces which helped to shape the original statute in the realm of organic regulation are still at the center of the debate, and continue to be inextricably involved in the National Organic Program's rulemaking process.

The exceptions found in the Act are not numerous, yet they are important. One example of an exemption which has been continuously debated this decade is the small farmers exception, which states that small organic farmers with less than \$5000 in annual gross sales of agricultural products are exempt from the certification requirements of OFPA.³⁷ There are possible international implications of this exemption, as will be explored in depth later. It is also important to read the text of the OFPA carefully and note that nothing in the statute exempts organic foods from other federal food safety and production statutes like the FDCA. Finally, OFPA's regulations do not affect farmers and food producers who truthfully claim that their products are produced without pesticides, so long as they do not explicitly make organic claims.³⁸ After obtaining a handle on the fundamental substantive content of the OFPA of 1990, we can move to an examination of reactions to the drafting of this statute.

³⁵West's Legal News Staff, *Aubrey Organics Petitions FDA for Regulation of Organic Cosmetics*, WEST'S LEGAL NEWS, July 30, 1996, at 7726.

³⁶Clark, *supra* note 10, at 324-325.

³⁷Vaupel, *supra* note 4, at 142.

³⁸Amaditz, *supra* note 1, at 544.

B.

Perhaps due to the intense lobbying effort many constituencies throughout the drafting of the OFPA of 1990, most of the interpretive comments after its enactment come from scholars rather than industry participants themselves. Within the organic industry, in fact, the legislation was largely regarded as reasonable. One commentator remarked that OFPA was “rooted in logic, rationality, and internal consistency... (it) may represent the most commendable attempt yet to make statutory law imitate natural law.”³⁹

Scholars by and large feared that the statute, however, was *not* internally consistent. In particular, three debilitating exceptions and clauses were cited as the most problematic areas of OFPA. The first problematic area dealt with consistency issues surrounding the state regulations and the NOSB efforts. Indeed, some feared that additional state restrictions (coupled with the mandate that USDA must approve any that are reasonable) would prevent the Act from achieving consistency and promoting interstate commerce. Related to this concern was a feeling that the institutional effectiveness of the NOSB might be vulnerable to unwise or contrary appointments.⁴⁰

Scholars identified the second fundamental flaw as potential consumer confusion over marketing, with the fine distinctions between tiers not being apparent. For example, to the ultimate consumers of organic food, the variation between a second tier organic food, containing 51% organic content, and a third tier organic

³⁹Clark, *supra* note 10, at 331.

⁴⁰Clark, *supra* note 10, at 346.

food, containing 49% organic content, could appear to be much larger than the difference in reality should be. Two vastly different labeling requirements govern these two situations, and the typical American consumer will not have enough of a knowledge base to make a truly informed decision on the content of the food he or she is buying. Also contributing to possible consumer confusion is the lack of differentiation by the OFPA between organic foods as a class and other foods which vie for organic market share.

Finally, some scholars fear a potential conflict between the OFPA and FDA labeling requirements. For example, the FDA could theoretically require organic producers to include a statement that the FDA didn't recognize organic foods as being safer or of higher quality than conventional foods.⁴¹ Note the discussion below regarding the possible cooperation between USDA and FDA forces to strengthen federal organic regulations. All three of the fundamental concerns expressed by scholars over the Organic Foods Production Act as drafted have been subsequently expanded upon by commentators. We now turn to some of the suggestions made thus far regarding ways in which the perceived inadequacies of the Act were seen to be candidates for remedial action at future stages of the organic regulation process.

C.

Commentators have called for an increased role for administrative ease in the implementation of OFPA.

They have suggested, for example, that there is no solid, defensible reason to draw a distinction between

⁴¹Amaditz, *supra* note 1, at 554-555. Amaditz appears to be fundamentally concerned about the fact that consumers consider "organic" to be more than a production claim. Consumers purchase organic foods for reasons of nutrition, safety, quality, or environmentalism. As such, the FDA could opt to restrict OFPA organic labeling claims for misleading consumers or concealing material facts in these areas.

second and third tier organics.⁴² As mentioned above, the importance of delineating the highest class of organics is obvious for both incentive-providing reasons on the production side and information-gathering reasons on the consumer side. The justifications for a further break-down in organic labeling classifications is not so apparent. Perhaps, therefore, the administration ease resulting from differentiating between only two classes of organics would warrant a transition to this more simple model. Also addressing the future administrability of the Act, the definitions of handling and processing could be drafted in a less confusing manner. As written, these provisions would likely boggle the minds of not only the handlers and processors themselves, but also the agency charged with implementing the rules.

While on the subject of institutional ability to enforce the Act, the final broad labeling recommendation moving forward from the OFPA is that the labeling provisions of the statute would be strengthened, the argument goes, if the entire bureaucracy of the Agriculture Marketing Service (“AMS”) were streamlined. In particular, some commentators worry that the majority of AMS employees in 1990 were “mainstream bureaucrats schooled primarily in agricultural economics with no experience in organic production.”⁴³ The composition of the AMS is crucial because they are tasked with overseeing the entire National Organic Program, and the smooth operation of this agency will improve all the labeling concerns which have been expressed.

Within the overall labeling considerations, many opinions have been vocalized about the OFPA’s interaction with pre-existing state regulations on organic food labeling as well as pre-existing Food and Drug Administration regulations on food generally. A closer examination of these two issues reveals that the OFPA’s apparent clarity is misleading, and important questions remain on how to reconcile these areas of potential

⁴²See the arguments presented above, which have been adapted from Amaditz, *supra* note 1, at 551.

⁴³Clark, *supra* note 10, at 332.

conflict.

1. *USDA Labeling vs. State Labeling.* OFPA contains an unresolved allocation of labeling authority between the state and federal governments. Original congressional intent is uncontroverted on this subject: “the Committee clearly intends to preserve the rights of States to develop standards particular to their needs that are additional and complementary to the Federal standards.”⁴⁴ In 1990, at the time of OFPA enactment, some states had their own certification programs, some cooperated with independent certification organizations, and most states simply defined organic foods and specified permitted production techniques, but did not provide any means of achieving organic certification.⁴⁵ In sum, many constituents had looked forward to national organic regulations precisely to supersede this medley of 33 private and 11 state organic certification agencies, each with its own set of standards.⁴⁶ Congress originally passed the OFPA to provide a uniform federal certification law which would partially pre-empt current state laws, but which arguably provided enough flexibility to allow states to continue to serve their own interests. As such, although OFPA was not designed to pre-empt the states entirely, the legislative history did indicate limits on how much authority the states may exercise.⁴⁷

Suggestions on ways to improve these complicated federal-state regulatory interactions focus on striking a balance between a uniform national system and individual states’ incentives to gain competitive advantages.

Specific recommendations for improving in this area concern the states’ ability to promote their own organic

⁴⁴S. REP. 101-357, *supra* note 11.

⁴⁵Kyle W. Lathrop, Note, *Pre-empting Applies with Oranges: Federal Regulation of Organic Food Labeling*, 1991 J. CORP. L. 885, 892-894 (1991).

⁴⁶Pontacq, *supra* note 8, at A19.

⁴⁷Lathrop, *supra* note 45, at 894. An interesting contrast can be made to the FDA. Within their regime, state regulation of food labeling is preempted only when particular state actions make it impossible for food manufacturers to comply with both federal and state law, or if those actions pose obstacles to accomplishing federal objectives. For more information on the contrasts between FDA and USDA preemption statutes, see generally Charles P. Mitchell, *State Regulation and Federal Preemption of Food Labeling*, 45 FOOD DRUG COSM. L.J. 123 (1990).

products through “consumer education campaigns rather than by label campaigns.”⁴⁸ To facilitate the states’ advertising campaigns, reformers have called for the National Organic Program to delineate the interaction of the “natural” and the organic labels with more certainty so as to avoid confusion with allowable state organic labels.⁴⁹

2. *USDA Labeling vs. FDA Labeling.* There has been much debate about the proper division of food labeling regulatory power between the FDA and the USDA. In general, the USDA has the authority to pre-approve, monitor, and enforce label regulations for meat, poultry, and eggs. The OFPA muddies this relatively clear split of authority by granting the USDA all regulatory power over *all* organic foods—foods traditionally within the jurisdiction of the FDA.⁵⁰ Congressional intent was to grant USDA wide-ranging authority, since “a consumer can find organically produced fruits and vegetables, cookies, meat, soda, milk, and cheese—almost any food product imaginable. It is the Committee’s intention that this bill continue to cover a wide range of food products.”⁵¹ As such, although the FDA has apparent jurisdiction over organic label regulation, OFPA mentions only a limited role for them.⁵² Only by removing such ambiguities will the USDA be able to create the contemplated strong regulatory system.

Reformers specifically call for the USDA and FDA to cooperate in order to clarify both the existing production as well as advertising standards for the organic industry. The agencies working together can establish firm standards for food claims such as “natural,” “ecologically produced,” “residue free,” and “sustainable” so that consumers can differentiate organic products from these.⁵³ Building on this cooperation, a strong

⁴⁸Lathrop, *supra* note 45, at 910.

⁴⁹Lathrop, *supra* note 45, at 916-919. Reactions to OFPA have also included a call for USDA itself to embark on a consumer education campaign in order to convey the message that all OFPA organic foods may contain chemical residues and synthetic inputs. *See generally* Amaditz, *supra* note 1, at 550-552. If the USDA had heeded this message, would the current backlash to the National Organic Program’s Proposed Rules been so negative?

⁵⁰Lathrop, *supra* note 45, at 903.

⁵¹S. REP. 101-357, *supra* note 11.

⁵²Lathrop, *supra* note 45, at 915.

⁵³Amaditz, *supra* note 1, at 552.

case can be made for joint agency lobbying of the FTC (which has traditionally been more tolerant of food claims in advertising) for strict advertising standards based on a clear congressional intent to differentiate “residue-free” and other advertising claims from valid organic claims.⁵⁴ If the agencies can work together, efficiencies of scale could be gained from cooperation on food labeling due to the fact the FDA already regulates this same food for adequate nutrition data, packaging statements, weight, origin, etc.⁵⁵ Furthermore, the FDA’s concern with the possibility of false health claims is minimized because organic regulations do not attempt to make scientific judgments. If adequate inter-agency cooperation is not attainable, some advocate simply having the USDA transfer OFPA labeling authority for FDCA foods to the FDA directly.⁵⁶

D.

The regulations found in the OFPA of 1990 are but a starting point for much more detailed provisions in the National Organic Program’s Proposed Rule. Even without the minute details, however, international commentators in the early 1990s expressed grave concerns about the viability of such a federal regulation scheme in the international marketplace. Most notably, the regulations could constitute a barrier to trade, in contravention of the General Agreement on Tariffs and Trade (“GATT”) if any OFPA provision operates to treat foreign products less favorably than domestic products or to afford protection to domestic production.⁵⁷

⁵⁴ Amaditz, *supra* note 1, at 558.

⁵⁵ Amaditz, *supra* note 1, at 558. See also S. REP. 101-357, *supra* note 11.

⁵⁶ Amaditz, *supra* note 1, at 559.

⁵⁷ See generally Terence C. Centner, *The United States’ Organic Foods Production Act: Does the Small-Farmer Exception Breach the United States’ Obligations Under GATT?*, 28 TULSA L.J. 715 (1993). To delve into more detail in the possible GATT compliance problems, it is useful to split OFPA into sanitary and non-sanitary measures. OFPA’s sanitary measures are subject to scrutiny under the Agreement on Application of Sanitary and Phytosanitary Measures (commonly referred to as the “SPS Agreement.”) Technical regulations that are not sanitary measures, such as labeling, packaging, or marketing standards, are covered by the Agreement on Technical Barriers to Trade (commonly referred to as the “TBT Agreement.”) Franzen predicts that the OFPA regulations as drafted would violate both of these measures. See also Rick Franzen, *Will*

In addition, the exception for small farmers may violate national treatment obligations because these individuals would be able to avoid the costs of preparing and submitting an organic plan for certification and from having their products certified altogether.⁵⁸ This possibility appears striking after an examination of the relevant congressional history. Rather than providing a loophole that would lead small farmers to run afoul of GATT, Congress expected that this exemption would “be used primarily by backyard gardeners and hobbyists who sell produce at farmer markets and roadside stands to consumers within their communities.”⁵⁹ Clearly, the magnitude of the comments on international implications of the small farmer exemption demonstrate that such “backyard gardeners and hobbyists” are not the individuals who in reality would be taking advantage of the exception.

Commentators are particularly troubled by the fact that foreign organic programs with standards slightly lower than the OFPA may not be recognized, and the OFPA makes no reference either to the FDCA standards or the Codex Alimentarius, by which useful comparisons of various countries’ organic regulations could be compared.⁶⁰ The Codex Alimentarius is an international organization charged with guiding and promoting the establishment of definitions and requirements for foods in order to facilitate the growth of international trade.⁶¹ Because its organizational goals appear to be in line with the original Congressional intent behind the drafting of the Act, it is useful to keep the Codex guidelines in mind while examining the progression of organic regulation drafting this decade.

GATT Take a Bite Out of the Organic Food Production Act of 1990?, 7 MINN. J. GLOBAL TRADE 399, 400-401 (1998).

⁵⁸Centner, *supra* note 57, at 720.

⁵⁹S. REP. 101-357, *supra* note 11.

⁶⁰Franzen, *supra* note 57, at 421-422.

⁶¹Consumers International Position Paper, *Comments and Response to Codex’s Proposed Draft Recommendations for the Labelling of Foods Obtained Through Biotechnology*, Apr. 24, 1998 (visited Jan. 7, 1999) <<http://193.128.6.150/consumers/campaigns/codex/CCFL-May98.html>>.

Importantly, some cases hold that even subtle distinctions between nations' regulations may be construed as barriers to trade.⁶² In *Norcal/Crosetti Foods, Inc. v. United States Custom Service*,⁶³ the plaintiffs, domestic packagers of frozen produce, sought to compel importers to comply with legal provisions⁶⁴ that required all foreign products to carry a conspicuous label indicating the country of origin. The court found that indeed the country of origin markings were not located in a sufficiently conspicuous place, and this decision may as a result force imported organic food to carry extra information related to foreign certification.

Inconsistencies between a proposed international inspection standard and a provision of the Poultry Products Inspection Act⁶⁵ formed the basis of a challenge in *Mississippi Poultry Ass'n v. Madigan*.⁶⁶ The Fifth Circuit held that the proposed equivalency standard allowing poultry products that had been inspected under standards "at least equal to" U.S. standards was invalid. Taking these cases together, we see that very small and seemingly unimportant distinctions between international regulations may be construed by American courts as barriers to trade. In light of the serious risk of such GATT non-compliance violations, the United States could help to mold the international standard to reflect the goals of the OFPA and thereby promote increased international trade in organic products.⁶⁷

IV. Reaction to National Organic Standards Board

⁶²Centner & Lathrop, *supra* note 34, at 46-49.

⁶³*Norcal/Crosetti Foods, Inc. v. United States Customs Service*, 758 F. Supp. 729 (Ct. Int'l Trade 1991), *rev'd*, 963 F.2d 356 (1992), *vacated* 790 F. Supp. 302.

⁶⁴19 U.S.C. 1304(a) (1994). The provision states:

Marking of articles. Except as hereinafter provided, every article of foreign origin (or its container...) imported into the United States shall be marked in a conspicuous place as legibly, indeliably, and permanently as the nature of the article (or container) will permit in such a manner as to indicate to the ultimate purchaser in the United States the English name of the country of origin of the article...

⁶⁵21 U.S.C. 451-70 (1994). The regulation promulgated by the Secretary of Agriculture would allow the entry of poultry imports whenever the foreign inspection standards were "at least equal to" U.S. standards.

⁶⁶31 F.3d 293 (5th Cir. 1994).

⁶⁷Franzen, *supra* note 57, at 429-430.

A.

The National Organic Standards Board (“NOSB”) was set up by section 6518 of the OFPA of 1990 to assist in the development of standards for substances to be used in organic production and to advise the Secretary of Agriculture on any other relevant aspects of the implementation of the Act.⁶⁸ Before we can approach the subject of what the National Organic Standards Board recommended to the USDA, we must first understand the composition of the board. The NOSB was originally established on January 24, 1992, with individual members appointed for staggered appointments of 3, 4, and 5 years.⁶⁹ It is a thirteen member panel of organic experts and consumer and environmental advocates.⁷⁰ Currently and more specifically, the NOSB is comprised of four growers, two handlers, three public interest advocates, three environmentalists, and a scientist.⁷¹ The selection criteria included such factors as: demonstrated experience and interest in organics; commodity and geographic representation; endorsed support of consumer and public interest organizations; and demonstrated experience with environmental concerns.⁷² The current chairman of the board is Bob Anderson.⁷³

⁶⁸AMS, *Nominations for Members of the National Organic Standards Board*, 61 FR 33897, July 1, 1996.

⁶⁹*Id.* at 1.

⁷⁰Organic Trade Association, *A Guide to the Recommendations of the National Organic Standards Board* (visited Jan. 5, 1999) <<http://www.organic.org/7/guide/>>. *See also* 1997 Testimony Before Congress, 1997 WL 154218 (F.D.C.H.) Note that the OFPA originally called for the Board to be composed of “fifteen members, of which four shall be individuals who own or operate an organic farming operation; two shall be individuals who own or operate an organic handling operation; one shall be an individual who owns or operates a retail establishment with significant trade in organic products; three shall be individuals with expertise in areas of environmental protection and resource conservation; three shall be individuals who represent public interest or consumer interest groups; one shall be an individual with expertise in the fields of toxicology, ecology, or biochemistry; and one shall be an individual who is a certifying agent as identified under section 6515 of the title.” 7 U.S.C. 6518(b)(1)-(7) (1990). Administrative ease is most likely the reason for the differences between this plan and the actual implementation of the NOSB.

⁷¹Susan D. Haas, Comment, *A Real Organic Food Supply Would Avoid Irradiation and Toxins*, ALLENTOWN MORNING CALL, Apr. 19, 1998, at A21. *See also* S. REP. 101-357, *supra* note 11. Therein, OFPA suggested the appointment of more specialized Technical Advisory Panels to provide scientific evaluations of the materials considered for inclusion on the National List. Such panels were to include agronomists, entomologists, toxicologists, soil scientists, and others with appropriate expertise in the area.

⁷²AMS, *supra* note 68, at 1.

⁷³Anon., *National Organic Standards Board Recommends Antibiotics Ban in Organic Farming*, FOOD CHEM. NEWS, Dec.

The main task assigned to NOSB by the OFPA of 1990 was to issue recommendations on the forthcoming National Organic Program Proposed Rule. The idea was to pool the collective experiences from a wide range of professionals in the field so that a balanced, fair, and fiscally responsible rule would eventually emerge. Each area of expertise represented on the NOSB was necessary to draw upon in the drafting of the National List and the recommendations for the ultimate regulations. In addition to the representative membership on the board's impact on the NOSB recommendations, the composition of the Board continues to be important to this day.

In the current stage of regulatory drafting, the refinement of the National Organic Program's Proposed Rule, we are seeing renewed activity by the NOSB. For example, in response to specific "issue papers" presented by the USDA in reaction to widespread commentary on the Proposed Rule, the NOSB recommended in December, 1998 that the USDA ban antibiotics in organic farming and allow the use of paraciticides only under special circumstances.⁷⁴ Within the last few months, the Board has also discussed certifiers' ability to discipline farmers who violate organic standards, and now plans to develop enforcement options which they will subsequently submit to the USDA.⁷⁵

B.

14, 1998, at 1.

⁷⁴*Id.* at 1.

⁷⁵*Id.* at 1. More specifically, the board recommends that local, county or state officials be given the authority to quickly remove labels on products mislabeled as "organic" or, in the alternative, be able to prevent them to be sold. *See generally* Anon., *National Organic Standards Board Recommends Antibiotics Ban in Organic Farming*, FOOD LABELING NEWS, Dec. 9, 1998, at 1.

Unfortunately, delays in the issuance of recommendations by the NOSB were compounded by funding difficulties, bureaucratic confusion caused by the Bush-Clinton transition, and a determined NOSB effort to allow for high levels of public participation.⁷⁶ Perhaps the most problematic aspect of the NOSB was its initial appointment: the Bush administration was openly hostile to the concept of organic agriculture and delayed the appointment of the NOSB members until January, 1992. After all was said and done, the NOSB took more than six years (dating from the enactment of OFPA) to compile hundreds of pages of technical material, most of which has now largely been ignored.⁷⁷

Of primary importance, the NOSB compiled a National List of acceptable synthetic substances and prohibited natural materials for use on organic crops and livestock. The NOSB worked from the hypothesis that a member could only propose a substance for inclusion on the list if the use of that substance was not harmful to human health or the environment, it was necessary to the production or handling because other natural substitutes were unavailable, and it was consistent with the overall process of organic farming and handling.⁷⁸

The decisions on National List inclusions were made based on seven basic criteria: (1) the potential of such substances for detrimental chemical interactions with other materials used in organic farming systems; (2) the toxicity and mode of action of the substance; (3) the probability of environmental contamination during manufacture, use, misuse, or disposal of such substance; (4) the effect of the substance on human health; (5) the effects of the substance on biological and chemical interactions in the agroecosystem; (6) the alternatives to using the substance in terms of practices or other available materials; and (7) its compatibility with a system of sustainable agriculture.⁷⁹ An examination of the substance of these requirements demonstrates

⁷⁶Amaditz, *supra* note 1, at 545.

⁷⁷Claire Cummings, *Some Questions Raised by the Proposed USDA Organic Standards* (visited Jan. 7, 1999) <<http://www.purefood.org/Organic/orgStdQues.html>>. For a more thorough discussion of the ways in which the NOSB recommendations were ignored by the USDA when drafting their Proposed Rule, refer to the next section.

⁷⁸Amaditz, *supra* note 1, at 541-542. While Congress recognized the importance of limiting the number of synthetics on the National List, they also expressed an appreciation for their need in certain circumstances. For example, some organic farmers use certain synthetic analogues to natural substances when those substances are difficult to obtain. The OPFA of 1990 was carefully drafted with the intent of allowing narrow exceptions to the rule of no-synthetics, yet preventing widespread exceptions of "loopholes." See generally S. REP. 101-357, *supra* note 11.

⁷⁹AMS, *Procedure to Submit Names of Substances for Evaluation for Inclusion in the National List To Be Included in the*

that the National List inclusions were to be decided upon in accordance with the original congressional intent of the OFPA of 1990.

Notwithstanding the obvious appeal of the seven specified criteria for the National List, questions linger about their wording. It strikes me as circular, for example, to proclaim as the goal of transcribing a “National List” to be the ability to accurately categorize organic practices, while allowing a substance on the “List” if it is consistent with organic farming! In addition to the enumerated list of situations for substance inclusion on the National List, the substance must be used in the production of the organic food and fall within one of approximately ten categories, or contain synthetic ingredients not of concern, or be used in handling while not being synthetic.⁸⁰ Again, I am perplexed by the inclusion of “synthetic ingredients not of concern” as one way to make the accepted list, when I thought the professed goal of the National List was to inform organic farmers and consumers of which synthetic ingredients were precisely not of concern, so as to make them acceptable organic components!

Working from the foundation of the National List, the NOSB succeeded in recommending general organic food labeling standards. By way of example, four of those standards are presented at this point, with the knowledge that their content is representative of NOSB labeling considerations generally. First, non-synthetic, non-organic agricultural products were allowed to be used in foods labeled as “organic foods” unless listed as a prohibited material on the list.⁸¹ On the other hand, synthetically processed non-organic agricultural products would not be used at all in organic foods labeled as such. A third labeling example

National Organic Program, 60 FR 15744, Mar. 27, 1995.

⁸⁰7 U.S.C. 6517(c)(1)(B)(i). These potential National List substances are those that contain an active synthetic ingredient in one of the following such categories: copper and sulfur compounds’ toxins derived from bacteria; horticultural oils; and livestock parasiticides and medicines. See Amaditz, *supra* note 1, at 541-542.

⁸¹Anon., *NOSB Issues Final Recommendations for Organic Program*, FOOD LABELING NEWS, Feb. 1, 1996, at 1.

is that NOSB also mandated that the organic food must be handled and processed by a certified organic handler, again focusing on the process-oriented, as opposed to the product-oriented, stance of the organic industry. The final example concerning NOSB labeling provisions is that all non-retail containers of organic products had to be correctly labeled, and all incidental processing aids had to be documented.⁸²

Organic industry watchers felt that one of the most promising aspects of NOSB's labors was its attempt to define many industry "buzz words." Indeed, NOSB's final recommendations contained proposed definitions to words such as "organic," "genetically engineered," "killed microbial pesticide," "recombinant RNA and DNA techniques," "synthetic," and "synthetic analogue."⁸³ "Organic" was defined in its context as a labeling term that simply denoted food that had been produced in accordance with the OFPA.⁸⁴ Note the process-based definition the NOSB accords to this important term; this demonstrates that the NOSB was adhering to Congress' vision of organic as a means of production rather than a result.

The actual recommendations of the NOSB are lengthy and technical, and so I attempt here only to flag some of the main recommendations which are often commented on by area experts and which arise again with respect to the National Organic Program's Proposed Rule. First, the NOSB recommended that no genetically engineered substances be allowed in organic foods.⁸⁵ Also prohibited were the use of antibiotics and parasiticides in organic livestock. However, questionable ingredients such as sulfur dioxide as a production aid for organic wine, nutrient supplementation, and natural flavors in organic foods were deemed

⁸²Anon., *NOSB at Odds with USDA Over National List Substances*, FOOD LABELING NEWS, Aug. 3, 1995, at 1. See also Anon., *supra* note 81, at 1.

⁸³Anon., *supra* note 81, at 1.

⁸⁴Amaditz, *supra* note 1, at 541.

⁸⁵Anon., *supra* note 82, at 1.

acceptable.⁸⁶

In sum, the NOSB appears to have done a commendable job compiling the vast array of technical considerations into a workable set of alternatives. Remembering that the ultimate goal of drafting the recommendations was to guide the USDA in implementing actual regulations for their National Organic Program, however, we cannot stop our analysis of the NOSB's success at the point of issuance of final recommendations. It is necessary to go one step further and to examine how commentators (reacting in the time period after the recommendations were issued but before December of 1997, when the Proposed Rule was issued) viewed the realistic chances of the conversion of the NOSB's data from simply recommendations to bases for the final regulations.

C.

The feedback for the NOSB as a group has been mixed. Admittedly, reduced funding by the USDA made it challenging for the Board to reach consensus on crucial issues such as organic food standards, production, and accreditation.⁸⁷ Even taking those administrative shortcomings into account, however, some critics believe that the NOSB began the watering-down process of organic food regulation. One reaction was that "long-term growth of organic farming can only be achieved by codifying high standards and eliminating inappropriate practices and products, not by lowering standards and squeezing questionable inputs onto the

⁸⁶Anon., *supra* note 82, at 1.

⁸⁷Anon., *supra* note 82, at 1.

National List, as the current NOSB seems determined to do.”⁸⁸ Other concerns were similar; now that organic production was recommended to be regulated at three levels (federal, state, and certifier), some felt that producers would find it difficult to actually know the requirements being imposed upon them.⁸⁹

Much of the discussion about the realistic possibility of the USDA implementing the NOSB’s recommendations stems from the continuing role of the NOSB and its interaction with the National Organic Program. There was a meeting in October of 1998, for example, which was called precisely to give an opportunity to the NOSB and USDA to discuss issues raised during the comment period on the proposed national organic rule and to explore options for moving forward.⁹⁰ The next full NOSB meeting will be held in Washington, DC from February 9-11, 1999. The Board should take this and other such opportunities to stay involved with the ongoing drafting process of the rules, as they have unique insight into each relevant issue after having spent years at the drawing board while drafting comprehensive recommendations. Indeed, the NOSB’s involvement should not be seen as a step of the process that has already reached completion, but rather should place the Board in an on-going, interactive, discussive role with other current actors in the organic regulation debate.⁹¹

V. Reaction to Proposed Rule

A. Overview of Content

Agriculture Secretary Dan Glickman announced the USDA’s National Organic Program Proposed Rule

⁸⁸Clark, *supra* note 10, at 345-346.

⁸⁹Vaupel, *supra* note 4, at 140-142.

⁹⁰AMS, *National Organic Standards Board to Meet in Washington Oct. 27-29*, Oct. 14, 1998 (visited Dec. 30, 1998) <<http://151.121.3.150/news/289b/htm>>.

⁹¹For a more extensive treatment of the author’s personal recommendations for moving forward in the organic regulation drafting process, see the final section.

(hereinafter referred to as the “Proposed Rule”) on December 15, 1997, one day before the rule was published in the Federal Register.⁹² The overarching goal of the Proposed Rule was to improve consumer confidence in organic foods, as mandated by the Organic Foods Production Act of 1990.⁹³ The text of the Proposed Rule is lengthy and convoluted, yet it is possible to glean the crucial federal requirements which the Rule addresses. For example, requirements are prescribed in the following areas: the production, handling and labeling of organic foods; certification procedures for organic operations; accreditation of both state and private certifying programs; compliance testing for organic programs; equivalency of foreign organic certification programs; approval of state organic programs; and payment of user fees.⁹⁴

The enormity of the USDA’s responsibilities under the Proposed Rule with regard to the implementation of these many federal requirements is striking. In sum, with a modest additional annual budget of \$1 million and a staff of only twelve, the USDA essentially would be charged with certifying the competence and qualifications of all private industry inspectors.⁹⁵ Congress, in drafting the OFPA, obviously recognized the scope of the agency’s duties and as a result made a plea for reasonableness in the later drafting of enforcement provisions. “In most cases previous experience in organic certification programs would provide sufficient expertise. The Committee does not intend that the Department establish accreditation standards that are so rigorous as to be unnecessary for the skills required.”⁹⁶ As with many other original congressional intentions, this desire for a rule built on ease-of-administration is not fully encompassed by the Proposed Rule.

While still on the administrative side of things, the National Organic Program elected a new program leader on February 11, 1998 named Keith Jones, a former wheat and cotton farmer as well as policy analyst for the

⁹²USDA, *Glickman to Announce National Organic Program Proposed Rule*, Dec. 12, 1997 (visited Dec. 30, 1998) <<http://www.usda.gov/news/releases/1997/12/0438>>. 62 FR 65850, Dec. 16, 1997.

⁹³Anderson, *supra* note 2, at 9.

⁹⁴USDA, *supra* note 92, at 1.

⁹⁵Anon., Editorial, *Getting Old Organically*, CHICAGO TRIBUNE, Dec. 16, 1997, at 24.

⁹⁶S. REP. 101-357, *supra* note 11.

state of Texas.⁹⁷ Jones currently has the difficult responsibility of structuring the comment period for this Proposed Rule, as well as the more global task of implementing some workable structure for moving forward from here.

Any structure which Jones brings to the current conundrum will be welcomed, and should be rooted in the substantive provisions of the Proposed Rule themselves. Without getting too bogged down in the complex language and requirements set forth in the National Organic Program's Proposed Rule, it is useful at this point to mention some of the most widely debated provisions, in the hope that the massive swell of constituents' comments and suggestions will be more easily comprehended against this baseline knowledge. In the four primary areas described below, we see that at its most basic level the Proposed Rule has lowered the requirements stated by both the OFPA of 1990 and the NOSB in their final recommendations to the USDA.

1. Most fundamentally, the Proposed Rule changes the definition of "organic" from exhibiting a focus on the agricultural process in its entirety to an emphasis only on the end product.⁹⁸

Organic. A term that refers to a raw agricultural product produced in accordance with the Act and the regulations of this part; or, to an agricultural product wherein organic agricultural products used as ingredients comprise between 95 percent and 100 percent of the total weight of the finished product, excluding water and salt; additionally, the percentage of the total weight of the finished product, excluding water and salt, that is not comprised of organic agricultural products is some combination of non-agricultural ingredients and/or non-organically produced agricultural products included on the National List.

While this alteration is confusing in light of the traditionally prominent role of process management in all of organic production, there has been some speculation that this definitional change is due to a desire on

⁹⁷AMS, *AMS Selects National Organic Program Leader*, Feb. 11, 1998 (visited Dec. 30, 1998) <<http://151.121.3.150/news/044b.htm>>. See also Martha Groves, *Organic-Farming Advocate to Fill USDA Post Agriculture: Agency Taps Keith Jones to Lead Nation's Program, Establish Industry Rules*, L.A. Times, Feb. 12, 1998, at D3.

⁹⁸Paul Schmelzer, *Label Loophole: When Organic Isn't*, THE PROGRESSIVE, May 1, 1998, at 28. See also Martha Brown, *Proposed Rules on Organic Farming Raise Hackles and Questions*, COUNTRYSIDE & SM. STOCK J., July 1, 1998, at 40.

the part of the USDA to mesh the Program's requirements within the current overall framework of US trade policy.⁹⁹

2. The Proposed Rule effectively erodes NOSB's statutory authority (as granted by the OFPA of 1990) by altering the recommended National List and by ignoring or twisting NOSB's other recommendations in the following areas: allowable synthetic material use; allowance of antibiotics in meat and poultry; lowering of traditional organic standards for intensive confinement of farm animals; use of non-organic animal feed and other factory farm practices; prevention of private organic certifiers from certifying and labeling organic products using higher standards; and granting to the USDA the power to regulate or even prohibit eco-labels of any kind.¹⁰⁰ Interestingly, the USDA has described its substantive rules as being "similar" to the NOSB's recommendations in a table entitled "Comparison of the Proposed National Organic Program Regulations with the NOSB Recommendations and Representative State and Private Programs." Commentators disagree, however, and have universally determined that such variations in the NOSB recommendations are contrary to the original Congressional intent behind the granting authority of the OFPA of 1990.¹⁰¹

3. In various provisions of the Proposed Rule, the USDA has added "if necessary" and other similar discretionary language, which has the effect of adding loophole language which was never before included in discussions.¹⁰² Note that this is in stark contrast with original congressional statements indicating that the drafters of the OFPA wanted to avoid costly loopholes.¹⁰³ The importance of these additions are evident, as now certain organic producers and handlers can find ways to circumvent the already-lowered standards.

4. In addition to straight regulation, the Proposed Rule also addresses the enforcement of those regulations. Organic production will still be regulated at three levels: federal, state, and certifier.¹⁰⁴ For example, one

⁹⁹Lilliston & Cummins, *supra* note 5, at 195.

¹⁰⁰Schmelzer, *supra* note 98, at 28. *See also* Lilliston & Cummins, *supra* note 5, at 195. The complete modifications of this regulatory regime are contained at 62 FR 65885-65896, Dec. 16, 1997.

¹⁰¹Amaditz, *supra* note 1 at 553. *See* Table 4, 62 FR 65965-65966, Dec. 16, 1997.

¹⁰²Schmelzer, *supra* note 98, at 28.

¹⁰³S. REP. 101-357, *supra* note 11.

¹⁰⁴Vaupel, *supra* note 4, at 140.

source of federal power within the Proposed Rule arises from its authorization of a \$10,000 penalty to be assessed against those selling or labeling products that do not meet the prescribed standards.¹⁰⁵ One wonders, however, whether this enforcement mechanism is realistically possible. Consider the variation in federal and state standards; now the substantive national standards are set far below any of the current state organic programs, and the high standards already set in states such as California by their own organic foods laws would be superseded.¹⁰⁶ This debate over the interaction of federal and state enforcement regulations is important, but even critics should remain mindful of the overriding benefits of a federal system. The flip side, of course, is that the Proposed Rule will help to mend the present hopelessly inconsistent patchwork of state and private accreditation programs that exist on a state level.¹⁰⁷

B.

The vocal reactions to the Proposed Rule have been loud and strong; over 275,000 comments flooded the USDA during the prescribed comment period for the Rule, 99% of which flatly denounced the Rule as written.¹⁰⁸ In an attempt to get a flavor for the substance of these comments, I examine the specific reactions of the following six distinct groups: (1) private and state organic certification programs, (2) environmental groups and small organic farmers, (3) large agri-business, (4) politicians, (5) the NOSB, and (6) the consumers of organic food as well as the voting public at large.

¹⁰⁵Anderson, *supra* note 2, at 9.

¹⁰⁶Anon., *GMOs, Irradiated Foods, Sludge to be Dropped from Organic Rule*, FOOD CHEM. NEWS, May 4, 1998. *See also* Cummings, *supra* note 77.

¹⁰⁷Rob Mahoney, *Green Acres: The Organic Food Industry May Indeed Plow Its Way Into the Mainstream, But Not Without Growing Pains*, PREPARED FOODS, Sept. 1, 1998, at 46. Also, refer to previous section detailing the current regime of certification and accreditation programs nation-wide.

¹⁰⁸Organic Trade Association, *OTA Calls Secretary Glickman's Surprise Announcement a Change in the Right Direction for Consumers and Industry*, July 22, 1998 (visited Jan. 5, 1999) <<http://www.ota.com/news/htm>>. *See generally* Lilliston & Cummins, *supra* note 5, at 195.

(1) *Private and State Organic Certification Programs.* The comments from the more than 40 currently operating private and state organic certification programs¹⁰⁹ reveal that this constituency is upset mostly because the Proposed Rule would dictate that it would be illegal for organic certifiers and producers to set higher standards than the those found in the Rule.¹¹⁰ “These rules are so bad they give us an opportunity to organize” said Michael Sligh, director of the Rural Advancement Foundation International upon first reading the Proposed Rule in January of 1998.¹¹¹

In addition to federal preemption concerns, this constituency is upset with the Proposed Rule’s shift away from a process-based approach. On a fundamental level, private certifiers take pride in focusing not only at what goes into an organic product in terms of inputs, but also at how organic farmers manage their land ;¹¹² as discussed previously, the Rule’s shift away from a process approach is therefore not consistent with this constituent’s methodology. The suggestions on appropriate responses to this methodological shift vary. Various legal arguments have emerged from the literature and document the reaction of the private and state certifiers, perhaps the most interesting being the theory that one could consider the substance of this Rule a “takings” by the government of the intellectual property of the leaders who developed the present meaning of the word “organic.”¹¹³

(2) *Environmental Groups and Small Organic Farmers.* Environmental action organizations and small organic farmers have also been virtually united in their expressed displeasure for the Proposed Rule. This

¹⁰⁹USDA, *Remarks of Secretary Glickman re: Proposed Organic Standards*, Dec. 15, 1997 (visited Dec. 30, 1998) <<http://www.usda.gov/news/releases/1997/12/0443>>.

¹¹⁰Lilliston & Cummins, *supra* note 5, at 195. *Reference* 62 FR 65914-65931, Dec. 16, 1997.

¹¹¹Groves, *supra* note 97, at D3.

¹¹²Brown, *supra* note 98, at 40.

¹¹³Cummings, *supra* note 77.

coalition has called on their members' lobbying support by politicizing a few of the "absolutely unacceptable" practices which would be condoned by the Rule, such as the use of germ-killing irradiation, the growth of genetically altered crops and the spreading of sewage sludge as a fertilizer.¹¹⁴

One such organization, the Organic Trade Association, argued to its members that there are nine fundamental threats to organic integrity imbedded in USDA's Proposed Rule. These threats have been articulated by the OTA in the following way: 1) missing the "big picture" by eliminating key concepts in the definition of "organic," 2) ignoring the recommendations of the NOSB (as detailed in section IV-B of this paper), 3) the possible inclusion of genetically-engineered organisms ("GEOs") in organic systems, 4) the possible inclusion of food irradiation in post-harvest organic production, 5) the possible inclusion of biosolids (sewage sludge), 6) a weak livestock section which as drafted simply gives too much leeway to the industry, 7) the presence of unnecessary loopholes, 8) a weakened de-certification authority¹¹⁵ that could lead to products which no longer meet organic requirements remaining on the market shelves for longer periods of time, and 9) ignoring historical land usage practices.¹¹⁶ These threats articulated by the Organic Trade Association provide a representative example of the response which has been vocalized by the environmental and small farmer coalition thus far.

(3) *Large Agri-Business.* The typical American small organic farmer shares the belief that the USDA is

¹¹⁴Michael Mansur, *USDA's Proposals to Regulate Organic Foods Anger Farmers, Consumers*, KANSAS CITY STAR, Apr. 28, 1998, at 1. See also Anderson, *supra* note 2, at 9. Note also that the Produce Marketing Association has said that the application of irradiation or biotechnology is not appropriate at this time. Note generally Anon., *Produce Group Opposes Use of Irradiation, Biotechnology in Organic Production*, FOOD CHEM. NEWS, Mar. 30, 1998.

¹¹⁵This particular concern about the lack of an effective de-certification authority was addressed by USDA's Issue Paper #3, entitled "Termination of Certification by Private Certifiers." The environmental groups and small farmer lobby is apprehensive of placing private certifiers in the impotent position of doling out perpetual certification licenses. For a more thorough discussion of this Issue Paper, consult AMS, *supra* note 33.

¹¹⁶Organic Trade Association, *supra* note 108.

prone to represent large agri-business interests rather than those of a small-time farmer.¹¹⁷ Many feel that as a result the USDA has succumbed to big agri-business' lobbying to redefine "organic" as only a standard of identity, not a mark of exceptional safety.¹¹⁸ As this stereotype would predict, therefore, most large corporations have been amenable to the Proposed Rule. Monsanto, the chemical super-giant, has advised the USDA to back off temporarily on trying to include gene-altered products under organic label for a three year period and then to try again.¹¹⁹ The FDA and the nuclear industry have similarly been lobbying USDA for the wholesale nuclear irradiation of meat and other organic foods.¹²⁰

In a similar attempt to protect a large industry's stake in organics, the Water Environment Federation (WEF) declares biosolids among the safest and most complete organic fertilizers currently available, and alleges that the negative reaction among small organic farmers is nothing more than the result of a "beauty contest" not founded in science.¹²¹ It is interesting to note that as represented by these discrete examples, the "large agri-business" constituency is very diverse, and encompasses many different interests which at various times may compliment or detract from other interests within the larger group.

(4) *Politicians.* The politicians who had first drafted the Organic Foods Production Act of 1990, which authorized the establishment of national standards, have sided with the organic farmers and generally share their outrage at the Proposed Rules. The importance of maintaining the viability of a national regime for the regulation of the organic industry is still obvious, and US Representative Sam Farr (D-Calif) notes that

¹¹⁷Mansur, *supra* note 114, at 1. *See also* Lilliston & Cummins, *supra* note 5, at 195.

¹¹⁸Pontacq, *supra* note 8, at A19.

¹¹⁹Lilliston & Cummins, *supra* note 5, at 195.

¹²⁰Lilliston & Cummins, *supra* note 5, at 195.

¹²¹Anon., *Water Environment Federation Responds to USDA*, AP POLITICAL SERVICE, May 13, 1998, at 1. The Water Environment Federation laid out forty years of research demonstrating that biosolids recycling benefits agriculture. In fact, in the past, the EPA, the FDA, the National Research Council, and the USDA itself have all declared that the use of biosolids is safe and appropriate in the production of fruits and vegetables.

“everything’s riding on these rules.”¹²² US Reps Peter DeFazio (D-Ore) and Jack Metcalf (R-Wash) agree that USDA’s current Proposed Rule represents a miscarriage of democracy, in light of the intent of Congress when authorizing their drafting.¹²³ By way of political comparison, the Clinton Administration is in a quite different situation, and has been facing a unique political dilemma over the past year: how can administrators claim that chemical-intensive agriculture, intensive confinement of farm animals, and genetic engineering are perfectly safe, and yet permanently ban those very practices under the federal organic label?¹²⁴ It remains to be seen how the lobbying efforts on both sides of this issue will influence both the legislative and executive branches of government.

(5) *The NOSB*. Former members of the NOSB, who had labored for years to provide the USDA with what they thought were well-reasoned and comprehensive recommendations for regulations, have also reacted negatively to the substance of the Proposed Rule. Board member Stephen Pavich, a California organics grower, complains that he was “blind-sided” by the document.¹²⁵ As Tom Stoneback, who served on the NOSB from 1992-1996, explains, during the majority of NOSB’s deliberations, “probably 95% of our (NOSB’s) votes were unanimous.”¹²⁶ This comment demonstrates that what was once clear support from industry representatives on the substance of the recommendations had been transformed, through the drafting of the Proposed Rule, to fragmented and conflicting negative reactions. The efforts of the NOSB suddenly appear to be a waste of time, and Stoneback remarked in April of 1998 that it only took the USDA one year to shop these recommendations around Washington, and the resulting rule was “laughable.”¹²⁷

¹²²Groves, *supra* note 97, at D3.

¹²³See generally Schmelzer, *supra* note 98, at 28 and Anon., *supra* note 106. In addition, U.S. Senators Olympia Snowe and Susan Collins condemned the original USDA Proposed Rule, and argued that the nation’s consumers “deserve clear, common-sense standards for food that will bear the organic label.” Anon., *Snowe, Collins Praise USDA Pledge to Review Proposed Organic Standards*, FED. DOC. CLEARING HOUSE, May 8, 1998, at 1.

¹²⁴Lilliston & Cummins, *supra* note 5, at 195. Note that this political dilemma is caused by the confusion between safety and nutrition claims in labeling, as discussed previously.

¹²⁵Pontacq, *supra* note 8, at A19.

¹²⁶Haas, *supra* note 71, at A21.

¹²⁷Haas, *supra* note 71, at A21.

(6) *Consumers and the Voting Public.* On a fundamental level, the voting public and consumers of organic foods in general are disheartened by the fact that it has taken over eight years to even get this far in the process of drafting national standards for the organic industry.¹²⁸ Consumers rightly believe that when they pay a premium for organic food, they are buying food that has been minimally processed without the use of synthetic preservatives or additives.¹²⁹ Now that the publicity has surfaced about the true nature of the Proposed Rule issued by the National Organic Program, consumers are most likely so disillusioned and distrustful of the USDA that many spectators fear they will no longer be willing to accept any compromises on the substance of the Rule, regardless of how reasonable they are from an objective standpoint.¹³⁰

From the beginning the USDA itself had proclaimed that they wanted this document to “serve as an informed starting point for a very public debate—one that engages consumers, agriculture and the scientific community.”¹³¹ If there is truth to this statement, then the USDA’s reaction to the strong response from all three of their mentioned groups should be satisfaction, for a “very public debate” is exactly what has ensued. The year of 1998 was entirely spent by the USDA reacting to the pushback of consumers, agriculture and the scientific community. While initially very supportive of the criticism, USDA has recently become a bit more defensive. The organization claims that a careful reading of the voluminous rule will reveal that the controversial practices often denounced by the comments were not actually proposed, but rather were mentioned only for consideration.¹³²

¹²⁸Anderson, *supra* note 2, at 9.

¹²⁹Anon., *Organic Standards Sprouting*, BETTER HOMES & GARDENS, June 1998, at 133.

¹³⁰Lilliston & Cummins, *supra* note 5, at 195.

¹³¹*See generally* USDA, *supra* note 109, at 1. For the first time, AMS is providing one of the most open and accessible public rulemakings in Federal experience—a fully electronic public drafting process via the internet. 1998 Testimony Before Congress, 1998 WL 879898 (F.D.C.H.).

¹³²Mansur, *supra* note 114, at 1. *See generally* 62 FR 65850-65967, Dec. 16, 1997.

The USDA is obviously feeling the uneasiness and skepticism with which their actions are looked upon, as displayed by Mike Hankin, senior marketing specialist of the National Organic Program when he remarked that “It’s a matter of trust. If you’re suspicious of us, no matter what we write or say, you’ll look at it with a critical eye. You’ve got to trust that we’re writing the highest possible standard.”¹³³ At this point, though, how realistic is it that all of the above mentioned constituencies will simply “trust” the USDA’s future actions with regard to the National Organic Program? At least the USDA has apparently turned to using humor as a deflection device. In fact, holding a hand-drawn paper target to his chest at a January 1999 conference, Keith Jones admitted that the federal agency failed the organic farmers in the past. “It seems that in the current environment the USDA can’t do anything right,” he said, “but I can tell you today we have a commitment to get it right.”¹³⁴

The most remarkable feature of the vocal debate which has ensued over the past year is the great diversity of constituencies, but the relatively unified reaction of substantive unacceptability of the Proposed Rule. In light of these tumultuous occurrences, the USDA is willfully blinding itself to the intensity of feelings on this issue if they honestly believe that a cursory plea for institutional trust will solve a decade-long problem which has personally embroiled hundreds of thousands of Americans. In summary, the various constituencies’ concerns about the USDA’s current Proposed Rule can aptly be described as grave, and a suitable and equally well-reasoned response by the USDA is warranted.

C.

¹³³Schmelzer, *supra* note 98, at 28.

¹³⁴Anon., *Organic Farmers Applaud Label Plan*, CAPITAL TIMES, Jan. 22, 1999, at 2C.

We now pick up on an issue previously examined in section III-D, the possible international implications of the drafting of organic regulations. In addition to the GATT compliance issues addressed previously, the international community has raised some interesting issues as a result of the release of the National Organic Program's Proposed Rules. It is fascinating to compare the GATT compliance arguments made earlier with regard to the OFPA of 1990 with those made now with regard to the Proposed Rule. Whereas previously commentators worried that United States standards would be *too high* for other countries' producers to be on equal footing with our own, those same commentators now worry that the United States standards will be *too low*! This small example, therefore, illustrates just how dramatically the organic regulations have shifted over the course of the decade.

For starters, the Codex Alimentarius wants to set international requirements for food aimed at ensuring that the consumer has access to sound, wholesome products which are free from adulteration and are correctly labeled.¹³⁵ Codex has defined its responsibilities in terms of an obligation "to guide and promote the elaboration and establishment of definitions and requirements for foods, to assist in their harmonization, and, in doing so, to facilitate international trade."¹³⁶ It is apparent, therefore, that the stated goals of the Proposed Rule are in close alignment with those of the Codex organization as a whole. In fact, the Codex Committee for Food Labelling will undertake in June of 1999 to adopt a set of "Draft Guidelines for the Production, Processing, Labelling, and Marketing of Organically Produced Foods," whereby they will define the term "organic."¹³⁷ Once these guidelines are released, the American organics industry will need to closely compare the substantive requirements with those of the National Organic Program, and ensure that the regulations in the United States are not materially lower than those established by Codex.

¹³⁵Consumers International Position Paper, *supra* note 61.

¹³⁶Consumers International Position Paper, *supra* note 61.

¹³⁷Note that in addition to Codex's forthcoming definition, the Food and Agriculture Organization of the United Nations (FAO) has suggested an international definition of "organic". FAO's Committee on Agriculture, *Organic Agriculture*, Agenda for Meeting Jan. 25-29, 1999 (visited Jan. 4, 1999) <<http://www.fao.org/unfao/bodies/coag/coag15/x0075e.htm>>.

In addition to the obvious tension caused by Proposed Rule standards which are actually lower than those of some of our trading partners in Europe and Japan,¹³⁸ such that our standards would not be acceptable to many foreign governments and private certification groups,¹³⁹ the United States now confronts three potential problems within the greater international organic community. First of all, Codex and other international organizations have repeatedly stressed the fundamental right of consumers world-wide to mandatory labeling of genetically-engineered foods (“GEOs”), and note that over 100 countries have already implemented such mandatory legislation.¹⁴⁰ The Proposed Rules’ inclusion of GEOs, therefore, is not in keeping with the traditional position of the United States at the forefront of health and safety issues. The second problem stems from the United States’ inclusion of irradiation in the Proposed Rule, which is likely to create international trade problems, since Codex Alimentarius drafts prohibit this technology in organic foods.¹⁴¹ Similarly, the third potential problem which has been flagged by the international community is the use of biotechnology having been approved in organics under the Proposed Rule. The existing Codex drafts would also prohibit this technological device in organic food.¹⁴²

The variation in acceptable technological inputs are especially problematic because an exported product’s certification must meet the buying nation’s accreditation requirements. This is a notoriously complicated and expensive process, and has led to calls that trade could be made easier not only be a comprehensive

¹³⁸Cummings, *supra* note 77. It is ironic that the congressional intent throughout the budget allocation process in 1998 was still to provide nomenclature and standards for organic production which would facilitate the international marketing of U.S. organic products. *See generally* 1998 Testimony, *supra* note 131. It appears that the USDA has finally acknowledged the disconnect between congressional goals and reality, yet Congress itself seems reluctant to admit it.

¹³⁹Brown, *supra* note 98, at 40. *Reference* 62 FR 65934-65935, Dec. 16, 1997.

¹⁴⁰Julian Edwards, *Statement Delivered Before the Codex Committee on Food Labelling*, May 26-29, 1998 (visited Jan. 7, 1999) <<http://193.128.6.150/consumers//campaigns/codex/jedwards.html>>. *See generally* Lilliston & Cummins, *supra* note 5, at 195.

¹⁴¹Anon., *supra* note 114. *See also* AMS, *supra* note 33.

¹⁴²Anon., *supra* note 114.

revision of the Proposed Rule, but also through an implemented National Organic Program relationship with USDA's Foreign Agricultural Services (FAS). Cooperation between these two agencies would facilitate the drafting of organic rules which would take into account technological input requirements of various nations. Thus far, however, no cooperation between the two branches has occurred.¹⁴³

VI. Looking Forward

A.

It appears that although the opinions of the various interest groups have waxed and waned throughout the drafting process over the course of a decade, the drafters' intent has remained constant. On December 17, 1998, Dan Glickman reminded us all of the USDA's commitment to enacting organic regulations grounded in this ultimate concern for consumer safety. He said that his department would focus on a number of key priorities in 1999, one of which was the issuance of national organic standards that are good both for farmers and consumers.¹⁴⁴

An examination of the totality of the comments generated in each of the three stages enumerated above reveals that the organic industry is currently galvanized into one strong lobby for the first time in history.¹⁴⁵

Whether the strength of this lobby will continue to play an instrumental role in the continuing effort to draft regulations for the National Organic Program remains to be seen, but we have no reason to doubt the

¹⁴³AMS, *supra* note 33.

¹⁴⁴Andy Solomon, *Glickman Touts 1998 Accomplishments, Sets Priorities for 1999*, Dec. 17, 1998 (visited Dec. 30, 1998) <<http://www.usda.gov/news/releases/1998/12/0516>>.

¹⁴⁵Brown, *supra* note 98, at 40.

continuing influence of this coalition.

B.

A variety of public statements have been made by USDA and National Organic Program representatives regarding their expectations for the future procedures in implementing the regulations. The most fundamental question at this point is whether the USDA intends to move straight to the issuance of a Final Rule, or instead will issue a second draft of the Proposed Rule, to be followed by another comment period, before moving on to the drafting of a final rule. It appears at this point that the later option will be chosen, although its not yet clear whether the second draft would be released by the Office of Management and Budget or directly to the public through the Federal Register.¹⁴⁶ We do know that a proposed timeline (generated in December 1998) predicts that the next draft will appear in mid-1999,¹⁴⁷ with both the schedule and method for the second public comment period being announced when the those revisions are released publicly.¹⁴⁸ After the Proposed Rule is finally accepted, the USDA will begin accrediting representatives of state agricultural departments and private persons who will inspect producers and handlers to certify compliance with the organic program.¹⁴⁹

¹⁴⁶Anon., *Organic Proposed Comment Period Closes This Week, USDA's Role Questioned in Re-Write Effort*, FOOD & DRINK WEEKLY, Dec. 14, 1998, at 1. The organic farming coalition appears to agree with this tactic. Katherine DiMatteo, executive director of the Organic Trade Association (OTA) stated in December of 1998 that it would be more appropriate to allow the USDA to re-write its original organic proposal rather than to provide the department with a list of complaints with which to work. She believes that this strategy will ultimately allow for greater latitude in the revision process. *See also* Organic Trade Association, *supra* note 108.

¹⁴⁷Anon., *supra* note 146, at 1.

¹⁴⁸Anon., *Organic Standards Regrown*, BETTER HOMES & GARDENS, Aug. 1998, at 80.

¹⁴⁹1997 Testimony Before Congress, 1997 WL 133699 (F.D.C.H.).

What can we expect substantively? Most informed Washington sources predict that the second draft will be a compromise which will lower the standards somewhat from the initial NOSB recommendations while trying to avoid setting off the kind of massive backlash that was triggered by the current Proposed Rule.¹⁵⁰

Indeed, the USDA says that the Final Rule will be just such a compromise rule, something the organic industry must “swallow for the good of the economy and the bottom line of the food sector.”¹⁵¹

Jones has given us some hints about the specifics on the next NOP rule. At an April 1998 briefing between about fifty industry officials and the United States’ delegation to the Codex Committee on Food Labeling, he stated that Dan Glickman, Secretary of Agriculture, had “pretty much ruled out” including genetically modified organisms, irradiated foods and crops fertilized with sewage sludge.¹⁵² This conjecture was cemented in Keith Jones’ presentation to farmers at the Ecological Farming Conference in January, 1999.¹⁵³ Similarly, in July of last year, Glickman himself assured the NOSB that the new rule would include no synthetic material that had not been previously approved by the NOSB.¹⁵⁴

On more general terms, Jones has announced that the USDA will adhere to six guiding principles when working on the National Organic Program’s regulation: 1) keep it simple; 2) make it enforceable; 3) make it defensible; 4) focus on accredited certifiers; 5) ensure consistency; and 6) minimize costs to the industry for certifying food as organic.¹⁵⁵ It remains to be seen how these principles are implemented throughout the coming year in the search for a workable Final Rule. Recognizing the poignancy and importance of each of these concepts, I hope to use these principles as the background framework for generating options on how to move forward on the next Proposed Rule.

¹⁵⁰Lilliston & Cummins, *supra* note 5, at 195.

¹⁵¹Lilliston & Cummins, *supra* note 5, at 195.

¹⁵²Anon., *supra* note 106.

¹⁵³Martha Mendoza, *USDA Rules on Organic Food Labels*, AP ONLINE, Jan. 22, 1999, at 1. *See also* Cathleen Ferraro, *Federal Rules Tighten Definition of “Organic” Food*, KNIGHT-RIDDER TRIBUNE BUS. NEWS, Jan. 22, 1999, at 1.

¹⁵⁴Organic Trade Association, *supra* note 108.

¹⁵⁵Organic Trade Association, *supra* note 108.

C.

We have come full circle. The drafters of OFPA who once argued for the need to end the turmoil in the organics industry are currently again vocalizing their suggestions on how to progress past the current turmoil. These lawmakers say that rather than starting over, the USDA should work with the organic industry and all the relevant interest groups to revise the current proposal “and give far more consideration to consumers’ preferences and customary practices in the growing organic food market.”¹⁵⁶ Not everyone supports revising the current proposal, however, and the USDA still receives requests to scrap all the previous work, and to concentrate on current California law as a model of sensible and workable organic food regulations. In light of these varying concerns, I have compiled a series of both procedural and substance-based steps that the USDA should take in order to improve the second draft of their National Organic Program Proposed Rule.

1. *Procedural Recommendations.* As the presence of a vocal minority of organic farmers who call for the USDA to scrap the Proposed Rule illustrates, one unresolved issue is how much deference the USDA should give to the onslaught of comments which continues to stream into National Organic Program headquarters.¹⁵⁷ After all, each individual comment is significant in that its author has enough interest in the current debate that s/he took the time to write to the USDA. It should be recognized, however, that not every comment must be incorporated into the next Proposed Rule. It is true that it has been my working hypothesis

¹⁵⁶Anon., *supra* note 106.

¹⁵⁷Many interest groups are sending renewed calls for revision daily. For example, the Organic Trade Association’s Quality Assurance Council recently lobbied the USDA with a specific set of nine threats to the organic industry encompassed by the Proposed Rule. *See* Organic Trade Association, *supra* note 108.

throughout this paper that if more institutional energy had been invested in the incorporation of valid comments into the various stages of regulatory drafting, the Proposed Rule in existence today would be much more representative of industry wishes and subsequently much more acceptable to all relevant interest groups. Assuming the presence of these benefits from incorporating comments into the second draft, how should the evaluation of this flood of commentary be efficiently managed? Where should we draw the line? The sheer magnitude of interest is staggering, and this interest will no doubt continue. As one op-ed author phrased her plea for audience activism, “how many citizen comments might it take to convince the USDA to return to the NOSB’s recommendations? Why gamble?”¹⁵⁸

My suggestion is that the USDA take this opportunity, while meeting behind closed doors and attempting to shape the second Proposed Rule into a workable regulatory regime, to not be preoccupied with the outlying opinions which are expressed, such as the calls to scrap all previous efforts this decade. Rather, the USDA should evaluate the common themes and interests expressed in the majority of reactions to the current Proposed Rule. If the agency can synthesize the comments into universally-held principles, and then progress to the next step and ground all the specifics of their regulations in these principles, their chances of achieving success will increase tremendously. I feel that a broad-based, collective evaluation of the data, such as that which I attempted to undertake throughout this paper, is the only way to escape from the destructive cycle of negative feedback and institutional finger-pointing that currently plagues the organic regulatory debate.

¹⁵⁸Haas, *supra* note 71, at A21.

In addition to my procedural recommendation that the USDA undertake a systematic incorporation of broadly-supported comments into the next Proposed Rule, procedures need to be implemented with regard to the USDA's interaction with the NOSB and its own sub-agency, the Agricultural Marketing Service (AMS). I believe that the USDA should allow the NOSB rather than a potentially politicized Secretary of Agriculture to govern the National List of allowable substances, especially given that this arrangement is in line with original congressional intent.¹⁵⁹ I am pleased with the recent renewed cooperation between the USDA and the NOSB, and by drawing on the expertise and prior recommendations of this Board, the second Proposed Rule should be much more in line with original congressional intent.

Similarly, the NOSB can be utilized to assuage concerns about the Agricultural Marketing Service as an institution. In order to address concerns regarding the ability of the AMS to adequately oversee the organic regulations' revision and implementation process, NOSB's role could be expanded to one of an expert consultant panel. If the organic community felt more confident that the AMS would turn to NOSB with technical questions about the revised Proposed Rule, it would feel more confident about the substance of the Rule generally. AMS can also internally take steps to ensure that its decision-making employees understand the legislative history throughout this decade, so that they will not repeat the mistakes of blatantly disregarding congressional intent.

2. Substantive Recommendations. As far as specific substantive recommendations for moving forward, I believe a number of changes should be made to the existing Proposed Rule. On a broad scale, I believe that if the USDA would turn back to a process-based, rather than an end-product focused approach to the Proposed Rule, many of the substantive failings of the current draft would be alleviated. Specifically, an adherence to original congressional intent regarding small loophole provisions and the equality of state and international regulations will lead to meaningful substantive changes in the National Organic Program

¹⁵⁹Haas, *supra* note 71, at A21.

Proposed Rule.

First of all, I believe that the vast majority of GATT-related international regulatory problems could be resolved if the rule closed the loophole for small farmers. Obviously the backyard farmers and hobbyists are not the individuals which the international regulations are geared to affect, and so aligning international standards with a more suitable domestic definition of “small farmer” would reduce the inequities between international and national standards. Of course I agree that backyard organic farmers should not be subject to the Proposed Rule’s complex certification requirements, but perhaps a figure lower than the current \$5,000 yearly intake is needed.

Secondly, the USDA must take steps to address more broad concerns about the interaction of federal organic regulations with both existing international and state regulations. The drafters of the next Proposed Rule should raise the level of all regulations to at least those suggested by Codex and other relevant international organizations. In keeping with existing international organic standards, the American Rule should not allow genetically-engineered foods, irradiation, or biotechnology in their fundamental organic regulatory scheme. The elimination of these major discrepancies will alleviate the current trade barriers. Additionally, the USDA would adequately respond to expressed concern about the possibility of substantively variable state regulations with the implementations of higher overall regulations. This would result in less concern about individual state restrictions depending on national consistency in the organic market.

In conclusion, the USDA is currently conducting extremely important discussions behind closed doors; discussions that will directly impact the future of the organic industry in the United States. The goal at this stage in the process of implementing workable organic regulations should be to synthesize the valuable

insights which can be gleaned from the events of the past decade into a compromise rule. The common and recurrent themes of constituent reactions must be considered by the USDA. Without undertaking rigorous academic and practical review of the constituency reactions at each stage of the regulatory process, the USDA will loose out in the end.

Just as I developed throughout this paper, the USDA should move through each of the four analytical stages of their review. First, they should obtain a substantively accurate summary of the Organic Foods Production Act of 1990, the recommendations which were issued by the National Organic Standards Board, and the current National Organic Program's Proposed Rule. Secondly, they should review the positions of various interest groups at each stage of this process. The third stage of action which the USDA should undertake is to synthesize the representative comments and suggestions from these relevant constituencies so that broad-based policies can be extrapolated. Finally, the drafters of the next Proposed Rule should incorporate the interest group comments and congressional intent into the substantive provisions which they are currently writing. I am confident that if this decision-making framework is employed by the USDA, a comprehensive, enforceable, and broadly-supported organic regulatory regime can be implemented. The time has come for organic regulations to become a reality.