AN AWKWARD ADOLESCENCE IN THE ORGANICS INDUSTRY: COMING TO TERMS WITH BIG ORGANICS AND OTHER LEGAL CHALLENGES FOR THE INDUSTRY'S NEXT TEN YEARS

A. Bryan Endres[1]

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1. Assistant Professor of Agricultural Law, University of Illinois, Department of Agricultural and Consumer Economics. This work is based on work supported by the Cooperative State Research, Education and Extension Service, US Department of Agriculture, under Project No. ILLU-470-309. Thanks to Michael Roberts for organizing this panel discussion and to Rich Schell and Mike Mazzocco for their valuable comments.

The organics industry has entered its commercial and regulatory adolescence and now claims the fastest growing market share of food purchases in the United States. Since 1997, sales of organic food have grown between 15 and 21% annually. Non-food categories, such as personal care, household cleaners, fiber and pet food, experienced an even higher 28 to 50% annual growth rate.[2]

While past scholarship has provided "nuts and bolts" reviews of the current regulatory system for organics in the United States and elsewhere,[3] this article focuses on legal and policy issues looming on the horizon as the organics industry matures in its second decade of federal standardization. These issues

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2. ORGANIC TRADE ASS'N, OTA 2006 MANUFACTURER SURVEY (2006), http://www.ota.com/pics/documents/short%20overview%20MMS.pdf (a survey conducted by the Nutrition Business Journal) [hereinafter OTA MANUFACTURER SURVEY] .

3. *See generally* Harrison M. Pittman, *A Legal Guide to the National Organic Program*, THE NAT'L AGRIC. LAW CENTER (Mar. 2004), *available at* http://www.nationalaglawcenter.org/assets/articles/pittman_organicprogram.pdf (providing details of the National Organic Program); Stephanie Jillian, *Federal Regulation of Organic Food: A Research Guide for Legal Practitioners and Food Industry Professionals,* THE NAT'L AGRIC. LAW CENTER (Jan. 2006), *available at* http://www.nationalaglawcenter.org/assets/articles/jillian_organicregulation.pdf (providing a unique research guide on organic agriculture); Claire S. Carroll, *What Does "Organic" Mean Now? Chickens and Wild Fish Are Undermining the Organic Foods Production Act of 1990*, 14 SAN JOAQUIN AGRIC. L. REV. 117 (2004); Michelle T. Friedland, *You Call That Organic? The USDA's Misleading Food Regulations*, 13 N.Y.U. ENVTL. L.J. 379 (2005); William J. Friedman, *The Framework for Global Organic Food Trade Circa 2005: Accomplishments and Challenges*, 60 FOOD & DRUG L.J. 361 (2005); Cindy Joffe Hyman, *Food for Thought: Defending the Organic Foods Production Act of 1990 Against Claims of Protectionism*, 14 EMORY INT'L L. REV. 1719 (2000); Chad M. Kruse, *The Not-So-Organic Dairy Regulations of the Organic Food Production Act of 1990*, 30 S. ILL. U. L.J. 501 (2006).

include: the emergence of "big organic" and alternative marketing standards, incomplete oversight by USDA, controversy surrounding exceptions to the National Organic Program (NOP) production/processing standards and "commercial availability" of organic ingredients, the impact of genetic engineering on organic marketing, ensuring a supply of labor, access to pasture and other animal welfare issues, non-food product standards, the development of organic aquaculture standards, and whether the 2007 Farm Bill will significantly advance the organic agenda.

The article concludes that if the organic industry continues its current course, the market will bifurcate into two distinct units: a suburban, homogenized organic product produced on an industrial scale for retail sale in conventional grocery stores and a "beyond-organic" market, with a focus on the social and local aspects of food distributed via shorter supply chains to a knowledgeable, quality motivated consumer. Although this transition may not be conflict-free, both sides can play an important, and profitable, role in satisfying the increased demand for organic food.

I. THE EMERGENCE OF THE DIVIDE BETWEEN "BIG ORGANIC" AND "ORGANICS AS RELIGION"

A. *Standards Development from the 1970s through 2000*

In the early 1970s, followers of Jerome Rodale, the founder of Organic Farming magazine,[4] began marketing food to consumers labeled as "organic."[5] Allegations began to emerge, however, that some producers were selling non-organically produced food to consumers under an "organic" claim. As a result, Oregon (in 1973) and several other states (e.g., California, Montana, North Dakota, and Virginia) passed organic certification laws.[6] Because state laws lacked uniformity, conflicting standards hindered interstate shipment of organically produced foods.

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4. Rodale Publ'g Co., http://www.rodale.com/1,6597,1.00.html (last visited May 24, 2007) (Organic Farming was renamed Organic Farming and Gardening, and then simply Organic Gardening); *see* Organic Gardening, http://www.organicgardening.com.

5. SAMUEL FROMARTZ, ORGANIC, INC.: NATURAL FOODS AND HOW THEY GREW 19-20 (Harcourt Books 2006) (noting that the term "organic" is thought to have originated with British biodynamic farmer Lord Northburne in 1940, though Rodale is believed to be the first American to coin the term).

6. Friedland, *supra* note 3, at 381-82, n.14; *see* S. REP. No. 101-357, at 289 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 4546, 4943.

Lack of consistent standards, coupled with fraudulent labeling and food scares, prompted federal legislative action.[7] Senator Patrick Leahy of Vermont took the lead in drafting a federal standard for organic food. Originally introduced as Senate Bill 2108 on February 8, 1990, the Organic Foods Production Act (OFPA) passed as Title XXI of the 1990 Farm Bill.[8] The Senate report on the Act confirmed that consumers could find little or no organic foods in major supermarkets because of large food distributors' skepticism regarding organic claims and their inability to work directly with growers on certification.[9] Without national standards, the Act's sponsors reasoned, farmers were unable to produce for a known domestic market and could be left out of expanding foreign markets.[10] Accordingly, OFPA provided "national standards for organic production so that farmers know the rules, so that consumers are sure to get what they pay for, and so [that] national and international trade in organic foods may prosper."[11]

The USDA placed responsibility for developing implementing regulations with the Agricultural Marketing Service (AMS), which in turn established the National Organic Program (NOP).[12] USDA's organizational maneuver in placing responsibility for the organic program with AMS demonstrates its position that OFPA merely created marketing tools to differentiate products based on a certain production method.[13] The final rule reflects this stance, noting that "the [organic] seal does not convey a message of food safety or more nutritional value."[14] OFPA language supports the USDA's view, as its introductory provision declares that "[i]t is the purpose of this title—(1) to establish national standards governing the marketing [of organic products] . . . (2) to assure consumers that organically produced products meet a consistent standard; and (3) to facilitate interstate commerce in . . . food that is organically produced."[15] OFPA con-

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7. *See* FROMARTZ, *supra* note 5, at 196-97 (postulating that the alar scare, "don't panic, eat organic" headlines, and the "great carrot caper" further prompted passage of the OFPA).

8. Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101-624, § 2101, 104 Stat. 3359, 3935 (codified as amended at 7 U.S.C. §§ 6501-6522 (2006)).

9. S. REP. No. 101-357, at 290 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 4546, 4944.

10. *Id.*

11. *Id.* at 289.

12. Friedman, *supra* note 3, at 366.

13. *See* DEPT. OF AGRIC., AGRIC. MKTG. SERV., NOP FINAL RULES SUMMARY 76, http://www.ams.usda.gov/NOP/NOP/standards/FullText.pdf [hereinafter NOP RULES SUMMARY] (stating that "OFPA was designed to certify a process for informational marketing purposes" and that "certification is a process claim, not a product claim, and, as such, cannot be used to differentiate organic from nonorganic commodities with regard to food safety.").

14. *See id.* at 149.

15. Organic Foods Production Act of 1990, Pub. L. 101-624, § 2102 (codified as amended at 7 U.S.C. § 6501 (2006)).

tains no reference, in the preamble or otherwise, to food safety or social values (e.g., fair wages or food miles[16]).

Prior to government regulation, "organics" represented, in large part, a social movement with a commercial consequence, rather than a mass marketing tool designed to generate price premiums. OFPA's framers, however, characterized "organic" as regulation of interstate commerce necessary to harmonize differing standards that reflected the heterogeneous values of the particular states. Although pragmatists within the organic community, including the Rodale family, supported the development of organic regulations to further commercial interests,[17] USDA's traditional role as a facilitator of conventional agriculture inevitably clashed with those who sought to embody social values and purist principles in implementing regulations. Thus, the rulemaking process endured for almost 10 years.[18]

As regulators distanced social values from preemptive national standards, organic production emerged from the 1990s looking more like conventional agribusiness with price premiums than the back-to-the-land movement of the early 1970s. As a result, many started to view the organic label as losing what made it "special" in the eyes of its original practitioners and consumers. Its overwhelming focus on marketing over social progression set the stage at the national level for a recurring conflict between those who view organics as a "movement" or "religion," and those entering the organic market primarily with a profit motive (although willing to accept and advertise any positive externalities of their business efforts).[19] A mere two days after the USDA finalized its regulations, this conflict moved to the courtroom.

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16. *See id.*; *see also* DEPT. FOR ENV'T, FOOD & RURAL AFFAIRS, FOOD INDUSTRY SUSTAINABILITY STRATEGY 50 (2006), http://www.defra.gov.uk/farm/policy/sustain/fiss/pdf/fiss2006.pdf (describing the term "food miles" as referring to consumers' concern with the "environmental and social costs associated (but not included in the price of) transporting food from where it is produced to where it is processed, to the wholesaler, to the retailer or catering outlet and to the consumer").

17. JULIE GUTHMAN, AGRARIAN DREAMS: THE PARADOX OF ORGANIC FARMING IN CALIFORNIA 112 (Univ. of Calif. Press) (2004).

18. *See* Nat'l Organic Program, 62 Fed. Reg. 65,850 (Dec. 16, 1997) (codified at 7 C.F.R. pt. 205) (implementing the first proposed regulations); Nat'l Organic Program, 65 Fed. Reg. 13,512 (Mar. 13, 2000) (codified at 7 C.F.R. pt. 205) (implementing second proposed regulations, issued after 275,603 comments received by the USDA regarding the first implementing regulations); Nat'l Organic Program, 65 Fed. Reg. 80,547 (Dec. 21, 2000) (codified at 7 C.F.R. pt. 205) (implementing the Nat'l Organic Program Final Rule with request for comments, to become final on April 21, 2001 in 66 Fed. Reg. 15,619 with an 18-month implementation period to Oct. 21, 2002).

19. *See* FROMARTZ, supra note 5, at 196-97 (providing a more in-depth account of the emergence of national organic standards in the U.S. and its suspected facilitation of the rise of "big organic"); *see also* Kathleen Merrigan, *The Role of Government Standards and Market Facilita-*

B. *The Divide Between "Big Organic" and "Organic as Religion" Escalates in Harvey v. Veneman*

Arthur Harvey, an organic producer and handler (as well as a consumer of organic products) filed a *pro se* complaint in October 2002 alleging that the NOP was inconsistent with OFPA.[20] Harvey, who represented himself, argued that OFPA prohibited the use of any synthetics in processing products bearing the USDA organic symbol and the use of non-organic agricultural products when commercially unavailable. Harvey further averred that OFPA did not support regulations that allowed feed of non-organic grains during conversion of dairy herds to organic,[21] or the limitation on more stringent private certification standards.[22]

Although he lost on all counts in the District Court, Harvey persevered. With the assistance of legal counsel, Harvey appealed his case to the Federal Court of Appeals for the First Circuit.[23] The court upheld the NOP's prohibition on more stringent private certifier standards, concluding that while OFPA explicitly allows state certification programs to be more restrictive than the federal program, the statute is silent as applied to private certifiers.[24] Therefore, USDA's interpretation was a reasonable and valid exercise of authority delegated by the statute.[25]

The court did side with Harvey on three significant issues, however. First, the court determined that OFPA does not provide a blanket exemption for nonorganic requirements that are commercially unavailable, and that the USDA must instead conduct notice and comment rulemaking to add such substances to

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tion, *in* ORGANIC AGRICULTURE: SUSTAINABILITY, MARKETS AND POLICIES (OECD, 2003) (stating that as one of the drafters of OFPA, she disagrees that "NOP standards have created commercialization forces that favor larger farms.").

20. *See* Harvey v. Veneman, No. Civ. 02-216-P-H, 2003 WL 22327171, at 1 (D. Me. Oct. 23, 2003) (Magistrate Judge's report and recommendation on cross motions for summary judgment), *aff'd in part, rev'd in part*, 297 F. Supp. 2d 334 (D. Me. Jan. 7, 2004), *aff'd in part, rev'd in part and remanded*, 396 F.3d 28 (1st Cir. 2005).

21. *See Harvey*, 2003 WL 22327171, at 18 (noting that NOP regulations allowed 80% organic feed for the first nine months of transition).

22. *See id.* at 21 (Harvey's blueberry farm was certified by Maine Organic Farmers and Gardener's Association (MOFGA). MOFGA initially prohibited the use of hexazinone for weed control, but then eliminated the requirement to become accredited as a USDA certifier. Among his objections to the certifier rule, Harvey alleged that he was put at a competitive disadvantage because he did not apply hexazinone to his crops).

23. *Harvey*, 396 F.3d at 28.

24. *Id.* at 45; *see also* 7 U.S.C. § 6507(b)(1) (2006).

25. *Harvey*, 396 F.3d at 45.

the national list.[26] Further, the court found no language in OFPA that would allow the use of synthetics during handling (processing), or the use of non-organic feed during the conversion of organic dairy herds.[27]

To some in the organic community, Harvey's victory signified that organic products can and should be something beyond a minimum marketing standard established by an agency whose traditional role is to promote values antithetical to the grassroots organic movement. For businesses that relied on the blanket exemption for commercially unavailable ingredients and the use of synthetic processing aids, as well as organic dairies that faced organic feed shortages, the *Harvey* decision posed a threat of cataclysmic proportions.

C. *Big Organic's Response to Harvey: A Sneak Attack In the Dark of the Night or Essential Amendments to Preserve the Organic Market for All?*

Opponents of the *Harvey* decision quickly convinced Congress to amend OFPA. In November 2005, Congress passed, as a rider to the 2006 Agricultural Appropriations Bill, an amendment to OFPA in response to the *Harvey* decision.[28] The amendment restored the NOP regulation allowing the use of synthetic ingredients in processed products labeled as organic if the ingredients are on the National List. USDA subsequently revised the NOP to reflect these changes.[29] The amendment also added a special provision to ease the transition of dairy livestock to organic production. Under the amendment, dairy operators could feed transitional dairy herds crops and forage from land managed in the third (final) year of transition to organic production.[30]

The amendments left many in the "religious" camp (represented by the Organic Consumers Association (OCA)) with a feeling that the values embedded in the original organic movement were under attack by (and losing out to) the growing power of "industrial" organic operations, represented by the Organic Trade Association (OTA) (whose members include big players such as Horizon). Indeed, Congress passed the amendment without a hearing and added the rele-

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26. *Id.* at 35-36.

27. *Id.* at 39.

28. Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-97, § 797, 119 Stat. 2120, 2165 (2006).

29. 7 C.F.R. § 205.606 (2007); 72 Fed. Reg. 2167 (Jan. 18, 2007).

30. 7 U.S.C. § 6509(e)(2)(B) (2005); 7 C.F.R. § 205.236(a)(2) (2006) (Conversion of dairy herds requires 12 months, while conversion of crop and grass land requires 3 years.).

vant language on the floor of the Senate without the benefit of any debate. OCA issued an open letter objecting to the process.[31]

Not surprisingly, OTA members expressed strong support for the legislation, citing pressing needs to continue current processing methods (which consumers appeared to support by continuing to purchase organically processed foods).[32] OTA compiled an economic report from its membership concluding that if the court decision was not reversed by Congress, "an estimated 25 percent of all manufacturers currently producing certified organic products would exit the organic industry altogether."[33] Another 18% "would change product formulations to include fewer organic ingredients or would eliminate [production of some] certified organic products…"[34] The projected net revenue loss for the manufacturing sector was estimated at $758 million per year.[35] From OTA's standpoint, "[t]hat loss [could trickle] down the supply chain to the farmer, causing potential economic devastation to those small and mid-sized organic farmers."[36]

D. *"The Wal-Mart Effect" on Organics*

As with the development of the National Organic Program's Final Rule, organics-as-business outmaneuvered (some may say outspent in lobbying) the "communal" founders of the organics movement in overturning the *Harvey* decision. Assuming a continuation of the current political and economic landscape,[37] the key legal issues facing organic agriculture in the next decade likely will arise from this growing divide among participants in the organic supply chain. These issues include the industrialization of organic retailing and the internationalization of organic production.

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31. *See* Organic Consumers Association, Open Letter to the OTA & the Organic Community on the Recent Sneak Attack on Organic Standards (Nov. 18, 2005), http://www.organicconsumers.org/sos/openletter112105.cfm.

32. News Release, Organic Trade Association, Organic Trade Association Asks Congress to Take Action to Keep Organic Standards Strong (Oct. 24, 2005), http://www.ota.com/news/press/181.html.

33. *Id.*

34. *Id.*

35. *Id.*

36. *See id.*

37. In this respect, the future remains uncertain. The spread of diseases such as Bovine Spongiform Encephalopathy (BSE) and avian flu, as well as agro-terrorism, could disrupt organic supply and lower disposable incomes used to purchase what many see as luxury items--organics.

1. *Industrialization*

Consumer demand for organic food continues to grow at unprecedented rates. Sales of organic food grew 16.2% in 2005—totaling $13.8 billion.[38] Organic purchases represented 2.5% of total food sales in 2005, up from 0.8% in 1997.[39] Non-food organic product sales increased 32.5% that same year.[40] Total organic food sales are expected to reach $32 billion by 2009.[41]

For most people, however, this growth does not represent a sincere commitment to the organic social movement, but merely a "healthier" or "feel good" alternative to regular grocery purchases.[42] Gene Kahn, the founder of Cascadian Farms organic food company, echoes this conclusion. "We tried hard to build a cooperative community and a local food system, but at the end of the day it wasn't successful. This is just lunch for most people. *Just lunch*. We can call it sacred, we can talk about communion, but it's just lunch."[43]

Large organic retailers such as Whole Foods and Wild Oats, and conventional big-box stores such as Wal-Mart, are seeking to satisfy the demand for organic products.[44] Independent natural food stores represent less than 25% of organic sales,[45] and there is growing concern that large industrial-scale organic farms, rather than local small-scale family farms, will secure valuable production contracts with large retailers. Large-scale organic farms tend to receive these contracts not because they are more productive—some studies indicate that smaller farms have higher per acre yields—but because of the higher transaction costs involved in dealing with numerous small organic farms as opposed to one large, industrial scale organic company.[46] One way in which companies have been able to reduce transaction costs was to carve out a niche within the established, highly-efficient commodity-based industrial food system versus adopting

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38. *See* OTA MANUFACTURER SURVEY, *supra* note 2.

39. *See id.*

40. *See id.*

41. *See* Pete Hisey, *Organic Food Market Predicted to Reach $32 Billion,* www.meatingplace.com (Nov. 26, 2004), *available at* http://foodsafetynetwork.ca/agnet/2004/11-2004/agnet_nov_26.htm (also on file with the author).

42. *See* AC Nielsen, *Organic and Functional Foods Have Plenty of Room to Grow, According to New AC Nielsen Global Study* (Dec. 5, 2005), http://us.acnielsen.com/news/20051205.shtml (citing consumer surveys relating to purchases and perceptions of organic foods).

43. MICHAEL POLLAN, THE OMNIVORE'S DILEMMA 153 (Penguin Press 2006).

44. *See* Hisey, *supra* note 41 (stating that in 2004, so-called mass market sales were 37% of total organic sales).

45. *See* OTA MANUFACTURER SURVEY, *supra* note 2.

46. *See* POLLAN, *supra* note 43, at 61.

the local cooperative model of distribution.[47] While this strategy allowed the organic movement to expand its market presence beyond the local food cooperative, many smaller farms are unable to participate, and therefore compete, in the distribution model. To the extent that the "Wal-Mart Effect" may drive out smaller, higher-cost producers from the organic marketplace, one solution could be to construct a distribution system that lowers transaction costs when dealing with smaller producers and increasing financial and legal support for organic cooperatives.

While the scale and location of production may fundamentally change with the entry of Wal-Mart-type players to the market, proponents note that the *total* amount of acreage under organic management may actually increase due to lower retail prices[48] and increased consumer demand. Put another way, "[b]ehind every organic TV dinner or chicken or carton of industrial organic milk stands a certain quantity of land that will no longer be doused with chemicals, an undeniable gain for the environment and the public health."[49]

Another possible "Wal-Mart Effect" is a diminished value of the organic "brand." A strong push to drive down prices and impose greater standardization in the industry (whether classified with the pejorative term "industrialized organic," or in the positive as "market growth") could result in some consumers questioning the propriety of organic food, prompting them to look for a new label that better reflects the values they wish to support with their food purchase decisions.

2. *Internationalization of Production*

Meat is the fastest-growing organic food category.[50] Sales of organic meat grew 55.4% in 2005 and have expanded by more than 150% since 2002.[51]

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47. *Id.* at 153. Increased emphasis and support for organic cooperatives is another model. Goodness Greenness is an example of a successful regional distribution system for organic products. The company operates a hub and spoke type system with regional warehouses in rural areas for farmers to deliver products. This eliminates the need for farmers to divert time and resources to deliver products to Chicago. *See* SUSTAIN, ORGANIC HARVEST: AN ACTION PLAN FOR LOCAL, ORGANIC AND FAMILY FARMED FOODS 8 (Jim Slama ed., 2006) *available at* http://www.sustainusa.org/familyfarmed/Organic-Harvest-Report.pdf. One limitation, however, is the capital funding necessary for optimal post-harvest handling of produce such as rapid chillers. *Id*.

48. AC Nielsen, *supra* note 42 (finding the main deterrent in purchasing organic products in the United States is "price").

49. POLLAN, *supra* note 43, at 158.

50. Ann Bagel Storck, *Meat is Fastest Growing Organic Sector, Survey Says,* www.meatingplace.com (May 18, 2006), (on file with the author).

Commentators believe that the public fear of mad cow disease (BSE) and the associated growth in consumer awareness of organic options has driven this spike in sales. Undersupply is now a problem (more than 60% of organic pork sold in the U.S. is imported), and continued market growth is now highly import-dependent, with organic meats imported from Central and South America, Australia, and Canada.[52] Structural problems, such as lack of organic certified slaughterhouses and processing plants, coupled with an inadequate distribution infrastructure,[53] contribute to this import reliance.

Despite continued high growth in retail sales of organic cotton and soy products, U.S. organic cotton and soybean acreage have *declined* since 2001. Although precise data is not available, USDA's Foreign Agricultural Service (FAS) has concluded import competition likely played a role in the decline (rather than yield increases). FAS estimated total organic imports of cotton and soy at $1-1.5 billion in 2002.[54]

Foreign expansion of organic production crosses all sectors. FAS expects that by 2010, over one third of the total Chinese agricultural land in production will be converted to organic production.[55] With organic farm acreage increasing nearly ten-fold over the last decade, China is well on its way to becoming one of the largest organic producers in the world.[56] Exports to markets like Japan, the world's largest organic food consuming nation, continue to grow.[57]

Lower production costs (such as cheaper labor costs in Mexico and China) are driving supermarket chains to purchase foreign organic products.[58]

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51. OTA MANUFACTURER SURVEY, *supra* note 2; *see also* Meatnews.com, U.S. Sees Growth in Organic Meat (May 24, 2006), www.meatnews.com/index.cfm?fuseaction=Article&artNum=11634&Status=Archive (also on file with the author).

52. Meatnews.com, U.S. Sees Growth in Organic Meat (May 24, 2006), www.meatnews.com/index.cfm?fuseaction=Article&artNum=11634&Status=Archive (also on file with the author).

53. Currently, chicken is the largest organic meat production sector in the United States due to the short production cycle that enables domestic producers to scale up or down as necessary.

54. Catherine Greene,*U.S. Organic Farm Sector Continues to Expand*, AMBER WAVES (April 1, 2006).

55. USDA, FOREIGN AGRIC. SERV., GAIN REPORT: PEOPLE'S REPUBLIC OF CHINA, ORGANIC PRODUCTS MARKET IN CHINA 4-5 (2006) [hereinafter USDA GAIN REPORT].

56. *Id.* at 5.

57. This rapid growth is also a reaction to internal consumer demand resulting from food safety issues and government support as a way to lift rural poverty. *Id.*; *see also* Lila Buckley, *Pathbreaking Newsletter Promotes Development of Organic Sector in China*, WORLD WATCH INSTITUTE, Feb. 28, 2006, http://www.worldwatch.org/node/3887 (providing background on growth of Chinese organic production).

58. *See* Kylene Kiang, *Organic Farmers Face Hazards*, PALM BEACH POST, Sept. 17, 2006, at 6F.

Problems with enforcement of U.S. standards, however, could lead to unfair overseas competition. "The NOP sets forth three options for permitting imported agricultural products to be sold, labeled, or represented as organic in the United States."[59] The USDA may accredit certifying agents to certify foreign products.[60] To date, the USDA has certified forty-one foreign organic certification agents.[61] The USDA also may recognize a foreign government's ability to accredit agents to certify production and handling operations in accordance with the United States NOP.[62] In addition, the government can negotiate an equivalency agreement with foreign governments to allow products to be marketed as organic in the United States.[63]

USDA's own auditors have found, however, that the agency lacked internal procedures for making equivalency determinations with other nations as of July 2005.[64] The audit also noted a lack of internal procedures for validating the fifty-six U.S. certifying agents.[65] The report was silent as to the forty-one foreign certifying agents, and the actual degree of oversight is unknown. Anecdotal evidence from many commentators notes that "organic" production in many developing nations is far removed from NOP standards. Absent extensive oversight by USDA of the certifying agents (through whom USDA monitors actual production), foreign producers likely will compete based on a different (weaker) set of rules than domestic farmers.[66]

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59. USDA, OFFICE OF INSPECTOR GEN. NORTHEAST REGION, AUDIT REPORT: AGRICULTURAL MARKETING SERVICE'S NATIONAL ORGANIC PROGRAM 3 (2005) [hereinafter USDA AUDIT REPORT].

60. *Id.* at 2.

61. *Id.*

62. *Id.* at 3.

63. *Id.*

64. *Id.* at 13.

65. *Id.*

66. *See id.* at 10-13. Allegations of inequitable foreign production standards (and outright fraud) in the conventional food and feed market surfaced as this article went to press. Specifically, at least one Chinese company incorporated the adulterant melamine in export-bound feed products in a bid to increase the measured protein content. David Barboza & Alexei Barrionuevo, *Filler in Animal Feed is Open Secret in China*, NYTimes.com (Apr. 30, 2007) at http://www.nytimes.com/2007/04/30/business/worldbusiness/30food.html?ei=5070&en=4258cd4a550dcd34&ex=1182398400&pagewanted=print. The extent to which fraud involving *detectable* residues in food and feed products is allowed to persist in China (and the United States government is unwilling to take firm action), presents little assurance to the "organic" customer seeking adherence to a process-based, and thus undetectable, standard.

3. *A New Culinary Buzzword: "Local"*

For many consumers, purchasing organically-produced food was, and still is, about reestablishing some connection to the land—for example, shopping at farmers' markets. As agribusiness interests consolidate their position in the organic industry, and organic supermarket products bear labels from around the world, there is a gathering realization among some that purchasing organic does not support the local economy, and moving organic food cross-country (or across the world) uses just as much energy as conventional farming.[67] For producers who conduct a majority of their sales via direct marketing (assuming they can convince customers of the benefits of their product via alternative labeling schemes such as "chemical free," "no harmful insecticides," "sustainably grown," "no spray," etc.), there is no need for organic certification under the NOP.[68]

Local demand must be cultivated, however. Those producers unable to connect with individual consumers may seek out or form regional labeling and distribution networks as an alternative, or in addition to, NOP certification. To date, some success has been achieved with institutional buyers such as school systems or local governments.[69]

Governments may also be an avenue of support for local food sourcing. For example, Woodbury County, Iowa adopted a "Local Food Purchase Policy" that required the county to purchase locally grown organic food (local is defined

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67. Marian Burros, *Eating Well: In Oregon, Thinking Local*, NY TIMES, Jan. 4, 2006, at F1; *see also* National Public Radio, ORGANIC APPLE? CHECK. BUT IS IT LOCAL?, http://www.npr.org/templates/story/story.php?storyId=5618390 &sc=emaf (discussing a 2001 survey finding that 95% of the organic produce sold in the Chicago area came from outside the region); SUSTAIN, *supra* note 47, at 5. *But see*, George Reynolds, *Could Organic Eat Itself?*, Food Quality News.com (April 6, 2007) at http://foodqualitynews.com/news/printNewsBis.asp?id=77044 (noting that removing a supplier's ability to import organic produce by air could restrict supply and cause the whole organic market to fall below a point of critical mass necessary to sustain its continued growth).

68. FROMARTZ, *supra* note 5, at 93. Moreover, many produce growers in the Midwest do not generate sufficient quantities to satisfy the needs of regional or national distributors and accordingly are forced to sell directly. This may, however, ultimately be a more profitable route. *See* Debra Levey Larson, *Making More with Less: Local Food Strengthens Local Economy*, 15 AGRO ECOLOGY 1, 1 (2006) (finding a large percentage of farmers making more money, and farming less acres, by selling high-value products directly to consumers at farmers' markets, local supermarkets and roadstands).

69. *See* Hal Walter, *Moving Beyond Organic*, THE PUEBLO CHIEFTAN, July 30, 2006 (describing the Beneficial Farm and Ranch Cooperative).

as within 100 miles of Sioux City, Iowa). The resolution has the potential to shift $281,000 in annual food purchases to a local farmer-operated cooperative.[70]

One retailer, Whole Foods, also has recognized the "local foods" movement as important to its economic welfare. Attempting to counter criticism that it has grown too fast and thereby left behind some of its core values, each store must now buy products directly from at least four local farmers.[71] Other initiatives include offering use of Whole Foods' parking lots for local farmers' markets.

On the international front, Italy's organic food industry, in an effort to boost sales, is pressuring the Italian government to develop a labeling system for local produce. In 2005, Organic demand increased by 21.7%, but imports of organic food declined 6%. Moreover, there was a 12% increase in organic farmland in Italy.[72] This data seems to suggest that Italy's Country-of-Origin Labeling efforts, in combination with a concerted campaign by the government to have supermarkets create a "Buy Italian" food section in stores, had a significant effect on instilling a "local" element into organic standards.[73] As one of the primary drivers of "industrial" organic, it remains to be seen how and to what extent "local" will be an important marketing tool for large retailers of organic products, and whether a program similar to Italy's efforts would translate to the domestic U.S. market.

Food security concerns, including bioterrorism, have elevated the importance of local food chains. Whether organically produced food can provide a critical link in a compromised food supply chain (even as a back-up) is uncertain. Furthermore, the legal structures necessary to support the role of organics in food security remain unexplored.

Food security and criticism of the negative implications of globalized organic production aside, conversion to organic at the local level has proven difficult. Even with significant and sustained price differentials, domestic farmers are not following market signals and rushing to convert cropland to organic production methods. One explanation for this reluctance may be the increased effort of organic farming. This includes acquiring "nuanced local knowledge at a time when most of the rest of agriculture has come to rely on precisely the opposite . .

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70. *See* Woodbury County, Rural Economic Development, Resolution, *available at* http://www.woodbury-ia.com/departments/economicdevelopment/WC%20LFPP%20v3.pdf. The policy includes transitional organic crops. *Id.*

71. *See* Walter, *supra* note 69.

72. Sean Roach, *Italian Producers Push for Organic Label*, FOOD QUALITY NEWS, Aug. 9, 2006, http://www.foodqualitynews.com/news/ng.asp?id=70428.

73. *See id.*

. the off-farm brain, and the one-size-fits-all universal intelligence represented by agrochemicals."[74]

There may well be a third (and more legally-based) reason—land ownership. In an era where an increasing number of farmers "rent" versus "own" substantial portions of the land they farm, conversion to organic farming is a difficult proposition. While anecdotal stories exist that absentee landowners residing in urban environments want their deceased grandparents' farm converted to organic production, there could be significant risks and income sacrifices involved in these arrangements on both ends.

Many of these concerns center on the lengthy (three year) conversion period for organic crop production. Transition cash flow is a significant impediment. The transitioning farmer likely will have a lower income and be unable to bid the market rate for cash rents as organically managed (but not yet certified) crops are sold on the conventional market. Accordingly, during the transition, there is little revenue and likely no profit. Similarly, in share lease situations, there is inadequate crop insurance (both during transition and after certification) to eliminate the downside risk. Moreover, the typical year-to-year agricultural lease (or even a three year lease) is insufficient when transitioning to organic production and devoting substantial resources to building soil fertility. Therefore, the farmer needs assurance (via a longer lease) that he/she will be able to farm the land for a considerable period after the three-year transition. It would be unfair to ask the tenant to endure the conversion process and then lose the land.[75] On the other hand, the land owner may not want to be bound by a long-term contract. State production contracts may provide some protection for the farmer from inequitable termination, but most states lack production contract statutes, and those that do have them tend to protect undepreciated capital expenditures rather than improvements to the land.

In sum, the unrivaled growth of the organic industry has created significant opportunities for large and small scale producers. The expansion of international production will bring new challenges to domestic producers, but could also lead to increased demand for locally grown products.

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74. POLLAN, *supra* note 43, at 191; *see also* John Otte, *Cashing in on Organic Opportunities*, FARM FUTURES (Oct. 2006) at 24.

75. *See* FROMARTZ, *supra* note 5 (describing a situation in which an organic farmer lost the tenancy after converting to organic).

II. USDA OVERSIGHT AND ENFORCEMENT EFFORTS: FRAUD IN THE ORGANIC MARKETPLACE

The average consumer's willingness to pay a premium for products bearing the "organic" label is based, in significant part, on the perception that he/she will receive a product with special attributes. Examples of these attributes include health benefits, elimination of pesticides, a lower impact on the environment, support of small farmers, increased animal welfare, or better working conditions for agricultural laborers. These attributes, associated with the organic label, create a brand image and justify the increased cost of the good. If the brand image of "organics" falters due to a lack of integrity at the producer/certifier level, or because of a failure by USDA to enforce NOP standards, the virtues of the organic label may weaken in consumers' eyes, price premiums will fall, and the organic industry as a whole may suffer.[76]

A. *Problems with Organic Certification Agents*

The integrity of the process-based organic system rests upon the network of USDA-accredited certifying agents. The NOP requires that agricultural products labeled as "organic" originate from farms or handling operations certified by a State or private entity (including foreign organizations) that the USDA has accredited.[77] Accredited agents may grant organic certification only upon determining that an operation's procedures are in compliance with OFPA and NOP regulations.[78]

Organic producers and processors may select any certifier for their operations. Competition among certifying agents for business, however, has two undesirable effects. First, certifiers have a strong incentive to minimize internal operating costs by reducing inspections and other oversight of the organic operations. Second, certifiers compete to attract and maintain clients by adopting minimum standards or charging the lowest fee. Principal-agent issues exacerbate this race-to-the-bottom among certifiers. As the principal, USDA/AMS has done

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76. *See* Luanne Lohr, *Implications of Organic Certification for Market Structure and Trade*, 80 AM. J. OF AGRIC. ECON. 1125, 1125 (1998) (discussing the importance of consumer confidence in the organic label to preserve price premiums, provide information to consumers on an attribute that is not observably different, and enhance market efficiency by reducing information asymmetry).

77. 7 C.F.R. 205.100(a) (2007); *see* USDA AUDIT REPORT, *supra* note 59, at 2.

78. *See* USDA AUDIT REPORT, *supra* note 59, at 2.

little to verify the actions of its agents, the certifiers,[79] and, when given the opportunity to require strict performance, opted for lesser standards.

Pesticide residue testing is one example of the USDA failing to halt the "race to the bottom." Because the NOP is a process-based standard, there are, for the most part, no quality or content standards for products carrying the organic label. OFPA does require pesticide residue testing by organic certifiers to verify the process.[80] The NOP, by contrast, does not mandate pesticide residue testing. Instead, NOP regulations state that a certifier "may require" testing "when there is reason to believe that the agricultural input or product has come into contact with a prohibited substance or has been produced using excluded methods."[81] This shifts the burden to justify testing to the certifying agent and, even when testing may be warranted, permits the certifier to ignore the possible violation. Moreover, the certifying agent must conduct the testing at its own expense.[82]

Dissatisfaction with private certifying agents may prompt some states to implement their own certification programs under the NOP. The Illinois Department of Agriculture recently proposed a legislative initiative to create an Illinois State Organic Program that would provide "clarification and further development of organics in the marketplace."[83] Development of a state-wide certification program would assure consumers "that organic products have consistent quality," and provide assistance to organic (and potential organic) producers within the state.[84] This program would preempt the independent operation of private certifiers within the state.

Some private interest groups have also objected to what they perceive is a lack of standards at the certification level and USDA's failure to enforce existing standards upon its certifying agents. For example, the Cornucopia Institute has filed four complaints with USDA regarding alleged compliance failures of two organic dairy facilities.[85] The Institute also alleged that USDA closed two of

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79. USDA's audit of AMS accreditation noted a lack of internal procedures for validating the fifty-six domestic certifying agents or for providing program updates to certifiers. *See id.* at 10-12.

80. 7 U.S.C. § 6506(a)(6) (2006).

81. 7 C.F.R. § 205.670(b) (2007); s*ee also* Friedland, *supra* note 3, at 391-93.

82. Friedland, *supra* note 3, at 393-94.

83. Memorandum from Director of the Illinois Department of Agriculture, to Governor Blagojevich (June 28, 2006) (on file with the author).

84. *Id.* On June 6, 2007, the Illinois legislature passed House Bill 1300 that established the Illinois Local and Organic Food and Farm Task Force to "develop a plan containing policy and funding recommendations for expanding and supporting a State local and organic food system and for assessing and overcoming obstacles to an increase in locally grown food and local organic food production." H.B. 1300, 95th Gen. Assem. (Ill. 2007).

85. MARK ALAN KASTEL, CORNUCOPIA INSTITUTE, MAINTAINING THE INTEGRITY OF ORGANIC MILK 17, http://abstract-

the complaints without investigating their merits.[86] The role of private individuals (or NGOs) to enforce/ensure compliance with the NOP, as well as the extent to which states will self-administer organic certification programs, is an open issue.[87] Regardless of the future role of states and consumer groups, standard enforcement by the USDA promises to be an important issue for the industry in the foreseeable future.

In addition to lapses in certifier oversight identified in USDA audits,[88] news coverage of "organic fraud"[89] has recently increased.[90] Although it is unclear at this time whether this increase in news coverage indicates that the system is working to weed out violators, or that oversight is lacking and instances of fraud are increasing, a Dallas Morning News exposé in the summer of 2006 described its review of "hundreds of [USDA] audits" showing violations of organic standards without USDA enforcement.[91] Misfeasance may occur in many instances within the organic food supply chain, from unauthorized pesticide use on the farm to false labels at the retail establishment. Unfortunately, as a process-based system, no amount of oversight realistically can prevent all contravention of the organic rules. Instances where fraud is detected by the government or private parties, therefore, should be a point of emphasis and vigorously pursued. In sum, while all participants in the organic supply chain have a strong incentive to

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concepts.net/cornucopia/OrganicDairyReport/cornucopia_milkintregrity.pdf [hereinafter *Milk Integrity*]; *see* Complaint Concerning Multiple Violations of the National Organic Program's Regulatory Standards by the Horizon Organic Dairies (Dean Foods/White Wave) in Paul, ID and Kennedyville, MD, *available at* http://www.cornucopia.org/HorizonComplaint8-06.pdf.

86. Complaint Concerning Multiple Violations of the National Organic Program's Regulatory Standards by the Horizon Organic Dairies (Dean Foods/White Wave) in Paul, ID and Kennedyville, MD, *available at* http://www.cornucopia.org/HorizonComplaint8-06.pdf.

87. Direct competitors, however, may be able to seek redress under state unfair competition laws.

88. *See generally*, USDA AUDIT REPORT, *supra* note 59.

89. The author uses the term "organic fraud" to refer to a broad range of intentional violations of National Organic Program standards, including, but not limited to, the use of pesticides not authorized in organic production, unlawful substitution of ingredients and false labeling.

90. *See* Paula Lavigne, *Firm Accused of Selling Regular Beans as Organic*, DALLAS MORNING NEWS, Aug. 20, 2006. For example, Sel-Cor Bean & Pea is alleged to have fraudulently sold pinto and garbanzo beans as organic. The case was referred to the Terry County District Attorney with possible fines up to $10,000. *Id.*; *see also* News Release, USDA, AMS Announces Revocation of Accreditation of Organic Certification Agency, http://www.ams.usda.gov/NEWS/188-06.htm (On July 26, 2006) (citing seven violations of the National Organic Program, and revoking accreditation of a Wisconsin organic certification agency, the American Food Safety Institute, International (AFSII)). AFSII principals were banned for three years from participating in organic certification and clients have 30 days to change labels that listed AFSII as their certifier. *Id.*

91. Paula Lavigne, *The Real Deal?,* DALLAS MORNING NEWS, July 16, 2006, at 1A [hereinafter Lavigne, *The Real Deal?*].

protect their collective brand of "organic," as well as their individual company brands, as with any growing industry, collective oversight and legal regimes to enforce integrity in the organic brand will be an important element of the NOP and its accreditation program in the foreseeable future.

B. *The Penalty Structure for Organic Fraud*

The processed-based organic industry relies on suppliers following organic management plans, and is susceptible to internally-generated shocks that degrade the confidence necessary to support the organic image.[92] With respect to product switching allegations—i.e., selling conventional goods as organic—deterrence/punishment plays an important role in maintaining the collective brand image of "organic." For example, Company X may have unjustly earned $100,000 and destroyed the Company X brand for distributing conventional pinto beans as organic, but the impact on the collective "organic" brand certainly extends beyond Company X because consumers are unlikely to distinguish between the unlawful conduct by Company X and other operators in the industry. Moreover, if Company X distributed the fraudulent beans to several retail suppliers, even informed consumers will be unable to distinguish between the various organic brands available. Accordingly, any punishment imposed on Company X should account for the impact on the industry as a whole. Current penalties under the statutes, however, limit fines to "not more than $10,000 per violation."[93] Whether this serves as a sufficient deterrent/punishment for the possible impact on the broader industry is uncertain and provides further incentive for others in the industry to police themselves.

C. *Fraud Overseas*

Concerns with organic fraud are amplified as the supply chain extends beyond the nation's borders. Currently, forty percent of organic foods sold in the United States originate overseas. William Friedman notes that "while rough around the edges, [the legal framework for international trade in organic food

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92. *See* Press Release, FDA, FDA Statement on Foodborne E. coli O157:H7 Outbreak in Spinach (Sept. 16, 2006), http://www.fda.gov/bbs/topics/NEWS/2006/NEW01452.html (A related concept is the recent E. coli contamination of spinach. The contamination of spinach on one farm in California impacted the spinach market (and spinach producers) nationwide, prompted the FDA to advise consumers not to eat any bagged spinach, and eroded the trust in many consumer's minds regarding the healthfulness of the product.).

93. *See* 7 C.F.R. § 205.662(g)(1) (2007). Violators of the organic production statute may also run afoul of the general federal prohibition against false statements. *See* 18 U.S.C. § 1001 (2006) (Fraud and False Statements).

products] has been sufficient to support a booming marketplace . . . because the core organic production and processing requirements, with some exceptions, are equivalent."[94] Moreover, countries lacking internal organic consumer markets can provide organic products to developed markets by relying on existing international standards.[95] Whether, and to what extent, common production requirements/international standards are enforced is open to considerable debate, with many commentators describing oversight at the international level as lax or non-existent.[96]

What can be done to protect the organic brand in the United States from dilution arising from non-organic imports? Of course, the best option is to have the foreign government strictly enforce its own production standards. For example, the Australian government concluded an investigation into free-range egg production and found 200,000 cage and barn hen eggs passed off to consumers as "free-range" at an additional price differential of $13 million.[97] In the organic context, would other governments, especially in the developing world, risk significant import dollars to western markets and unilaterally investigate similar scams? Can they afford, over the long-run, not to? Some in the organic industry would rather not take this risk and, mindful of the impact on their own company's brand, conduct their own product audits beyond licensed certifiers.[98] This, however, invariably increases their costs and provides even greater incentive for some companies to "look the other way" and continue to sell questionable products as "organic." In addition to private sector solutions, USDA should reevaluate current import rules to further protect the credibility of the organic brand.[99] In addition to intensifying audits of USDA-approved international certifying agents,

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94. Friedman, *supra* note 3, at 362.

95. *See* FAO/WHO Codex Alimentarius Commission, Guidelines for Production, Processing, Labelling and Marketing of Organically Produced Foods, 1999 (*as amended* 2004) *available at* http://www.ifoam.org/partners/advocacy/pdfs/Codex_Guidelines.pdf (providing an example of international guidelines).

96. *See* Lavigne, *The Real Deal?*, *supra* note 91 (noting obvious violations in Chinese organic production that are not tracked or known by the USDA and quoting a senior USDA official that it is "almost impossible to grow truly organic food in China.").

97. Kelly Burke, *Farms are Raided to Crack Egg Scam*, SYDNEY MORNING HERALD, Aug. 12, 2006.

98. Interview with Joe Dickson, Whole Foods Quality Standards Coordinator (March 1, 2006) (discussing the retailer's quality control system to verify the validity of their organic products).

99. *See* Friedman, *supra* note 3, at 369 (discussing certification and accreditation rules in the European Union); *see also* USDA, AGRIC. MKTG. SERV., Imported Organic Agricultural Products, http://www.ams.usda.gov/nop/NOP/NOP/TradeIssues/importedorganic.html (discussing current UDSA rules for imports of organic products).

product testing to verify process standards, such as pesticide residues, should be seriously considered.

III. COMMERCIAL AVAILABILITY: ADDING AND *REMOVING* ITEMS FROM THE "NATIONAL LIST"

The National List is a list of "approved and prohibited substances . . . included in the standards for organic production and handling" established by the Secretary of Agriculture.[100] For example, 7 C.F.R. § 205.606 lists the "nonorganically produced agricultural products allowed . . . in or on processed products labeled as 'organic' . . . ."[101] Items may be placed on the National List only following notice in the Federal Register, and an opportunity for public comment.[102] Additionally, such items are subject to periodic review for continued inclusion on the list.[103] Products currently on the National List include such common food processing items as cornstarch, water extracted gums, kelp, unbleached lecithin and pectin.[104] Construction of the initial list of exceptions, not surprisingly, engendered considerable controversy. Further amendment to the National List, whether in the form of adding or removing items, likewise will prompt spirited debate.

The growing demand for processed organic food requires substantial creativity on the part of food processors to source sufficient quantities of organic ingredients to meet the labeling requirements. A raw or processed agricultural product represented as "organic" (as opposed to "100% organic") must contain "not less than 95% organically produced raw or processed agricultural products" (excluding water and salt).[105] All remaining products (i.e., the other 5%) also must be organically produced unless the product is: (1) not commercially available in organic form; (2) a nonagricultural substance; or (3) a non-organic product on the National List.[106]

Commercial availability refers to "[t]he ability to obtain a production input in an appropriate form, quality, or quantity to fulfill an essential function in a system of organic production or handling, as determined by the certifying agent

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100. 7 U.S.C. § 6517(a) (2007).

101. 7 C.F.R. § 205.606 (2007).

102. *See* 7 U.S.C. §§ 6517(a), (d), (e), 6518(k), (l), (m) (2007).

103. *See id.* § 6517(d).

104. *See* 7 C.F.R. § 205.606(a)-(e) (2007). The National List also includes synthetic items allowed in the production of organic products, 7 C.F.R. §§ 205.601, 205.603, and prohibits use of some nonsynthetic items, 7 C.F.R. §§ 205.602, 205.604.

105. *Id.* § 205.301(b) (2007).

106. *Id.*; *see also* NOP RULES SUMMARY, *supra* note 13 at 58-61 (discussing change from proposed rule to require the "commercial availability" standard at the 95% organic standard).

in the course of reviewing the organic plan."[107] In *Harvey v. Veneman*, the court clarified (and directed entry of a declaratory judgment) that there is no blanket exception for the use of non-organically produced agricultural products in items sold as "organic" if the substance is not commercially available in organic form.[108] Rather, the inclusion of these non-organically produced ingredients is only allowable if they are included on the National List (and thus subject to periodic review).[109] The prior rule allowed processors to unilaterally justify to their respective certifier the need for 5% of non-organic ingredients based on a lack of commercial availability. Critics questioned the thoroughness of handlers and their certifiers in attempting to source organic forms of these ingredients. In addition, inconsistencies existed among certifiers and producers in the determination of what is "commercially unavailable."[110] The *Harvey* court set the deadline for USDA compliance at June 2007.[111]

Congress responded to the *Harvey* decision by adding subsection (d)(6) to 7 U.S.C. § 6517. This subsection granted the Secretary of Agriculture authority to develop "emergency" procedures to designate agricultural products "commercially unavailable in organic form for placement on the National List".[112] The amended statute limits "unavailability" to 12 months, but it is unclear if the emergency could be extended with a new declaration.[113] At any rate, this procedure removes the commercial availability issue from the public view. As Deputy Administrator Robinson noted, "[t]he bottom line for industry is it's back to business as usual for industry with respect to the National List."[114]

On May 22, 2006, the National Organic Standards Board (NOSB) recommended establishment of consistent criteria and procedures to be followed by all certification applicants and operators when petitioning for inclusion of materi-

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107. 7 C.F.R. § 205.2 (2007).

108. *Harvey*, 396 F.3d at 36.

109. *See* 7 C.F.R. § 205.606 (2007). An additional concern is the ability to preserve the quality of organic grains during storage before processing. As the quantity of organic production increases, there will be a corresponding increase in the need for storage of the raw and partially processed agricultural product. The need for an addition to the National List of substances in order to preserve the quality of the stored product may be subject to considerable debate.

110. *See NOP Cracking Down on Commercial Availability Issue*, ORGANIC BUS. NEWS, Feb. 2006, http://hotlineprinting.com/obn/archives/2006/2006-02/NOPCrackingDown.html.

111. Stephen R. Viña, *Harvey v. Veneman and the National Organic Program: A Legal Analysis*, Congressional Research Service 3 (2006), *available at* http://www.nationalaglawcenter.org/assets/crs/RS22318.pdf.

112. 7 U.S.C. § 6517(d)(6) (2007).

113. *Id.*

114. Transcript of NOSB Meeting, Nov. 16, 2005, at 36, http://www.ams.usda.gov/nosb/transcripts/Nov2005 /11_16_05.pdf [hereinafter NOSB Meeting Transcript].

als under 7 C.F.R. § 205.606 and when making commercial availability decisions regarding use of materials.[115] The NOSB noted that proactive petitioning of non-organic products to be included on the National List could alleviate significant disruptions in the supply of organically processed products into the marketplace after June 2007 (the effective implementation date of the *Harvey* decision).[116]

As difficult as including new items on the list of exceptions may be, removing items once considered commercially unavailable in organic form, is even more difficult. There is a strong incentive for organic food processors to use less expensive conventional (non-organic) substitutes at the 95% organic level. Requiring organic ingredients would increase their costs and complicate sourcing as processors compete for the organic ingredient.

Petitions for removal from the National List are sent to the NOSB.[117] The NOSB, however, lacks a timely process for acting on petitions to remove commercially available products from the National List. For example, organic versions of bleached and unbleached lecithin have been commercially available for several years and yet remain on hold while waiting for the NOSB to take action, and later for the National List to be amended via notice and comment rulemaking.[118] Moreover, USDA's audit of AMS found that "AMS does not have procedures for receiving, reviewing, and implementing recommendations from the [NOSB]."[119]

The mandatory Sunset Review provisions of the National List complicate this process of removal. The initial items placed on the National List are set to expire on October 21, 2007.[120] As a result, the NOSB must review the commercial availability of every item currently on the National List and issue a renewal recommendation (for or against) to AMS.[121] For example, NOSB recommended not to renew use of bleached lecithin, allowed as a synthetic under 7 C.F.R. §

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115. *See* NOSB, Policy Development and Handling Committee, *Final Recommendation for the Establishment of Commercial Availability Criteria*, Mar. 30, 2006, http://www.ams.usda.gov/nosb/FinalRecommendations/April06/ NOSBRecCommercial_Availability%20Apr%2020%2006%20(2).pdf.

116. *Id.* at 3. On January 18, 2007, USDA/AMS published guidelines for the submission of petitions to amend the National List. *See* 72 Fed. Reg. 2167 (Jan. 18, 2007) (National Organic Program—Submission of Petitions of Substances for Inclusion on or Removal From the National List of Substances Allowed and Prohibited in Organic Production and Handling).

117. 7 C.F.R. § 205.607 (2007).

118. *See* NOSB Meeting Transcript, *supra* note 114, at 136-46.

119. USDA AUDIT REPORT, *supra* note 59, at 8. Although this specific finding related to a backlog in petitions for addition to the National List, the same holds true for petitions for removal.

120. *See* National Organic Program, Sunset Review, 70 Fed. Reg. 35177, 35177 (June 17, 2005) (to be codified at 7 C.F.R. pt. 205) (soliciting comments for NOSB consideration).

121. *Id.* at 35178.

205.605(b) (allowed synthetics),[122] but did recommend renewal of unbleached lecithin as a non-organically produced agricultural product under 7 C.F.R. § 205.606 (commercial unavailability).[123] The rationale for recommending renewal was that, although not all forms of unbleached lecithin are available commercially, some are.[124]

The decision to renew non-organically produced unbleached lecithin's inclusion on the National List raises serious concerns regarding the future market for organically produced, unbleached lecithin. Absent the requirement to use the unbleached ingredient, there is little incentive to source this product until it is once again subject to sunset review. The same issue applies to other innovators considering production of organic versions of items currently on the National List. A lenient construction of commercial unavailability hinders product innovation and raises questions about the ability of the NOSB and AMS to adapt to rapidly expanding markets and innovation, especially when food processors are working on product formulations 24 to 36 months in the future. Innovators need rapid decisions on the viability of their products in the market and NOSB, to date, has struggled with meeting these requirements.

Final results of the Sunset Review process at the NOSB and USDA/AMS could be a signal as to the direction of organics, and the success of niche and small ingredient producers to penetrate the organic processed foods market (e.g., spices, herbs, and processing aids such as lecithin). Blanket renewal (or cursory review) of items on the National List could foretell further movement to accommodate non-organic alternatives (thereby lowering prices)—what some will undoubtedly characterize as a "weakening" of standards to benefit "industrial organics."

IV. BIOTECHNOLOGY: IS THE PROCESS-PRODUCT DISTINCTION SUFFICIENT TO DEFINE ORGANIC PRODUCTS?

The adventitious presence of genetically engineered DNA remains an important issue for organic producers, processors, and retail agents. Although the adventitious presence of genetically engineered DNA will not result in a revocation of organic certification,[125] genetic pollution will cause an otherwise

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122. *See* NOSB, Handling Committee, *Final Recommendation for Lecithin, Bleached*, April 20, 2006, http://www.ams.usda.gov/nosb/FinalRecommendations/April06/NOSB%20Final%20Sunset%20Lecithinbleached%206-7-06.pdf.

123. *See id.*

124. *See id.*

125. *See* NOP, Final Rule, 7 C.F.R. Part 205, National Organic Program, 13, *available at* http://www.ams.usda.gov/ NOP/NOP/standards/FullText.pdf.

organically produced/handled product to suffer drastic commercial consequences. An organic product tainted with genetically engineered DNA will most likely be marketed as conventional, rather than organic. The farmer/processor, therefore, loses any price advantage earned by foregoing conventional production techniques.[126]

Currently, there is no tolerance level for genetically engineered DNA in organic agricultural products. Organic certifies a process, rather than a final product, and there is no product testing requirement. Some large food processors/retailers in the United States are moving toward a tolerance standard for their organic/private label brands.[127] The European Union (EU) has proposed a 0.9% threshold for the adventitious presence of genetically engineered DNA in organic products.[128]

The tolerance debate likely will continue, especially if the processing/retail industry coalesces on a common threshold. So far, the industry has adopted the 0.9% standard not on a scientific basis, but simply because it was the threshold adopted by the EU for labeling genetically modified organisms in conventional food and provides some baseline from which to measure.[129] If the industry does establish a tolerance, whether it will be codified, and at what level, remains an important issue. Furthermore, the formal setting of a tolerance via statute or regulation may: (1) create a movement for other mandatory product testing in organic products (e.g., pesticide residue) and (2) send a message that genetically engineered products are not "substantially equivalent."[130]

Despite the segregation issues generated by application of biotechnology to food products, the organic industry indirectly benefits from consumer reluctance to embrace genetic engineering. At least some of the increased demand for

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126. *See* A. Bryan Endres, *Revising Seed Purity Laws to Account for the Adventitious Presence of Genetically Modified Varieties: A First Step towards Coexistence*, 1 J. FOOD L. & POLICY 131 (2005) (describing and comparing the effectiveness of seed laws in obtaining coexistence objective); Thomas P. Redick & Michael J. Adrian, *Do European Union Non-Tariff Barriers Create Economic Nuisances in the United States*, 1 J. FOOD L. & POLICY 87 (2005) (discussing impact of adventitious presence on international trade of agricultural products).

127. *See* PEW INITIATIVE ON FOOD AND BIOTECHNOLOGY, PEACEFUL COEXISTENCE AMONG GROWERS OF GENETICALLY ENGINEERED, CONVENTIONAL AND ORGANIC CROPS, *available at* http://pewagbiotech.org/events/0301/WorkshopReport.pdf.

128. *See* COMMISSION OF THE EUROPEAN COMMUNITIES, *Proposal for a Council Regulation on Organic Production and Labeling of Organic Products*, *available at* http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0671en01.pdf.

129. *See* PEW INITIATIVE ON FOOD AND BIOTECHNOLOGY, PEACEFUL COEXISTENCE AMONG GROWERS OF GENETICALLY ENGINEERED, CONVENTIONAL AND ORGANIC CROPS 14, *available at* http://pewagbiotech.org/events/0301/WorkshopReport.pdf.

130. Discussing FDA's guidance document finding GM Food "Substantially Equivalent" and thus avoiding the necessity for pre-market review as a food additive.

organic products in the past decade is in response to consumer avoidance of foods produced through genetic engineering.[131] If consumers become more accepting of genetically engineered food products, there could be a decline in organic demand and the attendant price premium.

Adventitious presence and organic process standards place organic food activists in a difficult situation regarding the superiority of their merchandise over conventional or genetically engineered products. To the extent that traces of genetically engineered DNA are found in organic foods, claims of superiority will be lost. On the other hand, genetic purity demands strict segregation, higher product costs, and increased production risks. Establishment of tolerances would alleviate some segregation burdens and lower costs, but could undermine the industry's "purity" claims by admitting the trace presence of genetically engineered DNA. In sum, as adoption of biotechnology continues to increase along with organic market growth,[132] coexistence of these two unique agricultural products, and attendant liability rules, will remain an important issue for the foreseeable future.

V. LABOR AND EMPLOYMENT ISSUES

A. *Border Security and Efforts to Establish a Temporary Agricultural Worker Program*

Calls for increased border security may make it more difficult for organic producers and processors to secure a sufficient supply of labor, legal or otherwise. In 2006, Congress appropriated $1.2 billion for a 700-mile long fence on the U.S.-Mexican border in an effort to curtail illegal immigration.[133] Whether or not a fence will deter illegal immigration, the fact remains that because chemical alternatives are not available, labor needs are greater in the organic sector. Labor shortages, especially for farms that grow hand-picked crops, have left fields un-

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131. *See* Konstantinos Giannakas & Amalia Yiannaka, *Agricultural Biotechnology and Organic Agriculture: National Organic Standards and Labeling of GM Products*, 9 AGBIOFORUM 84, 89, 93 (2006) (modeling the welfare of consumers and the demand for GM, conventional, and organic food products under various labeling regimes).

132. *See* Clive James, *Highlights of ISAAA Briefs No. 34-2005 Global Status of Commercialized Biotech/GM Crops: 2005*, *available at* http://www.isaaa.org/kc/CBTNews/2006_Issues/Jan/Briefs_34_Highlights.pdf (noting an 11% annual growth rate of the planting of genetically engineered crops).

133. *Uncertainty Remains Regarding Mexican Border Fence*, PORT SECURITY NEWS (Nov. 20, 2006), http://portsecuritynews.com/news/templates/registered.asp?articleid=1301&zoneid=1.

harvested in some instances.[134] More than half of the nation's 1.8 million farm workers are not legally permitted to work in the U.S., with that percentage significantly higher in California.[135]

The only legal mechanism for obtaining temporary, non-immigrant agricultural workers is through an H-2A Visa.[136] Although the government does not cap the number of H-2A visas, several bureaucratic obstacles face the applicant. The employer first must petition the Regional Administrator (RA) of the Department of Labor to certify that: (1) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor described in the petition; and (2) the employment of the alien will not adversely affect wages and working conditions of U.S. workers.[137] If the Department of Labor issues the certification, the employer must then petition the U.S. Citizenship and Immigration Services (USCIS), within the Department of Homeland Security (DHS), for the visa.[138] If USCIS approves, the Department of State may issue the visa. Not surprisingly, these bureaucratic hoops led to the issuance of only 31,892 H-2A visas[139] worldwide in 2005.

In an effort to provide a more stream-lined mechanism for obtaining legal migrant labor, legislation was introduced in the Senate in 2005 providing for a national guest worker or "Blue Card" Program.[140] Senate Bill 2611 (S. 1611), backed by the White House, passed the Senate on May 25, 2006 by a 62-36

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134. *See* Julia Preston, *Pickers are Few, and Growers Blame Congress*, NY TIMES, Sept. 22, 2006, at A1.

135. *Organic Sector Labor Needs May be as Much as 20% More than Conventional Farms,* ASSOC. PRESS (Aug. 14, 2006).

136. *See* Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(a) & 8 C.F.R. § 214.2(h)(5) (Regulations for the Immigration and Nationality Act); 20 C.F.R. § 655.90-655.215 (Department of Labor regulations).

137. *See* U.S. Dept. of Labor, Employment and Training Admin., *H-2A Certification*, http://www.foreignlaborcert.doleta.gov/h-2a.cfm (detailing current employer and employee requirements to obtain the labor certification).

138. *See* Jeffrey A. Feirick, *Understanding the Temporary Agricultural Guest Worker Program – H-2A*, The Agric. Law Research Ctr., The Dickinson School of Law, The Pa. State Univ., *available at* http://www.dsl.psu.edu/centers/aglawpubs/h2aacknow.cfm (explaining the entire H-2A process (current through March 2000)).

139. *See* U.S. Dept. of State, Bureau of Consular Affairs, *Table XVI(B) Non Immigrant Visas Issued by Classification: Fiscal Years 2001-2005*, *available at* http://travel.state.gov/pdf/FY05tableXVIb.pdf.

140. *See* Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006); *see also* Los Braceros, Strong Arms Aid the U.S.A., http://www.kvie.org/programs/kvie/braceros/default.htm (discussing the United States' "blue card" program in place from 1942 through 1964, called the Bracero program).

vote.[141] The blue card provision would establish a pilot program allowing current undocumented farm workers to legalize their status.

Under the Senate bill, an applicant would first apply for a "blue card," if the worker can demonstrate that he/she had performed agricultural employment in the U.S. for at least 150 work days during the two years prior to December 31, 2005.[142] The applicant also would be required to pay a $500 fine, as well as demonstrate that he/she owes no back taxes and did not have a criminal record.[143] If the "blue card" holder could demonstrate that he/she has worked in U.S. agriculture for an additional 150 days per year for 3 years, or 100 days for 5 years, the applicant would become eligible for a green card.[144] The blue card program would be capped at 1.5 million workers, and sunset in 5 years.[145] The legislation incorporated provisions of the AgJOBS Act, which sought, among other things, to streamline the H-2A program.[146]

In contrast, House Republicans' legislative efforts in the 2005-2006 session focused on border security and limiting illegal immigration. House Resolution 4437, passed on December 15, 2005, and was referred to the Senate Committee on the Judiciary. This legislation contained no guest worker or "blue card" provision for farm workers.

Congress failed to reach a compromise on the two bills—an unsurprising result given the nexus between the highly-charged issue of illegal immigration and election-year politics. The current H-2A program, therefore, remains the only outlet to obtain foreign farm workers. Unless immigration reform includes a guest worker program, further efforts to curtail illegal immigration likely will have a great impact on the organic sector.

B. *Incorporating Fair Labor Practices into Organic Standards*

Although social justice was a powerful strain in the early organic movement, OFPA and USDA did not codify labor practices into the certification stan-

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141. S. 2611, 109th Cong. (2006); U.S. Sen.: Legislation & Records Home, Vote Summary, Bill 2611, May 25, 2006, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=2&vote=00157.

142. S. 2611. 109th Cong. § 613 (2006).

143. *Id*. § 218A.

144. *Id*. § 613(c)(1)(A)(i).

145. U.S. Senator Dianne Feinstein, Senate Judiciary Approves Feinstein Measure Establishing a Pilot Earned Adjustment Program for Agricultural Workers, March 27, 2006, http://www.feinstein.senate.gov/06releases/r-agworker327.htm.

146. FARMWORKER JUSTICE FUND INC., FARMWORKER POLICY BRIEF, SUMMARY OF AGJOBS: AGRICULTURAL JOB OPPORTUNITIES, BENEFITS AND SECURITY ACT OF 2005 (Feb. 24, 2005), http://www.nfwm.org/pdf/ AgJOBS/AgJOBS05brief.pdf.

dards for organic farms. On the production side, the consensus was that fair labor practices were best dealt with at the farm level. USDA's position is that other statutes cover labor and worker safety standards and that OFPA does not provide authority to include them in the NOP.[147] It is unlikely, therefore, that fair labor standards will be incorporated in the NOP any time soon.

To date, only one organic grower, Swanton Berry Farm, has signed a labor contract with the United Farmworkers Union.[148] However, with the emergence of local food movements and the growth of fair trade certified products,[149] it is probable that informal or formal standards, exclusive of organic status, may develop that incorporate some form of fair labor standard.

VI. ANIMAL WELFARE/ACCESS TO PASTURE

Prior to OFPA's passage in 1990, USDA prohibited meat and poultry from being labeled as organically produced under the various state programs. As a result of this prohibition, there were few livestock producers practicing organic-like methods, and little consensus on what the appropriate standard for organic livestock production should be.[150] Given the lack of agreement, the Senate committee considering OFPA deferred to the NOSB and the public comment process to determine "the necessary balance between the goal of restricting livestock medications and the need to provide humane conditions for livestock rearing."[151]

Most of the discussion in the committee's report centered on the appropriate use of medications, with only the above phrase noting "humane conditions."[152] Despite the lack of attention in the committee report, many consumers and pioneers in the organic movement associate "organic" meat, poultry, and dairy products with a high level of animal welfare.[153] "Welfare" would include health care practices and general living conditions.

The compromise reached in the regulations requires "appropriate housing, pasture conditions, and sanitation practices to minimize the occurrence and

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147. *See* NOP RULES SUMMARY, *supra* note 13, at 32.

148. *See* FROMARTZ, *supra* note 5, at 35.

149. *See* Fair Trade Certified, About Us, http://www.transfairusa.org/content/about/aboutus.php (Fair trade coffee is now the fastest growing segment of the specialty coffee market in the U.S.). *See also* John Bowes & David Croft, *Organic and Fair Trade Crossover and Convergence, in* THE HANDBOOK OF ORGANIC AND FAIR TRADE FOOD MARKETING 262 (Simon Wright & Diane McCrea eds.) (Blackwell Publishing 2007)

150. S. Rep. No. 101-357, at 665-66 (1990), *as reprinted in* 1990 U.S.C.A.N. 4656, 5956.

151. S. Rep. 101-357, at 665; *see also* Kruse, *supra* note 3, at 504-05 (discussing legislative history of the livestock provisions of OFPA).

152. S. Rep. No. 101-357, at 665-66.

153. *See* POLLAN, *supra* note 43, at 173.

spread of disease and parasites; [and] provision of conditions which allow for exercise, freedom of movement, and reduction of stress appropriate to the species."[154] In addition, producers must "establish and maintain livestock living conditions which accommodate the health and natural behavior of animals, including: (1) [a]ccess to the outdoors, shade, shelter, exercise areas, fresh air, and direct sunlight suitable to the species, its stage of production, the climate, and the environment; [and] (2) [a]ccess to pasture for ruminants."[155]

The "state of production" clause has engendered significant controversy with respect to organic dairy production (and large-scale egg and poultry operations). Specifically, organic livestock may be confined temporarily because of "[t]he animal's stage of production."[156] Some large-scale dairies, and their certifiers, have interpreted "stage of production" to include lactation. Under this interpretation, lactating dairy cattle would not require access to pasture, and could be confined continuously under an organic production plan.[157]

Increased demand for organic meat and dairy products[158] pressures producers to introduce efficiencies and economies of scale commonly found in conventional production. Conventional dairy operations typically house hundreds, if not thousands, of dairy cattle on feedlots rather than pasture. Some argue that unless the organic industry tries to accommodate consumer demand and embrace large-scale production efficiencies, such as confinement during lactation, organics will remain "an elitist industry selling niche products at three times what the average person can afford."[159] Moving organic to an industrialized concept will open the market to a wider range of consumers who currently cannot afford the more expensive, and purportedly healthier and better tasting, organically-produced products.[160]

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154. 7 C.F.R. § 205.238(a)(3)-(4) (2007).

155. *Id.* § 205.239(a)(1)-(2).

156. *Id.* § 205.239(b)(2).

157. *See Milk Integrity*, *supra* note 85, at 19; *see also* Cornucopia Institute, Complaint, *supra* note 85.

158. Kim Severson, *An Organic Cash Cow*, N.Y. TIMES, Nov. 9, 2005, at F1 (noting that organics represents only 3% of all milk sales, but it has an annual growth of 23%, compared with an overall 8% drop in milk consumption). Moreover, organic sales have probably not reached their upward limit in the United States, as evidenced by the fact that 28% of all milk consumed in Denmark is organic. *See also* Oresund Food Excellent, *All Time High Danish Organic Milk Consumption*, http://www.foodoresund.com/composite-411.htm.

159. Andrew Martin, *Dairies Dispute "Organic" Values*, CHI. TRIB., Jan. 10, 2005.

160. *See e.g.*, Eva Langlands, *Organic Chicken is Fattier than Battery Birds*, THE SUNDAY TIMES (U.K.), Dec. 2, 2006 (noting that organic chicken is less nutritious, contains more fat and tastes worse than free-range or conventional chicken); Christine M. Williams, *Nutritional Quality of Organic Food: Shades of Grey or Shades of Green?*, 61 PROCEEDINGS OF THE NUTRITION SOCIETY 19, 19 (2002) (describing the difficulty in assessing the nutritional health of

On the other hand, the issue may not be so much an "ability" to pay for more expensive organically-raised food, but a matter of "priorities." Michael Pollan posits the question of how many people now pay $50-$100 per month for goods that were formerly free (television) or convenient (like cell phones).[161] Even very low income individuals have cable TV and cell phones. Moreover, some studies suggest that 52% of "heavy" organic buyers made less than $30,000 per year, and 31% of these "heavy" buyers made less than $15,000 in annual household income.[162] Accordingly, cost may not present the presumed barrier to organic food consumption commonly assumed.[163]

Perhaps because of its perception of wholesomeness and placement as a fundamental part of many diets, especially with respect to children,[164] organically labeled dairy products are a lightening rod for the access to pasture debate. Recent concerns center on organic milk sold under Wal-Mart's "Great Value" label. Aurora Organic Dairy supplies this milk (along with organic milk for Safeway, Costco, Target and Wild Oats).[165] Some, including the interest group The Cornucopia Institute, charge that the supplier violates the "spirit," if not the letter, of the law by raising its dairy cattle in feed lots rather than pasture.[166] Instead of feedlot production, many commentators to the NOP Final Rule (as well as the NOSB itself) recommended that "ruminant production systems [i.e., dairy and beef cattle] be 'pasture-based.'"[167]

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organic versus conventional food products and inadequate study design to date). To the extent organically grown food has health benefits (i.e., healthier, more vitamins, essential fatty acids, less pesticide residues, no GMOs) or tastes better, efforts should be made on an equity basis to provide organic food to all income classes. Of course, the relative health benefit of organic food compared to conventional products is subject to considerable debate.

161. POLLAN, *supra* note 43, at 243.

162. *See* Friedland, *supra* note 3, at 381 (*citing* Jack Whelan, Natural Sensibility, *Wellness Myth #2: The Organic Consumer is Limited to a Specific Well-Defined Demographic*, July 16, 2002, *at* http://www.hartman-group.com/products/natsens/issueIV-10.html).

163. Cornelia Dean, *On Special At Your Local Supermarket: Moral Choices*, N.Y. TIMES, June 27, 2006, at F5 (quoting renowned food policy professor Marion Nestle that "if anything, too much food is available in the United States" and "[p]oor families are spending a far smaller proportion of their income on food today than they did a generation ago.").

164. *See* Severson, *supra* note 158, at F1 (describing parents' desires to have children drink wholesome, organic milk).

165. Melanie Warner, *A Milk War Over More Than Price*, N.Y. TIMES, Sept. 16, 2006, at C1.

166. *Id.*; s*ee also* Diane Brady, *The Organic Myth: Pastoral Ideas are Getting Trampled as Organic Food goes Mass Market*, BUSINESS WEEK, Oct. 16, 2006, at 51, 51-52; Mark Alan Kastel, *Wal-Mart: The Nation's Largest Grocer Rolls-out Organic Products, Market Expansion or Market Delusion?*, CORNUCOPIA INST., Sept. 27, 2006, at 5-6, *available at* http://www.cornucopia.org/WalMart_White_Paper.pdf.

167. NOP RULES SUMMARY, *supra* note 13, at 98.

The NOSB recently recommended several rule changes to the NOP, including modification of the Access to Pasture requirements in 7 C.F.R. § 205.239(a)(2) to read as follows:

> § 205.239(a)(2) ~~Access to pasture for ruminants~~ Ruminant animals grazing pasture during the growing season.
>
> This includes all stages of life except:
>
> a) birthing; b) dairy animals up to 6 months of age and c) beef animals during the final fishing stage, not to exceed 120 days. Note: Lactation of dairy animals is not a stage of life under which animals may be denied pasture for grazing.[168]

Rather than issuing proposed rules for comment, USDA engaged in further "fact finding" and issued an advance notice of changes seeking additional public comment.[169] Strict interpretation of the proposed pasture rules could severely impact the viability of all large-scale organic dairy operations, as well as many organic dairies in dry regions.

While the USDA awaits additional public comment, the agency currently is devising regulations governing grass-fed beef. The proposed rule for a "grass-fed" label requires 99% grass, legumes, and forage (and mother's milk), but does not specify a minimum time spent using pasture or the use of antibiotics or hormones. Resolution of the grass-fed beef issue may foreshadow how the organic pasture rule will be resolved. In addition, this may provide an important signal regarding evolution of the organic program—a decision to allow feedlot-based organic dairy production could sanction further industrialization of organic standards in the United States. On the other hand, requiring significant pasture time for organic dairy cattle could hamper the ability, at least in the short run, of the industry to meet the increasing demand for organic dairy and meat products.

VII. ORGANICS FROM THE OUTSIDE-IN—ORGANIC PERSONAL CARE AND OTHER NON-FOOD ITEMS

A. *Personal Care Products*

The road to certification for personal care and other non-food products in the U.S. has been a rocky one. Because the additional assurances afforded by

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168. *See* NOSB, FORMAL RECOMMENDATION TO THE NATIONAL ORGANIC PROGRAM, March 18, 2005, *available at* http://www.ams.usda.gov/nosb/FinalRecommendations/Feb05/PastureRec.pdf.

169. National Organic Program (NOP)-Access to Pasture (Livestock), 71 Fed. Reg. 19,131 (Apr. 13, 2006) (to be codified at 7 C.F.R. pt. 205).

USDA certification could increase market value for these types of products, many pushed for a cosmetics, body care products, and dietary supplement standard to be incorporated in the initial NOP. The Final Rule, however, failed to include these products.[170]

A year after issuing its Final Rule, the USDA indicated that personal care products could be certified under national organic standards. It reversed course two years later, issuing a statement that excluded personal care products and other non-food products from the scope of the national organic standards.[171] In May 2004, Secretary of Agriculture Veneman directed NOP to rescind the document,[172] and in August 2005, USDA issued a memorandum outlining that if personal care products, by virtue of their organic agricultural product content, met NOP labeling standards, the products could carry the organic label and USDA organic seal.[173]

USDA's inconsistent positions have created uncertainty within the industry. This, coupled with the ability of some personal care product lines to put the phrase "organic" in the brand name regardless of actual organic content, has reinvigorated the calls for formal rules under the NOP or statutory language clarifying standards for personal care items. In the interim, many companies have worked to source and develop certified organic personal care products. Special success has been achieved in marketing personal care items to "pristine and delicate children."[174] Sales of organic fiber for infant clothes and diapers rose 40% to $40 million in 2005.[175] Child-teen organic fiber rose 52% to $3 million, and organic personal care in the U.S., including baby care, rose 34% to $26 million that same year.[176] The OTA is currently developing personal care standards in

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170. NOP RULES SUMMARY, *supra* note 13, at 36 (concluding that "[t]he ultimate labeling of cosmetics, body care products, and dietary supplements, however, is outside the scope of [NOP] regulations").

171. *See* NOSB, USDA RESPONSE TO NOSB FEEDBACK ON ISSUE STATEMENTS: FISHMEAL, INERTS, ANTIBIOTICS, AND SCOPE OF AUTHORITY, March, 10, 2005, *available at* http://www.ams.usda.gov/nop/NOP/PolicyStatements/USDANOSBFeedback3_10_05.pdf.

172. News Release, Organic Trade Ass'n, *Organic Trade Association to Collaborate with NSF International* (Aug. 16, 2004), http://www.ota.com/news/press/149.html [hereinafter OTA News Release].

173. Memorandum from Barbara C. Robinson, Deputy Administrator, Transportation and Marketing Programs, Agricultural Marketing Services to All USDA Accredited Certifying Agents (Aug. 23, 2005), *available at* http://www.ams.usda.gov/nop/NOP/ PolicyStatements/NOPPolicyMemo08_23_05.pdf.

174. Associated Press, *Organic Baby Products Get Parents' Attention*, PRINCE GEORGE CITIZEN, Aug. 25, 2006.

175. *Id*.

176. *Id*. The growth in sales of organic personal care items dovetails the "placebo effect" consumption of organically produced food. Even if not scientifically better or tastier, people "feel [that] organic food can even boost emotional and mental health, increasing their sense of well-

cooperation with the National Science Foundation International (NSF). NSF is accredited by the American National Standards Institute (ANSI), and it is OTA's hope that standards accredited by ANSI will be "recognized and referenced" by federal agencies (such as FDA).[177] The OTA also has developed organic cotton processing standards.[178]

B. *Pet Food*

Pet food standards are another area in which organic rules have yet to issue. The NOSB created the Pet Food Task Force (PFTF) in May 2005 to formulate standards for organic pet food.[179] In creating the PFTF, NOSB recognized that existing organic livestock feed regulations may not be suitable for pet food application because: (1) livestock regulations restrict the use of mammalian ingredients in feed, and (2) livestock regulations do not allow a "made with organic" claim.[180] It further noted that organic standards for human food processing standards would be difficult for pet food makers to adhere to because many ingredients used in the processing of pet food are not allowed in human food processing.[181]

In April 2006, the PFTF issued an interim report and proposal for regulation.[182] The report does not appear to have generated any significant controversy within the stakeholder community.[183] For reasons unclear from the explanations accompanying the interim report, the definitions section delineates between pets (cats and dogs) and specialty pets (domesticated animals typically confined in a cage or tank, but not horses, llamas, alpacas, rabbits and wild birds).[184] One comment points out that although these definitions are consistent with distinc-

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being and optimism when they choose the food they think is healthier." *Buying Organic 'Gives You a Boost,'* BBC News, Sept. 4, 2004, http://news.bbc.co.uk/2/hi/uk_news/3627026.stm. It follows that the same effect would be obtained though organic personal care items.

177. *See* OTA News Release, *supra* note 172.

178. *See* News Release, Organic Trade Ass'n, Organic Trade Association Adopts Organic Fiber Processing Standards (Feb. 23, 2004), http://www.ota.com/news/press/130.html.

179. USDA, NOSB, NOSB PET FOOD TASK FORCE INTERIM REPORT 3 (2006) [hereinafter TASK FORCE REPORT], *available at* http://www.ams.usda.gov/nosb/meetings/OrgPetFood.pdf.

180. *Id.*

181. *Id.*

182. *See id*.

183. *See* NOSB, USDA, NOSB PET FOOD TASK FORCE INTERIM FINAL REPORT: PUBLIC COMMENTS, *available at* http://www.ams.usda.gov/nop/PublicComments/PetFoodTaskForce/PublicCommentsPetFoodTaskForce.html (The public comment period has closed, and only four short comments were submitted.).

184. TASK FORCE REPORT, *supra* note 179, at 6; *see* 7 C.F.R. § 205.2.

tions made by the Association of American Feed Control Officials (AAFCO), the proposed regulation does not explicitly state that "specialty pet food" must be certified, but instead merely states that "pet food" must be certified.[185] Although the definition of "pet food" includes "specialty pet food," the comment suggests that the delineation is unnecessary and that the terms "specialty pet" and "specialty pet food" should be eliminated in favor of broader definitions of "pet" and "pet food."[186] The comment further points out that the exclusion of certain animals from the "specialty pet" definition places them in regulatory limbo because all horses are excluded from the definition of "livestock."[187]

The PFTF recommended that pet food regulations be codified within livestock provisions, but that labeling requirements follow those for human food.[188] The proposed regulation provides that non-organic meat may be included in the non-organic portion of a product labeled organic (either as organic (95%) or "made with organic" (70%)), which addresses concerns of manufacturers about the limited availability of organic protein sources.[189] The drafters further noted that the GMO prohibition in the non-organic portion of any product may pose sourcing problems.[190] Lastly, the proposed regulations considered the special dietary needs of pets with respect to the National List and the addition of synthetic ingredients.[191]

VIII. AQUACULTURE AND WILD HARVEST ORGANIC STANDARDS

> Diminishing fishery harvests, wild fish food-safety issues, environmental concerns, increased fish consumption, and the increasing market share of organic foods have combined to focus attention on "organic aquaculture." Consumer demand may well drive the organic production of finfish, shellfish, and other aquatic species into the mainstream during the next decade.[192]

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185. Letter from David A. Dzanis, Dzanis Consulting & Collaborations, to NOSB Pet Food Task Force (Sept. 1, 2006), *available at* htp://www.ams.usda.gov/NOP/PublicComments/PetFoodTaskForce/PFTFDDzanisComment.pdf.

186. *Id.*

187. *Id.*

188. TASK FORCE REPORT, *supra* note 179, at 3.

189. *Id.* at 4. For the "organic" label, non-organic meat may only be included if it is otherwise unavailable. *See id.* (proposing amendment to sections (f) and (g) to 7 C.F.R. § 205.301).

190. TASK FORCE REPORT, *supra* note 179, at 4.

191. *Id.*; *see* proposed 7 C.F.R. §§ 205.600, 205.603 (requiring use of any synthetic nutrient (as a supplement) to be in accordance with AAFCO nutrient profiles and listing such nutrients in the Appendix to the proposed rule).

192. BOEHMER, ET AL., ALTERNATIVE FARMING SYSTEMS INFORMATION CENTER, ORGANIC AQUACULTURE, AFSIC NOTES #5 (2005), http://www.nal.usda.gov/afsic/AFSIC_pubs/afnotes5htm.

Total aquaculture production has grown to 50 million tons yearly. Although organic aquaculture remains a small portion (less than 1%) of total production,[193] aquaculture growth is an important part of a strong organic market. At the rate of current growth, organic aquaculture production will reach 1.2 million tons worldwide by 2030.[194]

While demand for organically raised aquatic animal products[195] is increasing, standards have proven difficult to devise, and have inhibited future growth. Like pet food, standards that have been developed over the past decade for terrestrial animals (e.g., livestock) do not necessarily transfer to aquaculture or wild-harvest systems. Issues that regulators must address in developing organic standards for fisheries include, among others: (1) obtaining acceptable stock/animal identification and recordkeeping/traceability, (2) health care monitoring and management, (3) living conditions, (4) allowed and prohibited substances in both production and processing, (5) environmental externalities (including nutrient management), and (6) sustainable harvesting within wild fisheries.[196]

A. *The History of U.S. Organic Standards Development for Aquaculture and Wild-harvested Fish*

As early as 1998, the NOSB conducted public meetings to discuss certification standards for aquaculture and wild-harvest aquatic animal operations. During April and May of 2000, the USDA/AMS conducted public meetings and solicited comments regarding certification of organic aquatic animals harvested from aquaculture and wild and/or open sea production.[197] In order to analyze these comments, the NOSB formed the Aquatic Animal Task Force at its June 2000 meeting (hereinafter "the 2000 Task Force"). In October 2001, the 2000 Task Force recommended the development of aquaculture standards, but called

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193. Presentation by Audem Lem, FAO Fisheries Industries Division, An Overview of the Present Market and Trade Situation in the Aquaculture Sector: The Current and Potential Role for Organic Products, Ho Chi Min City, Vietnam 17 (June 2004), *available at* http://www.globefish.org/files/OrganicAquaculture_129.pdf.

194. *Id*. at 23.

195. Use of the term "aquatic animal" denotes finfish and shellfish unless otherwise noted.

196. *See* BOEHMER, *supra* note 192.

197. *See* National Organic Programs: Organic Production and Handling of Aquatic Animals to be Labeled as Organic, 65 Fed. Reg. 15,579, 15,580 (Mar. 23, 2000) (providing a list of topics open for public comment).

for a prohibition on wild-caught standards.[198] The NOSB voted to accept the recommendations as guidance.[199]

Because a consensus could not be reached on aquaculture and wild-harvest standards, the USDA's 2002 Final Organic Rule did not include a regulatory scheme for aquatic animals. Certifiers, therefore, began developing private criteria, based on the OFPA livestock standards.[200] In April 2003, Congress amended OFPA to clarify that the definition of organic "livestock" includes "fish used for food."[201] USDA subsequently issued a directive indicating that enforcement actions would be taken against entities labeling or implying aquatic animal products as USDA certified.[202] The USDA quickly rescinded the directive, and the NOSB announced shortly thereafter that it would form a task force to develop standard recommendations.

The NOSB formed the Aquatic Animal Taskforce in 2004 (hereinafter "the 2004 Task Force"), consisting of two working groups: the Aquaculture Working Group (AWG) and wild fisheries.[203] Taking into consideration the 2000 Task Force recommendations, the 2004 Task Force sought to determine whether standards for both farm-raised and wild-caught aquatic species should be developed, and if so, the scope of such standards. If the Taskforce concluded that standards should be developed, it was to recommend draft regulations to the NOSB. Meanwhile, the National Organic Aquaculture Working Group (NOAWG) was formed to "create an alliance of interested parties in government, industry and academia" to "mobilize expertise to develop organic standards for aquaculture products."[204] NOAWG later issued a white paper that recommended standards for organic farmed-aquatic animals and plants.[205]

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198. *See* NOSB, THE NATIONAL ORGANIC STANDARDS BOARD AQUATIC ANIMAL TASK FORCE RECOMMENDATION ON OPERATIONS THAT PRODUCE AQUATIC ANIMALS, May 30, 2001, available at http://www.fwcb.cfansumn.edu/isees/OrganicAquaculture/TskFrcRec5.01.doc.

199. *See* NOSB, Draft Meeting Minutes, Oct. 17, 2001, http://www.ams.usda.gov/NOSB/MeetingMinutes/October01Minutes/10_17_01.html.

200. *See* NOSB Meeting Transcript, *supra* note 114, at 61-62 (discussing how, in the absence of official standards, U.S. certifiers could provide a private "organic" label for aquatic animal products marketed in the U.S.); *see also* Jenn Abelson, *Defining Organic Seafood: Amid Rising Demand [sic], FDA Wrestles With Guidelines*, Boston Globe, Mar. 12, 2005, at E1.

201. 7 U.S.C. §§ 6502(11), 6506(c) (2006).

202. *See* NOP Guidance Statement, *National Organic Program Scope* (Apr. 14, 2004) at http://www.grist.org/pdf/ScopeGuidance041304.pdf.

203. *See* NOSB Meeting Transcript, *supra* note 114; *see also* National Organic Program (NOP), *supra* note 197; *see also* National Organic Program, Nominations for Task Force Members, 70 Fed. Reg. 3356, 3357 (Jan. 24, 2005).

204. *See* NOAWG White Paper, *Proposed National Organic Standards for Farmed-Aquatic Animals & Plants with Supporting Documentation & Information* 8 (May 24, 2005), *available at* http://govdocs.aquake.org/cgi/reprint/2005/801/8010170.pdf.

205. *See id.*

The AWG of the 2004 Task Force issued an Interim Final Report in January 2006.[206] The Interim Final Report stated that AWG considered both the 2005 NOAWG white paper and the Task Force recommendations.[207] The NOSB officially received the AWG Interim Report on June 10, 2006, and invited public comment. The NOSB's Livestock Committee currently is working on a recommendation to present to the full NOSB. The wild fisheries working group of the 2004 Task Force has not been formed and has not issued a report or recommendation.[208]

B. *Salient Features of the 2006 AWG Interim[209] Final Report*

The Interim Final Report proposes the following sections as the basis of future regulation: (1) terms/definitions, (2) aquaculture generally, (3) the origin of stock, (4) feed requirements, (5) health care, living conditions, (6) facility design, (7) standards for harvest, handling, transport and slaughter, and (8) aquatic plants.[210] Only the more controversial (as gleaned from public comments on the Report) aspects of the AWG's recommendations are highlighted here.

The first area of debate stems from the inclusion of the term "aquatic animals" (proposed § 205.2) within the NOP's definition of "livestock." At least one commenter asserts that Congress did not intend OFPA's "fish used for food" to include all "aquatic animals", and therefore the AWG should not recommend standards for non-fish species such as mollusks or shellfish.[211] On the other hand, some comments lament that the AWG has not issued recommendations for mollusks and shellfish, although the term "aquatic animals" has been included in the definition of livestock.[212]

Some comments protest that proposed § 205.250 (Aquaculture general) fails to set standards on a species-specific basis.[213] Other comments note that the

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206. *See* National Organic Program Aquaculture Working Group, *Interim Final Report (2006)*, available at http://www.ams.usda.gov/nop/TaskForces/AATFInterimFinalReport.pdf [hereinafter *Interim Report*].

207. *Id.* at 4.

208. *See* Andrew Martin, *Free or Farmed, When Is a Fish Really Organic?*, N.Y. TIMES, Nov. 28, 2006, at A1 (detailing the failure to develop wild-caught organic standards).

209. The report is "interim" because shellfish standards were not recommended, and are still being worked on.

210. *See Interim Report*, *supra* note 206 (The proposed sections are numbered 7 C.F.R. §§ 205.2 to 205.259, respectively).

211. Joseph Mendelson III, Center for Food Safety, Comments on the "Interim Final Report" of the Aquaculture Working Group 4 (2006), *available at* http://www.centerforfoodsafety.org/pubs/CommentsOrgAquaculture4.05.06.pdf.

212. *Id.*

213. *Id.* at 4-5.

Interim Report does not acknowledge foreign standards and the importance of equivalency for international trade.[214] Lastly, some comments suggest that the AWG should strengthen proposed § 205.250(5) and (6) relating to biodiversity and escapes of cultivated animals and plants.[215]

Proposed § 205.251(g)-(h) (origin of aquaculture animals) includes a genetic engineering, hormone, and steroid prohibition.[216] The section further provides that stock may be obtained from wild stocks when otherwise commercially unavailable, but only when it can be assured that natural populations are protected and that biodiversity in the ecosystem is supported.[217] Comments note that commercial unavailability should be determined by rule and not by certifiers, and that it will be difficult for certifiers to enforce the protection/biodiversity requirement.[218]

Many comments address the AWG's aquaculture feed recommendations (proposed § 205.252). The AWG Report sets forth two options (A and B) relating to the use of fish meal and oil derived from wild harvest fish for organic aquaculture feed.[219] Option A contemplates that a wild harvest rule will be developed and, therefore, its by-products could be used as feed if derived from fishery resources deemed to be sustainably managed by the Marine Stewardship Council.[220] Option B provides for only limited use of wild harvest oil and meal as additives and supplements.[221] Comment support for these options depends on whether the commenter supports a wild-harvest rule.

The recommendation states that aquatic animal feed must be organically produced, and cannot contain antibiotics or hormones, excessive supplements or additives, mammalian or poultry slaughter by-products, feedstuffs extracted with synthetic solvents, artificial colors, or GMOs.[222] The AWG added a caveat to the by-product prohibition by stating that perhaps more discussion should occur on this subject, as no evidence exists that mammalian diseases (e.g., BSE) are transmittable to humans through fish. One comment notes that the UK prohibits animal-byproducts in fish feed, and that studies are inconclusive that BSE-related disease cannot be transmitted to humans through fish. Another comment states that a blanket prohibition against feeding of mammalian or poultry slaughter by-

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214. *See generally id.* (discussing various comments to the Interim Report).
215. *Id.* at 4-5.
216. *Interim Report, supra* note 206, at 8.
217. *Id.*; s*ee* proposed 7 C.F.R. § 205.251(i).
218. Mendelson, *supra* note 211, at 6.
219. *Id.* at 6-7.
220. *Id.* at 7.
221. *See* proposed 7 C.F.R. § 205.252.
222. *See id.* § 205.252(d) (organic requirement, both options); § 205.252(k), (n) (options B and A, respectively (prohibited substances)).

products, in combination with Option B (no wild-harvest by-products), may require feeding of synthetic amino acids such as methionine and lysine. Yet another comment notes that using plant protein substitutes in some fish species may result in a poor feed conversion ratio and lead to the production of excess wastes.

The AWG further recommends that aquatic animals must be provided their natural foods to the greatest extent possible.[223] Some comments object, stating that only nutritional requirements that maintain health should be required. For fish meal and oils used as feed, the proposal requires that contaminants such as persistent bioaccumulative toxins (PBTs), mercury, cadmium, lead, arsenic and tin must be comparable to the lowest levels found in commercially available fish meal and fish oil.[224] The AWG requests in its Report that the USDA develop residual contamination standards applicable to all organic foods, including fish used food, and methods to determine tolerance levels.[225] One comment notes that the EPA already has toxicology data for fish that assists states in issuing no catch advisories, and that this data should be used to provide a measurement that would prevent an organic aquaculture product from being marketed and sold as organic. To ignore the EPA's role, and to call on the USDA to study and implement toxin thresholds, the comment argues, is a merely an effort by the AWG to deflect the health issues posed by environmental toxins in fish.

Some comments consider the sitting requirements proposed in § 205.255(a) and (d) (aquaculture facilities) as vague and failing to address the myriad of water quality and waste disposal problems generated by aquaculture. Another area of controversy is the AWG's allowance of open-water net pens,[226] which one comment objects to because of the risk posed by escapes to threaten already fragile native fish populations. Proposed § 205.259 (harvest, transport, post harvest handling, and slaughter of aquatic animals) contains several provisions relating to the welfare of fish. One member of the AWG (and this author) considers these provisions more detailed and restrictive than other rules related to organic livestock. It is unclear how the AWG and NOSB will reconcile the discrepancies in welfare standards between aquatic and other animals considered livestock.

C. *EU Standards*

While the U.S. continues its struggle to develop standards for an organic label, European private certifiers have certified some fish species as organic, and

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223. *See id.* § 205.252(b) (options B and A).
224. *Id.* § 205.252(h), (k) (options B and A).
225. *See Interim Report*, *supra* note 206, at 12-13.
226. *See* proposed 7 C.F.R. § 205.255(k).

these products are being exported to the U.S. with this private, organic certification label.[227] While a discussion of EU and individual member state standards is beyond the scope of this article, it is important to note that a new, overall EU regulation on organic production has been proposed. This proposed regulation includes a provision for development of organic aquaculture standards.[228] In December 2005, the EU sponsored a conference titled "Organic Aquaculture in the European Union: Current Status and Prospects for the Future."[229] The conference identified current production in the EU, the risks and opportunities in setting up organic production, current production knowledge, Danish and Soil Association (UK) standards, and future prospects.[230]

IX. THE 2007 FARM BILL: WILL IT SIGNIFICANTLY ADVANCE AN ORGANIC AGENDA?

The 2002 Farm Bill provided little with respect to promotion of organic agriculture. It did include an exemption from Marketing Fees administered by AMS if an entire operation is 100% organic.[231] Organic growers previously had concerns about assessments to promote commodity sales that did little or nothing to promote organic products. The Farm Bill also provided $3 million per year in competitive research grants, and $5 million (total) as a certification cost-share

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227. *See* NOSB, Meeting Minutes, Oct. 14, 2004, at 59-60, http://www.ams.usda.gov/NOSB/transcripts/Oct2004/10_14_04.pdf; *see also* FAO, ORGANIC AGRICULTURE, ENVIRONMENT AND FOOD SECURITY, ch. 6 (Nadia El-Hage Scialabba & Caroline Hattam, eds.) (2002), *available at* http://www.fao.org/DOCREP/005/Y4137E/y4137e06.htm (providing a list of private certifiers worldwide that have certified organic fish. Some EU Member States maintain organic aquaculture standards. S*ee, e.g.*, Compendium of U.K. Organic Standards, http://www.defra.gov.uk/farm/organic/standards/pdf/compendium.pdf) (U.K.); http://ec.europa.eu/fisheries/meetings_events/events/archives/events_2005/conf121205/sorensen.pdf) (Denmark); http://www.provaqua.com/english/quality-garanteed.htm (France).

228. *Commission Proposal for a Council Regulation on Organic Production and Labeling (sic) of Organic Products*, (Dec. 12, 2005), available at http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0671en01.pdf.

229. *See* European Commission on Fisheries*, Thematic Conference: Organic Auquaculture in the European Union; Current Status and Prospects for the Future,* Brussels, (Dec. 12-13, 2005), http://ec.europa.eu/fisheries/meetings_events/events/archives/events_2005/conf121205/program_en.htm.

230. *Id.*

231. 7 U.S.C. § 7401(e)(1) (2006).

program to assist producers and handlers in obtaining certification under the NOP.[232]

Interest groups such as the Sustainable Agricultural Coalition and American Farmland Trust are attempting to cobble together under a "big tent" progressive interest groups to influence the legislative progress. Food activists, food stamp advocates, environmental organizations, labor unions and organic interests may join these various coalitions in calls for Congress to increase research monies and protect the "integrity" of organic standards. In addition, organic groups may push for USDA's Risk Management Agency (RMA) to offer broader insurance coverage for organic crops. Despite its impressive growth, however, organics still comprise only 2.5% of the total food market.[233] Farm Bill programs traditionally have supported the big five commodities (corn, soy, rice, wheat, cotton), a course that is unlikely to change in the next version of the legislation, especially in light of the record budget deficits.

X. CONCLUSIONS AND PREDICTIONS

USDA repeatedly emphasizes that "[o]rganic labels are not statements regarding the healthiness, nutritional value, or overall safety of consuming such products."[234] From a marketing perspective, however, the organics industry and retailers must understand that consumer expectations regarding the organic label go beyond regulatory mandates. Otherwise, consumers may become increasingly disenfranchised from a label that gradually has appeared to more-closely resemble the standardized, commodity-based system of low price and quality. The organic consumer opts out of this lower-cost system for a reason, and all involved must recognize this sentiment if the organic "marketing program" is to continue its success in the long-run.

If the industry continues its current course, by the end of the next decade, the "organic" market may well bifurcate into two distinct units:

1. A suburban, homogenized organic market, produced for the most part on an industrial scale that shares retail space in conventional grocery stores.

2. A "beyond-organic" market, with focus on social and local aspects of communal organic food distributed via CSAs, farmers markets, food cooperatives and direct farm sales. Market participants may well forego the organic certification process and attendant costs/paperwork, and instead focus on marketing

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232. Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, §§ 7218, 10606. 116 Stat. 134, 449, 514 (codified as amended 7 U.S.C. §§ 5925b(3), 6523(a) (2006)).

233. *See* OTA MANUFACTURER SURVEY, *supra* note 2.

234. *See* Friedman, *supra* note 3, at 366 (citing NOP, Organic Food Standards and Labels: The Facts, http://www.ams.usda.gov/nop/Consumers/brochure.html).

their products as environmentally friendly, healthy, socially responsible (including the incorporation of minimum labor standards), and of better quality.

As the organic sector further industrializes, farmers with relatively small fields who otherwise are forced out of commodity agriculture, may forgo organics as a long-term strategy. That is, smaller farmers may not even attempt to compete in the industrial organic market. A more viable option for small farmers may be to move "beyond organic" and participate in the bifurcated market, as previously explained.[235] Productivity and profits are different concepts and the small producer can survive if he or she produces an excellent, differentiated product.[236] The power of the internet and its ability to quickly and efficiently connect producers offering, and consumers seeking, "beyond organic" products will further embolden the new pioneers of post-industrial commodity agriculture.

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235. *See supra* section I.D.3.

236. *See* POLLAN, *supra* note 43, at 153, 249 (elaborating on this concept of competition via quality differential).