

# HOW ORGANIC IS ORGANIC? DO THE USDA’S ORGANIC FOOD PRODUCTION ACT AND NATIONAL ORGANIC PROGRAM REGULATIONS NEED AN OVERHAUL?

*Erin Toomey\**

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## I. INTRODUCTION

When consumers push their shopping carts down the aisles of grocery stores, they are bombarded by the number of organic products available. Currently, the United States is the world’s largest organic market, showing double-digit growth since 2009.<sup>1</sup> Today, seventy-three percent of traditional grocery stores offer organic products,<sup>2</sup> while health

food stores have made organic products their staple.<sup>3</sup> According to the 2012 Organic Industry Survey conducted by the Organic Trade Association

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\* J.D., Drake University Law School, 2013.

1. ORGANIC TRADE ASS’N, 2012 ORGANIC INDUSTRY SURVEY 8 (2012); *Worldwide: FiBL/IFOAM Report Shows Top Markets*, GLOBAL TRADE GUIDE (Feb. 12, 2013), <http://www.globalorganictrade.com/news.php?id=42>.

2. CAROLYN DIMITRI & CATHERINE GREENE, USDA, ECON. RESEARCH SERV., RECENT GROWTH PATTERNS IN THE U.S. ORGANIC FOODS MARKET 1, *available at* [http://www.ers.usda.gov/media/255736/aib777c\\_1\\_.pdf](http://www.ers.usda.gov/media/255736/aib777c_1_.pdf).

3. *See, e.g.*, Adam Helfer, *U.S. Organic Food Trend Forecasted for Growth through 2018*, WASH. TIMES, Dec. 2, 2013, <http://communities.washingtontimes.com/neighborhood/omkara/2013/dec/2/us-organic-food-trend-forecasted-growth-through-20/>.

(OTA), the U.S. organic industry grew by 9.4% overall in 2011, including the food and beverage sector, and reached \$29.2 billion in sales.<sup>4</sup> According to this survey, the saturation of the marketplace by organic foods is driven in part by consumer demand.<sup>5</sup> However, continued consumer misconceptions over the benefits of organic foods, versus natural, versus non-genetically modified organisms (GMO), versus local, often impede this organic sales growth trend.<sup>6</sup> When a particular market is driven by such high consumer demand, it is frightening to think about consumer misconceptions regarding organic foods,<sup>7</sup> including misconceptions about pesticide residue, ingredients of organic products, exceptions to organic certification, organic farming techniques and requirements, genetic engineering,<sup>8</sup> and the use of synthetic substances.<sup>9</sup>

In the U.S., increasing health and environmental concerns, as well as calls for increased flavor and nutrition, have been the biggest contributors to the consumer demand for organic products.<sup>10</sup> This demand shows no signs of slowing down anytime soon, despite the higher price premiums.<sup>11</sup> Consumers are willing to pay a higher price for products they deem to be healthier, safer, and more environmentally friendly, and they rely on the integrity of the USDA's Organic Seal to indicate a certain level of process and quality.<sup>12</sup> However, standards set by the Organic Food Production Act and the National Organic Program

4. ORGANIC TRADE ASS'N, *supra* note 1, at 16.

5. *Id.*

6. *Id.*

7. See Debra Van Camp et al., *The Paradox of Organic Ingredients*, FOOD TECH., Nov. 2010, at 20–29 (discussing the misconception that organic foods are “better” than conventionally raised foods).

8. See INT'L FED'N OF ORGANIC AGRIC. MOVEMENTS, CRITICISMS AND FREQUENT MISCONCEPTIONS ABOUT ORGANIC AGRICULTURE: THE COUNTER-ARGUMENTS (2008), available at [http://infohub.ifoam.org/sites/default/files/page/files/misconceptions\\_compiled.pdf](http://infohub.ifoam.org/sites/default/files/page/files/misconceptions_compiled.pdf) (presenting arguments refuting that these statements are misconceptions).

9. See Aubrey Parlet, Note, *Organic Foods Production: What Consumers Might Not Know About the Use of Synthetic Substances*, 21 LOY. CONSUMER L. REV. 392, 398 (2009).

10. John Ikerd, Professor Emeritus, Univ. of Mo., Eating Local: A Matter of Integrity, Address at the Eat Local Challenge kickoff event hosted by Eco Trust (June 2, 2005), and the Sierra Club Farm Tour and the Alabama Sustainable Agriculture Network Field Day (June 18, 2005), available at <http://web.missouri.edu/~ikerdj/papers/Alabama-Eat%20Local.htm>.

11. ORGANIC TRADE ASS'N, *supra* note 1, at 17.

12. Stephen Barrett, “Organic” Foods: Certification Does Not Protect Consumers, QUACKWATCH, <http://www.quackwatch.com/01QuackeryRelatedTopics/organic.html> (last modified May 16, 2012) (stating that many consumers who pay higher prices for organic foods believe it is healthier and safer than conventional foods despite the USDA's opinion that there is no distinction between organic and non-organic products in terms of safety and quality).

are not completely clear to consumers.<sup>13</sup> With a booming market and all the confusion surrounding organic food, it is more important than ever for consumers to know when *organic* is really organic. An understanding of the current Organic Foods Production Act regulations is necessary to recognize the problems facing the organic market and the American public today. To cure these consumer misconceptions, organic must first be defined, and then the USDA's organic food labeling scheme must be examined. Officially, in the U.S., there is no exact definition of organic *products* themselves,<sup>14</sup> despite the legislative intent of the Organic Foods Production Act to homogenize numerous state sanctioned definitions of what organic means.<sup>15</sup> However, the USDA's National Organic Production Program (NOP) has crafted a more process-oriented definition of "organic" that revolves around labeling schemes.<sup>16</sup> The NOP has defined "organic" as "a labeling term that indicates that the food or other agricultural product has been produced through approved methods that integrate cultural, biological, and mechanical practices that foster cycling of resources, promote ecological balance, and conserve biodiversity" while prohibiting genetic engineering, synthetic fertilizers, radiation, and sewage sludge.<sup>17</sup> The Organic Foods Production Act (OFPA), enacted under Title 21 of the 1990 farm bill,<sup>18</sup> authorized the NOP to set these process-based national standards for the processing, production, and handling of organically grown food products.<sup>19</sup> The stated purposes of the OFPA are: "(1) to establish national standards governing the marketing of certain agricultural products as organically produced products; (2) to assure consumers that organically produced products meet a consistent standard; and (3) to facilitate interstate commerce in fresh and processed food that is organically produced."<sup>20</sup> More specifically, areas governed by the OFPA include organic production standards and requirements, state organic certification programs, prohibited crop produc-

13. *See id.*

14. 7 U.S.C. § 6502 (2012) (describing the process of how a product is labeled as organic, but not the specific term).

15. *See* S. REP. NO. 101-357, at 289 (1990), *reprinted in* 1990 U.S.C.C.A.N. 4656, 4943 (stating that "[e]ven the most sophisticated organic consumer finds it difficult to know, with certainty, what the term 'organic' really means").

16. National Organic Program, 7 C.F.R. § 205.2 (2013).

17. *Id.* § 205.105(e) (prohibiting use of "excluded methods"); *National Organic Program*, AGRIC. MKTG. SERV., USDA, <http://www.ams.usda.gov/AMSV1.0/nop> (last modified April 30, 2014) [hereinafter *National Organic Program*, AMS].

18. Organic Foods Production Act of 1990, Pub. L. No. 101-624, 104 Stat. 3935 (codified as amended at 7 U.S.C. §§ 6501–6522).

19. *See* 7 U.S.C. §§ 6501–6522 (laying out the standards for organic certification).

20. *Id.* § 6501.

tion practices, animal production practices, organic plan implementation guidelines, accreditation programs, the National List, the National Organic Standards Board, appropriations for the organic industry, and procedures for handling violations of the Act.<sup>21</sup>

The purpose of this Note is to examine the current regulatory framework of the OFPA, the integrity of the USDA's Organic Seal and labeling scheme, and set forth the problems that perpetuate consumer misconception of organic products. Specifically, Part II will discuss the legislative intent behind the OFPA and give an overview of the USDA Organic Seal certification process including requirements and exceptions, the National List, and the National Organic Standards Board and its influence on the OFPA's regulatory process. Part III will discuss the relationship between USDA's managers and corporate agribusiness lobbyists and their effect on the reputation and integrity of the USDA's Organic Seal. Further, Part IV will discuss criticisms the USDA has received from the National Standards Institute, the Cornucopia Institute, and other organic proponents about the lax standards and exceptions the USDA allows in the current organic certification and labeling requirement schemes. This section will also explore how such criticism has affected the integrity of the USDA's Organic Seal, specifically regarding the Prohibited List, synthetics, and GMOs. Finally, Part V proposes new standards and regulations that incorporate a product-based regulatory scheme into the process-based scheme that would better reflect the final condition of organic products and better educate U.S. consumers.

## II. LEGISLATIVE INTENT BEHIND AND OVERVIEW OF THE ORGANIC FOOD PRODUCTION ACT AND THE ACT IN ACTION

Before Congress passed the OFPA in 1990, numerous states had begun enacting laws regarding the requirements of organic food processing and labeling, creating conflicting regulatory schemes throughout the country.<sup>22</sup> In an effort to unify these standards, the OFPA was enacted.<sup>23</sup> At its inception, the stated goals of the OFPA were to create "national standards governing organic marketing, to assure consumers that organically produced products meet a consistent standard, and to facilitate interstate commerce in organically produced fresh and

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21. *See id.* §§ 6501–6522.

22. S. REP. NO. 101-357, at 289 (1990), *reprinted in* 1990 U.S.C.C.A.N. 4656, 4943.

23. Organic Foods Production Act of 1990, Pub. L. No. 101-624, 104 Stat. 3935 (codified as amended at 7 U.S.C. §§ 6501–6522).

processed foods.”<sup>24</sup> To implement these goals, the OFPA authorized the USDA to promulgate the NOP to regulate products sold, labeled, or represented as “organic” in the U.S.<sup>25</sup> The OFPA and NOP regulations focus on a process-based approach to the regulation of organic production in the U.S.<sup>26</sup> This process-based approach requires that agricultural products marketed as organic come from farms and handling operations that are certified by state departments of agriculture and private entities accredited by the USDA, and that such products meet certain standards.<sup>27</sup> The requirements for being accredited as a certifying agent are rather lax, and a bit subjective. For example, in order to qualify for USDA accreditation, a state official or private entity must only submit an application, comply with the USDA certifying process as laid out in the statute, and have expertise in organic farming and processing techniques.<sup>28</sup> This process raises a number of questions: What qualifies as expertise in organic farming? Who decides whether an applicant meets the requirements? Moreover, should the applicant be required to complete some level of education in a scientific discipline? Additionally, the NOP authorizes foreign governments to accredit private entities to serve as certification agents for the USDA organic regulations, which allows foreign products to be sold in the U.S. and marketed as organic.<sup>29</sup> Although the NOP claims this regulatory scheme allows the U.S. and other countries to equalize their organic standards and create uniformity,<sup>30</sup> it is hard to believe that the NOP can adequately audit this regulatory scheme from overseas. To ensure compliance and consistency among certifying agents, the OFPA states that the USDA may establish a peer review committee consisting of experts in organic farming and processing.<sup>31</sup> However, since the enactment of the OFPA in 1990, the USDA has yet to form a peer review panel.<sup>32</sup>

24. 7 U.S.C. § 6501; Michelle T. Friedland, *You Call That Organic?—The USDA’s Misleading Food Regulations*, 13 N.Y.U. ENVTL. L.J. 379, 382 (2005) (delegating the implementation of an organic certification program to the USDA).

25. See 7 U.S.C. § 6503.

26. National Organic Program, 65 Fed. Reg. 80,548, 80,549 (Dec. 21, 2000) (to be codified at 7 C.F.R. pt. 205) (quoting the NOP, “The emphasis and basis of these standards is on process, not product.”).

27. 7 U.S.C. § 6514(a); *National Organic Program*, AMS, *supra* note 17.

28. 7 U.S.C. § 6514(b); see 7 U.S.C. § 6515.

29. *USDA Oversight of Organic Products*, AGRIC. MKTG. SERV., USDA (Nov. 2012), <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3004443>.

30. *Id.*

31. S. REP. NO. 101-357, at 294 (1990), *reprinted in* 1990 U.S.C.C.A.N. 4656, 4948.

32. See OFF. OF INSPECTOR GEN., USDA, AUDIT REP. 01601-03-HY, OVERSIGHT OF THE NATIONAL ORGANIC PROGRAM 18 (2010), *available at* <http://www.usda.gov/oig/webdocs/01601->

The USDA lays out the national standards that must be verified by a USDA-accredited Certifying Agent before products are allowed to bear a USDA Organic Seal.<sup>33</sup> To abide by these standards, organic farmers and handlers are not allowed to use synthetic chemicals or any prohibited substances, other than those on the National List, on organic products or the land on which any organic products will be produced or handled for three years preceding harvest time of the agricultural products.<sup>34</sup> Additionally, farmers and handlers must comply with an organic plan that their Certifying Agent agrees to.<sup>35</sup> Further, “[s]ynthetic fertilizers, sewage sludge, irradiation, and genetic engineering may not be used.”<sup>36</sup> One of the stated purposes of the OFPA is to regulate how products are represented to consumers through various labeling schemes.<sup>37</sup> Those producers who wish to label their products as organic may only do so if they comply with NOP regulations’ requirements, which allow three levels of organic labeling on consumer products.<sup>38</sup> First, a label advertising “100 percent organic” can only accompany foods that contain only organically produced ingredients, excluding water and salt; the USDA Seal can be displayed on these packages.<sup>39</sup> Second, a product with a label advertising “organic” must consist of at least ninety-five percent organically produced ingredients, excluding water and salt; the USDA Seal can also be displayed on these packages.<sup>40</sup> Finally, products advertising the label “made with organic ingredients” refer to processed products that contain at least seventy percent organic ingredients.<sup>41</sup> Such products can use this phrase and list up to three of the organic ingredients or food categories contained in the product on the label.<sup>42</sup>

With three different levels of organic labeling, it is no wonder consumers are confused about what USDA Organic Labels represent. According to an or-

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03-HY.pdf (stating that an annual peer review panel has not been formed since the creation of the program in 2002).

33. 7 U.S.C. § 6504 (2012).

34. *Id.*

35. *Id.*

36. *Organic Production and Handling Standards*, AGRIC. MKTG. SERV., USDA (Oct. 2011), <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3004445>.

37. *See* 7 U.S.C. § 6501 (stating one of the purposes is “to establish national standards governing the marketing of certain agricultural products as organically produced products”).

38. *See* National Organic Program, 7 C.F.R. §§ 205.300–301 (2013).

39. *Id.* §§ 205.301(a), 205.302–303; *Labeling Organic Products*, AGRIC. MKTG. SERV., USDA (Oct. 2012), <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3004446>.

40. *See* 7 C.F.R. §§ 205.301(b), 205.302–303.

41. *See id.*; *Labeling Organic Products*, *supra* note 39.

42. *Labeling Organic Products*, *supra* note 39.

ganic marketing survey, less than half of respondents believed the USDA organic seal meant the products contained 100 percent organic contents.<sup>43</sup> One-fourth of respondents thought the organic seal indicated the product contained at least ninety-five percent organic ingredients, while twelve percent thought it indicated that the product contained “some organic” ingredients.<sup>44</sup> Further, likely because of the confusion that surrounds the meaning of the USDA organic seal, only twenty-five percent of respondents said they chose “USDA Organic” products, while seventy percent said they instead chose products labeled “all organic.”<sup>45</sup> As a result, the USDA’s confusing labeling scheme hurts not only organic consumers, but also organic farming and handling entities that advertise the USDA Seal by swaying consumers to choose products with more trustworthy and less confusing terms like “all organic.”<sup>46</sup>

Matthew Saline, the CEO of the marketing company that conducted the survey, explained that the “survey revealed that consumers are definitely looking for more clarity and definition in organic product classifications.”<sup>47</sup> According to the survey, consumers would be more confident in the USDA seal and in buying organic products if retailers had their own separate organic standards in addition to the USDA seal.<sup>48</sup> Apparently, large organic corporations, in addition to organic consumers have lost faith in the integrity of the USDA seal.<sup>49</sup> Michael J. Potter, owner of the major organic wholesaler and food producer, Eden, called the USDA certified-organic label “a fraud and refuse[d] to put it on Eden’s products,” and in reference to the National Standards Board, Potter stated, “[e]ither they don’t have a clue, or their interest in making money is more important than their interest in maintaining the integrity of organics.”<sup>50</sup> Another troubling fact about USDA certification requirements is that small organic farming or processing operations are exempt from such certification regulations. For example, farms that gross revenue of \$5000 or less per year are exempt from USDA feder-

43. Lorraine Heller, *Organic Labels Are Confusing, Says Consumer Survey*, FOOD NAVIGATOR-USA.COM (Aug. 22, 2007), <http://www.foodnavigator-usa.com/Suppliers2/Organic-labels-are-confusing-says-consumer-survey>.

44. *Id.*

45. *Id.*

46. *See id.*

47. *Id.*

48. *Id.*

49. *See* Stephanie Strom, *Has ‘Organic’ Been Oversized?*, N.Y. TIMES, July 7, 2012, [http://www.nytimes.com/2012/07/08/business/organic-food-purists-worry-about-big-companies-influence.html?pagewanted=all-t\\_r=0&\\_r=0](http://www.nytimes.com/2012/07/08/business/organic-food-purists-worry-about-big-companies-influence.html?pagewanted=all-t_r=0&_r=0) (describing the influence that large agricultural companies have on organic food).

50. *Id.*

al regulations.<sup>51</sup> Although small operations are expected to follow the national standard, they do not undergo the annual site inspections conducted by certifying agents, nor are they subject to any review of their farming practices and materials used in their growing and handling techniques.<sup>52</sup> Does this mean that small organic operations can label their products organic even if they do not meet the USDA's certification regulations? How do the producers prove their products meet the national standards? The size of organic food operations should be irrelevant when applying the OFPA. Despite the size of the organic food operation, the final product sold to consumers is the same. Because the final product will bear the same USDA seal, small operations should be inspected and their methods subjected to the same review as large operations. Another important issue to consider is whether OFPA penalties still apply to small operations, even if those operations are not subject to USDA organic certification requirements. If a certified operation knowingly labels or sells a product as "organic" when it does not comply with OFPA regulations, the operation is subject to the revocation or suspension of its organic certification.<sup>53</sup> However, because small organic operations are not technically certified, and the OFPA penalties refer to "certified operations," it can be argued that the penalties for non-compliance do not apply to them.<sup>54</sup>

The NOP established this organic certification program based on recommendations from the Federal Advisory Committee Act, establishing the National Organic Standards Board (NOSB), which is made up of fifteen members appointed by the Secretary of Agriculture.<sup>55</sup> The NOSB is comprised of representatives of the organic market, including individuals who own or operate organic farming or handling operations; retail establishments with significant business in organic products; experts in environmental protection and conservation; representatives of public and consumer interest groups; and an organic certifying agent.<sup>56</sup> The NOSB has six subcommittees that oversee certification, accreditation, and compliance; crops; livestock; handling; materials; and policy develop-

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51. 7 U.S.C. § 6505(d) (2012) (stating that compliance requirements for organic labeling do not apply to persons who sell less than \$5000 annually in agricultural products).

52. GEORGE KUEPPER, KERR CTR. FOR SUSTAINABLE AGRIC., *SMALL ORGANIC FARMS & LOCAL MARKETS: HOW TO ASSESS ORGANIC COMPLIANCE: A TOOL FOR MARKET GROWERS, MARKET MANAGERS, PRODUCE BUYERS, EXTENSION AGENTS, AND OTHERS 2* (2007), available at <http://www.kerrcenter.com/publications/Organic-certification-report/Organic-report07.pdf>.

53. National Organic Program, 7 C.F.R. § 205.662 (2013).

54. See 7 U.S.C. § 6515(j)(2).

55. *Id.* § 6518(a)-(b).

56. *Id.* § 6518(b).

ment subcommittees that meet to develop recommendations on various issues regarding rulemaking to the NOSB.<sup>57</sup> Perhaps the most important role of the NOSB, and most intriguing to organic consumers, is the Board's influence on the National List of Allowed and Prohibited Substances (National List).<sup>58</sup> The National List classifies substances that may or may not be implemented in organic processed products and crop and livestock production.<sup>59</sup> The NOP's regulations are comprised of three main areas: production and handling standards, labeling and marketing standards, and certification standards.<sup>60</sup> The federal standards for organic production and handling established by the NOP in conjunction with the NOSB are perhaps the most critical of the three areas because the NOP's regulation scheme is a process-based, not product-based, approach.<sup>61</sup> "The standards are process-based in that the regulations focus almost exclusively on the food production process, not the final food product," and they are "input-based because they focus on what substances can and cannot go into the food production, such as pesticides and synthetic chemicals."<sup>62</sup>

Further causing confusion, the regulations control the process of production without any detailed mention of alternative farming methods, transportation restrictions, or other organic sustainability concerns.<sup>63</sup> The NOP's production and handling standards address crop production and harvesting, organic livestock management, and the processing and handling of organic agricultural products.<sup>64</sup> In regards to crop production, the USDA prohibits the use of GMOs, and organic crops are grown without using most conventional pesticides, petroleum, or sew-

57. Notice of Meeting of the National Organic Standards Board, 77 Fed. Reg. 52,679 (Aug. 30, 2012).

58. 7 U.S.C. § 6518(k)(2); *Keeping Organic Strong: Changes in Organic Regulations and Farming Practices: National Organic Standards Board*, BEYOND PESTICIDES, <http://www.beyondpesticides.org/organicfood/action/index.php> (last visited Aug. 23, 2014).

59. National Organic Program, 7 C.F.R. §§ 205.600–.606 (2013).

60. See *Organic Production and Handling Standards*, *supra* note 36 (summarizing the standards set out by the USDA organic regulations).

61. National Organic Program, 65 Fed. Reg. 80,548, 80,549 (Dec. 21, 2000) (to be codified at 7 C.F.R. pt. 205) (quoting the final rule notice, "The emphasis and basis of these standards is on process, not product.").

62. See 7 U.S.C. §§ 6503(a), 6504; Arielle Lessing, *A Supplemental Labeling Regime For Organic Products: How the Food, Drug, and Cosmetic Act Hampers a Market Solution to an Organic Transparency Problem*, 18 MO. ENVTL. L. & POL'Y REV. 415, 429 (2011); see also 7 C.F.R. § 205.

63. See generally 7 U.S.C. § 6503 (illustrating that all of the regulations set out in the OFPA regulate the process of production with ambiguous guidelines and no specific requirements or alternative methods for organic production).

64. See 7 C.F.R. §§ 205.200–.290.

age sludge-based fertilizers.<sup>65</sup> The keyword is *most*. This is where the National List comes into play.

A large number of consumers are unaware of the substances on and exceptions to the National List, or even that the National List exists at all.<sup>66</sup> Originally, under the OFPA, five percent of USDA-certified organic products could be non-organic substances as long as those substances were approved by the NOSB.<sup>67</sup> The National List began as a way to include substances that were essential to creating organic products, such as the use of baking soda in making organic bread.<sup>68</sup> However, there are currently over 250 non-organic substances on the list, an increase from seventy-seven substances in just 2002.<sup>69</sup> The NOSB reviews all substances on the National List every five years and recommends removing, renewing, or altering each listing.<sup>70</sup> During this process, referred to as a “sunset review,”<sup>71</sup> companies petition the NOSB to keep an allowed substance on the list, while showing why there has not been an organic alternative discovered.<sup>72</sup> The goal of this review process is to reduce the number of substances on the National List over time.<sup>73</sup> In reality, however, the process has had the opposite effect.<sup>74</sup> Some claim the increase in the number of non-organic substances on

65. *See id.*

66. *See, e.g.,* Harriet Behar, *Efficiency or Democracy? NOP Changes ‘Sunset’ Policy Without Public Input*, ORGANIC BROADCASTER (Jan./Feb. 2014), <http://mosesorganic.org/policy/work/inside-organics-blog/nop-changes-sunset-policy-without-public-input/>; Barbara H. Peterson, *The USDA’s Organic Deception*, FARM WARS (Jan. 6, 2011), <http://farmwars.info/?p=4913>.

67. Kimberly Kindy & Lyndsey Layton, *Integrity of Federal ‘Organic’ Label Is Questioned*, WASH. POST, July 3, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/02/AR2009070203365.html>.

68. Strom, *supra* note 49.

69. *Id.*

70. *National Organic Program*, ORGANIC IT’S WORTH IT, <http://www.organicitsworthit.org/learn/national-organic-program> (last visited Aug. 23, 2014); *National Organic Program: Sunset Review Process*, AGRIC. MKTG. SERV., USDA, <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateN&navID=FederalRegisterNoticesNOPNewsroom&topNav=&leftNav=NationalOrganicProgram&page=NOPSunset&description=Sunset%20Review%20Process> (last modified Sept. 16, 2013) [hereinafter *Sunset Review Process*].

71. *Sunset Review Process*, *supra* note 70.

72. Kindy & Layton, *supra* note 67.

73. *Id.*

74. *Id.* (indicating an addition of 168 substances to the National List since 2002).

the list is a reflection of relaxed federal standards due to cozy relationships between USDA managers and agribusiness lobbyists.<sup>75</sup>

The Act allows the Secretary of Agriculture, in consultation with the NOSB, the EPA Administrator, and the Secretary of Health and Human Services, to establish this list of allowed and prohibited substances, as well as a list of allowed products that have been deemed safe for human health and the environment in the organic context.<sup>76</sup> The group gathers and evaluates the scientific data and makes recommendations to the board based on seven areas: the substance's effects on human health, the substance's effects on the farm ecosystems, the toxicity and mode of action, the availability of gentler alternatives, the probability of environmental contamination during manufacturing, the potential for interactions with other materials used, and the overall compatibility with a system of sustainable agriculture.<sup>77</sup> Generally, NOP regulations prohibit the use of genetic engineering, ionizing radiation, and sewage sludge in organic production and handling.<sup>78</sup> Further, all natural (non-synthetic) substances are allowed in organic production while conversely, all synthetic substances are prohibited,<sup>79</sup> or so one would think after deeming a product to be "organic."<sup>80</sup> The National List is the list of exceptions to this general requirement.<sup>81</sup> Examples of prohibited natural materials on the National List include arsenic, lead salts, strychnine, and ash from manure burning.<sup>82</sup> On the other hand, examples of natural materials that are allowed include aspartin and Vitamin C.<sup>83</sup> One caveat regarding the allowed synthetics is that although a synthetic may be allowed for one purpose, it may not be allowed for every possible use; thus, producers must pay close attention to the usage restrictions mentioned in the regulations.<sup>84</sup>

75. See CORNUCOPIA INST., *THE ORGANIC WATERGATE—WHITE PAPER: CONNECTING THE DOTS: CORPORATE INFLUENCE AT THE USDA'S NATIONAL ORGANIC PROGRAM 3* (2012), available at <http://www.cornucopia.org/USDA/OrganicWatergateWhitePaper.pdf> (claiming the USDA has filled positions of NOSB with corporate representatives against the congressional intent of the OFPA) [hereinafter CORNUCOPIA INST., *THE ORGANIC WATERGATE*].

76. 7 U.S.C. § 6517 (2012).

77. *OTA's National List Backgrounder*, ORGANIC TRADE ASS'N, <http://www.ota.com/listbackground05.html> (last updated Jan. 16, 2007).

78. National Organic Program, 7 C.F.R. § 205.105 (2013).

79. *Id.* §§ 205.600–.606; Parlet, *supra* note 9, at 397.

80. Parlet, *supra* note 9, at 397.

81. See 7 U.S.C. § 6517.

82. 7 C.F.R. § 205.602.

83. See *id.*

84. See *id.* §§ 205.300–.309 (indicating that the use of the allowed substances in one context or method may be prohibited in another).

With all the variations, exceptions, and inclusions in organic production, it is impossible for the USDA to implement a uniform labeling scheme for organic products and processes. Moreover, it is impossible to label a product correctly if the legitimacy of the substances contained in organic products are questioned and not considered to be organic at all. Without an accurate and consistent regulatory framework for organic product ingredients and labeling schemes, consumer confusion sets in, and the integrity of the USDA Organic Seal is compromised.

### III. EFFECT OF USDA MANAGERS AND CORPORATE AGRIBUSINESS LOBBYISTS ON THE INTEGRITY OF THE USDA SEAL

The USDA was founded and signed into law by President Abraham Lincoln over 150 years ago.<sup>85</sup> Lincoln referred to the USDA as “The People’s Department,” recognizing the importance of farming and agriculture to America’s prosperity, at a time when approximately half of Americans lived on farms.<sup>86</sup> Today, roughly two percent of Americans live on farms.<sup>87</sup> However, despite the small percentage of the U.S. population that lives on farms, the importance of farming and agriculture to America’s prosperity has not changed. According to the OTA’s 2012 Organic Industry Survey, the organic food market reached over \$29 billion in U.S. consumer sales in 2011.<sup>88</sup> Some claim the enormity of the organic market, and the profits it produces, has attracted many large corporations and changed the dynamic of the USDA.<sup>89</sup> In the past, the USDA focused on helping the people that worked the land and the consumers who supported them.<sup>90</sup> Today, the USDA can be considered the “Agribusiness Industry’s Department,” because “its policies on issues such as food safety and fair market competition have been shaped to serve the interests of the giant corporations that

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85. Tom Vilsack, *Secretary’s Column: “The Peoples’ Department: 150 Years of USDA”*, USDA BLOG (May 11, 2012, 12:45 PM), <http://blogs.usda.gov/2012/05/11/secretarys-column-the-peoples-department-150-years-of-usda/>.

86. *Id.*

87. *Id.*

88. ORGANIC TRADE ASS’N, *supra* note 1, at 16.

89. *Message to Obama: Please Fix the USDA’s Organic Mess Overhaul of Management and Culture Needed*, CORNUCOPIA INST. (July 6, 2009), <http://www.cornucopia.org/2009/07/message-to-obama-please-fix-the-usdas-organic-mess-overhaul-of-management-and-culture-needed/>.

90. PHILIP MATTERA, GOOD JOBS FIRST, USDA INC.: HOW AGRIBUSINESS HAS HIJACKED REGULATORY POLICY AT THE U.S. DEPARTMENT OF AGRICULTURE 4 (2004), available at <http://www.nffc.net/Issues/Corporate%20Control/USDA%20INC.pdf>.

now dominate food production, processing[,] and distribution.<sup>91</sup> For example, most consumers would be shocked to learn that large corporations such as Coca-Cola, M&M Mars, and General Mills own a large portion of the organic food industry in the U.S.<sup>92</sup> Staple organic brands such as Kashi, Wholesome & Hearty, and Bear Naked are owned by Kellogg, while the Naked Juice brand is owned by PepsiCo.<sup>93</sup> The marketing schemes of these huge agribusinesses are targeted at society's desire to help the underdogs, i.e., small local farms.<sup>94</sup> The advertising of these organic products leads consumers to believe that the USDA Organic Seals are representing small local family farms, which just is not the case anymore.<sup>95</sup>

One main contention against the USDA is that political pressure has led to filling key policymaking positions with agribusiness veterans, exempting any involvement by family farmers or consumer advocacy groups.<sup>96</sup> Specifically, the USDA is accused of stacking the NOSB with agribusiness representatives against the congressional intent of the OFPA.<sup>97</sup> As previously mentioned, when the OFPA was enacted, section 2119 read:

[t]he Board shall be composed of [fifteen] members, of which—

- (1) four shall be individuals who own or operate an organic farming operation;
- (2) two shall be individuals who own or operate an organic handling operation;
- (3) one shall be an individual who owns or operates a retail establishment with significant trade in organic products;
- (4) three shall be individuals with expertise in areas of environmental protection and resource conservation;
- (5) three shall be individuals who represent public interest or consumer interest groups;

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91. *Id.*

92. Strom, *supra* note 49.

93. *Id.*

94. See Press Release, Cornucopia Inst., Major Agribusinesses Competing with Organics on the Cheap, "Natural" Food Products with Toxic Chemicals and GMOs Deceiving Consumers (Oct. 12, 2011), available at <http://www.cornucopia.org/2011/10/cerealcrimes-pressrelease/> (discussing the use of "natural" products by agribusiness to compete with organic products).

95. See Strom, *supra* note 49.

96. MATTERA, *supra* note 90, at 12–14.

97. CORNUCOPIA INST. THE ORGANIC WATERGATE, *supra* note 75, at 8.

(6) one shall be an individual with expertise in the fields of toxicology, ecology, or biochemistry; and

(7) one shall be an individual who is a certifying agent . . . .<sup>98</sup>

Despite the plain language of the statute's requirements, a report conducted by the Cornucopia Institute on corporate influence on the USDA's NOP revealed that past and present NOSB members did not meet the legally required qualifications.<sup>99</sup> The following examples illustrate the USDA's blatant disregard for the congressional intent of the NOSB.

The environmentalist position was filled by Jean Afterman, an attorney with an undergraduate degree in art history who had previously worked as general counsel for PurePak, Inc., a huge corporate agribusiness.<sup>100</sup> Afterman had no background in environmental science, and actually specialized in international market development while working as general counsel for PurePak.<sup>101</sup> The farmer slot was filled by Carmela Beck.<sup>102</sup> Beck worked as a full-time employee in the conventional and organic berry marketing department at Driscoll's and had never owned or operated an organic farm.<sup>103</sup> William J. Friedman, an attorney, was appointed to the environmental science position and at the time of his appointment, was a state government bureaucrat with no training in environmental science.<sup>104</sup> Finally, Tracy Miedema was appointed to the consumer and public interest position.<sup>105</sup> However, "[i]n her five years as a consumer representative on the NOSB, Miedema never worked for or represented a public interest organization."<sup>106</sup> Further, there have been twelve major agribusinesses that have had their representatives appointed to the NOSB, filling eighteen different positions.<sup>107</sup> Immense political influence on USDA managers, including agribusiness lobbyists, and the size of the organic food profit sector have created a breeding ground for under the table dealings and relaxed federal standards.<sup>108</sup> One of the most startling recorded examples of this phenomenon happened in 2006, when

98. 7 U.S.C. § 6518(b) (2012).

99. CORNUCOPIA INST., *THE ORGANIC WATERGATE*, *supra* note 75, at 6–7.

100. *Id.* at 6.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 7.

106. *Id.*

107. *Id.* at 8.

108. *See generally Message to Obama*, *supra* note 89 (discussing the negative influence corporate agribusiness lobbyists have had on the organic industry).

“[USDA] employees determined that synthetic additives in organic baby formula violated [the] federal standards [set out in the OFPA] and should be banned” from the National List.<sup>109</sup> The USDA manager in charge at that time was lobbied by the formula makers that incorporated the synthetic additives into their product.<sup>110</sup> A deputy USDA administrator overruled the expertise of her staff and allowed the synthetic additives to be included on the National List.<sup>111</sup> To this day, despite disapproval from experts, ninety percent of baby formula contains these synthetic additives.<sup>112</sup>

More recently, in the 2012 House Farm Bill approved by the House Agriculture Committee, the agribusiness industry eliminated any genuine review of genetically engineered (GE) crops.<sup>113</sup> The federal bill immunized the review of GE crop impacts from any applicable environmental law, including the National Environmental Policy Act and the Endangered Species Act.<sup>114</sup> It restricts the review of any GE crops to the USDA only, which in turn prohibits review from other federal agencies and any environmental or consumer advocacy groups.<sup>115</sup> Finally, the bill incorporates unmanageable time deadlines requiring the USDA to approve or deny an application for GE crop approval within one year of its submission with an *optional* 180 day extension.<sup>116</sup> Further, if the USDA does not meet this deadline, the GE crop is automatically approved for commercialization, which would allow the crop to skip any review process all together.<sup>117</sup> This provision of the bill has been coined the “Monsanto Rider,” named after the company who owns the patents to genetically engineered strains of the U.S.’s key crops, including corn, soybeans, and cotton.<sup>118</sup> According to a scathing investigation into Monsanto’s close political ties in Washington, the biotech company spent \$6.3 million lobbying in Washington in 2011.<sup>119</sup> Even more troubling is that

109. Kindy & Layton, *supra* note 67.

110. *Id.*

111. *Id.*

112. *Id.*

113. Aviva Shen, *Agribusiness Sneaks Deregulation of Genetically Modified Foods into Farm Bill*, THINK PROGRESS (July 16, 2012), <http://thinkprogress.org/health/2012/07/16/519351/agribusiness-sneaks-deregulation-of-genetically-modified-foods-into-farm-bill/?mobile=nc>.

114. *Id.*

115. *Id.*

116. *See* Federal Agriculture Reform and Risk Management Act of 2012, H.R. 6083, 112th Cong. § 10012 (2012).

117. *See id.*

118. Shen, *supra* note 113.

119. Russ Choma, *Monsanto’s Deep Roots in Washington*, OPENSECRETS.ORG (May 9, 2012), <http://www.opensecrets.org/news/2012/05/monsantos-deep-roots-in-washington.html>.

three of Monsanto's lobbying targets were U.S. agencies: the USDA, the EPA, and the Food and Drug Administration.<sup>120</sup> It is clear Congress established the NOSB with the intention of representing the entire organic community with farmers who grow and handle the products and environmentalists who know the potential ecosystem and human health impacts of such products.<sup>121</sup> Moreover, consumers and interest groups were meant to have a voice in the NOSB's review process.<sup>122</sup> Appointing corporate agribusiness representatives to positions on the NOSB intended for federally enumerated agents is illegal and in violation of federal law.<sup>123</sup> The provision of the OFPA referring to the makeup of the NOSB reads "shall" not "may."<sup>124</sup>

Although the growing demand for organic products is greater than the supply, this does not justify cutting corners and disregarding federal law. One of the stated purposes of the OFPA at its inception was "to assure consumers that organically produced products meet [] consistent standard[s]."<sup>125</sup> In a way, the USDA has kept good on this promise by ensuring that the NOSB and corporate agribusinesses consistently undermine the federal standards with tools like the National List. There is a reason that only one-fourth of respondents in a U.S. organic marketing survey said they chose organic products with the USDA seal, while almost three-fourths of respondents said they instead chose products labeled "all organic."<sup>126</sup> Organic consumers and some organic producers have lost faith in the USDA Organic Seal, some even refusing to display the seal on their products despite the fact that they meet the federal criteria.<sup>127</sup> Although the USDA has helped create a booming organic industry, it has done so at the cost of the integrity of the USDA's Organic Seal.

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120. *Id.*

121. *Organic Industry Watchdog Challenges USDA's Lack of Transparency: Flawed Appointments Have Led to Corrupt Oversight System*, CORNUCOPIA INST. (June 21, 2012), <http://www.cornucopia.org/2012/06/organic-industry-watchdog-challenges-usdas-lack-of-transparency/>.

122. *Id.*

123. *See* 7 U.S.C. § 6518(b) (2012).

124. *Id.*

125. *Id.* § 6501(2).

126. Heller, *supra* note 43.

127. *See* Strom, *supra* note 49 (discussing how the owner of Eden, an organic wholesale company, refuses to use the USDA seal on his products, calling it a fraud).

## IV. CRITICISMS OF THE USDA AND THE ORGANIC FOOD PRODUCTION ACT

Besides the negative impact of the relationship between USDA managers and corporate agribusiness on the integrity of the USDA Organic Seal, there are many other criticisms of the USDA and the OFPA. One of the main criticisms is that the OFPA's certification process laid out in the NOP regulations focuses on a process-based approach, while completely omitting any inspections of final organic products.<sup>128</sup> The USDA's self-proclaimed process-based approach contradicts congressional intent and the OFPA, which is not entirely process-based.<sup>129</sup> Despite the language in OFPA, there is no mandatory inspection process that tests the quality and content of final organic products sold on the market. Without product-based inspection, there are concerns of unintentional and/or intentional contamination, which could lead to labeling foods "organic," even if they do not qualify under federal standards. The main source of unintentional contamination of organic foods is drifting GMOs and pesticides.<sup>130</sup> Pollen from GMOs can be transferred to conventional and organic organisms through the wind and through insect pollinators.<sup>131</sup> Naturally, the wind is also a common carrier of pesticides. The USDA recognizes that this is an unavoidable consequence, and, according to a study conducted by the USDA on pesticide residue testing of organic produce, thirty-nine percent of all fruit and vegetables, domestic and foreign, contained pesticide residue.<sup>132</sup> This study was the result of a 2010 audit of the USDA's NOP by the Office of the Inspector General (OIG) to determine whether products marketed and sold as organic met the requirements of the

128. See National Organic Program, 7 C.F.R. § 205.100(a) (2013) (providing process-based requirements for the handling and production of organic food without mention of requirements for the final organic product).

129. See 7 U.S.C. § 6506(a)(6) (stating that the OFPA calls for periodic residue testing of organic products for the purposes of determining whether organic products contain any non-organic residue or other toxicants); National Organic Program, 65 Fed. Reg. 80,548, 80,549 (Dec. 21, 2000) (stating that the NOP regulations emphasize process).

130. See Friedland, *supra* note 24, at 398–403 (describing the processes required to prevent pesticide and genetic drift).

131. Ben Lilliston, *Farmers Fight to Save Organic Crops*, PROGRESSIVE, Sept. 2001, available at <http://www.progressive.org/0901/hil0901.html>.

132. AGRIC. MKTG. SERV., USDA, 2010–2011 PILOT STUDY: PESTICIDE RESIDUE TESTING OF ORGANIC PRODUCE 1 (2012), available at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5101234> (USDA stating that although thirty-nine percent of the produce tested positive for pesticide residue, it was acceptable because it was less than five percent of the EPA's tolerance) [hereinafter 2010–2011 PILOT STUDY].

OFPA.<sup>133</sup> This investigation came amidst complaints from consumer groups and members of Congress that the OFPA's regulations had become too lax, and that the Department lacked the oversight of private certifiers hired by food producers and farmers to inspect products and determine whether they could display the USDA organic labels.<sup>134</sup> The findings of the OIG's investigation were shocking, and included the following: 1) NOP's lack of enforcement of organic operations that violate regulations; 2) untimely processing of program complaints; 3) NOP's improper approval and management the California State Organic Program (one of the largest in the country); 4) the lack of a determination on whether NOP regulations should require periodic residue testing; 5) irregular evaluations of NOP's accreditation process; 6) the need for more effectively identified and clarified NOP requirements and operating practices; and 7) the need to significantly improve NOP's oversight of foreign certifying agents.<sup>135</sup> If the NOP can begin to rectify these concerns, some of the USDA's integrity may be restored. Some critics of the NOP claimed that the 2009 Obama Administration would create change in the regulation of the organic industry by deviating from the practice of ignoring congressional intent and federal law.<sup>136</sup> Critics hoped that Secretary of Agriculture Tom Vilsack would possibly be the beginning of an overhaul of the OFPA and the NOP when he was appointed in 2009.<sup>137</sup> However, the USDA is still allowing large agribusiness to control the federal government's regulations on organic products by bending the rules on what can be certified as organic.<sup>138</sup> Some critics even suggest that Vilsack's appointment was a mistake.<sup>139</sup> For ex-

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133. *Id.* at 2.

134. Kindy & Layton, *supra* note 67.

135. See John Kepner, *Maintaining Organic Integrity: 2010 USDA Inspector General Audit Spurs Improvements*, PESTICIDES & YOU, Spring 2010, at 16–17 (discussing the findings of the 2010 USDA Office of the Inspector General audit).

136. See *Organic Industry Watchdog Challenges USDA's Lack of Transparency*, *supra* note 121.

137. See generally *USDA National Organic Program Gets New Leadership, Change Coming?*, CHEWSWISE (Sept. 18, 2009), <http://www.chewswise.com/chews/2009/09/usda-national-organic-program-gets-new-leadership-change-coming.html> (stating that, with a change in leadership, the NOP “will hopefully push forward”).

138. See Inge, *Faking 'O's: USDA Allows Agribusiness to Bend the Rules to be Called 'Organic,'* ORANGE JUICE BLOG (Sept. 25, 2012), <http://www.orangejuiceblog.com/2012/09/faking-os-usda-allows-agribusiness-to-bend-the-rules-to-be-called-organic/> (discussing that as recently as late 2012, the USDA, the agency that is supposed to be in charge of overseeing food that meets “high” standards in order to be called “organic,” has been taken over by the special interests of large corporations).

139. See *Organic Industry Watchdog Challenges USDA's Lack of Transparency*, *supra* note 121.

ample, Vilsack has come under fire for his appointments to the NOSB,<sup>140</sup> specifically that of Carmela Beck who was appointed to a seat reserved for an individual who “owns or operates” an organic farm.<sup>141</sup> Vilsack also came under fire for allowing the NOSB vote, by a one-vote margin, to re-approve carrageenan, a substance derived from seaweed that has been linked to causing cancer.<sup>142</sup> Further, the Organic Consumers Association says it is “disappointed in this controversial appointment” of Tom Vilsack, and has petitioned over 100,000 signatures from organic farmers and consumers objecting to the appointment of Vilsack, whom they have named a “biotech and biofuels booster.”<sup>143</sup>

#### V. PROPOSAL OF NEW REGULATIONS THAT INCLUDE A PRODUCT-BASED REGULATORY SCHEME

One of the latest blows to the organic industry and to the hope of any restoration of the NOP came in the form of the 2012 House Farm Bill approved by the House Agriculture Committee.<sup>144</sup> When the 2008 Farm Bill was extended on January 1, 2013 until September 2013, mandatory funding for a number of organic programs did not qualify for inclusion in the Farm Bill extension.<sup>145</sup> Organic programs that were omitted from the extension are critical to an overhaul of the NOP’s regulations. These include programs that fund organic research, cost-share systems for organic certifying agents, and organic data collection systems.<sup>146</sup> One of the most important losses is the funding for cost-share certification programs.<sup>147</sup> As stated above, the USDA certification process is the part of the NOP that needs the most help. Barbara Haumann, a spokesperson for OTA stated, “The cuts are severe. It will impact farmers who use safer practices and could discourage some farmers because of the loss of cost-share for certifica-

140. *Id.*

141. *Id.*

142. *See id.*

143. *Agriculture Nominee Vilsack Splits the Organic Community*, ENV’T NEWS SERV. (Jan. 14, 2009), <http://www.ens-newswire.com/ens/jan2009/2009-01-14-094.asp>.

144. *See* H.R. 6083, 112th Cong. (2012).

145. Cookson Beecher, *Organics “Thrown Under the Bus” in Farm Bill Extension, Say Industry Advocates*, FOOD SAFETY NEWS (Jan. 6, 2013), <http://www.foodsafetynews.com/2013/01/organics-thrown-under-the-bus-in-farm-bill-extension-say-industry-advocates/#.U0nfvSg8nfA>.

146. *Id.*

147. *See National Organic Certification Cost-Share Program: On Hold*, BEGINNING FARMERS (Aug. 30, 2013), <http://www.beginningfarmers.org/national-organic-certification-cost-share-program-on-hold/>.

tion.”<sup>148</sup> Despite funding cuts, there are new standards and regulations that could be implemented in the NOP that focus on a product-based regulatory scheme that would better reflect the final condition of organic products and educate and serve consumers in the U.S.

First, and most importantly, there should be an exact definition of organic products in the OFPA. One of the main reasons that the OFPA was established was to homogenize numerous state sanctioned definitions of what organic meant.<sup>149</sup> Therefore, we should comply with congressional intent and supplement the NOP’s current process-oriented definition of “organic” that revolves around labeling schemes, with a definition that includes the ingredients and condition of final organic products.

The author proposes a definition that would incorporate product standards into the OFPA’s current process-based definition. Specifically, it would define organic products as products free from all detectable levels of GMOs, pesticides, and chemicals. Additionally, in order to be labeled, marketed, and sold as organic, the final product must go through inspection to ensure it is free from such materials. However, rather than a periodic evaluation, which is the current standard, each producer or handler would have to subject their products to bi-annual testing to ensure that there are no GMOs or pesticide residue beyond the five percent level allowed by the EPA.<sup>150</sup>

Second, the author would not allow any organic products containing less than ninety-five percent of organic ingredients to advertise using the USDA Organic Seal. This would eliminate the third USDA Organic Seal that reads “made with organic ingredients” and refers to processed products containing “at least [seventy] percent organically produced ingredients.”<sup>151</sup> These products would still be able to advertise using the phrase “made with organic ingredients,” however, they would not be able to advertise using the USDA Organic Seal. Additionally, the substances included on the National List which are contained in processed organic products and implemented in organic farming and handling procedures must be enumerated on the USDA labels.<sup>152</sup> This would provide consumers more awareness of what exactly they are buying. Further, a stricter definition and labeling scheme would decrease the number of errors in certification, and allow the NOP to monitor the organic industry more efficiently and thor-

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148. Beecher, *supra* note 145.

149. See S. REP. NO. 101-357, at 289 (1990), *reprinted in* 1990 U.S.C.C.A.N. 4656, 4943.

150. 2010–2011 PILOT STUDY, *supra* note 132, at 2.

151. See National Organic Program, 7 C.F.R. § 205.301(c) (2013).

152. See *id.* § 205.303(b)(1).

oughly.<sup>153</sup> Moreover, it may decrease the political pressure agribusiness lobbyists can put on USDA managers.<sup>154</sup>

If the requirements of certification are more difficult to achieve and are centered on a product-based approach, it would be much harder for corporate agribusiness to throw its money around to achieve organic certification of a given product. Implementation of a final product testing standard would accurately reflect the ingredients and condition of the products, and these tests would not lie—either the product *is* organic or it is not. In turn, this would allow organic certifiers to be more consistent, more accurate, less biased, and less motivated by money when it comes to certification. The USDA Organic Seal would be given based on an inspection of each final organic product, not based on a certifier's opinion of whether an organic farming, handling, or production business's processes meet the federal requirements.

The evaluation of organic products in this country should eliminate the current process-based approach, and should incorporate a final product-based evaluation much like Congress intended when the OFPA was first enacted.<sup>155</sup>

## VI. CONCLUSION

The NOP is defective. There has been a long-standing oppositional relationship with the majority of organic farmers and consumers and the interest groups that represent them, which in turn affects NOP regulation.<sup>156</sup> Groups like the OTA claim to represent the organic industry as a whole; however, the OTA primarily represents agribusiness investments in the rapidly growing \$29.2 billion organic industry.<sup>157</sup> NOP senior management “has treated industry stakeholders arrogantly and disrespectfully, on many occasions, and has overridden

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153. See Kindy & Layton, *supra* note 67; Mischa Popoff, *Is the Organic Food Industry a Scam?*, REAL CLEAR SCI. (June 20, 2011), [http://www.realclearscience.com/articles/2011/06/20/is\\_organic\\_food\\_industry\\_a\\_scam\\_106244.html](http://www.realclearscience.com/articles/2011/06/20/is_organic_food_industry_a_scam_106244.html).

154. See Kindy & Layton, *supra* note 67.

155. See 7 U.S.C. § 6506(a)(6) (2012) (stating that the OFPA calls for periodic residue testing of organic products for the purposes of determining whether organic products contain any non-organic residue or other toxicants).

156. See *Agriculture Nominee Vilsack Splits the Organic Community*, *supra* note 143.

157. *USDA-National Organic Program: Recommendations for Obama Administration and the USDA*, CORNUCOPIA INST., [http://www.cornucopia.org/actionalerts/USDA\\_NOP\\_Recommendations.pdf](http://www.cornucopia.org/actionalerts/USDA_NOP_Recommendations.pdf) (last visited Aug. 23, 2014); ORGANIC TRADE ASS'N, *supra* note 1, at 16.

NOP career staff when their findings might have been unfavorable to corporations with interests in the organic industry.<sup>158</sup>

The administration should think about starting fresh and bringing in new management to oversee the NOP and try to salvage or recreate confidence in the American public and the organic industry. This process should begin with the fundamental idea of reading the language of the OFPA and deciphering congressional intent. After examination of the statute, it is clear that the top positions of the NOP's NOSB must be filled with highly-skilled individuals involved in the organic industry in order to fulfill the duties of the NOP with the expertise the program requires,<sup>159</sup> not with corporate agribusiness giants that are more concerned with corporate interests.

Additionally, the NOP should create a position in the program to integrate organic programs throughout the different divisions of the USDA. There are many policy resolutions promulgated by the NOSB—the expert advisory board that Congress requires the Secretary of Agriculture to consult—that the Department of Agriculture has failed to act on.<sup>160</sup> It is wrong for the NOSB to engage with the public in creating rulemaking and guidance documents, only to disregard them. Further, proof of this practice was revealed in an audit prepared by the Office of the Inspector General, which condemned the NOP for its failure to respect the NOSB's expert career staff, program requirements, and the intent of Congress.<sup>161</sup>

It is time to get back to the basics. President Abraham Lincoln established the USDA for the people over 150 years ago with the intent of representing and serving American farmers and consumers—perpetuating prosperity among *them*, not big corporations.<sup>162</sup> Currently, the U.S. is the world's largest organic market.<sup>163</sup> The sheer size of the organic market presence in our society demands clarification of the OFPA and the restructuring of the NOP. Also, with the recent recession slowly dwindling, it is more important than ever for consumers to be informed about the cost-benefit analysis of the products they buy. For example, some consumers would not spend the extra money on organic products if they knew such products contained synthetics, or that organic products are not

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158. See *USDA-National Organic Program: Recommendations for Obama Administration and the USDA*, *supra* note 157.

159. 7 U.S.C. § 6518(b).

160. See *USDA-National Organic Program: Recommendations for Obama Administration and the USDA*, *supra* note 157.

161. OFF. OF INSPECTOR GEN., *supra* note 32 at 8–9, 16–17, 21–25.

162. Vilsack, *supra* note 85.

163. *Worldwide: FiBL/IFOAM Report Shows Top Markets*, *supra* note 1.

inspected for GMOs or pesticide residue. People deserve to know what kind of product their hard-earned money is buying.

America is based on a free market economy, which is fueled by private economic decisions. It is critical, and a matter of public policy, that Americans' decisions on what they spend their money on are well informed. This is especially important when it comes to commercial marketing information that is regulated by the government.<sup>164</sup> Americans should be able to rely on the accuracy of consumer information, and they should be able to fully trust that the government regulation of that information is conducted with integrity and concern for their well-being. When people begin to lose faith in the integrity of the USDA's Organic Seal, it is a direct reflection of people beginning to lose faith in the integrity and regulating power of our government.

The USDA and the NOP's blatant disregard for the intent of Congress and the requirements laid out in the OFPA, is illegal and has favored corporate agribusiness over the interests of ethical farmers, businesses, and consumers for long enough.<sup>165</sup> It is time for the USDA's Organic Food Production Act and the National Organic Program regulations to get an overhaul.

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164. See Friedland, *supra* note 24, at 403–04.

165. CORNUCOPIA INST., ORGANIC WATERGATE, *supra* note 75, at 3. (claiming the USDA has filled positions of NOSB with corporate representatives against congressional intent of the OFPA).