

**Docket No. AMS-SC-16-0112; PR A-1**

**BEFORE**

**THE UNITED STATES OF AMERICA**

**DEPARTMENT OF AGRICULTURE**

**AGRICULTURAL MARKETING SERVICE**

**COMMENTS OF THE**

**AMERICAN HERBAL PRODUCTS ASSOCIATION**

**ON A PROPOSED RULE:**

**ORGANIC RESEARCH, PROMOTION, AND INFORMATION ORDER**

**April 19, 2017**

## Table of Contents

<b>Prefatory remarks .....</b>	<b>1</b>
<b>Summary of points.....</b>	<b>2</b>
<b>Public positions of marketers of NOP organic herbal products .....</b>	<b>2</b>
<b>Makeup of the Organic Research and Promotion Board should be more proportionate to the sources of assessment revenues .....</b>	<b>3</b>
<b>Spending for organic agricultural research should be increased .....</b>	<b>4</b>
<b>Promotion expenditures should support all NOP organic product categories .....</b>	<b>5</b>
<b>Assessment calculations should conform with GAAP .....</b>	<b>6</b>
<b>NOP organic is relevant to all agricultural products.....</b>	<b>7</b>

## **Prefatory remarks**

The United States Department of Agriculture (USDA) Agricultural Marketing Service (AMS) on January 18, 2017 issued a notice of proposed rulemaking (the January 18 Notice or the proposed rule) that would establish an industry-funded promotion, research, and information program for certified organic products, the purpose of which would be to strengthen the position of certified organic products in the marketplace, support research to benefit the organic industry, and improve access to information and data across the organic sector. The proposed program is identified in the January 18 Notice as the Organic Research, Promotion, and Information Order (the proposed Order).

The American Herbal Products Association (AHPA) is the national trade association and voice of the herbal products industry. AHPA members include domestic and foreign companies doing business as producers, handlers, and importers of herbs and herbal products. AHPA serves its members by promoting the responsible commerce of products that contain herbs, including human foods, dietary supplements, health and beauty products, animal products, and other products.

Numerous AHPA members market herbs and herbal products in or as foods, dietary supplements, health and personal care products, and other products labeled as “organic” in compliance with USDA’s National Organic Program (NOP). As such, AHPA’s members are engaged in activities that could be directly impacted by the proposed Order and therefore have an interest in the proposed Order. These comments are submitted on behalf of AHPA and its members.

## Summary of points

In these comments AHPA (1) notes that a significant number of marketers of NOP organic<sup>1</sup> herbal supplements and non-food products have publically expressed opinions on establishment of the proposed Order; (2) requests that the makeup of the Organic Research and Promotion Board that would be created if the proposed Order is established should reflect the source of those funds in a more proportional manner, such that organic producers and handlers should be represented on the board more closely proportionate to the percentage of the total annual assessments paid under the Order by each of these types of operations; (3) recommends that a larger portion of the funds assessed through the Order be devoted to organic agricultural research; (4) suggests that promotional expenditures should be used to promote all types of NOP organic goods, including herbal products such as teas, supplements, and body care products; (5) recommends that calculations for determination of assessment fees take into account total cost of goods sold, including labor and overhead expenses; and (6) clarifies that the NOP organic standard applies to conventional foods, non-conventional foods such as dietary supplements, and non-food products. Each of these points is articulated in greater detail below.

## Public positions of marketers of NOP organic herbal products

AHPA notes that a number of companies that market NOP organic herbal products, such as herbal teas, herbal dietary supplements, and non-food products such as shampoos and other body care products that contain NOP organic herbal ingredients, have expressed public support for USDA AMS to establish the proposed Order. For example, each of the following companies is identified as in support of the establishment of the proposed Order on a website identified as GRO Organic<sup>2</sup>: Celestial Seasonings (herbal teas), Earth Mama Angel Baby (various oral- and topical-use products with herbal ingredients), FoodState (herbal dietary supplements), Garden of Life (herbal dietary supplements), and New Chapter (herbal dietary supplements). At least two herbal ingredient suppliers, QTrade Teas & Herbs and Whole Herb Co., are also listed on this website in support of establishment of the proposed Order.

---

<sup>1</sup> The term “NOP organic” is used throughout these comments to mean products produced and certified under the authority of 7 CFR Part 205, the National Organic Program.

<sup>2</sup> Accessed at [http://groorganic.net/endorse\\_final/](http://groorganic.net/endorse_final/), April 19, 2017.

AHPA also notes that at least one company that markets NOP organic herbal products, Terressentials Organic (body care products with herbal ingredients), has expressed public opposition to establishment of the proposed Order as communicated on a website identified as No Organic Check-off.<sup>3</sup>

AHPA does not by these comments mean to state or imply that only the companies identified in the previous two paragraphs represent the interests of all companies that market NOP organic herbal products, nor that AHPA has conducted a thorough review of all such companies' views on the proposed Order. This data appears, however, to indicate that many more such companies have expressed public support for rather than opposition to the proposed Order. AHPA itself has not taken a formal position for or against the proposed Order, and acknowledges that a decision on whether to issue the proposed Order will be determined through a referendum as described in the proposed rule<sup>4</sup> and discussed in length in a separate proposed rule issued by USDA AMS on January 18, 2017.<sup>5</sup>

### **Makeup of the Organic Research and Promotion Board should be more proportionate to the sources of assessment revenues**

The January 18 Notice discusses the creation of an Organic Research and Promotion Board (the Board) that would function to administer the terms and provisions of the proposed Order. The Board is proposed to consist of 17 members, including 8 certified organic producers, 7 certified organic handlers (including 2 certified organic product processors), 1 importer, and 1 non-voting at-large public member.<sup>6</sup> Thus, the proposed makeup of the Board would assign 50 percent of the voting positions to producers, 44 percent of the voting positions to handlers, and 6 percent of the voting positions to an importer.

The January 18 Notice reports, however, that AMS estimates that about 14 percent of the total assessment revenues received under the Order will come from producers, 81 percent will come from handlers, and 5 percent will come from importers.

---

<sup>3</sup> Accessed at <http://noorganiccheckoff.com/wp-content/uploads/2015/04/checkoff-supporters-041117.jpg> on April 19, 2017.

<sup>4</sup> Proposed 7 CFR § 1255.81 (a).

<sup>5</sup> 82 FR 5438. Proposed rule: Organic Research, Promotion, and Information Order; Referendum Procedures. Document Number AMS-SC-16-0112; PR-B.

<sup>6</sup> Proposed 7 CFR § 1255.40 (b).

AHPA believes and hereby requests that the makeup of the voting positions on the Board should be more proportionately aligned with the proportion of assessment revenues received from each of the categories of producers, handlers and importers. AHPA notes that calculation on a strictly proportional basis would provide only 2 voting positions to producers, would increase to 13 the number of voting positions for handlers, and would retain 1 voting position for an importer. Such strict adherence to the expected proportion of assessment revenues would arguably leave producers insufficiently represented on the Board and AHPA is not proposing such a strictly proportional calculation or representation. AHPA nonetheless suggests there should be some increased number of voting positions on the Board for handlers.

### **Spending for organic agricultural research should be increased**

The proposed Order would require the Board to prepare annual budgets for submission to and approval by the Secretary of Agriculture, and would establish minimum proportions for fund allocation of not less than 25 percent of total funds to research; not less than 25 percent of total funds to information; and not less than 25 percent of total funds to promotion. The balance of 25 percent of funds would, under the proposed Order, remain discretionary.<sup>7</sup>

The proposed Order also stipulates that of the funds allocated to research a majority shall be allocated to agricultural research<sup>8</sup>, and describes agricultural research as including any type of investigation, study, evaluation or analysis (including related education, extension, and outreach activities) designed to improve organic farm production systems and practices, productivity, expand organic farming opportunities, and enhance sustainability for farms, farm families and their communities; enhance plant and animal breeding and varietal development for organic systems and improve the availability of other production inputs; optimize natural resource conservation, biodiversity, ecosystem services, and other environmental outcomes of organic agriculture, and advance organic farm and food safety objectives.<sup>9</sup>

AHPA encourages and hereby requests reconsideration of an increase in the minimum percentage of funds that would be spent under the Order for agricultural research. In suggesting that the minimum percentage of funds that would be spent

---

<sup>7</sup> Proposed 7 CFR § 1255.50 (a)(3)(i).

<sup>8</sup> Proposed 7 CFR § 1255.50 (a)(3)(ii).

<sup>9</sup> Proposed 7 CFR § 1255.32 (a).

under the Order for agricultural research be increased from the currently proposed minimum of the majority of 25 percent, AHPA recognizes the essential role that organic producers play, both to ensure supply of NOP organic raw agricultural commodities such as produce, nuts and seeds, and grains directly to consumers for use in their homes, and also to supply the NOP organic ingredients needed by organic handlers to produce NOP organic value-added products such as packaged and prepared foods and non-food items.

### **Promotion expenditures should support all NOP organic product categories**

As noted above, the proposed Order would establish that not less than 25 percent of total funds spent under the Order each year be used for promotion, defined in the proposed Order to mean any action, including paid advertising and the dissemination of information, utilizing public relations or other means, to enhance and broaden the understanding of the use and attributes of organic products for the purpose of maintaining and expanding markets for the organic industry.<sup>10</sup>

AHPA supports expenditures under the Order for promotion, as defined in the proposed Order. AHPA notes there is in the U.S. market a wide variety of products sold as NOP organic, as the proposed rule also acknowledges by correctly recording that organic products include conventional foods, dietary supplements,<sup>11</sup> and nonfood items, such as fiber, personal care products, pet food, household products, and flowers.<sup>12</sup>

To the degree that any promotion carried out under the Order identifies representative NOP organic products, AHPA requests inclusion of conventional food products as identified representative organic products; and also of non-conventional foods, such as dietary supplements or meal replacements; and also of non-food products. Any such product that contains any agricultural ingredients can be produced, handled and marketed as NOP organic, though this has not always been clear to consumers, or in fact to the regulatory personnel at USDA's NOP. Successful promotion of all NOP organic product categories will create greater demand for NOP

---

<sup>10</sup> Proposed 7 CFR § 1255.30.

<sup>11</sup> The proposed rule incorrectly identifies supplements as "non-foods;" see more in-depth discussion on this point below.

<sup>12</sup> This list is delineated in several locations in the proposed rule, including at 82 FR 5746 at 5775.

organic crops which will produce economic benefits to organic producers and handlers throughout the supply and market chain, and will best serve consumers who seek to consume and use NOP organic products in their conventional and non-conventional food and non-food product choices.

### **Assessment calculations should take all expenses into account**

AHPA is concerned about the approach as presented in the proposed Order to calculate annual assessments based on a definition of “net organic sales” that would deduct only actual costs of goods, described as “(a) the cost of certified organic ingredients, feed, and agricultural inputs used in the production of certified products and (b) the cost of any non-organic agricultural ingredients used in the production of certified products.”<sup>13</sup> This definition apparently does not take into account other costs, such as labor and overhead in a producer or handling operation.

AHPA strongly recommends that a different calculation of an assessed entity’s sales be proposed to determine annual assessments. The current proposal will place a significant and disproportionate burden on producers and handlers with high overhead and labor costs that may result in their assessments being unfairly high compared to entities with lower overhead or labor costs. In addition, most businesses currently have no reason to maintain the specific financial records that would be needed to calculate the amount of net organic sales as defined in the proposed rule to determine annual assessments and it would be unfortunate, and unnecessary, for the proposed rule to create a new and unique accounting burden for all covered entities.

AHPA understands in making this recommendation to change how assessed entities’ sales are determined to take into account both cost of goods and also labor and overhead expenses, a factor other than the currently proposed one-tenth of one percent, as applied to the current definition of net organic sales, would need to be set in order to produce the same level of total annual assessment revenue that would be produced under the proposed Order. To be clear, this specific recommendation is not intended to reduce the target total annual assessment revenue produced under the Order, and AHPA would be supportive of modifying that factor to a number higher than one-tenth of one percent to produce such a target for revenues.

---

<sup>13</sup> Proposed 7 CFR § 1255.21.

## **NOP organic is relevant to all agricultural products**

Over a period of several years, starting in 2000, USDA's NOP issued sometimes contradictory statements with regard to the application of the Organic Foods Production Act (OFPA), and by extension of the NOP rule, to agricultural products other than conventional foods.<sup>14</sup> AHPA is grateful that for over a decade NOP's communications have clearly identified agricultural products that are not conventional foods, including other food products such as dietary supplements and non-food products such as fiber and personal care products, as products that may comply with and be labeled and marketed under the NOP.

The January 18 Notice states AMS seeks comments about the inclusion of non-food items in the proposed Order and any data that could support AMS analysis of the impacts and implementation of a program on the non-food organic sector. AHPA strongly supports inclusion in the proposed Order of non-food items, and also of unconventional food items, such as dietary supplements and meal replacements. AHPA does not, however, have the type of data requested by AMS in regard to this matter, but is willing to assist as possible in obtaining such data.

AHPA greatly appreciates the opportunity to present comments on this matter. Please feel free to contact me if clarification or additional discussion is needed on the issues raised in these comments.

Respectfully submitted,



Michael McGuffin  
President, American Herbal Products Association  
8630 Fenton Street, Suite 918  
Silver Spring, MD 20910  
(301) 588-1171 x201  
mmcguffin@ahpa.org

---

<sup>14</sup> Additional details on this history are available on request.