The Organic Foods Production Act, the Process/Product Distinction, and a Case for More End Product Regulation in the Organic Foods Market

Valerie J. Watnick

Available at: https://works.bepress.com/valerie_watnick/2/
The Organic Foods Production Act, the Process/Product Distinction, and a Case for More End Product Regulation in the Organic Foods Market

Introduction

Congress passed the Organic Foods Production Act in 1990 and over a decade later, rules were finally promulgated implementing the Act in 2002. During the time between the passage of the Act and its implementation, the number of consumers purchasing organic food in the United States and globally has increased dramatically. Since 1990, the market has grown approximately 20% per year. This consumer interest in organic food is particularly striking given that the Organic Foods Production Act does not guarantee that food sold as “organic” will be free from toxins or pesticide residues. Indeed, the legislative history of the Act makes clear that

* Professor Valerie Watnick teaches environmental law and business law at Baruch College, Zicklin School of Business, City University of New York. An earlier version of this paper was presented at the Southeastern Academy of Legal Studies in Business in Miami, Florida. Professor Watnick is the author of multiple law review articles on toxics regulation and a popular book This Sh!t May Kill You: 52 Ways to Make Smarter Decisions and Protect Your Family from Everyday Environmental Toxins available at: http://amzn.com/B00CRFIGCA and on BarnesandNoble.com at . Professor Watnick is Chair of the Department of Law at Baruch College, Zicklin School of Business, City University of New York and is a graduate of the Cornell Law School, class of 1988, and Bucknell University, class of 1985.

4 REENE JOHNSON, SPECIALIST IN AGRICULTURAL POLICY RESOURCES, SCIENCE AND INDUSTRY DIVISION, CRS REPORT FOR CONGRESS, ORGANIC AGRICULTURE IN THE UNITED STATES: PROGRAM AND POLICY ISSUES at 1 (updated November 25, 2008).
5 See Johnson, supra note 4, at 1.
Congress did not intend to guarantee that food labeled “organic” would be free from toxins or pesticide residues.\textsuperscript{6} Rather, the Organic Foods Production Act focuses intently on process rather than end product regulation.\textsuperscript{7} In this way, the Organic Foods Production Act has a different focus than much of American business regulation,\textsuperscript{8} where the focus appears to be mainly on end product regulation.\textsuperscript{9}

This paper asserts that regulation of organic food products should be more product based for a number of reasons: the most important is that organic farming and marketing is unique in that not only does the process by which the food is produced matter to these particular consumers – consumers also care deeply about the quality of the end product.\textsuperscript{10} Organic food buyers recognize that the process by which food is produced has moral and ethical implications.\textsuperscript{11} The process impacts on farm workers and the environment and then ultimately on the quality of the food itself.\textsuperscript{12} This paper will discuss consumer preferences for process and/or product information in this area, particularly as concerns about farming methods and their relation to environmental health are on the rise.\textsuperscript{13}

\textsuperscript{6} See S. REP. NO. 357, S. 2830, the Food, Agriculture, Conservation and Trade Act, S. Report 101-357 at 292.
\textsuperscript{7} Id.
\textsuperscript{10} See discussion \textit{infra} in Part II(B).
\textsuperscript{11} Id.
\textsuperscript{12} See id.
\textsuperscript{13} Id.
Additionally, in analyzing this product/process distinction, this paper will discuss the “market for lemons” theory first espoused by Professor and economist, George A. Akerlof, in “The Market For ‘Lemons:’ Quality Uncertainty and the Market Mechanism.”¹⁴ In “Lemons,”¹⁵ Professor Akerlof analyzed a market where buyer and seller relied on asymmetric information, which ultimately resulted in low quality goods or “a lemons market.”¹⁶ This paper explores the application of the “Market for Lemons” theory to the organic foods market, considering that even while the organic market is one in which asymmetric information exists between buyer and seller, the market for organic foods continues to flourish.¹⁷

Part I of this paper discusses the current regulation of organic food under the Organic Foods Production Act of 1990 (the “OFPA”) and the implementing regulations, including recent changes to the regulations effective January, 2013.¹⁸ Part II will discuss consumer perceptions about and preferences for organic food and the factors that influence their reasons for buying in the organic food market, exploring whether these perceptions align with reality. Part III will discuss the shortcomings of the OFPA in light of these perceptions and preferences. Finally, Part IV of this paper urges that although the market for organic food is not a “Lemons” market, that it ought to be more heavily regulated from a product perspective.

¹⁶ Akerlof, supra note 15, at 490.
¹⁷ See discussion infra in Part IV(B)(1).
The essay asserts that ultimately, buying organic food has to do with a host of factors that will remain sound, despite asymmetric information about ultimate product quality, and that the market for organic food will remain fundamentally strong. For a multitude of other reasons, however, including the religious and ethical concerns of consumers relative to health and environment, I propose a regulatory paradigm that would include stricter “organic specific” regulation, as well as thorough end product testing to support the continued expansion of this profitable market.

I. The History of Organic and the Organic Foods Production Act

A. History

In 1942, J.J. Rodale, a Pennsylvania farmer and publisher, first used the word “organic” to describe a method of farming in which the farmer strove for improved natural soil condition through the use of natural additions of manure and compost and the avoidance of chemical amendments.19 “In the late 1940’s, organic framing took hold in the United States.”20 It initially began on small family farms, farms that provided food for the farmers themselves and their immediate families.21 Over the next half century, organic farming picked up steam, growing in demand and in the number of farmers.22 Farmers brought these products to market and labeled them “organic,” even though what this meant varied from farmer to farmer.23

---

20 Id. It is interesting that Rachel Carson, in her landmark work, SILENT SPRING, notes that synthetic pesticide use began to skyrocket in the mid-1940’s in the post World War II era. Rachel Carson, Silent Spring, at 7 (1962). This time period also coincides with the beginning of the organic farming movement. Carroll, supra note 19 at 119.
21 Carroll, supra note 19 at 119.
22 See Johnson, supra note 4, at 1.
Oregon was first to respond to this lack of clarity, passing the nation’s original state organic certification law in 1973.  

By the early 1990’s, twenty-two state legislatures had passed organic food statutes, unique to their states. Farmers in states lacking regulation continued to market their products in a haphazard manner, and the existing state regulations lacked consistency.

In response to the lack of consistent regulation for organic farming and marketing, Congress passed the Organic Foods Production Act (OFPA) on November 28, 1990. The OFPA’s stated goals were to “(1) [establish] national standards governing the marketing of certain agricultural products as organically produced products; (2) [assure] consumers that organically produced products meet a consistent standard; and (3) [facilitate] interstate commerce in fresh and processed food that is organically produced.”

B. Implementing Regulations

Ten years after the Act was passed, the USDA finally passed implementing regulations which set national standards for organic food production, and attempt to inform consumers and protect them from false or misleading organic claims. These standards under the OFPA, which allow farmers to make organic claims, describe a method of production and certification, rather than provide a guarantee about product

---

26 Amaditz, supra note 24 at 539; Harrison, supra note 23 at 215.
27 Amaditz, supra note 24 at 538; Harrison, supra note 23 at 216.
29 7 C.F.R. 205 et. seq.
quality. There is no clear definition for the term “organic,” but rather, something “organic” is better categorized, although not commonly understood, as “organically produced.”

Under the OFPA, Congress officially defines “organic food” as either crops produced “by farmers who emphasize the use of renewable resources and the conservation of soil and water to enhance environmental quality for future generations” or meat, poultry, eggs and dairy “products from animals that are given no antibiotics or growth hormones.” For food to be considered organic, it must be produced without using most man-made pesticides – in particular fertilizers made with synthetic ingredients or “sewage sludge.” In addition, the OFPA and its implementing regulations prohibit bioengineering, and ionizing radiation in the production of organic food.

Toward these ends, the OFPA authorized the Secretary of the United States Department of Agriculture (“USDA”) to administer the National Organic Program (“NOP”) and to form the National Organic Standards Board (“NOSB”). The Act outlines the proper ways to manufacture, handle, label, and test organic products and the NOSB makes recommendations about the “development of standards for

---

30 See Amaditz, supra note 24, at 213.
32 Id.
33 Id.
35 Under the NOP, the Agricultural Marketing Service (the “AMS”) oversees national standards for the production and handling of organically produced agricultural products.
36 See 7 U.S.C. s. 6518.
37 See OFPA supra note 1; Alternative Farming Systems Information Center, supra note 31.
substances to be used in organic production.” The NOSB in 1995 first defined organic as:

An ecological production management system that promotes and enhances biodiversity, biological cycles, and soil biological activity. It is based on minimal use of off-farm inputs and on management practices that restore, maintain, and enhance ecological harmony. "Organic" is a labeling term that denotes products produced under the authority of the Organic Foods Production Act. The principal guidelines for organic production are to use materials and practices that enhance the ecological balance of natural systems and that integrate the parts of the farming system into an ecological whole. Organic agriculture practices cannot ensure that products are completely free of residues; however, methods are used to minimize pollution from air, soil and water. Organic food handlers, processors and retailers adhere to standards that maintain the integrity of organic agricultural products. The primary goal of organic agriculture is to optimize the health and productivity of interdependent communities of soil life, plants, animals and people.39

C. Organic Plans

Under the OFPA, organic producers of crops or livestock must submit an organic plan to a certifying agent and, where applicable, the state organic program.40 This plan provides a detailed description of how an operation will satisfy the production and handling requirements of the regulations promulgated under the OFPA.41 Upon completion and submission of the proposed plan, the certifying agent

38 See id.
40 7 U.S.C. ss 6513.

The six key components to the plan include:

1. A description of practices and procedures to be performed and maintained, including the frequency with which they will be performed
2. A list of each substance to be used as a production or handling input, indicating its composition, source, location(s) where it will be used, and documentation of commercial availability, as applicable.
3. A description of the monitoring practices and procedures to be performed and maintained, including the frequency with which they will be performed.

7
and the producer must both agree that the plan fulfills key NOP requirements.\footnote{7 C.F.R. ss. 205.201(a).} If the producer modifies any piece of the plan, he must obtain a new approval from the independent certifying agent.\footnote{National Organic Program Handbook, \textit{supra} note 41.}

Once the agent and the producer establish a plan, the food goes into production without the use of most synthetic chemicals.\footnote{7 U.S.C. ss. 6504; 7 C.F.R. 205.600.}

The Act states: “no prohibited substances \textit{are to} be applied to the crop for at least 3 years prior to harvest of the crop.”\footnote{7 U.S.C. ss. 6504.} However, the Act does not exclude all synthetic substances; the NOSB makes recommendations about what synthetic substances ought to allowed on organic farms via a “National List of Allowed and Prohibited Substances” (the “National List”).\footnote{7 C.F.R. 205.600.}

Under the OFPA, the NOSB recommends that certain substances be designated as “banned” and others on the list “allowed” in the production of organic food.\footnote{See \textit{Amaditz, supra} note 24, at 541; 7 U.S.C. ss. 6504-06.} This results in an ever changing definition of organic, as it depends largely on what is placed on the National List at any given time.\footnote{See \textit{e.g.}, Amendment to the National List, 77 Fed. Reg. 57985 (Sep. 19, 2012) (in promulgation of final rule amending the National List, enumerates twenty previous amendments to the list); \textit{see infra} notes 127 to 133 and accompanying discussion.}

D. Production and Handling Standards

1. Crops

\begin{itemize}
  \item 4. A description of the record-keeping system implemented to preserve the identity of organic products.
  \item 5. A description of the management practices and physical barriers established to prevent commingling of organic and nonorganic products on a split operation and to prevent contact of organic production and handling operations and products with prohibited substances.
  \item 6. Additional information deemed necessary by the certifying agent to evaluate compliance with the regulations. 7 C.F.R. ss. 205.201(a).
\end{itemize}
Crops that are certified as organically grown must be grown according to a certification plan and grown without substances prohibited on the National List for a minimum of three years. Organic crops must have buffer zones between organic and non-organic crops so that drift and inadvertent exposure to harmful substances is minimized. As above, an organic plan must include a certification from an independent certifying agent that the farmer is growing the crops and operating in accord with its plan, an allowance for annual inspections of the farm and for limited residue testing by the certifying agent. Finally, the Act requires farmers to have “appropriate physical facilities” to avoid the mixing of organic and non-organic products, and rules to prevent the contamination of organic corps in the handling of them from farm to market.

2. Livestock

Organic animals must be given 100% organic feed, and must not be given hormones or antibiotics except in cases of illness. Livestock that is to be labeled and sold as “USDA Organic” must also be under organic management from the last third of gestation, with the exception of poultry, which must be under organic management from the first days of life. However, dairy cows can be converted to organic herds if they are fed organic feed for the 12 months prior to their new organic certification.

49 7 U.S.C. ss. 6504.
50 7 U.S.C. ss. 6506. Weaknesses in organic food residue testing provided for under the Organic Foods Production Act are discussed in notes 73, 81, 120 to 126, and accompanying discussion.
51 7 U.S.C. ss. 6506.
52 Id.
53 7 C.F.R. ss. 205.272
54 7 U.S.C. ss. 6509.
55 Id.; Robinson, supra note 34.
56 7 U.S.C. ss. 6509(e)(2)(B). Organic dairy cows can graze on pasture that is in the third year of its conversion to organic pasture. Id.
Additionally, relatively recent regulations put controversy to rest concerning the length of the growing season, pasture as a crop, and the required intake of dry matter for ruminates.\(^{57}\) Regulations passed in 2010 require that ruminates must have “daily grazing during the grazing season”\(^{58}\) and define the grazing season as “the period of time when pasture is available for grazing, due to natural precipitation or irrigation,” as impacted by “weather, season or climate.”\(^{59}\) These 2010 regulations also require grazing for a minimum of 120 days per year,\(^{60}\) that animals receive at least 30% of their “dry matter” from pasture during the grazing season, and that pasture be treated as any other organic crop when used for ruminates.\(^{61}\)

Organic livestock producers must also provide conditions that allow for exercise, freedom of movement and reduction of stress appropriate to the species,\(^{62}\) and must establish minimum livestock living conditions that accommodate the “health and natural behavior” of the animals, including access to the outdoors.\(^{63}\)

This rule, requiring farmers to accommodate the health and natural behavior of animals, was considered by a Massachusetts District Court in the famously known “Country Hen” case, Massachusetts Independent Certification, Inc., v. Johanns.\(^{64}\) In “Country Hen,” a certifier denied organic certification to a chicken farmer who put porches on existing hen houses to provide access to the outdoors but made little other

\(^{57}\) 7 C.F.R. ss. 205.2, 205.239(a)(2), 205.240.

\(^{58}\) 7 C.F.R. ss. 205.239(a)(2).

\(^{59}\) 7 C.F.R. ss. 205.2.

\(^{60}\) 7 C.F.R. ss. 205.2.

\(^{61}\) 7 C.F.R. ss. 205.240. The access to pasture rule had been a source of heated disagreement about what it means to raise “organic” animals that was finally laid to rest with the 2010 “access to pasture” rule. Id.

\(^{62}\) 7 C.F.R. ss. 205.238(a)(4).

\(^{63}\) 7 C.F.R. ss. 205.239(a)(1).

change to the living environment when converting to an organic operation. The chicken farmer, Country Hen, appealed the denial of organic certification to the Administrator of the Agricultural Marketing Service under the NOP, and the NOP Administrator sustained Country Hen’s appeal and allowed an organic certification.

The certifier then sued the Administrator, claiming that it had a stake in the outcome of the case as the outcome would affect its business and its future certification of organic animals. While the Massachusetts District Court held that the certifier did have standing, the court upheld the Administrator’s decision because it was not arbitrary and capricious.

In the wake of Country Hen, many industrial egg producers followed suit and added porches and made other minor changes to their hen houses to convert them to “organic” operations. Country Hen remains an important ruling that has significantly muddied the waters in the multimillion dollar organic egg industry so that consumers do not know and cannot ascertain the true quality of the eggs they are buying when they buy “organic.” Indeed, the regulations, concerning the process by which the chickens are raised, make no assurances about quality of the end product: quality that might be improved if the hens had real access to the outdoors. In some cases,

65 Id.
66 Id. at 113.
67 Id. at 105.
68 Id. at 115.
69 Id. at 119-20.
70 http://www.alternet.org/story/148408/are_organic_eggs_really_healthier_and_tastier_and_from_happier_chickens_than_conventional_eggs?page=0%2C0 (site visited Jan. 22, 2013).
71 Id.
consumers simply pay more for eggs from organically fed chickens that are living mainly indoors, contrary to their “natural behavior.”

3. Residue Testing

Typically, all food, both industrially produced and organically produced food, must not contain levels of pesticide residues above certain “tolerance” or maximum limit levels. While Congress intended that organic food would contain less pesticide residue and that tolerances would be much lower than those for industrially produced produce – between 1 and 10% of standard tolerances – the Act did not specifically require these lower tolerances. Thus, for many years – big growth years for the organic industry – organic food only had to meet the higher standard tolerance levels for pesticides.

It is only as a result of new regulations effective January 2013, that organic crop residues must now contain less than 5% of the maximum standard levels of contamination and residues allowed on industrially produced food. Additionally, as a result of these new regulations, organic certifiers must also now for the first time test

---

72 Id; see 7 C.F.R. ss. 205.239(a)(1).
73 These maximum levels of residue are known as tolerance levels on industrially produced food. Valerie Watnick, Risk Assessment: Obfuscation of Policy Decision in Pesticide Regulation and the EPA’s Dismantling of the Food Quality Protections Act’s Safeguards for Children, 31 ARIZ. L.J. 1315, 1318 (1999(4)) (hereinafter Watnick, RISK ASSESSMENT); 7 C.F.R. s. 205.670(e).
75 See 7 U.S.C. ss. 6518(k)(5).
76 7 U.S.C. ss. 6506 (a)(6); see supra notes 4-5 and infra notes 96 - 102 and accompanying discussion. Organic food can become contaminated due to “unavoidable drift” or residue from other non-organic operations.
78 On November 8, 2012, the NOP formally required organic certifiers to test products for prohibited substances and pesticide residues. Memorandum from Miles McEvoy, Deputy Administrator, USDA Agricultural Marketing Service, to National Organic Program certifying agents, November 8, 2012. The memorandum follows a 2010-11 pilot study by the NOP that tested 571 samples for pesticide residues. Fifty seven percent of those samples tested had no residue at all and 96% complied with existing organic regulations. Pesticide Residue Testing of Organic Produce, USDA National Organic Program, USDA Science and Technology Programs. (November 2012) found at
at least five percent\(^{79}\) of their certified operations to determine if the products contain pesticide residues, and if so, must determine the cause of such residues.\(^{80}\) If the residues found on the food exceed 5% of the residues allowed on industrially produced food, the food may no longer be labeled as organic as of January 2013.\(^{81}\) These are good steps in the right direction toward guaranteeing the quality of organic produce, but as discussed below, these provisions need to be strengthened to assure product quality.\(^{82}\)

E. Labeling Under the OFPA

True to its color as a marketing statute, the USDA developed strict labeling rules to help consumers understand the organic content of the food that they buy. The

---

\(^{79}\) The requirement that certifiers now test 5% of the crops they certify has been the subject of criticism in that smaller certifiers will have to pay more for residue testing and will not benefit from economics of scale. It has been estimated by at least one trade organization that the cost of this increased spot testing will account for up to 11% of the budget for small certifiers and that the NOP’s estimation that such testing will only account for 1% of a certifier’s budget is fallacious with regard to small certifiers. [Link](https://www.nofany.org/policy-work/resolutions/2012) (last visited March 20, 2013).

\(^{80}\) 7 C.F.R. s. 205 found at: [Link](http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5101235) (visited March 21, 2013). If a certifier only certifies 30 operations, it must test at least one of those operations annually. *Id.*

\(^{81}\) If a certifier or his testing agent detects residues on food above .01 part per million, he must:

1. Assess why residues are present.
2. If residues are due to inadequate buffer zones, prevention of commingling, or contact with prohibited substances, issue a notice of non-compliance if appropriate and require corrective actions to prevent future contamination.
3. If residues are due to intentional or direct application, consider suspending or revoking the operation’s organic certification.
4. If suspensions, revocations, or civil penalties are appropriate, coordinate adverse actions with the NOP or State Organic Program.
5. Retain the test results, which will be reviewed as part of your next compliance audit.” *Id.* at 3.

\(^{82}\) Specific maximum allowed levels of contamination on organic crops (“UREC” levels or Unavoidable Residue Environmental Contaminants) were not established in the Organic Foods Production Act or the initial implementing regulations. 77 No. 218 Fed. Reg. 67239,-51 (November 9, 2012); see Amaditz, *supra* note 24, at 542.
USDA Organic seal, seen below in both color and in black and white, informs consumers that “a product is at least 95 percent organically produced or processed.”

On packaged single-ingredient food, either an official seal or the word “organic” may appear on the product. For food containing more than one ingredient, the labeling becomes more complicated. When food contains 95-100% organic ingredients, the USDA seal may be used to designate the product, USDA organic. The first box on the left hand side of the following pictograph displays a product made with 95-100 percent organic ingredients and therefore eligible to be sold with the USDA organic seal. Producers may also prominently print “100% organic” on the front of the packaging if the product is so produced.

When a product contains between 70-94 percent organic materials, it may not use the USDA seal but can be labeled as “made with organic (ingredients).” If the product contains less than 70 percent organic ingredients, the NOP forbids the use of either the seal or the term “organic” in the large print labeling. Instead, a producer can state in smaller print “made with organic….”

84 7 C.F.R. § 205.301.
85 7 C.F.R. § 205.301; see Amaditz, supra note 24, at 542.
86 7 C.F.R. § 205.301.
87 Robinson, supra note 34.
88 7 C.F.R. § 205.301; Robinson, supra note 34.
89 7 C.F.R. § 205.301.
Even in the face of all of this determined labeling, consumers still face a varied and confusing array of labels on food products, from “natural,” to “wild” to “residue free.” These latter two terms in particular are not defined in the OFPA and accompanying regulations and the USDA does not endorse these alternative labeling terms. Similarly, the term “natural” is not fully or clearly defined under the OFPA. While the organic regulations define “natural” with regard to meat or egg products as “minimally processed and containing no artificial ingredients,” they provide no standards if the product does not contain meat or eggs, and do not make any comment.

---

91 7 U.S.C. ss. 6501 et. seq.
93 See Amaditz, supra note 24. It is important to note that the definition of natural signifying that such products must be minimally processed only applies to egg and meat products. There is no definition of natural as to other products, including most processed foods.

on actual farm practices at the farming operations where these items are produced.  

Similarly, the USDA has not developed any definition concerning “pasture-raised” or products labeled as “humane.”

II. Organic Food: An Expanding Profitable Consumer Market

A. The Expansion of the Organic Market

Though organic food typically costs up to 30% more than industrially produced food, consumers still seem willing to buy in the organic market. In 2010, organic food sales in the United States reached $28.6 billion dollars, growing at a rate of over seven percent from sales in the prior year. The current organic market is, however, dominated by large scale organic producers, who are entering the market at a dizzying pace. Many large supermarket chains are beginning to sell organic food and even market their own organic food lines to meet growing consumer demand for these products. As of 2009, nearly half of all organic purchases were made in conventional supermarkets.

95 Id. It is worth noting that food labels that state: “no added hormones” can be confusing and misleading in that federal regulations have never permitted hormones or steroids to be used in poultry, pork or goat. Id. 
99 Harrison, supra note 23, at 212.
100 See Stephanie Strom, “Has ‘Organic’ Been Oversized?” New York Times, BU1 (July 8, 2012) (noting that “giant agri-food corporations…have gobbled up most of the nation’s organic food industry”).
101 See e.g. Pallavi Gogoi, Wal-Mart’s Organic Offensive, Not Everyone is Pleased by the Giant Retailer’s Push into Natural Foods, Starting with Some Very Anxious U.S. Farmers, Business Week, March 29, 2006; http://www.shoprite.com/Cnt/Certifiedorganic.html (site visited 2/24/10); see also http://www.organicnewsroom.com/2011/11/seventyeight_percent_of_us_fam.html (site visited Jan. 29, 2013); Organic Trade Association, supra note 97 (in the United States over half of all organic foods were
This phenomenon of large scale production and marketing is both good and bad for the consumer. Large producers are able to take advantage of economies of scale and drive down prices so that organic food is accessible to more consumers. However, the downside is that large producers and sellers are pushing small organic farmers out of the market and may not be adhering to the highest quality standards.

On balance, if higher prices for organic food are actually associated with lack of supply, new entrants to the market would be a positive development for the market as they help satisfy market demand and drive down price, making organic food accessible to a wider variety of consumers.

B. Consumer Expectations and Perceptions

A USDA study found that the majority of those surveyed believed that organic food would contain fewer chemicals than industrially produced food and was better for them and their families. Additionally, 37% of respondents believed that organic food was better for the environment. A full 30% of those surveyed thought that

---


104 Id.

105 Id.

106 Green, supra note 103 at 828-29.

107 Marketing U.S. Organic Foods: Recent Trends From Farms to Consumers, Carolyn Dimitri, USDA, September 2009 1, 10 (noting that periodic shortages of organic food are due to the inability of organic farms to supply enough products to meet demand)[hereinafter “Marketing Organic Foods”].

108 See Green, supra note 103, at 805 (noting Wal-Mart’s intention to provide organic foods at no more than a 10% price premium over conventional products). More accessible organic food also has other benefits, including the reduction in the use of pesticides and a decrease in greenhouse gases. For a fuller discussion of these benefits, see id. at 828-30; infra notes 211 to 215 and accompanying discussion.

109 Robinson, supra note 34.

110 Id.
organic food tasted better than other foods.\footnote{Id.} Other surveys have also showed that consumers believe organic food to be healthier.\footnote{Don Lotter, Recent Patterns in the U.S. Organic Market II: Price Premiums and Consumer Demand, Mar. 14, 2003.}

A Whole Foods Market study found similar results.\footnote{Survey results reported in Green, supra note 103, at 805.} Respondents in this study chose organic products because they believed it to be better for the environment (58\%) or their personal health (54\%) or the best way to support small and local farmers (57\%).\footnote{Id.} Others felt that organic foods were of high quality (42\%) or tasted better (32\%) than non-organic products.\footnote{Id.}

Consumers have also noted ethical and philosophical reasons for buying organic foods.\footnote{Id.; Benjamin J. Gutman, Ethical Eating: Applying the Kosher Food Regulatory Regime to Organic Food, 108 Yale L.J. 2351, 2355 (1999).} “Organic food is not just about a product; it is a philosophy in which the process of production is as important as the final result.”\footnote{Peter Hoffman, Going Organic, Clumsily, New York Times, Mar. 24, 1998, at A23.} An individual’s ethical considerations\footnote{It is worth noting that one’s ethical and other reasons for purchasing organics may ultimately not be best served by making such a choice as organic products may not be locally available. “Some of the most environmentally conscious consumers…desire organic fresh fruit and vegetables year-round, which…has led to an immensely unsustainable agricultural practice.” Douglas B. Holt, Constructing Sustainable Consumption: From Ethical Values to the Cultural Transformation of Unsustainable Markets, 644 Annals 236, 242-43 (2012).} will vary and may be considerably broader, ranging from concerns over the environment, to animal protection, to humanitarian and human rights concerns for farm workers.\footnote{Gutman, supra note 116, at 2380 (“For example, a consumer solely interested in the health benefits of organic food might not be interested in whether the food was also produced in accordance with the U.N. Human Rights Charter; other consumers, however, might see this as essential to their decision to purchase organic.”)}

III. Shortcoming of the “Process” Regulation of Organic Food: Misalignment Between Regulations and Consumer Expectations

A. Quality Not Guaranteed
Research thus indicates that consumers buy in the organic market for varied reasons, some of which are not fully supported by the reality of the products for sale in the organic market. The term organic really “represents a continuum of attitudes and practices, only some of which are actually represented in the organic standards.” Yet, consumers largely believe that organic food is healthier and free from pesticide residues.

The OFPA does not, however, even claim to meet those expectations. Although the OFPA created a uniform federal system to regulate organic production and labeling, it does not make guarantees that food is free from pesticides under federal law or standards. In short, in its limited labeling and marketing approach, even with the addition of recent mandatory, but very limited residue testing, the OFPA currently fails to meet consumer expectations of organic. In fact, recent results from a USDA Pilot Study of residues on organic products indicated that almost half of all the organic food tested was tainted with pesticide residue.

---

120 Harrison, supra note 23, at 221.
121 See discussion supra notes 109-19 and accompanying discussion. In the Organic Produce Pilot Study, USDA pilot testing found that only 57% of 571 products tested were residue free. See USDA Organic Produce Pilot Study, supra note 78 at 1,6.
122 Robinson, supra note 34.
123 Robinson, supra note 34.
124 See discussion infra in Part III.
125 Memorandum from Miles McEvoy, Deputy Administrator, Agricultural Marketing Service, to certifying agents, November 8, 2012.
126 USDA Organic Produce Pilot Study, supra note78, at 6. This USDA Organic Produce Pilot Study found that 43 percent of the produce samples tested was tainted with pesticide. The Pilot Study noted that reasons for contamination include “mislabeling, misidentification of the samples during data entry; post-harvest contamination; inadvertent, unavoidable contamination from environmentally persistent pesticides; or drift from pesticides applied to adjacent land.” Id. at 5.
B. National List Loophole

In addition to the fact that the Act is mainly process based,\(^\text{127}\) does not guarantee that organic produce will be residue free, and does not subject organic products to widespread end product testing, there also exist many loopholes in the National Organic Program that further this misalignment of interests between the NOP and consumers. In terms of the National List, for example, Congress introduced a major loophole to the procedure for obtaining a spot on the List in 2006.\(^\text{128}\) In that year, Congress allowed the Secretary of the USDA to designate certain substances as allowed in an “emergency” where organic alternatives were not available.\(^\text{129}\) This same bill allowed the USDA Secretary to determine when an emergency exists and \textit{also} the standards for determining when an alternative was not available.\(^\text{130}\)

Critics asked questions about whether an ingredient would be considered unavailable if the organic version of the ingredient were simply too expensive or difficult to obtain.\(^\text{131}\) To this day, clarity about when the Secretary is permitted to designate an emergency is lacking. This ability of the Secretary to so designate items on the National List results in an ever changing definition of organic processes.\(^\text{132}\) It makes the “organic” designation more political than functional in that it depends on who the current USDA Secretary is and to whom his loyalty runs.\(^\text{133}\)


\(^{130}\) \textit{Id.}

\(^{131}\) Bryan Endres, An Awkward Adolescence in the Organics Industry: Coming to Terms with Big Organics and Other Legal Challenges for the Industry’s Next Ten Years, 12 \textit{DRAKE J. AGRIC. L.} 17, 37-40 (2007).

\(^{132}\) \textit{See id.}

\(^{133}\) \textit{See id.}
C. Livestock Loopholes in the National Organic Program

In the livestock arena, loopholes also exist. In the dairy cow market, huge controversy continues to percolate concerning whether cows are getting an appropriate amount of pasture time\textsuperscript{134} and the ability to convert non-organic herds into organic herds.\textsuperscript{135} Partly in response to the great demand for organic dairy products, the Act allows the conversion of non-organic herds to organic herds where producers feed the herd organic feed for 12 months prior to labeling the milk as organic.\textsuperscript{136} Many consumer groups and small organic farmers object to this conversion rule as too lenient and misleading to consumers.\textsuperscript{137}

Additionally, controversy has surrounded the pasture requirements and the USDA’s somewhat recent rule that organic dairy cows get at least 30\% of their dry matter from pasture and that animals graze for a minimum of 120 days per year.\textsuperscript{138} Many farmers in dry and or colder states have urged that their land cannot support such extensive pasturing of their animals.\textsuperscript{139} Proponents of the 30\%/120 day rule argue that if the pasturage can only support small dairy or beef cattle herds, or none at all, then organic farms should not continue to operate in such places.\textsuperscript{140}

In the poultry area as well, the standards have spurned controversy and allow for some “maneuvering” so that the quality of the end products is not easily ascertained. The “Country Hen” case is a prime example of a non-organic producer

\textsuperscript{134} 7 C.F.R. ss. 205.239.
\textsuperscript{135} 7 U.S.C. ss.6509.
\textsuperscript{136} Id.
\textsuperscript{137} See id.
\textsuperscript{138} Final Rule on Access to Pasture, 75 Fed. Reg. 7154 (Feb. 17, 2010).
\textsuperscript{139} Johnson, \textit{supra} note 4, at 5.
\textsuperscript{140} Johnson, \textit{supra} note 4, at 5.
vying to become organic in a short amount of time. In Country Hen, the farm’s living arrangements for the hens were barely changed in the conversion process, but the producer ostensibly turned his production into an organic one under the NOP with the simple addition of porches for its henhouses.  

Despite the Administrator’s ruling in favor of the producer in the case, consumer groups have urged that eggs from hens under these circumstances should not be labeled organic and to allow such labeling and marketing is misleading.

IV. The Organic Market is not a Market for Lemons but Should be Closely Regulated from a Process and a Product Perspective

A. A Market for Lemons?

The “Market for Lemons” theory was first espoused by Professor George A. Akerlof, in “The Market For ‘Lemons’: Quality Uncertainty and the Market Mechanism.” Professor Akerlof discussed a market where buyer and seller relied on asymmetric information that resulted in low quality goods or “a lemons market.” To paraphrase, Professor Akerlof asserted that where a consumer cannot ascertain the quality of a good he is buying, and only the producer knows the real quality of the product, that producers have no incentive to sell high quality goods. The theory proceeds that this lack of incentive drags down the quality of the entire market, and the market for the goods disappears as consumers lose confidence in the products on the market. In turn, as consumers lose confidence in the products on the market, the

---

142 Id.  
144 Akerlof, supra note 14 at 490.  
145 See id.  
146 See id. at 490.
market for the goods finally collapses.\textsuperscript{147} Professor Akerlof argued that the used car market is a typical “Market for Lemons.”\textsuperscript{148}

One might hypothesize that because the Organic Foods Production Act does not guarantee that the final product will be of a certain quality\textsuperscript{149} (that is, free of pesticide residues and toxins and/or that livestock was raised with allowances for its “natural behavior,”\textsuperscript{150} and therefore the resulting better animal health),\textsuperscript{151} and because consumers cannot readily ascertain the quality of the food, that the organic market may be a readily collapsible “market for lemons.”\textsuperscript{152}

B. Consumer Preferences for Organic Food Can be used to Determine if the Organic Food Market is a Market for Lemons

While there are some factors that suggest a collapse in the organic food market if quality is not maintained, there is a strong argument that the organic food market will not collapse even if current regulation does not clearly guarantee that the end product will meet a certain quality standard and even if regulation is not as rigorous as consumers believe.

1. Factors Suggesting that the Organic Market Will not Collapse

First, consumers buy in the organic food market for many different reasons, including the opinion that organic food is more healthful for people and the environment.\textsuperscript{153} And while organic food may not be entirely free of pesticide residues

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{147}] See id.\textsuperscript{147}
\item[\textsuperscript{148}] See id.\textsuperscript{148}
\item[\textsuperscript{149}] See Johnson, supra note 4, at 1.\textsuperscript{149}
\item[\textsuperscript{150}] 7 C.F.R. ss. 205.239(a)(1).\textsuperscript{150}
\item[\textsuperscript{151}] See Food, Inc, directed by Robert Kenner, April 2010. (noting that beef cows that are allowed to graze prior to slaughter will significantly reduce the amount of e coli bacteria in their systems).\textsuperscript{151}
\item[\textsuperscript{152}] See Akerlof, supra note 14, at 490.\textsuperscript{152}
\item[\textsuperscript{153}] See supra notes 109 to 119 and accompanying discussion.\textsuperscript{153}
\end{itemize}
\end{footnotesize}
due to drift or unavoidable contamination,\textsuperscript{154} recent studies have confirmed that organic food may actually contain less pesticide residue than industrially produced food.\textsuperscript{155} Moreover, the President’s 2010 Cancer Panel has endorsed the position that where possible, consumers should buy consume organic food to minimize the risk of contracting cancer.\textsuperscript{156}

More recently, another trend has added to the power of the organic market: the idea that buying organic makes one more sophisticated and has some cache.\textsuperscript{157} This notion further acts to booster a market in which asymmetrical information exists, with the consumer on the short end of information.

In addition to these consumer preferences for organic food based on cache and sometimes misguided beliefs about the pristine nature of organic food, the market for organic food is also markedly different from the used car market analyzed by Professor Akerlof in “Lemons.”\textsuperscript{158} For example, the organic food market is different than the used car market in that a peach that is supposed to be organic, but is tainted with pesticides, still “works” in that one can still eat it. A bad used car – one that is akin to a tainted peach – does not “work.” This difference in the two markets would likely force used car consumers to be more “wary” than those in the organic food market.

\textsuperscript{154} It might be argued that organic food might also not be free from pesticide residues in certain instances due to intentional application of pesticides.

\textsuperscript{155} USDA Organic Produce Pilot Study, supra note 78 at 1, 6.

\textsuperscript{156} \url{http://deainfo.nci.nih.gov/advisory/pcp/annualReports/pcp08-09rpt/PCP_Report_08-09_508.pdf} (dated April 2010)(site visited March 21, 2013).

\textsuperscript{157} See e.g., Is Organic Food Marketing Hype, Newsweek (4/18/2010), available at http://www.thedailybeast.com/newsweek/2010/04/18/is-organic-food-marketing-hype.html (“Organic food is trendy, edgy, and advocated by all the right people. It affords a chance to enjoy a sense of superiority over the coupon-clipping bourgeois, to identify with beautiful actresses instead of old farmers in overalls.”); See also Dimitri, Marketing U.S, Organic Foods, supra note 107, at 3 (noting that organic consumers are hard to categorize but they consistently found that households with higher levels of education were the most likely to purchase organic products).

\textsuperscript{158} See Akerlof, supra note 14.
Consumers cannot tell if a peach is tainted with pesticide residues, but they can tell if the used car has failed to start.

Moreover, even if the food is tainted with pesticide residues, at some level, consumers still believe that the food produced under an organic label is better for the environment and for health (two of the main reasons for purchase). This assumption has some basis in fact because pesticides were not generally intentionally applied in the production process, and recent testing by the Agricultural Marketing Service in the USDA Pilot Study tends to bear this out, even if the end product is not completely free of pesticide residues or does not meet the consumer’s overall quality standards.

Additionally, the “cache effect” of buying organic does not exist in the used car market. Indeed, buying in the used car market would have considerably less cache than buying in the new car market, even in this time of “pre-owned” marketing efforts by dealers of second hand cars. In this way, Akerlof’s theory must also be discounted as it relates to this somewhat anomalous organic food market, where price is higher, even if quality is not guaranteed or readily discernible to the consumer.

These differences between a used car market and the organic food market support an argument that Akerlof’s Lemons theory does not apply to the organic food market and that the market will remain strong, even as information continues to be

159 See supra notes 109 to 119 and accompanying discussion.
160 The USDA Agricultural Marketing Service has made it clear that where a certifier determines that pesticides have been intentionally applied, the resulting products cannot be labeled as organic. Memorandum from Miles McEvoy, Deputy Administrator, Agricultural Marketing Service, to certifying agents, November 8, 2012.
161 See USDA Organic Produce Pilot Study supra note 78 at 1,6.
162 See USDA Organic Produce Pilot Study supra note 78 at 1,6 (43% of the samples tested contained some pesticide residues and 4% labeled and sold as organic contained an amount of residue above the allowed standard limit for sale as organic); supra notes 73 to 82, 120-43 and accompanying discussion.
163 See supra note 157-58, noting that organic customers tend to have a higher level of education than the general public.
164 See e.g., Arlena Sawyers, Certified-used sales set a record in 2011, Automotive News, 24 (Jan 23, 2012).
 Consumers will continue to buy organic products, even if they cannot readily discern product quality and even if the quality is not as high as the consumer expects it to be.

2. Why the Organic Market Might Collapse

On the contrary, other factors suggest that the organic food market is even more likely to collapse than the used car market and that it will not remain viable. In the organic food market, in contrast to the used car (vs. new car) market, the price generally goes up, not down, once a consumer decides to buy in the organic food market instead of in the industrially produced food market. The consumer is therefore hit with a double negative – asymmetrical information about what he is buying and the strong possibility that quality does not fully meet his expectations – and a higher price. Whereas a consumer who chooses to buy in the used car market with asymmetrical information gets a lower priced good for his more risky choice, the organic consumer pays more for his choice.

In addition, as the limitations of the current organic food regulatory regime become publicized through academic articles, government studies and reports, and

---

165 See e.g., Victor Fleischer, Brand New Deal: The Branding Effect of Corporate Deal Structures, 104 Mich. L. Rev. 1581, 1634 (2006) (“Integrity brands are brands that generate a sense of trust where the integrity or social responsibility of the firm is an important product attribute. Examples include...organic foods. With these products, the quality of the goods is difficult to measure even after purchase.”).
166 Marketing U.S. Organic Foods, supra note 107, at 5.
167 See e.g., Department of Agriculture, Emerging Issues in the U.S. Organic Industry (June 2009), 18-19 (noting that organic price premiums for organic milk, fruits and vegetables ranged from 5% to over 100% over competing non-organic products).
168 See USDA Organic Produce Pilot Study supra note 78 at 1, 6 (noting that 43% of organic food contains some pesticide residues).
169 The USDA recent marketing report notes that organic foods are 10-30% more expensive than industrially produced foods. Marketing U.S. Organic Products, supra note 107 at 5.
170 See supra notes 109 to 123 and accompanying discussion.
171 See e.g., Chenglin Liu, Is “USDA Organic” A Seal of Deceit?: The Pitfalls of USDA Certified Organics Produced in the United States, China and Beyond, 47 Stan. J. Int’l L. 333 (2011); Jessica Hass, Don’t Take the Bait: Why USDA Organic Certification is Wrong for Salmon, 34 WM & MARY ENVTL. L. &
in the mass media, consumers will be increasingly less willing to pay premium prices for products of dubious quality, without stricter quality controls. Even the latest regulations requiring residue testing only calls for testing of 5% of a certifier’s overall program or, if the certifier is a small operation, of only one of its operations. Further risks to the industry include the growing domination of multinational corporations in organic foods, which may conflict with some consumers’ desire to support small and local farmers via their purchase of organic products.

V: Changes Needed to More Ethically Conform the Implementation of the OFPA to What Consumers Believe and Expect

A. Should the OFPA and its Implementing Regulations Meet Consumer Expectations?

The research and analysis in this paper poses the question about whether changes are needed to the OFPA and its implementing regulations to squarely meet consumer expectations. After all, other toxics regulations also do not do what consumers think they do. The Food Quality Protection Act of 1996, for example, often called landmark legislation for the scope of its efforts to improve the quality of

\footnotesize


See e.g., Tim Devaney, Pediatricians raise doubts about the benefits of organic foods, \textit{Washington Times}, 1 (Oct. 23, 2012); Leslie Beck, Is the love affair with organics over? Study comparing nutrient and contaminant levels in conventional and organic foods finds few significant differences, \textit{The Globe and Mail}, L6 (Sep. 5, 2012); Mike Gibney, No scientific evidence showing organic is better, \textit{The Irish Times}, 16 (July 5, 2012).

See Pilot Study supra note 78 at 1, 6 (noting that 43% of organic food contains some pesticide residues).


See Strom, supra note 100.

See supra note 114 and accompanying discussion.

See infra notes 179-96 and accompanying discussion.
our food, reduce consumers’ exposure to pesticide residues, and protect children from pesticide residues in food,\textsuperscript{179} certainly does not guarantee that our food is safe.

Rather, the Act regulates the level of pesticide residue allowed on individual foods and thereby proclaims protection.\textsuperscript{180} The FQPA, however, certainly does not offer any realistic guarantee of food safety: it makes no accounting for interactions between different toxins and only minimal accounting for the cumulative effect of pesticide residues in foods.\textsuperscript{181} Moreover, to date, the FQPA has not been consistently or rigorously enforced to protect children,\textsuperscript{182} despite this being one of Congress’ primary goals in passing the legislation.\textsuperscript{183}

Similarly, the Federal Insecticide, Fungicide and Rodenticide Act also does not guarantee that pesticide use is safe.\textsuperscript{184} Rather, FIFRA is a “labeling statute” designed to provide information appropriate to the product.\textsuperscript{185} The EPA has stated: “no pesticide can be considered safe”\textsuperscript{186} and all pesticides are “associated with some risk of harm to human health or the environment.”\textsuperscript{187}

\textsuperscript{179}See e.g., Environmental Protection Agency, Accomplishments under the Food Quality Protection Act, Aug. 2006, \url{http://www.epa.gov/pesticides/regulating/laws/fqpa/fqpa_accomplishments.htm} (site visited on Nov. 30, 2012) (“…the most comprehensive and historic overhaul of the Nation’s pesticide and food safety laws in decades.”).
\textsuperscript{181}See e.g., 21 U.S.C. ss. 346a(b)(2)(C)(I)(III) (cumulative exposure only being required to be taken into account for limits with respect to children’s exposure to pesticides and toxins).
\textsuperscript{182}See Watnick, \textit{Risk Assessment}, supra note 73, at 1341-57.
\textsuperscript{183}Id. at 1316.
\textsuperscript{184}7 U.S.C. ss.,136-136y.
\textsuperscript{185}Id.
\textsuperscript{187}See ROBERT ABRAMS, ATTORNEY GENERAL, ENVTL. PROTECTION BUREAU, N.Y. STATE DEP’T OF L., LAWN CARE PESTICIDES: A GUIDE FOR ACTION 4 (undated); see also Valerie Watnick, \textit{Who’s Minding The Schools: Toward Least Toxic Methods of Pest Control In Our Nation’s Schools}, 8 FORDHAM ENVIRONMENTAL LAW JOURNAL 73-102 (1996).
And perhaps even more emblematic of our lack of strict toxics regulation, the Toxic Substances Control Act, arguably passed and intended to regulate highly toxic substances, does not do what a consumer might believe. While one would think the Act would empower the EPA to regulate toxic substances on a regular basis, it has not been used frequently for this purpose. Rather, Professor Joanne Scott has said that the TSCA suffers from a “data gap, safety gap and technology gap.” Describing these gaps, Professor Scott urges that the data gap exists in that new chemicals are only subject to “pre-market notification” but no specific safety testing. For chemicals on the market prior to enactment of the TSCA, the EPA must justify asking for new data. The EPA must do this by either showing that the chemical in question may present an unreasonable risk to human health or the environment, that the

---

188 See Kate E. Bloch, Neuroscience from Womb to Death: Creating a Clearinghouse to Evaluate Environmental Risks to Fetal Development, 63 HASTINGS L.J. 1571, 1584 (2012) (“under the TSCA] the U.S. EPA has been able, since 1976, to...partially regulate five existing chemicals (or chemical classes): polychlorinated biphenyls (PCBs), chlorofluorocarbons, dioxins, asbestos, and hexavalent chromium. Of these, an amendment by Congress to TSCA required regulation of PCBs, and the...asbestos regulation, promulgated after the agency spent 10 years building its case, was overturned [in court]”)(quoting American Academy of pediatrics scholars Wilson and Schwarzman).

189 Id.

190 Joanne Scott, From Brussels with Love: The Transatlantic Travels of European Law and the Chemistry of Regulatory Attraction, 57 AM. J. COMP. L. 897, 901-04 (Fall 2009).

191 In addition to the data gap under the TSCA, Professor Scott has described a safety gap under the TSCA. Professor Scott has posited that there exists a high evidentiary burden that the EPA must satisfy before it can act to restrict or ban a chemical and that the EPA must provide “substantial evidence” that the chemical presents or will present an unreasonable risk to health or the environment, that the benefits of regulation outweigh the costs, and that it has chosen the least burdensome way to eliminate the unreasonable risk before the EPA will act to restrict or ban the chemical. Indeed, according to Scott, the EPA has only acted to restrict five chemicals since Congress enacted the TSCA (contrasted with 87,000 chemicals on the existing list to be tested under FQPA for possible endocrine disrupting properties). And similarly, Professor Scott has described a “Technology Gap” that results in differential treatment of new and existing chemicals where existing chemicals are “grandfathered in” and there is an incentive for the continued use of existing substances. This Technology Gap, it is urged, suppresses industry investment in green chemistry and safer chemicals. Thus, the Toxics Substances Control Act has been rendered virtually meaningless in the protection of humans from toxic substances, despite the existence of what is seemingly powerful federal law. Joanne Scott, From Brussels with Love: The Transatlantic Travels of European Law and the Chemistry of Regulatory Attraction, 57 AM. J. COMP. L. 897, 901-04 (Fall 2009).

192 Id.

chemical is produced or imported in substantial quantities or existing data is somehow insufficient.\textsuperscript{194}

As a result of this “data gap,” the EPA has requested new data on only 200 existing chemicals since the late 1970’s.\textsuperscript{195} Yet, every year, new chemicals are introduced. As of 2004, 87,000 chemicals were on the list of those possibly causing severe health risks to humans and had yet to undergo significant testing for these potentially harmful properties.\textsuperscript{196}

B. A Normative Goal: Meeting Consumer Expectations Under the OFPA

Despite this failure of other regulatory regimes designed to keep us safer from toxins as promised on their face, there remains an argument that even when other federal statutes do not meet consumer expectations, we ought to at least try to meet the promise of the OFPA. Foremost, if one were to be single-mindedly practical, the organic market is a booming business\textsuperscript{197} and ought to be protected from consumer backlash. Consumers should have confidence in the quality of the market so that they will continue to buy in it and so that it will continue to prosper.

Additionally, there are ethical reasons that the organic foods industry ought to meet consumer expectations.\textsuperscript{198} Some commentators have suggested that because consumers may have religious concerns in choosing organic food, we have an ethical obligation to make sure that the ultimate quality of food labeled organic meets these

\textsuperscript{194} Id.
\textsuperscript{197} See \textit{supra} notes 3 to 4, 96-98 and accompanying discussion.
\textsuperscript{198} See \textit{supra} notes 116 to 119 and accompanying discussion.
religious expectations. There are consumers for example, who are forbidden to eat
treated with animal by-products – both prohibited under the
irradiated food, or food treated with animal by-products – both prohibited under the
OFPA and currently outlawed. However, in the absence of mandatory, uniform and
OFPA and currently outlawed. However, in the absence of mandatory, uniform and
regular testing of purported organic foods, there can be no guarantee or confidence that
such treated foods will not be inappropriately marketed as organic.

Similarly, certain religions, such as Buddhism for example, prohibit use of
genetically modified foods crops, and some Christian and Jewish tenets also prohibit
ingesting these types of products. The current system, however, even with changes
going into effect this year, does not provide for any significant monitoring of organic
crops for genetic modification, antibiotics, medications or hormones. Rules about
what to do if such transgressions of the OFPA are found are not clear or strict. Strengthening existing process rules and adding stricter end product regulation and
mandatory testing for GMOs, antibiotics and hormones will make it more likely (but
not guarantee) that consumers are getting what they think they are getting when they
buy organic.

---

200 7 C.F.R. ss. 205.105(f), 205.237(b)(5).
201 See Friedland, supra note 2, at 391-98.
202 Green, supra note 103, at 805. GMOs are prohibited under the OFPA. 7 C.F.R. ss. 205.105(e), 205.2.
203 See e.g., Kammi Rencher, Food Choice and Fundamental rights, A Piece of Cake or Pie in the Sky? 12 NEVADA LAW J. 418, 434 (spring 2012)(“some Orthodox Jews believe that foods made with GMOs are not kosher”).
205 http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5102502 (site visited March 21, 2013). AMS guidance for certifiers specifically says that no tolerances exist for GMOs and that if the
investigation determines that the residue levels (an awkward description of GMO presence) are as a result
of excluded methods, the certifier should take action to suspend or revoke certification. If the residues are
determined to be as a result of inadequate measures present to avoid contact with excluded methods, then
the certifier is advised to issue an NONC and take corrective action to mitigate contamination. Id.
206 See Luanne Lohr, Implications of Organic Certification for Market Structure and Trade, 80 Am. J. OF
AGRIC. ECON. 1125, 1125 (1998). Recent requirements for residue testing call for decertification if a
product is found to have had prohibited ingredients intentionally applied. Certified Agent Training Topic:
Additionally, shoring up the organic food market regulations so that organic products meet consumer expectations will make the market stronger. It will likely result in a greater number of market entrants as producers feel more certainty about the future of the market and what is expected of them, which may ultimately drive down price, help meet consumer expectations, and potentially improve overall human health.

Finally, improving and sustaining the organic food market may reduce our output of greenhouse gases, reduce the use of toxins and improve the overall environment. Indeed, there is evidence that organic farming methods result in a reduction in nitrous oxide omissions—a greenhouse gas formed when nitrogen fertilizers are used. These fertilizers are not permitted in organic farming.

In turn, there is also evidence that organic farming reduces nitrogen flow to the water and soil, making it more environmentally sound than industrial farming methods. Additionally, in a time of climate change and anticipated increased...
droughts and more arid land around the globe, experts believe that organic farming will be a more productive method to grow the world’s food.215

C. Proposed changes

1. Increase period for transition farming for crops from three years to ten years.

Many pesticides are persistent in the environment such that three years is not sufficient to clear organic farmland for use.216 For example, all pesticide uses of dieldrin and chlordane were cancelled in the 1980’s,217 and these chemicals were major subjects of the Stockholm Convention on Persistent Organic Pollutants in 2001.218 However, even after decades of very limited use, these pesticides are still commonly found in soil.219 The transition period from non-organic to organic farming should be increased from three years220 to at least ten years to minimize the risk of pesticides and other chemicals contaminating new organic farms. Additionally, non-toxic soil amendments should be used to further reduce the risk that organic crops take up lingering poisons from the soil.221

219 See e.g., Dennis Waslenchuk, “Ground Wars,” New York Times, 14CT (Sep. 23, 2007) (noting that both chemicals are prevalent in local topsoil).
220 7 U.S.C. ss. 6504(2).
2. Change existing regulations to require that dairy cows can only produce organic milk when organically raised from the last third of gestation. Currently, federal rules allow for transitioning of dairy herds to organic even when originally raised as non-organic herds. These cows need only receive organic feed for the 12 months prior to the time their milk is marketed as organic. This practice is deceptive and misleading as animals store persistent toxic substances in their fat cells. Twelve months would not be nearly enough time for a dairy cow to rid itself of the toxins it had absorbed from non-organic feed prior to the point of conversion. Milk thus produced from cows that have been transitioned to organic feed and production, would be more accurately called “transition milk.” This type of labeling plan would accurately inform consumers about what they are buying and at the same time encourage market entry for new producers of organic milk.

3. Encourage new entrants to the market, but clearly label their products as “transition” products.

Current law requires that products from a previously non-organic farm may not qualify as “organic” before a three-year transition period without the use of pesticides or synthetic fertilizers. I would argue for the extension of this transition period to ten years or longer to allow long-lasting chemicals a chance to dissipate before

---

222 7 U.S.C. 6509.
225 See id.at 178-183, 189-91 (discussing the piling up of toxic substances in animal and human bodies)
226 See infra notes 227 to 228 and accompanying discussion.
227 7. U.S.C. ss. 6504(2).
228 See discussion supra in Part V(C)(1).
allowing organic products to be sold. To aid the producer in this longer waiting period, the NOP should allow and encourage the marketing of “transition” products with their own transition specific USDA label. These types of products would be those produced during the changeover period, but produced in accord with an organic plan. This additional labeling regime would offset the hardships of a lengthened transition period and encourage more producers to shift to organic methods.

4. Give small, conscientious, local farmers a boost by allowing those who do more than meet minimum standards a new label by reserving the federal green “organic” label for these farmers and use the black label for all other organic food.

Currently, the USDA green and black organic labels\textsuperscript{230} are used interchangeably. A higher level “Green Label” could be reserved for those farmers and producers who are doing more to improve the quality of their end products, including better care of their livestock, longer pasture periods, higher quality feed, larger buffer zones between industrially produced and organic crops, and extreme care to avoid cross contamination or mislabeling between organic and non-organic crops.\textsuperscript{231} In general, this higher level label could additionally be reserved for those whose organic farms have been operating as such for a certain sustained period.

5. Create a “Local” label.

Furthermore, to meet consumer demand and expectation,\textsuperscript{232} create and use a local label that designates organic produce that is produced within 150 miles of its

\textsuperscript{230} See supra note 83 and accompanying discussion.
\textsuperscript{231} See USDA Organic Produce Pilot Study, supra note 78, at 6 (detailing the ways in which organic crops, for example, become contaminated with pesticide residue).
\textsuperscript{232} See supra note 114, 159 and accompanying discussion.
intended point of sale. This way, “local” will have a consistent meaning upon which consumers may rely.\textsuperscript{233}

6. Require certifiers to test a larger percentage of crops and to test for a broader spectrum of pesticides, both those banned and currently in use, as well as for antibiotics and GMOs.

While this step may be costly, it is the most effective way to shore up consumer confidence and ensure the long-term viability of the organic market. The current process focus, even with the advent of required, but limited, certifier crop testing as of January 2013, ignores a major reason that consumers chose organic products: the desire to minimize exposure to pesticides and other harmful chemicals in crops and other food products.\textsuperscript{234}

Consumer motivations for purchasing organic products can be divided into two categories: a desire for regulation of process (e.g., organic food is grown using environmentally sustainable techniques) and a desire for regulation of product (e.g., organic food is pesticide-free) [i.e., end-product regulation]. The majority of organic consumers purchase organic for the [end-]product regulation.\textsuperscript{235}

Initial USDA Agricultural Marketing Service Pilot Study tests of organic produce have found pesticide residues on organic produce, but not on all produce tested.\textsuperscript{236} It remains to be seen what testing USDA certified animal products and processed food

\textsuperscript{233} See generally supra note 116-119 and accompanying discussion.

\textsuperscript{234} See Green, supra note 88, at 805 (“organic consumers seek products that are free from pesticides, synthetics, and genetically modified ingredients produced through environmentally-friendly and natural methods”); Ariel 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, 430-31 (2011) (“the process-based nature of the regulations ignores the possibility, for example, that organically produced food can be tainted by pesticides blowing onto the foods from nearby fields”).


\textsuperscript{236} USDA Organic Produce Pilot Study, supra note 78, at 1, 6.; see Green, supra note 88, at 807 (finding residues 23% of the time).
products would indicate in terms of pesticide and other environmental contamination. To the author’s knowledge, no comprehensive study to study these issues has been undertaken to date.

Enacting stricter standards for the use and testing of pesticides and other synthetic substances in organic foods would more closely align the standard of what constitutes “organic” with consumers’ preferences and beliefs. \(^{237}\) Requiring that a greater segment of USDA certified organic products be tested for a broader range of synthetic substances, in addition to moving the industry in the direction of consumer preferences and expectations, would also help meet ethical obligations owed by producers to consumers. \(^{238}\) Shifting regulatory focus away from mere processes and inputs and increasing emphasis on the actual resulting food product will strengthen consumer protection and buyer confidence. \(^{239}\) This is the clearest path to ensuring that the organic food market will never become a “Market for Lemons” \(^{240}\) and will continue to thrive.

**Conclusion**

The market for organically grown food has sky-rocketed since Congress passed the Organic Foods Production Act of 1990 and the organic market has real significance in terms of quantity and interest from the public. Yet, the Organic Foods Production Act defines organic food by the process by which it will be produced and does not go far

---

\(^{237}\) See generally *supra* notes 109 to 119 and accompanying discussion.


\(^{239}\) See *supra* notes 197 to 210 and accompanying discussion.

\(^{240}\) See *supra* notes 167 to 176 and accompanying discussion (for a discussion of why the organic market might become a “Market for Lemons”).
enough to guarantee product quality such that the food will be free from environmental
toxins or pesticide residues, or produced strictly in accordance with the Act.

The producer in the organic market will always have access to more information
than the consumer about the relative level of toxins in the product, or the actual quality
of the end product. In this sense, the organic foods market is similar to the used car
market described by Professor Akerlof in his article describing a “Market for Lemons”
theory. Indeed, Professor Akerlof’s “Lemons Market” theory might well apply to the
organic food market, suggesting its ultimate collapse, given the lack of symmetrical
information between buyer and seller.

Surprisingly, however, the organic foods market appears to be an anomalous
market, in which consumers buy in the market even though they cannot readily ascertain
final product quality. The reasons for this vary from ethical and religious, to health
concerns, but also relate to the fact consumers seem to believe organic food is better for
people and the environment, and that buying “organic” connotes a high level of
sophistication. Although the organic market is thus not a “Lemons Market” subject to
imminent collapse, to maintain consumer confidence, meet consumer expectations, and
enhance this profitable and growing market segment, organic food regulation ought to
be more focused on end product regulation.