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MEMORANDUM

From: Steven B. Steinborn
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Re: USDA Withdraws Final Rule on Organic Livestock and Poultry Practices

The United States Department of Agriculture (USDA) Agricultural Marketing Service (AMS) recently issued a final rule withdrawing the Organic Livestock and Poultry Practices (OLPP) Final Rule published in the Federal Register on January 19, 2017. ^{1/} The OLPP rule promised to impose various animal handling and raising requirements on livestock and poultry labeled Organic, but it was never allowed to go into effect during the administration transition. The Trump Administration signaled an interest in revisiting the rule and solicited comments on the OLPP. The recent final rule is noteworthy not only for its withdrawal of the OLPP, but also for the statutory and cost-benefit analyses that USDA cites to justify the withdrawal. In the recent final rule, USDA explains is withdrawing the OLPP Final Rule based on:

- The agency's current interpretation of 7 U.S.C. § 6905, under which USDA believes the OLPP final rule would exceed USDA's statutory authority; and
- Independent justification based upon USDA's revised assessments of its benefits and burdens, and USDA's view of regulatory policy. ^{2/}

The Organic livestock and poultry regulations currently published at 7 CFR Part 205 remain effective.

Background

As background, the Organic Foods Production Act of 1990 (OFPA) established uniform national standards for the production and handling of foods labeled as "Organic." The OFPA authorized a new USDA National Organic Program (NOP) to set national standards for the production, handling, and processing of organically grown agricultural products. ^{3/} Referencing its authority to establish such standards, NOP issued the OLPP proposed rule in 2016 to amend the Organic livestock and poultry production requirements by adding new provisions for livestock handling and transport and avian living conditions, as well as expanding and clarifying existing requirements covering livestock

^{1/} National Organic Program; Organic Livestock and Poultry Practices, Final Rule; Withdrawal. 83 Fed. Reg. 10775 (Mar. 13, 2018) <https://www.gpo.gov/fdsys/pkg/FR-2018-03-13/pdf/2018-05029.pdf>.

^{2/} This is considered a deregulatory action under Executive Order 13771.

^{3/} 7 U.S.C. 6501–6522.

healthcare practices and mammalian living conditions. ^{4/} The OLPP final rule was published in 2017, but implementation was delayed several times until issuance of this withdrawal. ^{5/}

Rationale for Withdrawing the Organic Livestock and Poultry Practices Final Rule

Statutory Authority

The OLPP final rule primarily addressed how producers and handlers participating in the NOP must treat livestock and poultry. In withdrawing the OLPP, AMS explains that the agency believes the OFPA does not authorize the animal welfare provisions of the OLPP final rule. Rather, the agency explains that it now understands that the OFPA’s allowance of regulatory standards “for the care” of organically produced livestock does not encompass standalone concerns about animal welfare, but rather is limited to practices that are similar to those specified by Congress in the statute and necessary to meet congressional objectives.

AMS provides detailed discussion in reaching the conclusion that the broadly prescriptive animal welfare regulation is in conflict with the underlying statutory authority. AMS states “[w]hile subsection 6509(d)(2) authorizes promulgation of additional standards for the ‘care’ of livestock, that provision is not freestanding authority for AMS to adopt any regulation conceivably related to animal ‘care’; rather, standards promulgated under that authority must be relevant to “ensur[ing] that [organic] livestock is organically produced.” ^{6/} AMS explained that, similarly, section 6509(g) is not open-ended authority to regulate any and all aspects of livestock production. Rather, “it authorizes AMS to promulgate regulations to ‘guide the implementation of the standards for livestock products provided under this section’; in other words, standards relevant to and necessitated by the expressed purposes of Congress in enacting the OFPA. Thus, standards promulgated pursuant to section 6509(d)(2) and section 6509(g) must be relevant to ensuring that livestock is ‘organically produced.’” ^{7/} While “organically produced” is not defined, AMS believes that the authority provided by the OFPA does not extend to any and all aspects of animal care, but rather is more limited to examples provided in the statute and relate to the ingestion or administration of non-organic substances. ^{8/}

AMS’s rationale, therefore, is that after reading the language in context, the agency now believes that the authority granted in section 6509(d)(2) and section 6509(g) for the Secretary to issue additional regulations fairly extends only to those aspects of animal care that relate to the ingestion or administration of non-organic substances—thus tracking what AMS believes are the purposes of the OFPA—and that are shown to be necessary to meet the congressional objectives specified in 7 U.S.C. § 6501.

^{4/} 81 Fed. Reg. 21956 (Apr. 13, 2016)

^{5/} Final Rule, 82 Fed. Reg. 7042 (Jan. 19, 2017); the final rule delaying the OLPP final rule’s effective date until May 19, 2017, 82 Fed. Reg. 9967 (Feb. 9, 2017); the final rule delaying the OLPP final rule’s effective date until November 14, 2017, 82 Fed. Reg. 21677 (May 10, 2017); a second proposed rule presenting four options for agency action, 82 Fed. Reg. 21742 (May 10, 2017); a final rule further delaying the OLPP final rule’s effective date until May 14, 2018, 82 Fed. Reg. 52643 (Nov. 14, 2017); and a proposed rule explaining AMS’ intent to withdraw the OLPP final rule, 82 Fed. Reg. 59988 (Dec. 18, 2017).

^{6/} 83 Fed. Reg. 10776; *see also* 7 U.S.C. 6509(d)(2).

^{7/} *Id.*

^{8/} *Id.* “The current prohibited practices that relate to ingestion of chemical, artificial, or nonorganic substances are the types of practices and standards that Congress intended to limit exposure of animals to non-organic substances and thus ‘ensure that [organic] livestock is organically produced.’”

Economic Impact of the OLPP Final Rule

AMS provides an additional rationale for withdrawal of the rule focusing on analyses related to required cost/benefit analysis (Executive Order 12866 and Executive Order 13563) of economically significant regulatory actions. ^{9/} The Office of Management and Budget (OMB) designated OLPP as an economically significant rule, and thus AMS was obligated to consider whether the potential benefits of the OLPP rule outweigh its costs, and demonstrate a need for regulation. AMS concluded that regulation is unwarranted. Further, AMS maintained that the costs of the OLPP final rule outweigh potential benefits. AMS reasoned that “given the high degree of uncertainty and subjectivity in evaluating the benefits of the OLPP final rule, and the lack of any market failure to justify intervention, and the clear potential for additional regulation to distort the market or drive away consumers, even if the comparison of costs and benefits was a close call, AMS would choose not to regulate as a policy matter.” ^{10/}

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Beyond the direct significance of the withdrawal of the planned final rule, this action also offers useful insight into how AMS may interpret its authority in other contexts related to contemplated changes to the “Organic” definition. We will continue to monitor developments concerning NOP regulations and requirements. Should you have any questions, or wish to discuss these issues further, please do not hesitate to contact us.

^{9/} Executive Order 12866, Regulatory Planning and Review (Sept. 30, 1993), https://www.reginfo.gov/public/jsp/Utilities/EO_12866.pdf; see also Executive Order 13563, Improving Regulation and Regulatory Review (Jan. 18, 2011) <https://obamawhitehouse.archives.gov/the-press-office/2011/01/18/executive-order-13563-improving-regulation-and-regulatory-review>.

^{10/} 83 Fed. Reg. 10779.