



June 24, 2015

Tom Vilsack, Secretary
U.S. Department of Agriculture
1400 Independence Ave., SW
Washington, D.C. 20250
Email: agsec@usda.gov

Miles McEvoy, Deputy Administrator
U.S. Department of Agriculture
Agricultural Marketing Service
National Organic Program
1400 Independence Ave., SW
Washington, D.C. 20250
Email: Miles.McEvoy@ams.usda.gov

Dear Secretary Vilsack and Deputy Administrator McEvoy:

Prior to the National Organic Standards Board (NOSB) meeting held this spring in La Jolla, California, the National Organic Coalition (NOC) convened its semi-annual Pre-NOSB meeting. During the latter part of this meeting, NOC members and other members of the organic community had a productive discussion with Mr. McEvoy concerning a range of issues and topics.

One of these discussion topics addressed the use of antibiotic injections into organic hatchery eggs and day-old poultry and the fact that this practice is permitted under current organic standards.

In a Consumer Reports survey conducted in 2014, we found that the majority of consumers think that the organic label on chicken and eggs currently means that no antibiotics or other drugs were used (72%). An even greater percentage of consumers believed this label *should* mean that the chickens' feed contained no artificial ingredients (88%) and that no antibiotics or other drugs were used (88%).¹

Consumer Reports believes that these survey results emphasize a serious inconsistency between consumer expectations and organic practices and standards. We raised a couple key questions concerning this inconsistency both within the organic program and given broader U.S. Dept. of Agriculture (USDA) labeling standards, such as "raised without

¹ CONSUMER REPORTS® NATIONAL RESEARCH CENTER, Survey Research Report Organic Food Labels Survey 2014 Nationally-Representative Phone Survey 1,016 adult U.S. residents, March, 2014, p. 3, <http://www.greenerchoices.org/pdf/CR2014OrganicFoodLabelsSurvey.pdf>.

antibiotics,” as well as the movement within conventional production giants like Tyson’s and Perdue to phase out this practice, during the NOC discussion with Mr. McEvoy.

While Mr. McEvoy acknowledged the inconsistency and a willingness to allow the NOSB to include this issue on its future workplans should the Board feel it necessary, the NOP maintained its previous position that they could not address the problem due to statutory limitations within the Organic Foods Production Act (OFPA).

Consumer Reports recognizes certain OFPA limitations concerning day-old poultry, however, we would like to provide some additional background and analysis to aid the NOP and USDA in reconsidering all of the potential regulatory options available to it in addressing this problematic inconsistency within the organic label.

OFPA and Regulations

A. OFPA and the Day-Old Poultry Exemption

The provision within OFPA that exempts up to day-old poultry from organic production standards is found in section 6509 as codified. This section governs organic animal production practices and materials and reads as follows:

(e) Additional guidelines

(1) Poultry

With the exception of day old poultry, all poultry from which meat or eggs will be sold or labeled as organically produced shall be raised and handled in accordance with this chapter prior to and during the period in which such meat or eggs are sold.²

In other words, all poultry that is to be labeled and sold as organic must be raised and handled in accordance with the organic standards established under OFPA and its implementing regulations, unless it falls within the day-old poultry time period. What this means is that day-old and younger poultry can be obtained from conventional hatcheries that have not been produced according to organic standards. Second day and older poultry, however, cannot be sourced conventionally. OFPA regulations do not elaborate on the day-old poultry exemption.

B. OFPA and Antibiotics in Livestock

OFPA and its implementing regulations do address the use of antibiotics in livestock, by placing a general prohibition on any subtherapeutic treatment of livestock with

² 7 U.S.C. § 6509(e)(1).

antibiotics,³ as well as use as a growth stimulant in feed.⁴ These references are the only specific mention of antibiotics or medications within OFPA concerning livestock.

OFPA only prohibits treatment of animals with medications in the absence of illness⁵ and OFPA regulations go one step further as to actually require treatment of sick animals for animal welfare purposes.⁶ Because an antibiotic is considered a synthetic substance, however, and prohibited under organic production unless included on the National List, use of antibiotics on sick animals removes their organic eligibility in the marketplace and cannot be labeled organic.⁷ Treatment of a sick animal with an antibiotic, however, does not require that a livestock producer's organic certification as a whole be removed.

Additional Antibiotic Use and Labeling Standards

As you are aware, the power of the USDA as a whole to regulate labeling claims and consumer expectations with regard to those claims on certain food items is not limited to the confines of OFPA. In fact, to ensure that animal product labels are truthful, accurate, and not misleading to consumers, as required by USDA law and regulations, such claims must be submitted to USDA's Food Safety Inspection Service (FSIS) for approval prior to marketing in interstate commerce.⁸ And while the organic label is primarily regulated within the confines of its own program and FSIS defers to the Agricultural Marketing Service (AMS) and NOP on approval and oversight of products carrying the organic label, it is still considered a label which falls under the purview and authority of FSIS's meat and poultry labeling responsibilities.⁹

³ 7 U.S.C. § 6509(d)(1)(A).

⁴ 7 U.S.C. § 6509(c)(3), *see also* 7 C.F.R. § 205.237(b)(7).

⁵ 7 U.S.C. § 6509(d)(1)(C).

⁶ 7 C.F.R. § 205.238(c)(7).

⁷ *See* 7 C.F.R. § 205.60 *and* 7 C.F.R. § 205.238(c)(7) ("Livestock treated with a prohibited substance must be clearly identified and shall not be sold, labeled, or represented as organically produced.").

⁸ *See* 21 U.S.C. § 607(e); 21 U.S.C. § 457(c). *See also* accompanying regulations for meat and poultry inspections at 9 C.F.R. §§ 412.1 – 412.2.

⁹ *See* U.S. Dept. of Agriculture, Food Safety Inspection Service, *Meat and Poultry Labeling Terms*, webpage available at http://www.fsis.usda.gov/wps/portal/food-safety-education/get-answers/food-safety-fact-sheets/food-labeling/meat-and-poultry-labeling-terms/meat-and-poultry-labeling-terms!/ut/p/a1/jZDNCsIwEISfxQcI2doqepSCtFVbRNSYi6ya1kCbICyq-vRaREHxp7unZb5hh6GcMsoVHmWGVmqFeX3z7hqm0HX6PkRJ3xICGC-mycj3oTfr3IDVDyB2G_q_zAD--aMGD9rVxJ9klJdo90SqVFOWCUtQmZOoDGWp1jtiMBX2TFLcWmL2QtiHkONG5FJlIBUCa9eOIPqQ2-r8IIgVVWH-A0vKX-OCc9swdmdeEMUuJN478KHPO_C9sLKYS8t4EIAMW1dofMrM/#14.

USDA provides some general guidance on the process for label evaluations and general standards underlying it,¹⁰ however, there is no regulation or guidance that details USDA positions or standards on claims involving “raised without antibiotics,” “no antibiotics added,” and similar statements.

Nevertheless, USDA has made it known through individual label approvals, statements to Consumer Reports, and litigation concerning antibiotic statements on labels, that claims of “raised without antibiotics” mean that both feed containing antibiotics and injection of hatchery eggs and day-old poultry with antibiotics cannot bear these kinds of labels.¹¹ This has been confirmed through industry practice and statements to the media.¹²

Options to Address the Organic Poultry and Egg Labeling Inconsistency

Understanding that the NOP and USDA must not violate explicit statutory instructions provided in OFPA, the Agency as a whole must also be wary of violating explicit directives in separate sections of OFPA and in other statutes. In this case, we believe that OFPA requires the Agency to assure consumers that organically produced products meet consistent standards¹³ and that the Federal Meat Inspection Act (FMIA), Poultry Product Inspection Act (PPIA), and Egg Products Inspection Act (EPIA) all prohibit the labeling of products that are misleading to consumers and thus misbranded.¹⁴

Thus while the NOP faces a certain legal obstacle in stating that OFPA specifically allows for an exemption for day-old poultry from organic standards, including the general prohibition of subtherapeutic antibiotic treatments, the canons of statutory interpretation

¹⁰ See U.S. Dept. of Agriculture, A Guide to Federal Food Labeling Requirements for Meat Poultry, and Egg Products, available at http://www.fsis.usda.gov/shared/PDF/Labeling_Requirements_Guide.pdf; U.S. Dept. of Agriculture, Animal Production Claims Outline of Current Process, available at <http://www.fsis.usda.gov/wps/wcm/connect/6fe3cd56-6809-4239-b7a2-bccb82a30588/RaisingClaims.pdf?MOD=AJPERES>.

¹¹ Sanderson Farms, Inc. v. Tyson Foods, 547 F. Supp. 2d 491 (D.Md. 2008)(holding that Tysons “raised without antibiotics” campaign misled consumers when poultry was fed with ionophores and hatchery eggs injected with antibiotics two-to-three days before hatching.)

¹² See, e.g., Tom Philpott, Wait, We Inject Antibiotics Into Eggs for Organic Chicken?!, MotherJones, Jan. 15, 2014 (“Perdue has over the past five years removed antibiotics from 80 percent of its hatcheries[.]”) available at <http://www.motherjones.com/tom-philpott/2014/01/organic-chicken-and-egg-antibiotics-edition>.

¹³ 7 U.S.C. § 6501(2).

¹⁴ 21 U.S.C. § 607(e); 21 U.S.C. § 457(c); 21 U.S.C. § 1036.

and legal precedent require that all statutory language should be given effect unless leading to the truly absurd.

With this in mind, we would posit that the OFPA provision exempting day-old poultry from organic production standards **does not prohibit** the application of individual aspects of the organic standards. Instead, the provision merely states that organic standards cannot be required for day-old poultry as a whole. Prohibiting the injection of eggs and day-old poultry with antibiotics does not amount to a requirement that these products adhere to organic production standards across the board, but rather a singular component. Furthermore, because implementing this singular requirement would be satisfying a key purpose of OFPA concerning consumer assurance and organic consistency as well as other mandatory labeling standards under separate acts, there is a strong argument that a narrowly tailored regulation addressing this issue would be viewed as legally favorable.

We would also point out that if these kinds of actions to better align organic poultry production concerning antibiotics with consumer expectations are not taken, then the Agency must consider whether it is necessary under the PPIA and EPIA to require labeling identifying this problematic conflict in consumer expectations to avoid misbranding. For example, should organic eggs and poultry that do receive antibiotic injections up through the first day of life be labeled with a disclosure statement concerning this practice?

Recommendations & Requests

Consumer Reports would like to continue the discussion on this important topic with representatives of the USDA and we thank Mr. McEvoy for his willingness to address our initial questions and concerns during the NOC meeting in La Jolla. Moving forward, we would ask that the USDA consider the following next steps:

- Encourage NOSB consideration and investigation of antibiotic use in eggs and day-old poultry.
- Investigate the availability of both organic and conventional hatchery supplies that do not allow for antibiotic injections during this period of life.
- Initiate discussions within the Agency and with stakeholders concerning the potential for regulatory action.

Again, we thank you for your engagement on this issue thus far and hope that this information will be useful in finding a solution to this problem.

Sincerely,

Urvashi Rangan Ph.D.

Urvashi Rangan, Ph.D.
Executive Director
Food Safety and Sustainability Center
Consumers Union / Consumer Reports
101 Truman Avenue
Yonkers, NY 10703



Aimee Simpson, J.D.
Policy Counsel & Consultant
Food Safety and Sustainability Center
Consumers Union / Consumer Reports
101 Truman Avenue
Yonkers, NY 10703