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## Is USDA Organic a Seal of Deceit: The Pitfalls of USDA Certified Organics Produced in the United States, China and Beyond

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# IS “USDA ORGANIC” A SEAL OF DECEIT?: THE PITFALLS OF USDA CERTIFIED ORGANICS PRODUCED IN THE UNITED STATES, CHINA AND BEYOND

CHENGLIN LIU\*

*American consumers' appetite for organic foods (organics) has dramatically increased since Congress passed the Organic Foods Production Act (OFPA) in 1990. Because the domestic organic food industry has been unable to meet the growing demand for these products, U.S. groceries have increasingly relied on imported organics. Studies show that 40% of organic foods consumed in the United States are imported from over 100 foreign countries.*

*To regulate organic food production, the United States Department of Agriculture (USDA) accredits certifying agents, which in turn certify organic farms and handlers according to U.S. organic standards. Certifying agents can be state agencies or private enterprises, including foreign entities. In 2007, USDA-accredited agents certified 27,000 organic producers worldwide. This certification allows approved foreign products to bear the “USDA Organic” seal and freely enter the U.S. market.*

*This article evaluates the trustworthiness of the USDA organic certification process. By using China as an example, the article offers a comparative assessment of the quality and safety of both domestically produced and Chinese produced organics in the U.S. market. In addition, the article discusses the USDA's failure to keep pace with the supervision of certifying agents, especially in China and other foreign countries. The article concludes that the current regulatory framework is not only inadequate to the task of regulating domestic organics, but also incapable of ensuring the integrity of imported organics. Thus, the “USDA Organic” seal misleads*

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*consumers.*

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## I. INTRODUCTION

American consumers' appetite for organics has dramatically increased since Congress passed the Organic Foods Production Act (OFPA) in 1990.<sup>1</sup> In 2008, organic food sales reached \$21.1 billion in the U.S. market, which is more than five times greater than the sales figures from 1997.<sup>2</sup> The U.S. domestic organic food industry, however, has fallen far short of meeting the increasing demand for organic food.<sup>3</sup> As a result, U.S. groceries have increasingly relied on organic production from foreign countries. As much as 40% of organic foods consumed in the United States<sup>4</sup> are imported from over 100 countries.<sup>5</sup> In 2008, an ABC News report revealed that Whole Foods, the undisputed leader in organic foods known for promoting its products as "locally grown," sold organic products produced in China, including spinach, sugar snap peas, asparagus spears, pine nuts, and creamy peanut butter.<sup>6</sup> The Cornucopia Institute estimated that in 2009 up to 50% of organic soybeans consumed in the United States were produced in China.<sup>7</sup> Facing a shortage of U.S. grown soybeans, leading soy-based food manufacturers, such as Dean Foods, have switched their sources to imports from China.<sup>8</sup>

The U.S. regulatory scheme on organics is based on the OFPA,<sup>9</sup> which delegates to the U.S. Department of Agriculture (USDA) the task of regulating organic production, handling, and labeling.<sup>10</sup> In 2002, the USDA promulgated the National Organic Program (NOP) to enforce the OFPA.<sup>11</sup> According to the OFPA, the USDA itself does not conduct field reviews and inspections. Rather, it accredits certifying agents to certify and monitor organic farms and handlers pursuant to the organic standards defined in the OFPA and NOP.<sup>12</sup> Certifying agents can be state agricultural departments or private entities, including foreign entities.<sup>13</sup> In 2007, USDA-accredited agents certified 27,000 organic producers and handlers

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<sup>1</sup> Organic Foods Production Act of 1990, Pub. L. No. 101-624, 104 Stat. 3935 (codified as amended at 7 U.S.C. §§ 6501-6523 (2006)).

<sup>2</sup> CATHERINE GREENE ET AL., U.S. DEP'T OF AGRIC. ECON. RESEARCH SERV., ECONOMIC INFORMATION BULLETIN NO. 55, EMERGING ISSUES IN THE U.S. ORGANIC INDUSTRY 3 (2009), available at <http://www.ers.usda.gov/publications/eib55/eib55.pdf>.

<sup>3</sup> *Id.* at 3-5.

<sup>4</sup> 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 DRAKE J. AGRIC. L. 17, 35 (2007).

<sup>5</sup> GREENE ET AL., *supra* note 2, at 8.

<sup>6</sup> WJLA/NewsChannel 8, *ABC 7 I-Team Investigates: Organic Foods*, ABC 7 NEWS (WJLA-TV), May 21, 2008, <http://www.wjla.com/news/stories/0508/521743.html>.

<sup>7</sup> CORNUCOPIA INSTITUTE, BEHIND THE BEAN: THE HEROES AND CHARLATANS OF THE NATURAL AND ORGANIC SOY FOODS INDUSTRY 17 (2009), available at [http://www.cornucopia.org/soysurvey/OrganicSoyReport/behindthebean\\_color\\_final.pdf](http://www.cornucopia.org/soysurvey/OrganicSoyReport/behindthebean_color_final.pdf).

<sup>8</sup> *Id.*

<sup>9</sup> Organic Foods Production Act of 1990, Pub. L. No. 101-624, 104 Stat. 3935 (codified as amended at 7 U.S.C. §§ 6501-6523 (2006)).

<sup>10</sup> *Id.* § 6503.

<sup>11</sup> National Organic Program, 7 C.F.R. §§ 205.1-205.669 (2011).

<sup>12</sup> 7 U.S.C. § 6506.

<sup>13</sup> 7 C.F.R. § 205.500(a): "The Administrator shall accredit a qualified domestic or foreign applicant in the areas of crops, livestock, wild crops, or handling or any combination thereof to certify a domestic or foreign production or handling operation as a certified operation."

worldwide, 11,000 of which were outside of the U.S.<sup>14</sup> This method of certification means that USDA certified products from foreign countries are entitled to bear the USDA Organic Seal and circulate freely in the U.S. market.

How does the USDA regulate domestically produced organics? How can the USDA rigorously enforce the same standards on both foreign organic certifying agencies and producers in over one hundred countries? What are the obstacles the USDA faces in regulating both domestic and foreign organic products consumed in the U.S. market? Using China as an example, this article offers a comparative assessment of the quality and safety of both domestically produced and Chinese produced organics in the U.S. market.

Part II of the article examines the development of the U.S. regulatory framework for organics and the challenges facing the USDA in enforcing U.S. organic standards on imported foods. Part III explores the Chinese laws and regulations for food safety and organic production, and China's serious challenges in regulating organic food, including fraud, corruption, conflicts of interest, environmental degradation, and lack of incentives for long term agricultural investment. Part IV discusses the signaling function of the USDA accreditation and certification system from a theoretical perspective. The OFPA was designed to establish a national standard and prevent consumer confusion. Apparently, the law did not anticipate the deep impact that globalization would have on organic trade in the United States just two decades later. While the USDA has significantly expanded its presence by accrediting foreign certifying agents throughout the world, it has failed to keep up with the supervision of those agents. The article concludes that the current regulatory framework is not only inadequate to the task of regulating domestic organics, but also incapable of ensuring the integrity of imported organics. Thus, the "USDA Organic" seal on imported organics misleads consumers.

## II. THE U.S. REGULATORY FRAMEWORK FOR ORGANICS

### *A. Development*

Jerome Rodale is widely credited for pioneering the organic movement in the United States.<sup>15</sup> Influenced by Sir Albert Howard and Ehrenfried Pfeiffer, Rodale firmly believed that organic farming would produce healthier foods while preserving soil fertility.<sup>16</sup> He vividly "likened chemical fertilizers to whipping a horse, speeding up growth but hastening tiredness."<sup>17</sup> In 1942, Rodale published the Organic Farming Magazine, which provided a platform for spreading his belief in

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<sup>14</sup> GREENE ET AL., *supra* note 2, at iii.

<sup>15</sup> See PHILIP CONFORD, THE ORIGINS OF THE ORGANIC MOVEMENT 100 (2001); SAMUEL FROMARTZ, ORGANIC, INC.: NATURAL FOODS AND HOW THEY GREW 20 (2006); Michelle T. Friedland, *You Call That Organic?—The USDA's Misleading Food Regulations*, 13 N.Y.U. ENVTL. L.J. 379, 381 (2005); Kyle W. Lathrop, *Pre-empting Apples with Oranges: Federal Regulation of Organic Food Labeling*, 16 J. CORP. L. 885, 886 (1991).

<sup>16</sup> FROMARTZ, *supra* note 15, at 20.

<sup>17</sup> *Id.*

organic food and distaste of chemically induced agriculture.<sup>18</sup> Even though Rodale's ideas were met with skepticism, resistance, and even ridicule,<sup>19</sup> organic farming gradually gained momentum through his persistent efforts. Around the same time, the U.S. government began to evaluate the ruinous consequences of modern farming in its influential report entitled "Soils and Men."<sup>20</sup>

In the early 1970s, Rodale's followers began to market products labeled as "organic."<sup>21</sup> Organics soon became popular with consumers who were concerned with the use of agrochemicals. Due to a lack of regulation, however, some farmers allegedly mislabeled their conventionally grown products as organics to deceive consumers.<sup>22</sup> In response, Oregon enacted the first organic certification law in 1973.<sup>23</sup> By 1990, twenty-two states had passed laws on organic standards and certification requirements.<sup>24</sup> State laws helped to create an orderly organic market within each individual state, but differences in these state laws provided no uniformity for a national organic market. The discrepancies not only hampered interstate commerce but also caused enormous consumer confusion.<sup>25</sup> For example, to market organic milk, laws in New Hampshire and Texas required dairy cows to be fed exclusively with organic feed, while Kansas and other states had less stringent requirements.<sup>26</sup> The divergent standards forced organic farmers to create different labels and adjust farm operations for sales in different markets.<sup>27</sup> In addition, conflicting standards made it difficult for American farmers to export organics to other countries.<sup>28</sup> As a result, organic farmers, certification agents, and organic trade associations called for Congress to establish a national organic certification program.<sup>29</sup> Against this background, Congress enacted the Organic Foods Production Act of 1990 (OFPA).<sup>30</sup> Since then, the OFPA has served three purposes: "(1) to establish national standards for organically produced products; (2) to assure consumers that organically produced products meet a consistent national standard; and (3) to facilitate interstate commerce of organically produced products."<sup>31</sup>

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<sup>18</sup> *Id.* For a brief biography of Mr. Rodale, see J. I. Rodale and the Rodale Family Celebrating 50 Years as Advocates for Sustainable Agriculture, available at <http://www.portal.state.pa.us/portal/server.pt?open=514&objID=588386&mode=2> (last visited April 22, 2011).

<sup>19</sup> *Id.*; see also Friedland, *supra* note 15, at 381.

<sup>20</sup> FROMARTZ, *supra* note 15, at 19.

<sup>21</sup> Lathrop, *supra* note 15, at 886.

<sup>22</sup> Friedland, *supra* note 15, at 381–82.

<sup>23</sup> *Id.* at 382.

<sup>24</sup> S. REP. NO. 101–357, at 292 (1990), reprinted in 1990 U.S.C.C.A.N. 4943, 4943.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 4944.

<sup>29</sup> *Id.*

<sup>30</sup> Organic Foods Production Act of 1990, Pub. L. No. 101–624, 104 Stat. 3935 (codified as amended at 7 U.S.C. §§ 6501–6523 (2006)).

<sup>31</sup> *Id.* § 6501.

## *B. Overview of the Organic Foods Production Act of 1990*

### *1. Defining "Organic"*

The OFPA takes a production-based approach to its regulation of the organic industry.<sup>32</sup> Under this approach, the OFPA sets forth certain methods that organic farmers and handlers must either follow or avoid. That is, instead of focusing on the end results of production, the Act emphasizes adherence to standard production and handling processes. However, the Senate report detailing the legislative intent of the OFPA conceded that "[o]rganically produced food defies simple definition."<sup>33</sup> As a result, the OFPA broadly defines organically produced food as "an agricultural product that is produced and handled in accordance with [the Act]."<sup>34</sup> In essence, the OFPA regulates organic production processes and not the actual products themselves.

To comply with these national standards, organic farmers and handlers must not only produce foods without the use of synthetic chemicals but also refrain from applying synthetic chemicals "during the [three] years immediately preceding the harvest of [organic] products."<sup>35</sup> In addition, they must comply with an "organic plan" agreed upon with their certifying agents.<sup>36</sup> Yet, the seemingly strict standards for organic production are undermined by exceptions in the OFPA, which allow for the use of certain synthetic substances in organically produced products.<sup>37</sup> Therefore, products bearing the "USDA Organic" seal that were produced in accordance with the OFPA may not be completely free of synthetic chemical residue. As a former Vice-Chair of the U.S. National Organic Standards Board (NOSB), Mr. William J. Friedman, explained, "Organic labels are not statements regarding the healthiness, nutritional value, or overall safety of consuming such products."<sup>38</sup>

### *2. The National List*

The OFPA authorizes the USDA to promulgate a "National List" of synthetic chemicals that are allowed for use in organic production.<sup>39</sup> Because the use of synthetic chemicals in the production of organic food necessarily involves conflicting interests between organic producers and consumers, the OFPA prescribes a cautious approach for the USDA to determine what substances make the National List. Accordingly, the Secretary of the USDA must consult with both

<sup>32</sup> See Friedland, *supra* note 15, at 388.

<sup>33</sup> S. REP. NO. 101-357, at 292 (1990), *reprinted in* 1990 U.S.C.C.A.N. 4943, 4946.

<sup>34</sup> 7 U.S.C. § 6502(14).

<sup>35</sup> *Id.* § 6504(2).

<sup>36</sup> *Id.* § 6504(3).

<sup>37</sup> *Id.* §§ 6504(2), 6517; *see also* The National List of Allowed and Prohibited Substances, 7 C.F.R. 205.600 (2011).

<sup>38</sup> William J. Friedman, *The Framework For Global Organic Food Trade Circa 2005: Accomplishments and Challenges*, 60 FOOD & DRUG L.J. 361, 366 (2005).

<sup>39</sup> 7 U.S.C. § 6517 (2006); *see also* 7 C.F.R. § 205.600 (2010).

the Department of Health and Human Services (DHHS) and the Environmental Protection Agency (EPA) to amend this list of permissible synthetic chemicals.<sup>40</sup> More importantly, the USDA must ensure that such chemicals will not be harmful to human health, and are necessary to and consistent with organic production practices.<sup>41</sup> In addition, such chemicals must either fall within a category of acceptable substances enumerated in the Act,<sup>42</sup> or not be classified by the EPA as "inerts of toxicological concern."<sup>43</sup>

Furthermore, the OFPA established the NOSB to propose changes for the National List to the USDA.<sup>44</sup> The NOSB is composed of fifteen members representing a balance of interests in the areas of organic production, consumer protection, and environmental protection.<sup>45</sup> The USDA's decisions concerning the list must be based on NOSB proposals because the OFPA does not authorize the USDA to add synthetic substances to the list on its own initiative.<sup>46</sup> To ensure transparency, the OFPA requires that the USDA publish proposed changes in the Federal Register and seek public comments before amending the National List.<sup>47</sup> Similarly, once the USDA finalizes a new version of the National List, it must be published in the Federal Register along with any public comments made regarding the changes.<sup>48</sup> Currently, the National List allows over sixty synthetic substances to be used in organic crop production.<sup>49</sup>

### 3. The National Organic Program (NOP)

The regulation of organic standards takes several steps and involves several layers of administrative offices within the USDA. First, Congress delegated the administration of the OFPA to the USDA.<sup>50</sup> In turn, the USDA delegated the functions of the Act to its sub-agency, the Agricultural Marketing Service (AMS).<sup>51</sup> One of the functions of the AMS is to ensure that "organically produced products meet uniform standards and that they are appropriately labeled."<sup>52</sup> To administer the national organic standards, the USDA created the National Organic Program (NOP).<sup>53</sup> The term "NOP" is used to refer both to the organization that administers

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<sup>40</sup> 7 U.S.C. § 6517(c)(1)(A).

<sup>41</sup> *Id.* § 6517(c)(1)(A)(i),(ii).

<sup>42</sup> *Id.* § 6517(b); *see also* 7 C.F.R. § 205.600.

<sup>43</sup> 7 U.S.C. § 6517(c)(1)(B)(ii).

<sup>44</sup> *Id.* § 6518.

<sup>45</sup> *Id.* § 6518(b).

<sup>46</sup> *Id.* § 6518(k)(2).

<sup>47</sup> *Id.* § 6517(d)(4).

<sup>48</sup> *Id.* § 6517(d)(5).

<sup>49</sup> 7 C.F.R. § 205.601 (2011).

<sup>50</sup> 7 U.S.C. § 6521 (2011).

<sup>51</sup> OFFICE OF INSPECTOR GEN., U.S. DEP'T OF AGRIC., OVERSIGHT OF THE NATIONAL ORGANIC PROGRAM, AUDIT REPORT 01601-03-Hy 5 (2010), *available at* <http://www.usda.gov/oig/webdocs/01601-03-HY.pdf>.

<sup>52</sup> OFFICE OF INSPECTOR GEN., U.S. DEP'T OF AGRIC., AUDIT REPORT NO. 01001-02-HY, AGRIC. MKTG. SERV.'S NATIONAL ORGANIC PROGRAM (2005), *at i*, *available at* <http://www.usda.gov/oig/webdocs/01001-02-HY.pdf>.

<sup>53</sup> OFFICE OF INSPECTOR GEN., U.S. DEP'T OF AGRIC., AUDIT REPORT 01601-03-HY, *supra* note 51, *at* 5.



the national organic standards (the NOP Office)<sup>54</sup> as well as the rules themselves (the NOP regulations).<sup>55</sup> The NOP Office leads and oversees all of the activities of the NOP, which is further supported by three organizational units: the Standards Division, the Accreditation and International Activities Division, and the Compliance and Enforcement Division.<sup>56</sup>

#### 4. Accreditation and Certification

To ensure that organic farmers and handlers comply with national organic standards, the OFPA provides for a two-tier regulatory scheme of accreditation<sup>57</sup> and certification.<sup>58</sup> The USDA first accredits certifying agents, which can be either governing state officials or private persons.<sup>59</sup> In turn, the accredited agents certify applicants as organic producers or handlers who, in compliance with the OFPA, can sell or label their products as “organically produced.”<sup>60</sup>

For USDA accreditation, a prospective agent must have expertise in organic farming and handling, although an advanced degree in a scientific discipline is not necessary.<sup>61</sup> To further ensure a high degree of integrity and consistency among certifying agents, the OFPA provides that the USDA may establish a peer review committee consisting of persons with expertise in organic farming and handling methods.<sup>62</sup> Unfortunately, in the two decades since enactment of the OFPA, the USDA has never formed such a peer review committee.<sup>63</sup> When approved, an agent’s accreditation lasts five years and may be renewed as long as the agent demonstrates the ability, and sufficiently trained personnel, to comply with the law.<sup>64</sup> The OFPA requires an agent to conduct annual performance evaluations of all persons who review certification applications, perform and document on-site certifications, or make certification decisions.<sup>65</sup> The agent must also maintain certification records for USDA inspection<sup>66</sup> and, except for business related information,<sup>67</sup> provide public access to certification documents and

<sup>54</sup> For a detailed description of the NOP as an administrative office, see AGRIC. MKTG. SERV., U.S. DEP’T OF AGRIC., NATIONAL ORGANIC PROGRAM ORGANIZATIONAL STRUCTURE 1–2 (July 13, 2010), available at <http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5086500>.

<sup>55</sup> See 7 C.F.R. § 205.1–205.699 (2011).

<sup>56</sup> AGRIC. MKTG. SERV., U.S. DEP’T OF AGRIC., NATIONAL ORGANIC PROGRAM STRATEGIC PLAN 1 (Aug. 2010), available at <http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5086491>.

<sup>57</sup> 7 U.S.C. § 6514 (2006).

<sup>58</sup> *Id.* § 6506.

<sup>59</sup> *Id.* § 6514.

<sup>60</sup> *Id.* § 6506(a)(1).

<sup>61</sup> S. REP. NO. 101–357, at 294 (1990), reprinted in 1990 U.S.C.C.A.N. 4943, 4948.

<sup>62</sup> *Id.*

<sup>63</sup> OFFICE OF INSPECTOR GEN., U.S. DEP’T OF AGRIC., AUDIT REPORT 01601-03-HY, *supra* note 51, at 3 (“We found that NOP officials did not assemble a peer review panel to annually evaluate their accreditation procedures.”).

<sup>64</sup> National Organic Program, 7 C.F.R. § 205.501(a)(1)–(5) (2011).

<sup>65</sup> *Id.* § 205.501(a)(6).

<sup>66</sup> *Id.* § 205.501(a)(9).

<sup>67</sup> *Id.* § 205.501(a)(9)–(10).

laboratory analyses that pertain to certifications.<sup>68</sup>

Under the OFPA, an operation that applies for organic certification pays an accredited agent for inspection and certification.<sup>69</sup> To prevent conflicts of interest, the OFPA sets forth strict rules to govern the relationship between an accredited agent and its client.<sup>70</sup> Thus, an accredited agent must not have a commercial interest in an operation that it inspects, including the provision of consultancy services.<sup>71</sup> An agent must also not accept gifts or favors of any kind from the operation the agent inspects.<sup>72</sup> The Act further prohibits an agent from charging its client a fee for advice on proper organic practices or technologies to use.<sup>73</sup>

### 5. Organic Products and Labeling

Table 1: Organic Labeling Types and Requirements

Type and Requirement	The USDA Seal	Certifying Agent Logo
100% Organic	Yes	Yes
Organic (>95%)	Yes	Yes
Made with organic (70% to 95%)	No	Yes
<70%	No	No

Under the applicable regulations, there are three layers of organic products: (1) 100% organic, (2) organic, and (3) made with organic.<sup>74</sup> A product sold as "100% organic" must contain (by weight or fluid volume, excluding water and salt) 100% organically produced ingredients.<sup>75</sup> A 100% organic product may display on its packaging the certifying agent's logo and the USDA seal.<sup>76</sup> A product sold as "organic" must contain (by weight or fluid volume, excluding water and salt) not less than 95% organically produced raw or processed agricultural products.<sup>77</sup> An organic product may also display on its packaging the certifying agent's logo and

<sup>68</sup> 7 U.S.C. § 6505(a)(9) (2006).

<sup>69</sup> *Id.* § 6506(a)(10).

<sup>70</sup> *Id.* § 6514(h).

<sup>71</sup> *Id.* § 6514(h)(1).

<sup>72</sup> *Id.* § 6514(h)(2).

<sup>73</sup> *Id.* § 6514(h)(3).

<sup>74</sup> See National Organic Program, 7 C.F.R. § 205.301(a)–(c) (2011).

<sup>75</sup> *Id.* § 205.301(a).

<sup>76</sup> *Id.* § 205.303(a)(1).

<sup>77</sup> *Id.* § 205.301(b).

the USDA seal.<sup>78</sup> A product sold as “made with organic,” specifying which ingredients are organic, must contain (by weight or fluid volume, excluding water and salt) at least 70% organically produced ingredients.<sup>79</sup> A product made with organic ingredients may display on its packaging the certifying agent’s logo but not the USDA seal.<sup>80</sup>

## 6. Penalties

If a certified operation knowingly sells or labels a product as organic when it is not in compliance with the OFPA, the operation is subject to suspension or revocation of its organic certification.<sup>81</sup> An operation whose certification has been revoked becomes ineligible to receive certification for a period of five years following the date of revocation.<sup>82</sup> In addition, such an operation can be assessed a civil penalty of up to \$10,000 per violation.<sup>83</sup> If an operation knowingly makes a false statement to the USDA or its certifying agent regarding its compliance with organic regulations, it is subject to a criminal penalty of up to five years imprisonment.<sup>84</sup> Penalties for a nonconforming certifying agent, however, are more lenient. If a certifying agent willfully violates the OFPA or the NOP, the maximum penalty is revocation or suspension of its accreditation.<sup>85</sup> A certifying agent whose accreditation has been revoked becomes ineligible to receive accreditation as a certifying agent for a period of up to three years following the date of revocation.<sup>86</sup>

## C. Challenges for Enforcing the OFPA and the NOP Regulations<sup>87</sup>

### 1. *Harvey v. Veneman and the 2005 OFPA Amendments*

The USDA’s eventual promulgation of the NOP raised significant concerns. In 2003, Arthur Harvey, a producer, handler, and consumer of organic crops, filed a lawsuit against the USDA alleging that several provisions of the NOP diluted the national organic standards established by the OFPA and thus violated the Act.<sup>88</sup> Harvey further alleged that he suffered individualized harm as a result of the weakened integrity of organic standards and degraded quality of organically

<sup>78</sup> *Id.* § 205.303(a)(1).

<sup>79</sup> *Id.* § 205.301(c)(2).

<sup>80</sup> *Id.* § 205.303(c).

<sup>81</sup> *Id.* § 205.662(g)(1).

<sup>82</sup> *Id.* § 205.662(f)(2).

<sup>83</sup> 7 U.S.C. § 6519 (2006); *see also* 7 C.F.R. § 205.662(g)(1).

<sup>84</sup> 7 C.F.R. § 205.662(g)(2); *see also* 18 U.S.C. § 1001 (2006).

<sup>85</sup> 7 C.F.R. § 205.665(d)–(g).

<sup>86</sup> *Id.* § 205.665(g)(2).

<sup>87</sup> Kimberly Kindy, *USDA’s Deputy Secretary Discusses Challenges for Organic Food Market*, WASH. POST, Apr. 6, 2010, at A11, available at [http://www.washingtonpost.com/wp-dyn/content/article/2010/04/05/AR2010040504599\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2010/04/05/AR2010040504599_pf.html).

<sup>88</sup> *Harvey v. Veneman* (*Harvey I*), 396 F.3d 28, 32 (1st Cir. 2005).

labeled foods caused by the NOP.<sup>89</sup> Among his seven claims, Harvey challenged two parts of the NOP that permitted synthetic substances to be used in processed organic foods.<sup>90</sup> The court agreed with Harvey that the OFPA only permitted "certain synthetic substances during production or growing of organic products, but not during the handling and processing stages."<sup>91</sup> Accordingly, the court concluded that these challenged NOP provisions were inconsistent with the plain language of the OFPA<sup>92</sup> and the USDA exceeded its authority to permit the use of synthetic material in the handling or processing of organic food.<sup>93</sup>

Harvey also argued that the NOP provision regarding the conversion of dairy herds to organic production was inconsistent with the OFPA. Specifically, the OFPA required that a dairy farm maintain a mandatory twelve month period of 100% organic feed for its herds prior to selling or labeling its products as organic,<sup>94</sup> whereas the NOP provision only required 80% organic feed during the first nine

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 33. The two provisions that Harvey challenged were 7 C.F.R. §§ 205.600(b) & 205.605(b).  
§ 205.600 Evaluation criteria for allowed and prohibited substances, methods, and ingredients.

The following criteria will be utilized in the evaluation of substances or ingredients for the organic production and handling sections of the National List:

[...]

(b) In addition to the criteria set forth in the Act, any synthetic substance used as a processing aid or adjuvant will be evaluated against the following criteria:

(1) The substance cannot be produced from a natural source and there are no organic substitutes;

(2) The substance's manufacture, use, and disposal do not have adverse effects on the environment and are done in a manner compatible with organic handling;

(3) The nutritional quality of the food is maintained when the substance is used, and the substance, itself, or its breakdown products do not have an adverse effect on human health as defined by applicable Federal regulations;

(4) The substance's primary use is not as a preservative or to recreate or improve flavors, colors, textures, or nutritive value lost during processing, except where the replacement of nutrients is required by law;

(5) The substance is listed as generally recognized as safe (GRAS) by Food and Drug Administration (FDA) when used in accordance with FDA's good manufacturing practices (GMP) and contains no residues of heavy metals or other contaminants in excess of tolerances set by FDA; and

(6) The substance is essential for the handling of organically produced agricultural products.

§ 205.605 Nonagricultural (nonorganic) substances allowed as ingredients in or on processed products labeled as "organic" or "made with organic (specified ingredients or food group(s))."

The following nonagricultural substances may be used as ingredients in or on processed products labeled as "organic" or "made with organic (specified ingredients or food group(s))" only in accordance with any restrictions specified in this section.

<sup>91</sup> Before the amendment in 1991, 7 U.S.C. § 6517 provided that:

The national list may provide for the use of substances in an organic farming or handling operation that are otherwise prohibited under this title only if . . .

(B) the substance—

is used in production and contains an active synthetic ingredient in the following categories . . .

is use in production and contains synthetic inert ingredients that are not classified by the Administrator of the Environmental Protection Agency as inert of toxicological concern; or is used in handling and i[s] non-synthetic but is not organically produced . . .

<sup>92</sup> *Harvey I*, 396 F.3d at 40.

<sup>93</sup> *Id.* at 39.

<sup>94</sup> The OFPA provides: "[A] dairy animal from which milk or milk products will be sold or labeled as organically produced shall be raised and handled in accordance with this chapter for not less than the 12-month period immediately prior to the sale of such milk and milk products." 7 U.S.C. § 6509(e)(2).

months and 100% organic feed for the final three months.<sup>95</sup> Thus, Harvey challenged that the NOP provision substantially reduced the organic standards for milk or milk products.<sup>96</sup> While admitting to the deviation of the NOP from the OFPA requirement regarding dairy herd conversion, the USDA argued that it had the discretion to create an exception for the conversion requirement on which the OFPA remained silent.<sup>97</sup> The court disagreed with the USDA and ruled that, because the OFPA had already set forth clear requirements for dairy conversion, “the [USDA] may not promulgate a regulation directly at odds with those statutory requirements.”<sup>98</sup> In the end, the USDA reached a settlement agreement with Harvey, which included a promise not to permit the use of synthetic ingredients in the processing of organic products.<sup>99</sup>

Harvey’s victory, however, was short lived. Soon after the court ruled in Harvey’s favor, Congress reacted with the passage of OFPA amendments in 2005.<sup>100</sup> In essence, the 2005 amendments overruled *Harvey I* and made the challenged NOP provisions legitimate. Specifically, the amendments made three significant changes. First, they extended the permissible use of synthetic substances on the National List to the handling and processing of organic products.<sup>101</sup> Second, they granted the USDA authority to add any synthetic ingredient to the National List for use not only in organic production but also in the handling and processing of organic products.<sup>102</sup> Third, they stated that “crops and forage from land included in the organic system plan of a dairy farm that is in the third year of organic management may be consumed by the dairy animals of the farm during the 12-month period immediately prior to the sale of organic milk and milk products.”<sup>103</sup> Therefore, dairy cows could be given feed that would not qualify as organic products and their milk could still be sold and labeled as organically produced.<sup>104</sup>

Despite the amendments, Harvey mounted yet another legal challenge to the NOP and tried to enforce the USDA’s previous promise to prevent the use of

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<sup>95</sup> *Harvey I*, 396 F.3d at 43: When the entire, distinct herd is converted to organic production, the producer may:

For the first 9 months of the year, provide a minimum of 80-percent feed that is either organic or raised from land included in the organic system plan and managed in compliance with organic crop requirements; and

Provide feed in compliance with § 205.237 for the final 3 months.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 43.

<sup>98</sup> *Id.* at 44.

<sup>99</sup> *Harvey v. Johanns (Harvey II)*, 494 F.3d. 237, 239 (1st Cir. 2007).

<sup>100</sup> *Id.* at 239.

<sup>101</sup> *Id.* at 239–40.

<sup>102</sup> *Id.*

<sup>103</sup> Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109–97, § 797, 119 Stat. 2120, 2165 (2005), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109\\_cong\\_public\\_laws&docid=f:publ097.109](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_public_laws&docid=f:publ097.109).

<sup>104</sup> The NOP regulations state: “Any field or farm parcel from which harvested crops are intended to be sold, labeled, or represented as ‘organic,’ must: . . . (b) Have had no prohibited substances, as listed in § 205.105, applied to it for a period of 3 years immediately preceding harvest of the crop; and . . .” 7 C.F.R. § 205.202 (2011). Thus, crops and forage in the third year of transition to organic farming are not organic products.

synthetic ingredients in the processing of organic products.<sup>105</sup> This time, however, Harvey predicated his case on linguistic rather than legal grounds, alleging that the choice of words in the 2005 amendments still supported his claims.<sup>106</sup> Refusing to play this word game, the court ruled in the USDA's favor after a short deliberation.<sup>107</sup> Indeed, the court humorously reasoned that the 2005 amendments had already pulled "the legs out from under" *Harvey I*.<sup>108</sup> In light of how these new changes were made to the OFPA, the NOP is likely to withstand any similar challenges in the future.

## 2. *Massachusetts Independent Certification, Inc. v. Johanns*

The case of *Massachusetts Independent Certification, Inc. (MICI) v. Johanns*<sup>109</sup> marked another setback for consumers of organic products whose reliance on the integrity of organic standards necessarily depends on organic certifiers' rigorous enforcement of the OFPA and the NOP. MICI was a private organic certifier accredited by the USDA.<sup>110</sup> In 2002, The Country Hen applied to MICI for organic certification of its egg-farming operation.<sup>111</sup> After inspecting The Country Hen's facilities, MICI found "four areas of noncompliance, including [a] failure to provide hens with access to the outdoors as required by NOP regulations."<sup>112</sup> In fact, "[u]nknown to MICI, The Country Hen had previously applied for organic certification [from] another certification agent, which rejected the application on the same grounds ultimately cited by MICI."<sup>113</sup> MICI issued a notice of noncompliance and gave The Country Hen three months to take corrective actions.<sup>114</sup> Shortly after the inspection, The Country Hen submitted to MICI a plan for providing outdoor access to its hens.<sup>115</sup> However, MICI concluded that the proposed plan was inadequate under NOP regulations and issued a notice of denial of certification.<sup>116</sup>

During the time it applied to MICI for organic certification, The Country Hen also submitted a proposed egg carton bearing the "USDA Organic" seal to a NOP program manager.<sup>117</sup> The Country Hen claimed its operation, feed, and eggs were "certified organic by NOFA/Mass."<sup>118</sup> Without consulting with MICI, the NOP program manager approved the egg carton before MICI denied The Country Hen's application.<sup>119</sup>

<sup>105</sup> *Harvey v. Johanns (Harvey II)*, 494 F.3d. 237 (1st Cir. 2007).

<sup>106</sup> *Id.* at 241.

<sup>107</sup> Unlike in *Harvey I*, the Court did not elaborate on its decision in *Harvey II*.

<sup>108</sup> *Id.* at 241.

<sup>109</sup> *Mass. Indep. Certification, Inc. v. Johanns (MICI)*, 486 F. Supp. 2d 105 (D. Mass. 2007).

<sup>110</sup> *Id.* at 112.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 113.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 112.

The Country Hen appealed MICI's decision to deny its organic certification application to the USDA Administrator for the Agriculture Marketing Service (AMS).<sup>120</sup> Three days later, the AMS Administrator sustained the appeal and directed MICI to grant certification to The Country Hen.<sup>121</sup> MICI refused to follow AMS's instruction.<sup>122</sup> Nevertheless, The Country Hen quickly released to market its eggs packed in cartons bearing the "USDA Organic" seal and a statement that The Country Hen, its eggs, and feed were "certified organic by NOFA/Mass."<sup>123</sup> MICI repeatedly demanded that The Country Hen stop claiming it was NOFA/Mass certified.<sup>124</sup> The Country Hen, however, continued to use the label until it obtained an organic certification from another certifier several months later.<sup>125</sup>

MICI's efforts to repeal The Country Hen's organic certification were persistent. The certifier filed a complaint with both the USDA Office of Administrative Law Judges and the USDA Judicial Officer, seeking to overturn the Administrator's decision to grant organic certification to The Country Hen.<sup>126</sup> MICI alleged that the USDA had violated the requirements of due process by granting direct certification regardless of a certifier's objections.<sup>127</sup> Both offices dismissed MICI's complaint for lack of subject-matter jurisdiction.<sup>128</sup> Afterwards, MICI brought a civil action against the USDA seeking declaratory and injunctive relief from the NOP regulations that apparently denied MICI a right to an administrative appeal of USDA certification decisions.<sup>129</sup>

After applying the analytical framework established in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>130</sup>, the Court concluded the NOP regulations were not arbitrary, capricious, or manifestly contrary to the statute, and ruled against MICI.<sup>131</sup>

The *MICI* court may have skillfully applied the *Chevron* test and properly denied certifying agents a right to appeal USDA decisions. The case itself, however, reveals a serious flaw in the existing certification process. Under the OFPA and the NOP, certifying agents are the first reviewers of applications for

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<sup>120</sup> *Id.* at 113.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* ("On October 28, 2002, MICI sent a letter to the Administrator objecting both to the procedure followed in deciding The Country Hen's appeal and the substance of the October 25 decision. After receiving no response, MICI filed a complaint with the USDA Office of Administrative Law Judges, petitioning to overturn the Administrator's decision and alleging that USDA had violated due process requirements.").

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). In *Chevron*, the Supreme Court set forth a two-step analysis for reviewing an agency's statutory interpretation. The first step is to determine "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If Congress's intent is clear, then the second step is to determine whether the regulation "give[s] effect to the unambiguously expressed intent of Congress." *Id.* at 843. If Congress's intent is ambiguous, however, then the second step is to give the regulation "controlling weight unless it is arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844.

<sup>131</sup> See *MICI*, 486, F. Supp. 2d at 119-120.

organic certification.<sup>132</sup> If a certifying agent denies an applicant's certification, the applicant has a right to appeal the decision to the USDA.<sup>133</sup> If the USDA sustains the appeal, the applicant can market its products as certified organic, bearing the "USDA Organic" seal.<sup>134</sup> Even if the certifying agent has sufficient reasons to disagree with the USDA decision, it does not have a right to administratively appeal the decision or even, according to the holding in *MICI*, to challenge the decision in court.

This critical exclusion of certifying agents essentially strips consumers of a necessary layer of protection from substandard or bogus organic products. When Congress enacted the OFPA in 1990, it did not create a new network of USDA certifying agents.<sup>135</sup> Instead, Congress decided to utilize the then-existing private certification programs, "allowing those independent third parties to become accredited and certify operations in the field."<sup>136</sup> Unlike federal agencies, certifying agents are privately owned and independent economic entities. To preserve their own credibility and market viability, certifying agents have a vested interest in enforcing OFPA standards. It is the certifying agents, not USDA officials, who conduct the field investigations of applicants' facilities and production processes. Due to budgetary constraints, the USDA does not have the necessary staff and resources to conduct thorough reviews for proper certifications.<sup>137</sup> In *MICI*, The Country Hen concealed that it had been denied organic certification by a previous certifying agent. Both *MICI* and the previous agent discovered the same noncompliance—lack of outdoor activity for hens. The only effect the *MICI* decision can have is to embolden applicants to game the system by shopping around for favorable certifying agents until they finally acquire approval without addressing their noncompliance issues. Certifying agents play a vital role in safeguarding organic standards and their denials of certification should carry more weight.

### 3. Residue Testing

Despite the fact that the OFPA focuses on production processes rather than the products, the Act does "require periodic residue testing by certifying agents of agricultural products that have been produced on certified organic farms and handled through certified organic handling operations."<sup>138</sup> Indeed, Congress realized the importance of residue testing while deliberating on the passage of the Act in 1990. In pertinent part, the corresponding Senate Report explained the rationale for the OFPA requirement of residue testing of organic products. First, residue testing is important to ensure the "honesty of the system" and prevent mislabeling.<sup>139</sup> If the testing reveals any detectable residue of prohibited substances

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<sup>132</sup> *Id.* at 110.

<sup>133</sup> *Id.* at 111.

<sup>134</sup> *Id.* at 113.

<sup>135</sup> *Id.* at 109.

<sup>136</sup> *Id.*

<sup>137</sup> See *infra* Part 2.3D.

<sup>138</sup> 7 U.S.C. § 6506(a)(6) (2006).

<sup>139</sup> S. REP. NO. 101-357, at 294 (1990), reprinted in 1990 U.S.C.C.A.N. 4943, 4954.



in a product labeled as organically produced, it would be incumbent on the certifying agent<sup>140</sup> to conduct an investigation to determine whether the producer has violated the OFPA and governing regulations.<sup>141</sup> Second, the Senate committee acknowledged that most consumers expect organically produced products to have fewer residues as compared with conventionally grown products.<sup>142</sup> Accordingly, residue testing is an important tool to “ensure that consumers are getting what they pay for.”<sup>143</sup>

The Senate took a pragmatic approach in implementing the residue testing requirement. While recognizing the importance of testing, the Senate had no intention to make organic food absolutely residue free. The Senate committee found that a product should not be labeled organic if it contains prohibited materials at a level that is greater than what would unavoidably occur as a result of residual environmental contamination.<sup>144</sup> Prior to the OFPA, some states had very strict requirements regarding acceptable residue levels. For example, New Hampshire required residual contamination in organic food to not exceed 1% of the applicable EPA tolerance level.<sup>145</sup> The Senate maintained that the standard tolerance level should adjust to developments in technology and knowledge concerning such contaminants.<sup>146</sup> Consequently, it did not set a specific level and instead recommended a range from 1% to 10% of the applicable EPA tolerance level.<sup>147</sup> In effect, the Senate left the question open for the USDA and NOSB to determine the level of contamination to tolerate.<sup>148</sup> The Senate also delegated to the USDA, the states, and certifying agents the task of deciding on the appropriate frequency for certifying agents to test organic products.<sup>149</sup>

Since the establishment of the NOP in 2002, however, the NOP regulations have largely ignored the original intent of the OFPA regarding residue testing.<sup>150</sup> That is, the NOP regulations do not mandate residue testing.<sup>151</sup> Instead, the regulations have deferred the decision on whether to test organic products to the USDA AMS Administrator, state officials, and certifying agents. According to the NOP regulations, residue testing *may* be performed “when there is reason to believe that the agricultural input or product has come into contact with a prohibited substance or has been produced using excluded methods.”<sup>152</sup> More importantly, the

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<sup>140</sup> *Id.*, reprinted in 1990 U.S.C.C.A.N. 4943, 4955. “Certifying agents will oversee the residue testing.”

<sup>141</sup> *Id.* at 4954.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 4955.

<sup>149</sup> *Id.*

<sup>150</sup> OFFICE OF INSPECTOR GEN., U.S. DEP’T OF AGRIC., AUDIT REPORT 01601-03-Hy, *supra* note 51, at 2–3.

<sup>151</sup> Friedland, *supra* note 15, at 393.

<sup>152</sup> 7 C.F.R. § 205.670 (2011):

(b) The Administrator, applicable State organic program’s governing State official, or the certifying agent may require pre-harvest or postharvest testing of any agricultural input used or agricultural product to be sold, labeled, or represented as “100 percent organic,” “organic,” or “made with organic (specified ingredients or food group(s))” when there is

state officials and certifying agents who conduct such testing must bear the costs.<sup>153</sup>

Clearly, the NOP regulations have substantially deviated from the OFPA’s requirement for residue testing. First the NOP regulations use the word “may” to make the testing voluntary,<sup>154</sup> whereas the OFPA unambiguously mandates certifying agents to test organic products on a periodic basis.<sup>155</sup> Second, such voluntary testing may be performed only when the officials or certifying agents have reason to suspect the quality of an organic product has been compromised in some way.<sup>156</sup> In fact, the NOP regulations inherently add another hurdle in the guise of free market competition to dissuade the performance of residue testing. Under the current system, applicants for organic certification pay certifying fees and are free to choose certifying agents, thereby putting certifying agents in competition to attract applicants.<sup>157</sup> As a result, certifying agents have been reluctant to critically evaluate applicants for fear of losing business.<sup>158</sup> By leaving the discretionary testing decision to certifying agents, who have no incentive to perform the necessary testing, the NOP regulations have effectively eliminated the residue testing requirement. Indeed, after reviewing the OFPA and the NOP regulations, the USDA Inspector General concluded that the regulations are not in compliance with the requirement of the OFPA.<sup>159</sup> Therefore, it is not surprising that certifying agents have rarely performed residue testing in the twenty years since enactment of the OFPA.<sup>160</sup>

The notion that organic products can reach the market without any type of residue testing is probably inconceivable to consumers who strongly believe

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reason to believe that the agricultural input or product has come into contact with a prohibited substance or has been produced using excluded methods. Such tests must be conducted by the applicable State organic program’s governing State official or the certifying agent at the official’s or certifying agent’s own expense.

[. . .]

(d) Results of all analyses and tests performed under this section:

- (1) Must be promptly provided to the Administrator; Except, That, where a State organic program exists, all test results and analyses shall be provided to the State organic program’s governing State official by the applicable certifying party that requested testing; and
- (2) Will be available for public access, unless the testing is part of an ongoing compliance investigation.

(e) If test results indicate a specific agricultural product contains pesticide residues or environmental contaminants that exceed the Food and Drug Administration’s or the Environmental Protection Agency’s regulatory tolerances [sic], the certifying agent must promptly report such data to the Federal health agency whose regulatory tolerance or action level has been exceeded.

7 C.F.R. § 205.671 (2011). When residue testing detects prohibited substances at levels that are greater than 5 percent of the Environmental Protection Agency’s tolerance for the specific residue detected or unavoidable residual environmental contamination, the agricultural product must not be sold, labeled, or represented as organically produced. The Administrator, the applicable State organic program’s governing State official, or the certifying agent may conduct an investigation of the certified operation to determine the cause of the prohibited substance.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> 7 U.S.C.A. § 6506(a)(6) (West 2011).

<sup>156</sup> 7 C.F.R. § 205.670(b).

<sup>157</sup> Friedland, *supra* note 15, at 394.

<sup>158</sup> *Id.*

<sup>159</sup> OFFICE OF INSPECTOR GEN., U.S. DEP’T OF AGRIC., AUDIT REPORT 01601-03-Hy, *supra* note 51, at 17.

<sup>160</sup> *Id.*

organics are residue-free. Yet, a 2010 report by the USDA Inspector General revealed that four of the largest certifiers, who oversaw almost one third of the organic operations nationwide, had never done regular spot testing of organic products for residues.<sup>161</sup> As a result, the Inspector General urged the USDA to institute a residue testing program to help guarantee the integrity of organic products.<sup>162</sup> In fact, the USDA planned to require certifying agents to perform random spot tests starting in September 2010.<sup>163</sup> Yet, at the time of this writing, the USDA has not released any details for standard testing methods.<sup>164</sup>

#### 4. Lack of Oversight and Organic Fraud

Since the NOP regulations were created in 2002, the USDA Office of the Inspector General has conducted two internal audits to assess the effectiveness of the NOP Office in enforcing the regulations.<sup>165</sup> In its latest audit report in March 2010, the Inspector General identified several serious problems.<sup>166</sup>

First, the NOP Office has failed to act appropriately upon a number of AMS recommendations to take enforcement actions against operations that have violated the law. From 2006 to 2008, the AMS found that five out of eight certified organic operations it investigated had violated the law.<sup>167</sup> Notably, the Inspector General report did not identify the names of the violators. One operation was found to have knowingly marketed nonorganic mint under the USDA organic label “on 22 separate occasions and used a prohibited pesticide.”<sup>168</sup> As a result, the certifying agent revoked the operation’s organic certification.<sup>169</sup> Given the willful nature of the violation, the AMS asked the NOP Office to impose civil penalties on the operation in addition to revocation of certification.<sup>170</sup> According to the regulations, “any certified operation that knowingly sells or labels a product as organic shall be subject to a civil penalty of not more than \$11,000 per violation.”<sup>171</sup> The NOP Office, however, refused to impose such penalties claiming that the regulations did not clearly indicate which agency was responsible for imposing civil fines.<sup>172</sup> A former NOP Office director revealed the real reasons for the NOP’s reluctance to enforce the law: The NOP Office lacked not only the resources to act upon such

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<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 18.

<sup>163</sup> William Neuman, *U.S. Plans Spot Tests of Organic Products*, N.Y. TIMES, Mar. 20, 2010, at B1: “The inspector general’s report said a review of four large certifiers, which were collectively responsible for inspecting almost a third of the organic operations nationwide, found that none did regular spot testing.”

<sup>164</sup> *Id.*

<sup>165</sup> See generally OFFICE OF INSPECTOR GEN., U.S. DEP’T OF AGRIC., AUDIT REPORT NO. 01001-02-HY, *supra* note 52; OFFICE OF INSPECTOR GEN., U.S. DEP’T OF AGRIC., AUDIT REPORT 01601-03-HY, *supra* note 51 (discussing results of two internal audits of NOP Office in 2005 and 2010, respectively).

<sup>166</sup> OFFICE OF INSPECTOR GEN., U.S. DEP’T OF AGRIC., AUDIT REPORT 01601-03-HY, *supra* note 51, at 2–4.

<sup>167</sup> *Id.* at 8.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 8–9.

<sup>170</sup> *Id.* at 9.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

complaints but also the internal procedures on how to handle such complaints and a timeframe to resolve pending issues.<sup>173</sup>

Furthermore, the NOP Office did not even have a formal method to keep track of complaints and violating firms. In one case, the AMS found that a noncompliant operation, whose organic certification was suspended for violation of the law, had continued to market fruits and vegetables as certified organic products online.<sup>174</sup> When the AMS referred the case to the NOP Office, it was not even aware of the operation's continuing violations.<sup>175</sup> The incident demonstrated that the NOP Office had no mechanism to monitor violating firms to ensure compliance. In other cases, the NOP Office delayed actions against violating operations for as long as thirty-two months and, during the delays, "the operations continued to improperly market their products as certified organic."<sup>176</sup>

Second, in addition to clear deviations between the NOP's regulations and the OFPA's requirements, the NOP Office has not even observed its own regulations.<sup>177</sup> For example, the audit report noted that the AMS did not have a peer review panel to scrutinize the NOP Office's decisions to accredit certifying agents.<sup>178</sup> The NOP regulations require the NOP Office to create a peer review panel, which is also required by the Federal Advisory Committee Act (FACA).<sup>179</sup> This panel would be responsible for conducting an annual review of "both the NOP's accreditation decisions and its adherence to the accreditation procedures within the regulations."<sup>180</sup> However, such a review panel has never been established since the NOP regulations were promulgated in 2002.<sup>181</sup> In other words, the NOP's decisions to accredit certifying agents have never been subject to any form of external review for the entire time the NOP has existed. The American National Standards Institute (ANSI) found that the NOP Office did not even have "documented policies and procedures for managing the accreditation of certifying agents."<sup>182</sup> When the Inspector General raised this issue with the NOP Office, the NOP officials attributed the deficiencies to budgetary constraints and other

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<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 10.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 8.

<sup>177</sup> *Id.* at 18.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*; see also Federal Advisory Committee Act (FACA), 5 U.S.C.A. App. 2 § 7(b) (West 2011).

(b) The Administrator shall . . . institute a comprehensive review of the activities and responsibilities of each advisory committee to determine—

(1) whether such committee is carrying out its purpose;

(2) whether, consistent with the provisions of applicable statutes, the responsibilities assigned to it should be revised . . .

The Administrator may from time to time request such information as he deems necessary to carry out his functions under this subsection. Upon the completion of the Administrator's review he shall make recommendations to the President and to either the agency head or the Congress with respect to action he believes should be taken. Thereafter, the Administrator shall carry out a similar review annually. Agency heads shall cooperate with the Administrator in making the reviews required by this subsection.

<sup>180</sup> OFFICE OF INSPECTOR GEN., U.S. DEP'T OF AGRIC., AUDIT REPORT 01601-03-HY, *supra* note 51, at 18.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

difficulties in forming a peer review panel each year.<sup>183</sup> In fact, the NOP Office has never requested additional funding for the panel.<sup>184</sup> The Inspector General expressed serious concerns that the absence of a peer review panel would reduce the overall integrity of the organic program.<sup>185</sup>

Another example of unobserved regulations: For organic livestock, the NOP regulations require “access to the outdoors, shade, shelter, exercise areas, fresh air, and direct sunlight suitable to each species, its stage of production, the climate, and the environment.”<sup>186</sup> However, the regulations do not specify standards for either the duration or dimensions of an animal’s access to the outdoors.<sup>187</sup> Moreover, the NOP Office has yet to provide certifying agents with any guidance on implementing the regulations’ mandate for livestock access to the outdoors.<sup>188</sup> As a result, certifying agents have adopted vastly different standards, if any, for livestock access to the outdoors. Among four certifying agents that the Inspector General audited, only one agent had a dimension requirement for poultry.<sup>189</sup> One certified facility had only three hundred square feet of outdoor access for 15,000 chickens, while two other certified facilities had much larger pastures for outdoor access and “significantly fewer birds.”<sup>190</sup> Such obvious disparities in standards can only compel a race-to-the-bottom problem. The facility that provides greater access to the outdoors and the one that does not are both certified as organic, albeit by different certifying agents. Consumers cannot tell the difference between the two products on grocery store shelves because they are both certified organic and bear the “USDA Organic” seal. Thus, the phenomenon of adverse selection ensures that, in the long run, the facility required to provide greater access to the outdoors will not be able to compete with the facility that can cut corners. In such a situation, both producers and certifying agents have an incentive to keep lowering standards in order to effectively stay in business.

Third, the NOP has been lax in regulating foreign certifying agents. The NOP regulations require the NOP Office to conduct an initial site evaluation “within a reasonable timeframe” after accreditation has been granted to a certifying agent.<sup>191</sup> Such an onsite review is necessary for ensuring the accredited agent’s compliance with the law in its certification processes. The audit report suggested that when the NOP Office conducted onsite visits, it often found noncompliance issues with accredited agents.<sup>192</sup> For example, the NOP Office found that some

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<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 22; see also 7 C.F.R. § 205.239(a)(1) (2011).

<sup>187</sup> OFFICE OF INSPECTOR GEN., U.S. DEP’T OF AGRIC., AUDIT REPORT 01601-03-HY, *supra* note 51, at 22.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 28.

<sup>192</sup> *Id.* at 28–29. NOP identified major noncompliances during the initial onsite reviews of seven of these ten agents. Some of the major noncompliances included:

- Failure to identify noncompliances, such as mislabeled product and the use of uncertified organic feed, at its certified operations (NOP regulations require certifying agents to have adequate expertise to ensure its certified operations are complying with the regulations);
- Failure to maintain complete certification files as part of the initial accreditation process. (NOP

certifying agents failed to identify mislabeled products and the use of uncertified organic feed at certified operations.<sup>193</sup> It also found that some certifying agents failed to keep all proper records related to their certification activities.<sup>194</sup>

Clearly, the NOP Office’s site evaluations of certifying agents are indispensable for ensuring the integrity of certified organics.<sup>195</sup> However, the NOP Office has not always conducted the required site visits. The Inspector General discovered that the NOP Office failed to conduct initial onsite evaluations for five foreign certifying agents for as long as seven years after the Office conditionally accredited the agents.<sup>196</sup> These five agents collectively certified 1500 organic operations.<sup>197</sup> The NOP officials explained that they were unable to visit the agents because their countries were under travel warnings issued by the U.S. Department of State.<sup>198</sup> To be fair, the NOP Office did seek advice from the Office of the General Counsel (OGC) on whether it could suspend the agents’ certifications “because they could not conduct onsite reviews.”<sup>199</sup> The OGC determined that suspensions may not be justified because American tourists had traveled safely to all those countries despite official travel warnings.<sup>200</sup> The NOP Office nevertheless refused to send its inspectors, claiming certified operations were often in remote regions that were more dangerous than tourist spots.<sup>201</sup> While the validity of the NOP Office’s claim has not been confirmed, one thing is certain—foreign agents, never subject to the NOP Office’s onsite supervision, have continued to certify products, bearing the USDA organic seal, for sale and consumption in the U.S. market.<sup>202</sup>

### III. IMPORTATION OF USDA CERTIFIED ORGANICS FROM CHINA AND BEYOND

Currently, the USDA does not have up-to-date, consistent data on the volume of organics imported from other countries.<sup>203</sup> However, USDA estimates

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regulations require certifying agents to maintain all records related to their certification activities);

- Onsite inspections and certification decisions being made by the same person (NOP regulations require agents to ensure that the decision to certify an operation is made by a person different from the person who conducted the onsite review); and
- Failure to maintain conflict of interest disclosures for all certifying agent employees (NOP regulations require certifying agents to prevent conflicts of interest and complete annual disclosure reports) (citations omitted).

<sup>193</sup> *Id.* at 28.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 29: “Issues such as those described above can only be identified after the certifying agent has actually begun issuing certifications to operations applying for certified organic status. However, as described below, we found that the necessary reviews were not always being performed.” (emphasis added).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 30.

<sup>198</sup> *Id.* at 29.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 29.

<sup>203</sup> GREENE ET AL., *supra* note 2, at 8. Recently, the USDA announced a plan to track the import and export of some organic products under the Harmonized Tariff Schedule. Tom Karst, *Handling &*

demonstrate that the organic trade, like other areas of international trade, ran a substantial deficit in 2002, with \$1 to \$1.5 billion in imports, but only \$125 to \$250 million in exports.<sup>204</sup> The Cornucopia Institute estimated that in 2009 as many as 50% of organic soybeans consumed in the United States were produced in China.<sup>205</sup> Cheap soybean imports from China have had a tremendous impact on the soybean farmers and soy-based food industry in the United States. According to the Cornucopia Institute's research report, even though sales of soy-based food increased by 29% between 2003 and 2007, acres of organic soybeans grown in the United States decreased from 126,000 acres to 122,000 acres.<sup>206</sup> Around the same time, acreages of farmland certified organic in China increased by over 1000%.<sup>207</sup> Facing a shortage of U.S. grown soybeans, leading soy-based food manufacturers, such as Dean Foods, switched their sources to imports from China.<sup>208</sup>

In 2008, an ABC News report revealed that Whole Foods sold organic products produced in China, including spinach, sugar snap peas, asparagus spears, pine nuts, and creamy peanut butter.<sup>209</sup> Consumers interviewed for the report were most surprised that even Whole Foods sourced its organics from China.<sup>210</sup> These products bore "USDA Organic" seals and words "Product of China" in fine print on the package.<sup>211</sup> Among the products, the "California Blend" of carrots, cauliflower, and broccoli, under the "365 Organic" brand, was most confusing to consumers because the packages highlighted "California" in bold letters on the front and put "Product of China" in fine print on the back.<sup>212</sup> A consumer complained: "It's definitely misleading. If they were proud of it being from China, they would be, it would be prominently displayed on the front."<sup>213</sup> The investigation depicted a sharp contrast to Whole Foods' carefully guarded image of promoting "locally grown" products, and it instantly drew a fierce point-by-point rebuttal from Whole Foods posted on the corporation's official blog "Whole Story."<sup>214</sup> In its rebuttal, Whole Foods strongly defended its practice of importing organics from China and assured consumers that all the Chinese produced organics it sold were subject to the USDA's rigorous standards, as a result of oversight by certifying agents.<sup>215</sup>

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*Distributing: Trade Statistics to Track Organic Food*, THE PACKER (Oct. 22, 2010), [http://thepacker.com/Article.aspx?oid=1275940&tid=&fid=PACKER-TOP-STORIES&src=share\\_visitor](http://thepacker.com/Article.aspx?oid=1275940&tid=&fid=PACKER-TOP-STORIES&src=share_visitor). These statistics will reportedly be available on the U.S. International Trade Commission's website. *Id.* However, no such data was found at the time this article was written. See Harmonized Tariff Schedule of the United States, 19 C.F.R. § 152.11 (1999), available at <http://www.usitc.gov/tata/hts/bychapter/index.htm>.

<sup>204</sup> *Id.*

<sup>205</sup> CORNUCOPIA INSTITUTE, *supra* note 7.

<sup>206</sup> *Id.* at 16.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 17.

<sup>209</sup> <http://www.wjla.com/news/stories/0508/521743.html> ABC 7 I-Team Investigates: Organic Foods, ABC 7 NEWS (WJLA television broadcast May 21, 2008), available at <http://www.wjla.com/news/stories/0508/521743.html>.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> Joel Dickson, *Whole Foods Market Responds to WJLA*, WHOLE STORY (last visited Apr. 10, 2011), <http://blog.wholefoodsmarket.com/whole-foods-market-responds-to-wjla/>.

<sup>215</sup> *Id.*: "Since 2002, the USDA's National Organic Standards have governed exactly what can be sold as organic in the US—how it's grown, processed and handled—regardless of where in the world it's

### A. Importation of Organics

#### 1. Three Ways for Foreign Products to be Sold as Organics in the U.S. Market

The OFPA provides that imported products may be marketed in the United States as organically produced if such products have been produced and handled under an organic certification program that meets U.S. organic standards.<sup>216</sup> Specifically, there are three ways for foreign products to be sold, labeled, or represented as organic in the United States.

The first is through certification by a USDA accredited certifying agent.<sup>217</sup> Currently, there are ninety-four USDA accredited agents, of which fifty-three are domestic agents and forty-one are foreign agents.<sup>218</sup> Both U.S.-based and foreign-based USDA accredited agents can engage in certifying organic products in foreign countries. For example, of the nine USDA accredited agents certifying products in China, one is from the United States,<sup>219</sup> and the rest are from Europe and Japan.<sup>220</sup> In 2007, certifying agents accredited by the USDA certified 27,000 producers and handlers according to U.S. organic standards: "approximately 16,000 in the United States and 11,000 in over 100 foreign countries."<sup>221</sup>

The second way is through a Recognition Agreement under which a foreign government may accredit certifying agents in its country to certify organic products in adherence with the NOP regulations, which will bear the USDA seal.<sup>222</sup>

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grown, INCLUDING China."

<sup>216</sup> 7 U.S.C. 6505(b) (2006).

<sup>217</sup> See 7 C.F.R. § 205.500(a) (2011) (stating the general rule for the USDA to accredit domestic and foreign certifying agents).

<sup>218</sup> For a complete list of USDA accredited domestic and foreign accredited agents, see *USDA Accredited Certifying Agents (ACAs)*, USDA AGRIC. MARKETING SERVICE

<http://www.ams.usda.gov/AMSv1.0/ams.fetchTemplateData.do?template=TemplateJ&navID=NationalOrganicProgram&leftNav=NationalOrganicProgram&page=NOPACAs&description=USDA%20Accredited%20Certifying%20Agents&acct=nopgeninfo> (last visited Apr. 20, 2011).

<sup>219</sup> The Organic Crop Improvement Association (OCIA) is another U.S.-based accredited certifying agent working in China. In 2010, the USDA suspended OCIA's accreditation for one year. For details, see 3.1 C of this article.

<sup>220</sup> E-mail from Mr. Samuel Jones-Ellard, Public Affairs Specialist, USDA Agric. Mktg. Serv., to author (June 14, 2010) (on file with author) (identifying the nine other accredited certifying agencies operating in China as: CERES—Certification of Environmental Standards—GmbH (Ltd.), Germany; BCS—Oeko Garantie GmbH, Germany; Bioagricert, Italy; Control Union Certifications, Netherlands; ECOCERT S.A., France; IMO—Institute for Marketecology, Switzerland; Overseas Merchandise Inspection Co., Ltd. (OMIC), Japan; The Organic Food Chain Pty Ltd, Australia; Oregon Tilth Certified Organic, Oregon).

<sup>221</sup> GREENE ET AL., *supra* note 2, at 8.

<sup>222</sup> *International Agreements*, USDA AGRIC. MARKETING SERVICE, <http://www.ams.usda.gov/AMSv1.0/ams.fetchTemplateData.do?template=TemplateJ&page=NOPInternationalAgreements> (last modified Mar. 11, 2011). For example, USDA recognition of India's conformity assessment program, as authorized under 7 C.F.R. § 205.500(c)(1), states:

The Department of Agriculture's (USDA) Agricultural Marketing Service (AMS) has determined the following foreign government conformity assessment program sufficient to ensure conformity to the technical standards of USDA's National Organic Program (NOP). These determinations allow organic certification organizations in good standing, to apply the NOP technical standards to certify operations that produce or handle agricultural products that will be sold, labeled or represented as organic in the United States. Production or handling operations certified by an organization that is recognized under these determinations may only use the USDA organic seal on their products when those products have



Currently, the USDA has Recognition Agreements with Denmark, India, Israel, Japan, New Zealand, and the United Kingdom.<sup>223</sup>

The third way is through an Equivalency Agreement under which two countries agree to allow products produced and certified according to either country's organic standards to be sold as organic in both countries.<sup>224</sup> Currently, the United States has an Equivalency Agreement with Canada.<sup>225</sup>

The USDA does not recognize Chinese accredited certifying agents, nor does it have an Equivalency Agreement with China. Therefore, the only way for Chinese products to be sold, labeled, or presented as USDA organic is through certification by a USDA accredited certifier.

## 2. Certifying Agents in China

Since certification is the only way that organics grown in China can gain access to the U.S. market, the work of certifying agents is crucial to ensuring the integrity of a majority of imported organic products. However, USDA audit reports have revealed serious flaws in the work of certifying agents in China. Under pressure from consumer protection groups, the USDA sent two officials in 2007 to conduct an audit in China for the first time since 2002, when the USDA first accredited certifying agents to work China.<sup>226</sup> The officials audited four certifying agents and two farms.<sup>227</sup> Even with a cursory review, the audit brought to light numerous noncompliance issues.<sup>228</sup> The NOP Regulations mandate that inspectors in the certification process "have sufficient expertise in organic production or handling techniques to successfully perform the duties assigned."<sup>229</sup> In reviewing the work of the Institute for Market Ecology (IMO), a Swiss-based certifying agent accredited by the USDA, the audit found that the lead inspector had very limited experience in organic certification.<sup>230</sup> Prior to joining IMO, the lead inspector had worked in accounting, human resources, and technical documents management and he had only attended four training sessions on how to inspect organic farms since joining IMO.<sup>231</sup> During the audit, the officials found that this inspector did not even

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been produced and handled in accordance to the NOP regulations. *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> Equivalence Agreements between two countries allow products produced and certified to either country's organic standards to be sold as organic in both countries. *Id.*; see also 7 C.F.R. § 205.500(c)(2) (2011).

<sup>225</sup> U.S.—Canada Determination of Equivalency, USDA AGRIC. MARKETING SERVICE, <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateN&navID=NationalOrganicProgram&page=USCanadaDeterminationofEquivalency&leftNav=NationalOrganicProgram&description=US-Canada%20Determination%20of%20Equivalency&acct=nopgeninfo> (last modified Feb. 28, 2011).

<sup>226</sup> CORNUCOPIA INSTITUTE, *supra* note 7.

<sup>227</sup> *Id.* at 19.

<sup>228</sup> *Id.*

<sup>229</sup> 7 C.F.R. § 205.501(a)(1) (2011).

<sup>230</sup> U.S. DEP'T OF AGRIC., LIVESTOCK AND SEED PROGRAM, AUDIT, REVIEW AND COMPLIANCE BRANCH, QUALITY SYSTEM AUDIT REPORT, *NP7051GGA NC Report IMO Weinfelden Switzerland 4* (2007), *available at* <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5071120&acct=AQSS>.

<sup>231</sup> *Id.*

understand the NOP regulations.<sup>232</sup> In another audit report for Ecocert, a German-based certifying agent, the auditor found that Ecocert did not provide the full NOP Regulations to applicants.<sup>233</sup> Since Ecocert did not even provide the organic standards defined in the NOP Regulations to producers, it is very doubtful that this certifier sought to ensure that certified organic growers in China would follow the same standards with which American farmers are required to comply.

### 3. Suspension of OCIA in China

On June 13, 2010, the USDA suspended the Organic Crop Improvement Association (OCIA) from certifying organic operations in China for one year.<sup>234</sup> Based in Lincoln, Nebraska, the OCIA was one of the most active USDA accredited organic food certifiers, certifying over 1800 organic operations in 11 countries.<sup>235</sup> In 2009, the OCIA had certified 223 operations in China, accounting for a third of all USDA approved producers in China.<sup>236</sup> The reason for the suspension was that the OCIA violated the NOP by using employees of an agency affiliated with the Chinese Ministry of Environmental Protection to inspect state-controlled farms and food processing facilities.<sup>237</sup> These employees had an inherent conflict of interest that made them unable to objectively certify organic operations; objectivity is an essential element of the NOP.<sup>238</sup> NOP officials discovered the violation during a 2007 field visit in China.<sup>239</sup> The NOP proposed to revoke the OCIA's accreditation but eventually reached a settlement agreement, under which the OCIA agreed to suspend its operation for one year and promised to pay for the NOP's field visit.<sup>240</sup> If OCIA satisfies the requirements of the settlement agreement, it will resume its certification activities in China in 2011. It took three years for the USDA to reach its final decision, during which time consumers were kept in the dark because the USDA conducted the disciplinary process in secret.<sup>241</sup> In addition to the OCIA, nine other USDA accredited organic certifying agents are currently

<sup>232</sup> *Id.* at 8.

<sup>233</sup> U.S. DEP'T OF AGRIC., LIVESTOCK AND SEED PROGRAM, AUDIT, REVIEW AND COMPLIANCE BRANCH, QUALITY SYSTEM AUDIT REPORT, *NP7246EEA NC Report Ecocert Northeim Germany* 6, (2007), available at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5071118&acct=AQSS>: "The NOP standards are not provided to all clients that apply for certification. The translated standards are only provided to those clients that request the standards or that participate in training sessions. Those that request the standards are provided only those portions they inquire about . . ." (emphasis in original).

<sup>234</sup> William Neuman & David Barboza, *U.S. Drops Inspector of Food in China*, N.Y. TIMES, June 13, 2010, at B1.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> E-mail from Samuel Jones-Ellard, Public Affairs Specialist, USDA Agric. Mktg. Serv., to author (June 14, 2010) (on file with author). In this e-mail, Mr. Jones-Ellard provided the original settlement agreement between USDA and OCIA by email (Settlement Agreement—USDA, AMS & OCIA (May 28, 2008) (on file with the author). The Settlement Agreement states at ¶ 4(g): "If OCIA is reaccredited to certify operations in China after the settlement has been in effect for one (1) year, OCIA shall pay for NOP auditors to inspect OCIA certification records and OCIA certified operations in China for the duration of this Settlement."

<sup>241</sup> Neuman & Barboza, *supra* note 234.

operating in China.<sup>242</sup> These agencies continue to certify Chinese products as organic (i.e., stamping the USDA organic seal on products that are freely marketed in the United States).

### *B. China's Regulatory Framework for Organics*

In its rebuttal to the 2008 ABC news report discussed above, Whole Foods tried to convince consumers that it was irrelevant whether their organic products came from Chinese or domestic producers because both were subject to the same regulations and supervision.<sup>243</sup> However, certifying agents working in China were found to not even understand the NOP regulations. How could those agents enforce U.S. organic standards in China? Whole Foods' claim of equivalency is at least grossly inaccurate, if not misleading.

Even if certifying agents are well immersed in U.S. organic standards, because the NOP Regulations only require agents to check certified farms annually, the day-to-day management of organic farms is largely left to farmers.<sup>244</sup> Sporadic checks are hardly sufficient to identify serious issues, such as the clandestine use of synthetic pesticides and fertilizers. Thus, even with certifying agents exercising the utmost due diligence, there are numerous areas where the quality of organics ultimately depends on the Chinese regulatory regime. For example, the NOP Regulations allow synthetic materials on the National List to be used in organic farming and handling.<sup>245</sup> Chinese organic farmers are allowed to use these synthetic materials too, but because organic farmers purchase their farming materials from local chemical stores in China, it is Chinese regulations—not the USDA, FDA, or EPA—that determine the quality of the synthetic materials and thus whether the organic products will meet U.S. standards.

As a result, the USDA accredited certifying agents alone cannot ensure the honesty of organic operations in China. The apparent assumption is that Chinese governmental branches, such as the State Environmental Protection Agency, Food and Drug Agency, the Ministry of Health, the Ministry of Agriculture, and other governmental entities, strictly enforce U.S. regulations to ensure organic food quality and safety. In reality, Chinese governmental agencies face serious challenges in enforcing their own regulations, let alone foreign laws. It is naïve to assume that certifying agents, as an extended arm of the USDA, are capable of supervising not only organic farming processes, but also the critical materials used in producing organic food products, by visiting certified farms only once a year. The suspension of OCIA's operation in China illustrates the limited benefits of supervision by accredited certifying agents. Furthermore, the USDA has rarely considered the impact of land tenure, water pollution, industrial discharges, soil erosion, unethical practices, counterfeiting, and corruption on the integrity of Chinese produced organics. Therefore, the inquiry of whether Chinese produced organics are up to the quality required by the NOP has to be put in a broader

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<sup>242</sup> E-mail from Mr. Samuel Jones-Ellard, *supra* note 220.

<sup>243</sup> Dickson, *supra* note 214.

<sup>244</sup> 7 U.S.C. § 6506(a)(5) (2008).

<sup>245</sup> See generally *supra* Part 2.2B (explaining the purpose of the National List of synthetic chemicals whose use is permitted in organic production, and the process for updating).

context; the quality of organic production ultimately hinges on the regulatory environment in China. Thus, it is necessary to examine the regulatory framework of organic farming in China and the serious challenges that the Chinese government faces in implementing laws and regulations for organic production.

### *1. The Development of China's Regulatory Framework for Organics*

In the United States, the organic movement originated with farmers who sought to capture extra price premiums<sup>246</sup> while protecting their lands from agricultural pollution.<sup>247</sup> As previously explained, the OFPA was enacted to harmonize organic standards that had already been in place in individual states for decades.<sup>248</sup> In contrast, China's organic movement originated with the government. Chinese farmers, who only lease land from collectives, played no role in the decision to go organic. Like other laws and policies in China, organic farming was a decision that the government imposed upon farmers without consultation.

Traditionally, organic farming was the sole method of farming throughout most of China's 4000 year history.<sup>249</sup> This tradition came to a complete halt in the 1970s when the Chinese government followed the trend in Western nations and embraced agrochemical-driven agriculture, a change often known as the Green Revolution.<sup>250</sup> The Green Revolution called for improved irrigation, hybrid crop varieties, and an increasing input of agrochemicals, such as synthetic pesticides and fertilizers.<sup>251</sup> Concerned with its ability to sustain a growing population, the government firmly believed that the Green Revolution was the most viable solution.<sup>252</sup> Since the Chinese government had total control of rural land through the system of communes, farmers had virtually no choice but to follow the government's directions. For example, a farmer served 102 days in jail for resisting the government's decision to abandon organic farming methods.<sup>253</sup> As a result, the Green Revolution spread to farms throughout the nation and quickly took hold.

The negative effect of the Green Revolution, however, began to take a heavy toll on farmlands, the environment, and consumers. China's economic reforms in the 1980s further exacerbated environmental degradation resulting from agricultural pollution.<sup>254</sup> During this reform period, the government dismantled the communes, permitting farmers instead to lease land from collectives and keep the

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<sup>246</sup> Friedland, *supra* note 15 at 382.

<sup>247</sup> ORGANIC FOOD: CONSUMERS' CHOICES AND FARMERS' OPPORTUNITIES (Maurizio Canavari & Kent D. Olson, eds., 2007).

<sup>248</sup> S. REP. NO. 101-357, at 289 (1990), *reprinted in* 1990 U.S.C.C.A.N. 4943, 4943.

<sup>249</sup> ALBERT HOWARD AND WENDELL BERRY, *THE SOIL AND HEALTH: A STUDY OF ORGANIC AGRICULTURE* 38 (1947).

<sup>250</sup> Eva Sternfeld, *Organic Food "Made in China"*, at 1, EU-China Civil Society Forum (Aug. 2009), available at [http://www.eu-china.net/web/cms/upload/pdf/materialien/eu-china\\_2009\\_hintergrund\\_10.pdf](http://www.eu-china.net/web/cms/upload/pdf/materialien/eu-china_2009_hintergrund_10.pdf).

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> Fang Yan & Chen Jie, *Zhongguo Nongye Wuran De Xianzhuang He Weihai* [Current status of agricultural pollution and its impact in China], HUANQIU SHIYE [GLOBAL VIEW] (*reprinted from* HONGQI [RED FLAG], Vol. 15 (2005)), available at <http://www.globalview.cn/ReadNews.asp?NewsID=5153> (last visited May 11, 2011).

proceeds from their agricultural productions.<sup>255</sup> Influenced by the Green Revolution, farmers were reluctant to use traditional methods of organic farming, which were more costly and less productive than chemical-based farming. In addition, a younger generation of farmers grew up completely ignorant of the organic farming methods employed in the past. Furthermore, the leasehold system did not give farmers an incentive to care about the land, let alone invest in its future sustainability. Consequently, farmers became more aggressive than ever before in using agrochemicals to save on production costs and increase productivity. A recent study showed that Chinese farmers use about a third of the world's supply of nitrogen fertilizers even though China has only a tenth of the world's arable land.<sup>256</sup> China has also been a world leader in making and using pesticides. Data has revealed that Chinese farmers in total apply 300,000 tons of pesticides to their farmlands annually.<sup>257</sup> China remains one of the few countries in the world still producing and using DDT, residues of which have been found to persist in the soil.<sup>258</sup>

Concerned with overuse of agrochemicals, China's Ministry of Agriculture (MOA) began to experiment with a return to organic farming in state-owned farms, which were kept under government control even after the economic reforms of the 1980s.<sup>259</sup> The Chinese government also started to advocate for organic farming due to the increasing demand for organic foods in the international market.<sup>260</sup> The organic movement in China, therefore, has been entirely government-driven and, like many other industries, predominately export-oriented.<sup>261</sup>

In response to the growing demand for pollution-free food both in China and the international market, the State Farm Department, a sub-agency of the MOA, proposed that state farms be allowed to specialize in "pollution-free" food.<sup>262</sup> In 1990, the State Council and the MOA approved the proposal.<sup>263</sup> To avoid the implication that other foods were polluted, the MOA changed the term from "pollution-free" food to "Green Food."<sup>264</sup> Notably, Green Food is not equivalent to organic food because chemical pesticides and fertilizers can still be used to produce it.<sup>265</sup> The only difference between Green Food and regular food is that the Government sets limits on the use of agrochemicals in Green Food production.<sup>266</sup>

The MOA later created the China Green Food Development Center (GFDC), a new governmental entity in charge of the administration of Green Food standards, certifications, and marketing labels.<sup>267</sup> The MOA became the sole entity

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<sup>255</sup> For an understanding of rural landownership in China, see JEAN C. OI & ANDREW GEORGE WALDER, *PROPERTY RIGHTS AND ECONOMIC REFORM IN CHINA* (1999).

<sup>256</sup> Sternfeld, *supra* note 250, at 2.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> Paul Thiers, *Challenges for WTO Implementation: Lessons from China's Deep Integration into an International Trade Regime*, 11 J. OF CONTEMP. CHINA 413, 417 (2002).

<sup>260</sup> *Id.* at 419–21.

<sup>261</sup> Sternfeld, *supra* note 250, at 3.

<sup>262</sup> Thiers, *supra* note 259, at 417.

<sup>263</sup> *Id.* at 418.

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

to provide the Green Food label. Thus, for an individual enterprise to use the Green Food label, it must obtain GFDC certification.<sup>268</sup> The MOA also created the China National Green Food Corporation (CNGFC), a for-profit company, to monopolize the export market for Green Food.<sup>269</sup> Thus, enterprises that seek to export Green Food products have to go through the CNGFC. The potential for the Green Food label to provide an increased profit margin soon attracted provincial and local governmental entities to apply for the right to grow and market Green Food.<sup>270</sup> To enter the international market, the GFDC translated the term Green Food (Lüshe Shipin) into English as "Organic Food,"<sup>271</sup> despite the fact that Green Food standards allow for the limited use of synthetic pesticides and fertilizers. The misleading translation attracted attention from international buyers who were lured by cheap prices and a lack of knowledge about the Chinese system for organics.<sup>272</sup> It was a Chinese competitor that pointed out the discrepancies between "Green Food" and "Organic Food" at an international conference.<sup>273</sup> In response, the GFDC introduced the Green Food AA-Grade label, which purportedly prohibits the use of synthetic chemicals in Green Food production.<sup>274</sup> In 2002, the GFDC established its own organic food certification body, the China Organic Food Certification Center (COFCC), which emerged as China's leading organic certifying agent.<sup>275</sup> Prior to the COFCC, the State Environmental Protection Agency (SEPA) had seen the commercial opportunity in the organic food market and set up the Organic Food Development Center (OFDC) in 1994.<sup>276</sup> The OFDC was the first Chinese organic certifier to be certified by the International Federation of Organic Agricultural Movements (IFOAM) and the International Organization for Standardization (ISO-65).<sup>277</sup>

With the varying labels and standards for Green Food, Green Food AA-Grade, and Organic Food, even Chinese consumers are often confused about the exact meaning of organic food. The "balkanization" of organic food standards in China reflects the unique reality of a government-driven economy.<sup>278</sup> Each governmental agency cashes in on bureaucratic power by setting organic standards and granting certifications to farms under its own control.<sup>279</sup> In fact, each government agency acts as both the certification agency and the food producer at the same time.<sup>280</sup> As a result, conflicts of interest in the Chinese organic system run directly against the notion of third party certification in the United States.

To gain the confidence of international buyers, the Chinese government

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<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> *Id.* at 420.

<sup>272</sup> *Id.* at 421.

<sup>273</sup> *Id.* at 420.

<sup>274</sup> *Id.* at 421.

<sup>275</sup> Sternfeld, *supra* note 250, at 5.

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> Thiers, *supra* note 259, at 419.

<sup>279</sup> *Id.* at 417.

<sup>280</sup> Peter Thiers, *China and Global Organic Food Standards*, in *AGRICULTURAL STANDARDS: THE SHAPE OF THE GLOBAL FOOD AND FIBER SYSTEM* 193, 203 (J. Bingen & L. Busch, eds., 2006).

promulgated three major regulations to harmonize its national organic standards: the Administrative Measures for Organic Product Certification (AQSIQ, 2004),<sup>281</sup> Rules for Implementing the Certification of Organic Products (CNCA, 2005),<sup>282</sup> and the State Standards of the People's Republic of China (GB/T 19630.1–19630.4, 2005).<sup>283</sup> In general, the Chinese organic standards are in line with IFOAM criteria, Japan Agricultural Standards (JAS), and U.S. NOP Regulations.<sup>284</sup> The inclusion of international standards in the Chinese regulatory framework for organic production is entirely intended to facilitate export.<sup>285</sup> In practice, however, the implementation of these organic standards faces serious challenges.

## 2. Food Safety Law in China

Unlike the well-developed regulatory framework in the United States, food safety law in China remains in a stage of infancy.<sup>286</sup> The Food Safety Law of China (FSL) came into effect in June 2009.<sup>287</sup> The Food Safety Commission, the chief regulatory body, was just created in February 2010.<sup>288</sup> Prior to the FSL, the government relied on various ministerial regulations and rules to regulate food safety.<sup>289</sup> In 1965, the State Council promulgated the first food regulation, which merely recommended sanitary conditions for food manufacturers.<sup>290</sup> It was largely ineffective for ensuring food safety because it did not set any standards for the contents of food products.<sup>291</sup> The 1965 regulation was not subject to any changes until after China's economic reforms in the 1980s. In 1995, the People's Congress passed a law on food sanitation, which also proved to be ineffective in securing food safety.<sup>292</sup>

<sup>281</sup> Youji Chanpin Renzheng Guanli Banfa [Administrative Measures For Organic Product Certification] (promulgated by the Gen. Admin. of Quality Supervision, Inspection, & Quarantine (AQSIQ), Nov. 5, 2004, effective Apr. 1, 2005) (China), *translated in* [www.lawinfochina.com](http://www.lawinfochina.com).

<sup>282</sup> Youji Chanpin Renzheng Shishi Guize [Rules for Implementing the Certification of Organic Products] (promulgated by the Certification & Accreditation Admin. of China (CAAC), June 2, 2005, effective June 2, 2005) (China), *translated in* [www.lawinfochina.com](http://www.lawinfochina.com).

<sup>283</sup> Zhonghua Renmin Gonghe Guo Guojia Biaozhun GB/T 19630.1-2005 [The State Standards of the People's Republic of China GB/T 19630.1-2005] (promulgated by AQSIQ & Zhongguo Guojia Biaozhun Hua Guanli Weiyuan Hui [China State Standardization Admin. Comm. (CSSAC)], Jan. 19, 2005, effective Apr. 1, 2005) (China).

<sup>284</sup> Sternfeld, *supra* note 250, at 7.

<sup>285</sup> *Id.*

<sup>286</sup> Chenglin Liu, *The Obstacles of Outsourcing Imported Food Safety to China* 43 CORNELL INT'L L.J. 250, 281–82 (2010) (“In 1983, China enacted a trial implementation of the Food Sanitation Law, in an attempt to regulate the growing number of privately owned food manufacturers and vendors emerging from the economic reform.”) [hereinafter Liu, *Obstacles*]. In the United States, Congress passed the Pure Food and Drug Act in 1906. The Federal Food, Drug and Cosmetics Act was passed in 1938. For a detailed account of the food safety law in the United States, see Richard A. Merrill & Jeffrey K. Francer, *Organizing Federal Food Safety Regulation*, 31 SETON HALL L. REV. 61 (2000).

<sup>287</sup> Shipin Anquan Fa [Food Safety Law] (promulgated by the Standing Comm. Nat'l People's Cong., Feb. 28, 2009, effective June 1, 2009) (China), *translated in* [www.lawinfochina.com](http://www.lawinfochina.com).

<sup>288</sup> Waidian Gaodu Guanzhu Zhongguo Chengli Shipin Anquan Weiyuan Hui [China Established the Food Safety Commission], IFENG NEWS, Feb. 11, 2010, <http://finance.ifeng.com/opinion/hwkzg/20100211/1825676.shtml>.

<sup>289</sup> Liu, *Obstacles*, *supra* note 286, at 281.

<sup>290</sup> *Id.* at 282.

<sup>291</sup> *Id.*

<sup>292</sup> *Id.* at 283.

The 2009 FSL was the Chinese government's reaction to a series of food safety scandals that greatly tarnished the image of made-in-China products.<sup>293</sup> In 2004, more than two hundred infants in China suffered so-called "big head" syndrome due to malnutrition, and at least thirteen died, after drinking baby formula that contained no nutrients.<sup>294</sup> In 2008, at least six babies died and nearly 300,000 infants were sickened from drinking melamine tainted baby formula.<sup>295</sup> The melamine contamination was by no means an accident. A subsequent investigation revealed that milk suppliers deliberately added melamine to diluted milk in order to boost protein counts and deceive quality control checks.<sup>296</sup>

The 2009 FSL overhauled the entire food safety regulatory framework. It not only set forth food safety standards but also created a new regulatory regime.<sup>297</sup> Under the 2009 FSL, the Food Safety Commission, consisting of three Vice Premiers of the State Council, oversees the administration of the law.<sup>298</sup> At the central level, the Ministry of Health (MOH) is responsible for setting food safety standards, evaluating food safety risks, and investigating major food safety incidents.<sup>299</sup> To enforce the law, the FSL also imposes duties on other government agencies, including the General Administration of Quality Supervision, Inspection, and Quarantine (AQSIQ), the State Industrial and Commercial Administration (SICA), and the State Food and Drug Administration (SFDA).<sup>300</sup> At the local level, the FSL puts governments at the county level and above in charge of food safety administration in their respective jurisdictions.<sup>301</sup>

The new law and formation of the new Food Safety Commission, however, has not altered the public perception of entrenched food safety problems. A 2010 survey shows that food safety is the biggest concern of the public in China and over seventy percent of people interviewed have anxieties about food safety.<sup>302</sup> Professor Chen Junshi, a member of the Chinese Academy of Engineering and the Institute on Disease Control and Food Safety, was rather pessimistic about any improvement of food safety in China. He commented, "It is impossible for 200 million small farms which operate on individual bases to comply with food safety law and

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<sup>293</sup> There have been numerous reports on food safety scandals in China: David Barboza, *China Office Kept Arrests In Milk Case From Public*, N.Y. TIMES, July 1, 2010, at A6; David Barboza, *Recycled Cooking Oil Found To Be Latest Hazard in China*, N.Y. TIMES, Apr. 1, 2010; Andrew Jacobs, *China: Prison Sentence for Parent in Tainted-Milk Case*, N.Y. TIMES, Nov. 11, 2010, at A10; Eric Shlosser, *Unsafe at Any Meal*, N.Y. TIMES, July 25, 2010, at WK; Michael Wines, *Tainted Dairy Products Seized in Western China*, N.Y. TIMES, July 10, 2010, at A6; Edward Wong, *More Families in China File Lawsuits Over Tainted Milk*, N.Y. TIMES, Oct. 31, 2008, at A13.

<sup>294</sup> Jim Yardley, *Infants in Chinese City Starve on Protein-Short Formula*, N.Y. TIMES, May 5, 2004, at A3.

<sup>295</sup> For an in-depth analysis of the milk scandal in China, see Chenglin Liu, *Profits Above the Law: China's Melamine Tainted Milk Incident*, 79 MISS. L.J. 371, 371-72 (2009) [hereinafter Liu, *Profits*].

<sup>296</sup> *Id.* at 371.

<sup>297</sup> Liu, *Obstacles*, *supra* note 286, at 281.

<sup>298</sup> *Id.* at 283-90.

<sup>299</sup> Shipin Anquan Fa, *supra* note 287, art. 4.

<sup>300</sup> Liu, *Obstacles*, *supra* note 286, at 281.

<sup>301</sup> *Id.*

<sup>302</sup> Ouyang Haiyan, Su Feng & Li Yanan, *Shipin Anquan Wenti Cheng Guoren Zuida Buan Jingchang Jiaoliu Zhe Chao Banshu* [Food Safety Has Become People's Biggest Concern: Over Half of the Public Surveyed Frequently Worries About Food Safety], XIAO KANG ZAZHI [XIAO KANG MAGAZINE], June 30, 2010, <http://news.eastday.com/c/20100630/u1a5300771.html>.



regulations.”<sup>303</sup> Mr. Su Zhi, the director of the MOH’s food safety, coordination, and supervision division, echoed the same sentiment, pointing out that the Chinese government faces serious challenges to regulate over 400,000 food manufacturers, ninety percent of which are mid-sized to small firms.<sup>304</sup> In November 2010, Mr. Li Yizhong, the Minister of Industry and Informational Technology, admitted in an interview with China Central Television (CCTV) that the public has lost confidence in the government’s efforts to ensure food safety.<sup>305</sup> Responding to a popular web post that ridiculed the government’s ability to regulate the food industry, the Minister pledged to regain the public’s trust but failed to provide a detailed plan on how he intended to achieve that goal.<sup>306</sup>

### 3. Melamine Resurfaced in 2010

Despite the new food safety law, food poisoning incidents continue to injure consumers.<sup>307</sup> Among the numerous recent scandals, the most ironic one took place in the midst of enforcing the 2009 FSL and establishing the Food Safety Commission, when the notorious problem with melamine-tainted baby formula resurfaced.<sup>308</sup>

The public was stunned by the reappearance of melamine contamination in milk products because the government had taken extreme measures during the national crackdown in 2008. Mr. Zhang and Mr. Geng were sentenced to death for making and selling melamine to milk farmers.<sup>309</sup> Ms. Tian, the CEO of the Sanlu Milk Corporation, was sentenced to life imprisonment, and other Sanlu managers were sentenced to prison terms from five to fifteen years, for making and distributing tainted milk.<sup>310</sup> In addition, the government recalled all the melamine-tainted formulas and ordered milk corporations to destroy them.<sup>311</sup> Through these severe punishments and mandatory recalls, the government hoped to show its

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<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> Gongxin Buzhang Tan Chongshu Zhongguo Zhizao Xinxin Huiying Wangshang Liuchuan Yu [The Minister of Industry and Information Technology Talked About Regaining Trust in Chinese Made Products, Responding to Online Comments], SINA NEWS, Nov. 15, 2010, available at <http://news.sina.com.cn/c/sd/2010-11-15/211621475322.shtml>.

<sup>306</sup> *Id.*

<sup>307</sup> For more details regarding the melamine tainted milk accident, see Liu, *Profits*, *supra* note 295.

<sup>308</sup> See *id.* at 371–72. In September 2008, a news report first linked the death of an infant to baby formula tainted with melamine, a harmful chemical that is often used for industrial production. The melamine contamination was by no means an accident. The World Health Organization (WHO) confirmed reports from China that milk suppliers deliberately added melamine to diluted milk in order to deceive quality control review. The Sanlu Company (Sanlu) based in Shijiazhuang City, Hebei Province produced the tainted milk. According to official estimates, at least six babies died and nearly 300,000 were sickened from drinking the tainted milk. More than three hundred children were hospitalized.

<sup>309</sup> Sanlu Du Naifen Xilie An Xuanpan Zhang Yujun Sixing Zhang Yanzhang Wuqi [The Trial of Sanlu Melamine Tainted Milk Scandal Ended: Mr. Zhang Yujun Was Sentenced to Death, Mr. Zhang Yangzhang Life Imprisonment], XINHUA NEWS, Jan. 22, 2009, available at <http://business.sohu.com/20090122/n261905608.shtml>.

<sup>310</sup> David Barboza, *China Plans To Execute 2 In Scandal Over Milk*, N.Y. TIMES, Jan. 23, 2009, at A5.

<sup>311</sup> Zhou Yuting, *Sanlu Jueding Zhaohui Shou Sanju Qingan Wuran Yingyouer Naifen* [Sanlu Has Decided to Recall Melamine Tainted Baby Formula], XINHUA NEWS, Sept. 11, 2008, available at <http://news.163.com/08/0911/21/4LJCTVCF0001124J.html>.

determination to root out unscrupulous food makers and regain public trust in the food safety system. While the public was still wary about the food safety system in general, it did not expect the same melamine scandal to strike again within such a short period of time. The return of tainted milk suggested that government regulation of food safety was completely broken.

According to the government order, milk producers should have recalled all the melamine tainted formulas and destroyed them after the 2008 scandal. In reality, however, the producers secretly hoarded the poisonous formulas for two years and then remarketed them when the public horror over melamine tainted milk faded away.<sup>312</sup> The repackaged poisonous formulas even passed quality checks with provincial governments.<sup>313</sup> In 2010, melamine contamination was found in ice creams, candies, yogurts, and other milk based products.<sup>314</sup> The repackaged tainted products were found not only in remote regions but also in big cities.<sup>315</sup> In Shanghai, the most prosperous city in China, investigators found melamine in the products of Panda Dairy, one of the most trusted food corporations in the nation.<sup>316</sup> The CEO of Panda Dairy admitted that the corporation purchased the tainted formulas on the black market to save on production costs.<sup>317</sup>

To the public, the most unacceptable fact was that the Shanghai city officials had actually known about the contamination but deliberately kept it a secret for almost a year.<sup>318</sup> In other words, tainted Panda candies circulated freely in the market for almost a year during the government cover-up. Wang Xixin, a law professor at Beijing University School of Law, commented that "[i]f Shanghai Panda's crime is confirmed, the quality supervision bureaus, both local and national, violated the law. [. . .] The government hid the truth from the public and

<sup>312</sup> Edward Wong, *China Begins Emergency Check of Dairy Products*, N.Y. TIMES, Feb. 3, 2010 ("The government ordered all suspect products to be recalled and destroyed, but some 'unscrupulous' companies have taken the recalled products and repackaged them for sale . . ."); see also *Shanxi Jingfang Zhenpo Weinan Wenti Naifen An: Qiye Siyong 08 Guoqi Naifen* [Shanxi police uncovered tainted milk case; the accused milk manufacturer used tainted milk left in the 2008 milk scandal], XINHUA NET (Feb. 3, 2010), [http://news.xinhuanet.com/society/2010-02/03/content\\_12925644.htm](http://news.xinhuanet.com/society/2010-02/03/content_12925644.htm); Zhou Yuting, *Quanguo Shipin Anquan Zhengdun Ban Yaoqiu Checha Shipin Anquan Tuchu Yinhuai* [The state food safety taskforce requires strict investigation of latent conditions that could cause food scandals], XINHUA NET (Jan. 31, 2010), [http://news.xinhuanet.com/politics/2010-01/31/content\\_12908469.htm](http://news.xinhuanet.com/politics/2010-01/31/content_12908469.htm).

<sup>313</sup> Jiang Zhenrong & Wang Daqian, *Qinghai Wenti Naifen Zai Bensheng Jiancha Hege Jiancha Yuan "Fei Zhuanye"* [Melamine tainted milk passed the provincial quality checks in Qinghai; Officials defended that the inspector was not professional], JINGJI CANKAO BAO [ECONOMIC INFORMATION DAILY], Nov. 24, 2010, available at <http://news.sohu.com/20101124/n277863840.shtml>.

<sup>314</sup> Zhao Zuo, *Sanju Qingan Du Naifen Chongxian Shichang Shipin Anquan Xu Duo Huanjie Baozhang*, [Melamine tainted milk resurfaced in the market; Food safety system needs multiple safeguards], SHIDAI ZHOUBAO [TIMES WEEKLY], Mar. 11, 2010, available at <http://news.sina.com.cn/c/2010-03-11/153019842948.shtml>.

<sup>315</sup> David Barboza, *China Office Kept Arrests In Milk Case From Public*, N.Y. TIMES, Jan. 7, 2010, at A6; "Du Naifen" Chongxian Zaoyou Duanni [The authority likely knew about the return of the toxic milk power earlier], BEIJING DAILY, Feb. 4, 2010, available at [http://news.xinhuanet.com/politics/2010-02/04/content\\_12927265.htm](http://news.xinhuanet.com/politics/2010-02/04/content_12927265.htm).

<sup>316</sup> *Id.*

<sup>317</sup> *Quanguo Zai Chachu Baiyu Dun Wenti Sanju Qingan Naifen Zhujiu Jianguan Shizhi Zhe* [Over a hundred tons of melamine tainted milk power were found; officials will be charged for dereliction], XINJING BAO [NEW BEIJING DAILY], Aug. 21, 2010, <http://news.sohu.com/20100821/n274363377.shtml>.

<sup>318</sup> James T. Areddy, *Authorities in China Likely Knew Bad Milk*, WALL ST. J., Jan. 6, 2010, at A10.

behaved extremely irresponsibly to public safety.”<sup>319</sup> Another commentator sarcastically opined that the eventual news release must have been an accident because the government would have kept the secret until babies died from the tainted products.<sup>320</sup> As of yet, none of the government officials involved in the cover-up have been subjected to a criminal investigation.

The repeated milk scandals demonstrate three major flaws in China’s food safety system. First, local governments remain reluctant to obey the law, despite being the primary entities responsible for enforcing the new FSL.<sup>321</sup> Article 82 of the FSL requires that local governments timely, accurately, and objectively release information about food safety incidents to the public.<sup>322</sup> The recent scandal revealed that the Shanghai Government’s first reaction to the new melamine contamination was to cover it up due to fears that bad publicity would hurt the city’s jubilant image and booming economy. Furthermore, local officials were worried that a damaged image would hurt their chances for reappointment and promotion.<sup>323</sup> Indeed, they responded in the usual way that local officials deal with any potential scandal, trying to resolve the problem quietly within their leadership circle even though that might mean uninformed consumers would continue to feed their babies with tainted milk.<sup>324</sup>

Second, the usually close ties between food manufacturers and local governments greatly hinder the implementation of the FSL. Local officials depend on the food industry to boost their local economies.<sup>325</sup> In return, food manufacturers rely on local governments to provide a buffer of protection whenever their illegal practices end up injuring consumers.<sup>326</sup> Local courts and prosecutors have similar ties with food manufacturers.<sup>327</sup> In addition, the news media is under the direct control of local governments.<sup>328</sup> With the protection of local governments, food manufacturers are emboldened and frequently put profits above compliance with

<sup>319</sup> David Barboza, *China Office Kept Arrests In Milk Case From Public*, N.Y. TIMES, Jan. 7, 2010, at A6.

<sup>320</sup> Pan Hongqi, *Yong Manbao Zhutui Ruye Huifu Wuyi Yinzhen Zhike* [Covering up will backfire the recovery of the milk industry], ZHONGGUO QINGNIAN BAO [CHINA YOUTH DAILY], Jan. 6, 2010, available at [http://www.ycwb.com/epaper/ycwb/html/2010-01/06/content\\_706132.htm](http://www.ycwb.com/epaper/ycwb/html/2010-01/06/content_706132.htm).

<sup>321</sup> Liu, *Obstacles*, *supra* note 286, at 285, (“At the local level, the new FSL places governments at the county level and above in charge of food safety administration in their respective jurisdictions.”); *id.* at 397–400 (arguing that local governments are reluctant to release information that could damage local image and business); *see also* David Barboza, *China Office Kept Arrests In Milk Case From Public*, N.Y. TIMES, Jan. 7, 2010, at A6 (revealing that the Shanghai government kept food scandal prosecution from the public for several months despite that the new Food Safety Law requires food producers to alert the public of serious food safety problems).

<sup>322</sup> Shipin Anquan Fa [Food Safety Law] art. 82 (promulgated by the Standing Comm. Nat’l People’s Cong., Feb. 28, 2009, effective June 1, 2009) (China), *translated in* [www.lawinfochina.com](http://www.lawinfochina.com).

<sup>323</sup> Liu, *Profits*, *supra* note 295, at 397 (2009).

<sup>324</sup> *Id.*; *see also* Shanghai Xiongmiao 8 Yue Qian Yi Chachu Sanjuqing’an: Bei Yaoqiu Manbao [Shanghai Panda dairy products were found to have melamine but the information was kept from the public], XINHUA NET (Jan. 5, 2010), <http://finance.people.com.cn/GB/10705340.html>. A commentator argued that cover-up is as poisonous as milk tainted with melamine. *See* Qilu, *Manbao Caishi Zui Kepa de Sanjuqing’an* [Cover-up is equally as dangerous as melamine], LUOYANG RIBAO [LUOYANG DAILY], Jan. 7, 2010, available at <http://lyrb.lyd.com.cn/images/2010-01/07/1262810013156RB04B107C.pdf>.

<sup>325</sup> Liu, *Profits*, *supra* note 295, at 397.

<sup>326</sup> *Id.*

<sup>327</sup> *Id.*

<sup>328</sup> *Id.* at 401.

the law. Furthermore, the close ties between businesses and local government officials are often tainted with corruption. In a most telling example, the former director of the SFDA was sentenced to death for taking more than \$850,000 in bribes in exchange for granting licenses to pharmaceuticals.<sup>329</sup> As James J. Shen, an industry analyst, commented, "If the head of the drug agency is corrupt . . . you can imagine how corrupt the whole system is."<sup>330</sup>

Third, food makers lack self self-discipline and any notion of professional ethics.<sup>331</sup> Premier Wen Jiabao fiercely criticized the food industry for a lack of conscience.<sup>332</sup> Unethical practices, such as using harmful chemicals and drugs to enhance the look and taste of food, are prevalent in China's food industry.<sup>333</sup> Indeed, it is well-known that Chinese food makers employ the most unthinkable means to adulterate food for economic gain. Adding melamine to milk is only one of numerous food adulteration tactics. An investigative report by China Central Television (CCTV) in 2009 revealed a number of horrifying practices commonly used in the food industry.<sup>334</sup> Multinational food chains that operate in China are also vulnerable to using adulterated food ingredients, whether inadvertently or not, because they primarily source ingredients from the Chinese market. In 2005, Kentucky Fried Chicken (KFC) had to pull its popular hot chicken wings from the market in China because the hot sauce, purchased from a Chinese source, was tainted with Sudan Red, a cancer-causing dye normally used in the chemical industry.<sup>335</sup> With the protection of local governments, food manufacturers rely on adulteration to make greater profits. Such across-the-board violations of the law essentially leave no room for any honest business enterprise to compete in the market. At a trial arising from the first tainted milk scandal, a Sanlu manager testified that if his company had refused to take melamine-tainted milk from milk farmers, it would have permanently lost that supply source because other firms

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<sup>329</sup> *Id.* at 398.

<sup>330</sup> David Barboza, *A Chinese Reformer Betrays His Cause, and Pays*, N.Y. TIMES, July 13, 2007, at A1.

<sup>331</sup> Liu, *Obstacles*, *supra* note 286 at 298.

<sup>332</sup> *Wen Jiabo Tanshi "Naifen Shijian" Huaner Ma Qiye "Mei Liangxin"* [Premier Wen Jiabo criticized the food industry lack of conscience], IFENG NEWS, Sept. 22, 2008, <http://bbs.ifeng.com/viewthread.php?tid=3379827> (This report originally appeared in all major news websites in 2008. As of publication, it is only available on a few websites outside of China.).

<sup>333</sup> Li Yizhong, *Shipin Anquan Shijian Fanying Qiye Chengxin Wenti* [Food safety scandals reflect unethical practices in the food industry], RENMIN WANG [PEOPLE NET], Mar. 12, 2010, available at <http://news.sina.com.cn/c/2010-03-12/171219851722.shtml>.

<sup>334</sup> Cai Jing, *Kaowen Shipin Zhiliang Haiyou Sha Neng Chi* [Food Quality: What is Left to Eat?], China Central Television (CCTV) broadcast, Mar. 11, 2009, available at <http://www.39kf.com/focus/spaq/01/2009-03-11-573535.shtml>. The full transcript of the interview is still on a few websites as of the date of publication. The author has a printed copy of this interview on file. Melamine, hydrochloric acid, and human hair, which are rich in amino acid, are added to soy sauce; tannic acid is used with alcohol and water to make red wine; *dichlorvos* (a pesticide) is added to sausage for better taste; formaldehyde is added to hot pot soups for better taste; sulphur is added to dry fruits as a preservative; paraffin wax is used as a preservative used in rice; copper sulfate is used as a preservative in dry mushrooms; and *clenbuterol* is added to pig feeds, a chemical that can turn fat into red meat in a few weeks.

<sup>335</sup> Ke Huiming, *Yin Han Sudan Hong Kendeji Zhihai, Baisheng Yuan Chengdan Falv Zeren* [Baisheng is taking responsibility for its Sudan Red-tainted Kentucky Products], SINA NEWS, Mar. 17, 2005, available at <http://finance.sina.com.cn/xiaofei/consume/20050317/16061438808.shtml>; see also Lei Min & Liu Juhua, *Woguo 30 Jia Qiye 88 Zhong Shipin Bei Jianchu You Sudan Hong* [Eighty-Eight Food Products Produced by 30 Firms Are Tainted with Sudan Red], XINHUA NEWS, Apr. 6, 2005, available at <http://finance.sina.com.cn/xiaofei/puguangtai/20050406/00041490488.shtml>.

would have accepted the milk regardless of the contamination.<sup>336</sup>

The organic industry in China is not immune to the problems that plague the Chinese food industry as a whole. More importantly, because most organic products are produced for export to other countries, domestic consumers of organics in China are few and far between and do not form the critical mass necessary to exert any real influence on lawmakers and enforcement agencies. As a result, public scrutiny and media attention are unlikely to create the same pressure on organic products as on conventionally grown products, which the Chinese people mainly consume. Therefore, organics produced in China are even less subject to domestic regulations than conventional food products.

### *C. Challenges of Implementing Organic Standards in China*

#### *1. Land Tenure and Farmers' Incentive*

In China, farmers do not make the decision to "go organic," because they are not the owners of the land on which they farm. According to the Constitution, rural and suburban land, including house sites and family plots, are owned by the collectives.<sup>337</sup> Therefore, farmers can only obtain use rights of land through a fixed term lease from the collectives.<sup>338</sup>

The decision to go organic comes from the township or county officials appointed by a higher level of government.<sup>339</sup> The officials make such a decision for the sole purpose of increasing local GDP on the assumption that organics are more profitable than conventional products.<sup>340</sup> Increased GDP is essential for the officials to seek reappointment or promotion.<sup>341</sup> As a result, farmers are completely left out of the decision making process.<sup>342</sup> Since land use rights are evenly dispersed among farmers on a family basis, the officials require a large number of farmers in a village to achieve organic conversion and economies of scale. Any farmer who resists the decision will be forced by village leaders or township officials to swap land with those who agree to join.<sup>343</sup> Therefore, farmers have no choice but to go along with the conversion to organic farming. Through collective conversion, family farmlands are joined together to form organic "production bases."<sup>344</sup> The county government appoints a manager to operate the production

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<sup>336</sup> Ye Tieqiao, *Gongsu Jiguan Pilu Sanlu Yinman Shishi Zhi Dunai Wailiu* [According to Prosecutors, it was Sanlu's Cover-Up that Caused Poisonous Milk to Enter the Market], *ZHONGGUO QINGNIAN BAO* [CHINA YOUTH DAILY], Jan. 1, 2009, available at <http://news.sina.com.cn/c/2009-01-01/050616959786.shtml>.

<sup>337</sup> XIANFA art. 8, § 10 (1982) (China).

<sup>338</sup> JEAN C. OI & ANDREW GEORGE WALDER, *PROPERTY RIGHTS AND ECONOMIC REFORM IN CHINA* 72 (1999).

<sup>339</sup> Thiers, *supra* note 259 at 423.

<sup>340</sup> *Id.*

<sup>341</sup> See Chenglin Liu, *Informal Rules, Transaction Cost, and the Failure of the "Takings" Law in China*, 29 *HASTINGS INT'L & COMP. L. R.* 1, 7 (2005).

<sup>342</sup> Thiers, *supra* note 259, at 423.

<sup>343</sup> *Id.*

<sup>344</sup> *Id.*

bases and handle such issues as entering contracts with participating farmers, selling farming materials, coordinating field inspections for foreign agents, and selling organic products to foreign buyers.<sup>345</sup> Essentially, the various organic production bases are components of a big county-run enterprise for which individual participating farmers are merely workers. Because production bases are village-based, there are a number of them within any given county. A study revealed that even the county manager did not know specifically which farmers grew under contract for him.<sup>346</sup> Only village leaders know the exact boundaries for the production bases, but they keep this vital information from certifying agents by refusing to provide detailed lists of contracted farmers or maps of the organic fields.<sup>347</sup>

Village leaders are the primary point of contact for foreign buyers and USDA certifying agents.<sup>348</sup> When foreign agents request to conduct field inspections, village leaders would provide "a few 'representative' farmers of his own choosing."<sup>349</sup> A study showed that randomly interviewed farmers told an entirely different story.<sup>350</sup> During these interviews, the farmers claimed that: "[T]hey had no contracts, that the factory [referred to by the county manager] paid no more than conventional market rates and provided no organic input, that they were unsure of the meaning of [organic food], and that they purchase[d] their own chemical inputs on the open market."<sup>351</sup> The same study also showed that local officials used various tactics to disrupt the field inspections of foreign agents. One common tactic has been for local officials to coordinate elaborate banquets and sightseeing trips, in order to take up much needed inspection time.<sup>352</sup> When the agents requested access to workers and production sites, the local officials either delayed the inspection work or provided ambiguous answers.<sup>353</sup>

Even the most devoted certifier is not able to monitor all aspects of organic farming. Sometimes, inspectors find it impossible to ascertain a simple fact, such as whether a plot has not been used for a certain period of time. An inspector tried to verify with a state official whether a farmer's affidavit was accurate.<sup>354</sup> The official replied, "I don't know. I don't care. [The farmers] asked me to stamp it [to certify the plot had not been used], so I stamped it."<sup>355</sup> The official's answer reflects a common sentiment that local officials in China are reluctant to enforce foreign laws. A study conducted by the International Fund for Agricultural Development also revealed that some farmers clearly did not fully comply with organic standards.<sup>356</sup> According to the study, one major reason for non-compliance is that

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<sup>345</sup> *Id.* at 427.

<sup>346</sup> *Id.*

<sup>347</sup> *Id.*

<sup>348</sup> *Id.*

<sup>349</sup> *Id.*

<sup>350</sup> *Id.*

<sup>351</sup> *Id.*

<sup>352</sup> *Id.* at 430.

<sup>353</sup> *Id.*

<sup>354</sup> Paula Lavigne, *Is Organic Food the Real Deal?*, THE DALLAS MORNING NEWS, July 17, 2006, available at [http://www.organicconsumers.org/articles/article\\_1159.cfm](http://www.organicconsumers.org/articles/article_1159.cfm).

<sup>355</sup> *Id.*

<sup>356</sup> INT'L FUND FOR AGRIC. DEV., REPORT NO. 1664, THEMATIC EVALUATION: ORGANIC AGRICULTURE AND POVERTY REDUCTION IN ASIA: CHINA AND INDIA FOCUS 36 (2005).

farmers are tempted to boost yields by applying chemical fertilizers, especially for high value or rotation crops.<sup>357</sup> Another reason is that farmers apply chemical pesticides to deal with difficult pests or disease conditions.<sup>358</sup>

The efforts of local officials to disrupt the verification process of certifying agents serve two purposes. First, local officials spare no effort to ensure the continuation of organic certification, which brings in a considerable amount of revenue to the local economy. Because the farmers do not own the land, they have no incentive to make long-term investments in the land. To increase output, farmers clandestinely use prohibited pesticides and fertilizers. An inspection unaccompanied with local officials might reveal this practice and result in decertification. Second, local officials not only manage organic production bases but also act as sales agents for the products. Farmers, who operate on individual family bases, lack a sophisticated network for market access. Thus, local officials are the only conduit by which farmers can access the foreign market. These officials fear that direct contact between farmers and foreign buyers, or certifying agents, would lead to the disclosure of the profit margins that the officials keep from the farmers on the sales of their products.<sup>359</sup>

## 2. Excessive Use of Synthetic Pesticides and Fertilizers

Agriculture was an important part of China's ancient civilization.<sup>360</sup> Up until the economic reforms in the 1980s, the great majority of Chinese people were farmers.<sup>361</sup> Agriculture was the major economic sector and close to 90% of the populace was engaged in agrarian affairs.<sup>362</sup> Throughout Chinese history, farmers developed a set of outstanding techniques to cultivate their fields and keep them continuously fertile for 4000 years.<sup>363</sup> The key to these techniques was organic farming. Many years ago, commentators observed that the "Chinese pay great attention to the making of the compost, every twig, every dead leaf, every unused stalk is gathered up and every bit of animal excreta and the urine, together with all the wastes of human population, are incorporated."<sup>364</sup>

Unfortunately, China moved away from its tradition of organic farming when the government called for the use of synthetic fertilizers and pesticides in the 1960s. In the beginning, farmers adamantly refused to give up their traditional farming techniques.<sup>365</sup> With the socialization of farmlands, however, farmers no longer owned their lands and had no choice but to adopt the "advanced" methods of farming that the government advocated. In addition to compelling farmers to use these new techniques, the government subsidized the cost of synthetic fertilizers

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<sup>357</sup> *Id.*

<sup>358</sup> *Id.*

<sup>359</sup> Thiers, *supra* note 259, at 428.

<sup>360</sup> MILTON W. MEYER, CHINA—A CONCISE HISTORY 2 (2d ed. 1994).

<sup>361</sup> *Id.* at 15.

<sup>362</sup> *Id.*

<sup>363</sup> See HOWARD & BERRY, *supra* note 249, at 38.

<sup>364</sup> *Id.*

<sup>365</sup> *Id.*

and pesticides.<sup>366</sup> Because wide adoption of synthetic substances resulted in high productivity levels and savings on the cost of labor resources, the government largely ignored the potential harm that the substances brought to the soil. In the early stage of the resulting economic boom, Professor Smil, a prominent soil scientist, warned:

Many recent cropping practices are seriously degrading the previously good or excellent soils . . . . Crops grown in these degrading soils, shallow and deficient in organic matter do not respond to . . . chemical fertilizer inputs. The improper application of synthetic fertilizers and lower quantities of organic fertilizer . . . have greatly accelerated soil degradation.<sup>367</sup>

Despite the warning, Chinese agriculture went down an irreversible path. Now, China is the largest chemical fertilizer user in the world "with an average use of 290 to 400 kg of nitrogen per [hectare] in 1996, and applications exceeding 500 kg nitrogen per [hectare] in some vegetables [*sic*] growing areas."<sup>368</sup> China is also one of the largest producers and users of pesticides in the world.<sup>369</sup> As a result of the overuse of chemical fertilizers over several decades, the chemically induced high productivity levels began to decline, because the soil quality had deteriorated severely.<sup>370</sup> Pesticide overuse has been linked to the disappearance of the natural enemies of some pests, which in turn has caused devastating pest outbreaks.<sup>371</sup> To combat these pest outbreaks, farmers have used even more pesticides. The vicious cycle is hard to break when pesticides are cheap and regulations on pesticide use are lax.

Past abuse of synthetic pesticides and fertilizers is not the only cause of soil contamination. Unscrupulous farmers deliberately apply toxic pesticides and fertilizers to the soil in order to increase productivity or to make products appear more appealing to consumers.<sup>372</sup> Despite the government's repeated campaigns against toxic pesticides, food poisoning incidents resulting from their use are a frequent occurrence. In January 2010, Wuhan city inspectors found that cowpeas grown in Hainan were tainted with Isocarbophos, an extremely toxic pesticide.<sup>373</sup> Even though the Chinese government had banned the use of Isocarbophos because

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<sup>366</sup> *Id.* at 35.

<sup>367</sup> Richard Sanders, *A Market Road to Sustainable Agriculture? Ecological Agriculture, Green Food and Organic Agriculture in China*, 37 (1) DEV. & CHANGE 201, 203–04 (2006).

<sup>368</sup> Carola Milbrodt, *Organic Food Industry in China—Current State and Future Prospects* 34–35 (2004) (unpublished M.A. thesis, Free University of Berlin) (on file with author).

<sup>369</sup> Sternfeld, *supra* note 250, at 2.

<sup>370</sup> Milbrodt, *supra* note 368, at 35.

<sup>371</sup> See Yolanda Chen, International Rice Research Institute, *The Unsung Heroes of The Rice Field*, RICE TODAY, (Jan. 18, 2008), <http://irri.org/knowledge/publications/rice-today/special-reports/science-shorts/the-unsung-heroes-of-the-rice-field>; see also Dominique Patton, *Pesticide Residues Still High in Chinese Vegetables*, AP-FOOD TECHNOLOGY.COM (Apr. 25, 2006), available at <http://www.ap-foodtechnology.com/content/view/print/29111>.

<sup>372</sup> Cai Jing, *supra* note 334 (depicting deplorable practices in China's food industry).

<sup>373</sup> *Qingdao "Du Jiucui" Shijian 9 Ming Zhongdu Zhe Lianhe Tousu Suopei* [Nine victims of toxic cowpeas collectively brought a legal action against growers], WUHAN WANBAO [WUHAN EVENING NEWS], Apr. 11, 2010, available at [http://news.xinhuanet.com/society/2010-04/11/c\\_1227223.htm](http://news.xinhuanet.com/society/2010-04/11/c_1227223.htm).



of its high toxicity, farmers could easily get Isocarbophos products from local vendors anyway.<sup>374</sup> This revelation set off a wave of panic across the country because Hainan produced most of the nation's cowpeas during the winter, and cowpeas were one of most popular vegetables in China.<sup>375</sup> The government recalled the tainted cowpeas but did not close the shops that sold the banned pesticides.<sup>376</sup> Three months later, the use of similar pesticides reappeared, and nine people were hospitalized after eating chives tainted with organophosphorus insecticide.<sup>377</sup> A test revealed that the amount of organophosphorus insecticide residue on the chives was sixty four percent greater than the amount allowed by the state standard.<sup>378</sup>

Excessive use of agrochemicals in the past thirty years has permanently damaged the soil all across China.<sup>379</sup> A recent report published in the Journal of Science reveals that the soil pH in major croplands in China has declined significantly from 0.13 units in the 1980s to 0.8 units in the 2000s.<sup>380</sup> Such a dramatic decrease in pH would normally take hundreds of thousands of years.<sup>381</sup> Heavily acidified soil not only makes crops prone to diseases and pests but also prompts the leaching of toxic metals into nearby bodies of water, "[s]o when pH values plunge, as they have in China, scientists start to worry."<sup>382</sup> Fred Gale, a senior USDA economist, concluded that it was "almost impossible to grow truly organic food in China."<sup>383</sup>

### 3. Water and Soil Pollution

The quality of organic production is highly dependent on the purity of water and soil. Both the OFPA and the NOP regulations require organic producers to maintain water and soil quality.<sup>384</sup> In China, however, heavy metals and other harmful chemical pollutants present in the water have seriously affected the quality of agricultural products.<sup>385</sup> The major sources of pollution are discharges of industrial and domestic wastewater, indiscriminate solid waste disposal, and agricultural runoff from excessive use of pesticides and fertilizers.<sup>386</sup> According to

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<sup>374</sup> *Id.*

<sup>375</sup> *Id.*

<sup>376</sup> *Id.*

<sup>377</sup> *Id.*

<sup>378</sup> *Id.*

<sup>379</sup> See Mara Hvistendahl, *Fertilizer is Acidifying Chinese Land*, SCIENCE MAG., Feb. 10, 2010, <http://news.sciencemag.org/sciencenow/2010/02/11-02.html>.

<sup>380</sup> *Id.*

<sup>381</sup> *Id.*

<sup>382</sup> *Id.*

<sup>383</sup> Lavigne, *supra* note 354.

<sup>384</sup> See National Organic Program, 40 C.F.R. § 205.203 (2011); 7 U.S.C. § 6513 (2006).

<sup>385</sup> Chi Fengling, *Qiantan Shui Wuran Dui Woguo Shipin Anquan de Yinxiang Ji Jiejue Duice* [Preliminary analysis of the impact of water pollution on food safety and solution], ZHONGGUO SHIPIN YU YINGYANG [JOURNAL OF CHINA FOOD AND NUTRITION], 2006/5, available at [http://www.sfncc.org.cn/Article\\_Print.asp?ArticleID=1584](http://www.sfncc.org.cn/Article_Print.asp?ArticleID=1584).

<sup>386</sup> THE WORLD BANK, COST OF POLLUTION IN CHINA: ECONOMIC ESTIMATES OF PHYSICAL DAMAGES 33 (2007), available at [http://siteresources.worldbank.org/INTEAPREGTOPENVIRONMENT/Resources/China\\_Cost\\_of\\_Pollution.pdf](http://siteresources.worldbank.org/INTEAPREGTOPENVIRONMENT/Resources/China_Cost_of_Pollution.pdf).

a joint study by the United Nations Development and Environment Program (UNDP) and the Chinese government, "only five percent of household sewage and seventeen percent of industrial waste are properly treated prior to discharge."<sup>387</sup> A study by the State Environmental Protection Agency (SEPA) revealed a bleak outlook of China's water systems: Seven of the nine lakes under its surveillance were dangerous "to human skin on contact."<sup>388</sup> On February 9, 2010, the Chinese government released a new environmental survey, in which the government admitted that water pollution was much more serious than it previously reported.<sup>389</sup> The government explained that the previous report did not take into account the effects of agricultural pollution.<sup>390</sup>

Unsurprisingly, water quality in the Yangtze River has deteriorated dramatically with the rapid economic growth of China. The Yangtze is the longest river in China serving as a water source for 186 cities and a food source for nearly one-third of the Chinese population.<sup>391</sup> In fact, this river is the only source of drinking water for Shanghai, which has a population of over 20 million people.<sup>392</sup> It is also a major source of economic growth producing over 40% of China's GDP and hosting 50% of China's chemical plants.<sup>393</sup> In 2008, 21 billion tons of wastewater flowed into the Yangtze, 70% of which came from chemical plants.<sup>394</sup> Unlike many other industrial countries, where the production and use of hazardous chemicals such as alkylphenols and perfluorinated comp compounds (PFCs) have been greatly reduced, China's production and use of harmful chemicals has continued to rise.<sup>395</sup> Studies revealed the presence of hazardous chemicals in wild fish found in the Yangtze.<sup>396</sup> Despite the deteriorating water quality, "[t]he Yangtze basin contributes nearly half of China's crop production, including more than two-thirds of the total volume of rice. Among the other crops grown are cotton, wheat, barley, corn (maize), beans, and hemp."<sup>397</sup>

In remote regions, groundwater is an important water source for agricultural use. However, groundwater is not immune to industrial pollution. Groundwater accounts for one third of the total water resources and provides fresh

<sup>387</sup> Srinu Sitaraman, *Regulating the Belching Dragon: Rule of Law, Politics of Enforcement, and Pollution Prevention in Post-Mao Industrial China*, 18 COLO. J. INT'L L. & POL'Y 267, 280 (2007) (arguing that "[t]he lack of strong centralized environmental administration and a deep-seated political unwillingness to disrupt economic growth, combined with corruption and local protectionism, has precluded China from fully complying with its international treaty obligations and enforcing its domestic environmental laws.").

<sup>388</sup> Sun Xiaohua, *Ban Slapped on Polluting Cities, Zones*, CHINA DAILY, July 4, 2007, available at [http://www.chinadaily.com.cn/china/2007-07/04/content\\_909239.htm](http://www.chinadaily.com.cn/china/2007-07/04/content_909239.htm).

<sup>389</sup> Jonathan Ansfield & Keith Bradsher, *China Gives Fuller View of Pollution In Its Waters*, N.Y. TIMES, Feb. 10, 2010, at A9.

<sup>390</sup> Emma Graham-Harrison, *China's Water Pollution Level Higher than Estimated in 2007*, WASH. POST., Feb. 10, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/09/AR2010020903572.html>.

<sup>391</sup> See GREENPEACE, SWIMMING IN POISON: AN ANALYSIS OF HAZARDOUS CHEMICALS IN YANGTZE RIVER FISH 12 (2010).

<sup>392</sup> *Id.*

<sup>393</sup> *Id.*

<sup>394</sup> *Id.*

<sup>395</sup> *Id.* at 6.

<sup>396</sup> *Id.*

<sup>397</sup> *Yangtze River*, ENCYCLOPÆDIA BRITANNICA ONLINE, <http://www.britannica.com/EBchecked/topic/651857/Yangtze-River> (last visited Apr. 18, 2011).

water for 70% of the population in China, especially in rural areas.<sup>398</sup> An official study by the Chinese government shows that 90% of ground water in China is polluted.<sup>399</sup> The study indicates that agrochemical and industrial waste are the major sources of pollution.<sup>400</sup> It also links heavy metals found in ground water to increased rates of cancer, infertility, and birth defects in rural regions.<sup>401</sup>

#### 4. Organic Fraud and Counterfeiting<sup>402</sup>

Fraud is a rampant problem that challenges the Chinese manufacturing industry.<sup>403</sup> Likewise, organic fraud is the most serious problem facing the domestic organic industry in China.<sup>404</sup> A study shows that seventy five percent of consumers surveyed have no confidence in domestic organic products.<sup>405</sup> In 2006, Wal-Mart stores in China had to pull fresh organic produce from their shelves because a surprise inspection revealed that the produce from a trusted farm based in Beijing was actually treated with pesticides.<sup>406</sup>

On December 15, 2005, an investigation brought to light that the Jiahe Agricultural Technology Development Corporation (Jiahe) deliberately labeled its conventionally grown produce as "Green Food" for at least two years. In the investigation, Jiahe managers admitted that, due to the Jiahe brand's popularity, the corporation was no longer able to meet the growing demand for its products.<sup>407</sup> As a result, the company began to label conventionally grown produce as "Green Food" and to deliver this mislabeled produce to grocery stores.<sup>408</sup> Further investigation revealed that Jiahe itself did not even have government approval to produce Green Food.<sup>409</sup> In fact, Jiahe obtained its Green Food certification and

<sup>398</sup> Nian Yifeng, *Diaocha Xianshi Zhongguo Dixiashui Wuran Yanzhong Nongcun Ren Shouhai Zui Zhijie* [Study reveals serious pollution in groundwater, which directly harms rural residents], XINHUA NET, Sept. 8, 2010, <http://nc.people.com.cn/GB/12670784.html>.

<sup>399</sup> Yan Zhan, *China's Groundwater Future Increasingly Murky*, WORLDWATCH INSTITUTE (May 8, 2011), <http://www.worldwatch.org/node/4753>.

<sup>400</sup> *Id.*

<sup>401</sup> *Id.*

<sup>402</sup> See generally Qiu Chongzhi & Yang Yi, *Jiyu Shipin Anquan de Xiaofei Xingwei Fenxi* [Consumer Behavior Analysis with Regard to Food Safety], 36(8) ANHUI NONGYE KEXUE [J. OF ANHUI AGRIC. SCI.], 3432, 3433 (2008) (arguing that prevalent fake and shoddy food products discourage consumer spending on food); Zeng Yanchu, Xia Wei & Huang Bo, *Xiaofeizhe Dui Lvse Shipin de Goumai yu Renzhi Shuiping Jiqi Yingxiang Yingshu* [Factors Affecting Consumers' Purchase and Cognition of Green Foods] 23 XIAOFEI JINGJI [CONSUMER ECON.] 38, 42 (2007) (noting that "half of the consumers surveyed have no confidence in authenticity of green food.").

<sup>403</sup> Mark Alan Kastel, *Wal-Mart: The Nation's Largest Grocer Rolls-out Organic Products—Market Expansion or Market Delusion?* THE CORNUCOPIA INSTITUTE REPORT, Sept. 27, 2006, at 8.

<sup>404</sup> Chi-Chu Tschang, *Organic, With Pesticides (Extended)*, BUSINESSWEEK, July 30, 2007, available at [http://www.businessweek.com/magazine/content/07\\_31/b4044062.htm](http://www.businessweek.com/magazine/content/07_31/b4044062.htm) (Professor Thiers pointed out, "The problem with the domestic market is that Chinese consumers don't believe in certification. They don't believe in the integrity of what they see.").

<sup>405</sup> Yang Xiaoli & Jing Zaifang, *Shenyang Shi Lvse Shipin Yingxiao Xianzhuang ji Wenti Fenxi* [Analysis of green food sales and challenges in Shenyang], ZHONGGUO SHIYU YU YINGYANG [CHINESE FOOD AND NUTRITION], (2005). A survey shows that only one fourth of consumers surveyed have confidence in green food.

<sup>406</sup> *Id.*

<sup>407</sup> *Id.*

<sup>408</sup> *Id.*

<sup>409</sup> *Id.*

serial numbers from another company approved by the Ministry of Agriculture.<sup>410</sup>

The Jiahe scandal illustrates deep flaws in China's regulatory system for organics. Under current law, multiple departments are in charge of regulating Green Food products. The Ministry of Agriculture is responsible for approval; the Industrial and Commercial Administration is responsible for registration of Green Food certifications; the Quality Control Department ensures that Green Food producers follow proper procedures in production; the Food and Drug Agencies ensure that the end products comply with state standards; and the State Development and Reform Commission is responsible for supervising green food certification.<sup>411</sup> Jiahe would not have been able to mislabel its products for two years if any of the governmental agencies had exercised due diligence. Ironically, the Director of the GFDC said that because Jiahe obtained its Green Food certification and labels through fraudulent means, it was in fact not a registered Green Food producer, and therefore, GFDC had no jurisdiction to apply any sanctions against Jiahe.<sup>412</sup>

In addition, the distributors—Wal-Mart, Carrefour, and other grocery chains—were negligent in marketing Jiahe products without verification. However, there is no effective means to hold distributors liable under current Chinese law. Article 49 of the Law on Consumer Protection provides:

Business operators who engaged in fraudulent activities in supplying commodities or rendering services shall, on the demand of the consumers, increase the compensation for victims' losses; the increased amount of the compensations shall be two times the cost that the consumer paid for the commodities purchased or services received.<sup>413</sup>

Article 49 bases the double payment on what the plaintiff paid for goods or services, not on the compensatory damages caused by the defendant. In the Jiahe scandal, even if consumers were allowed to recover double damages under Article 49, they could only be paid twice the amount they paid for the items they purchased from the grocery stores, not twice the amount of compensatory damages. Thus, the so-called double damages provision does very little to punish wrongful conduct.

In December 2005, Mr. Chen Zhiwei sued seventeen enterprises in various courts for misusing Green Food labels and defrauding consumers.<sup>414</sup> One court ruled that the producer and Wal-Mart were jointly and severally liable and paid Mr. Chen RMB15.5 (U.S. \$2) for a refund and RMB15.5 (U.S. \$2) in compensation.<sup>415</sup> Obviously, the negligible amount of compensation was inadequate to deter the wrongdoing of the unscrupulous producers and the stores that carried their products. In a similar story, Mr. Feng Zhibo purchased several food items from Wal-Mart and

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<sup>410</sup> *Id.*

<sup>411</sup> *Id.*

<sup>412</sup> *Id.*

<sup>413</sup> Xiaofei Zhe Quanyi Baohu Fa [Law on Consumer Protection] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 31, 1993, effective Jan. 1, 1994), translated in [www.lawinfochina.com](http://www.lawinfochina.com).

<sup>414</sup> Li Yuanfang, "Lvse" Shipin Zaoyu Xinren Weiji [Losing Confidence in "Green Food"], SHICHANG ZHOUBAO, Dec. 15, 2005, available at [http://www.cb-h.com/2008/shshshow.asp?n\\_id=22670](http://www.cb-h.com/2008/shshshow.asp?n_id=22670).

<sup>415</sup> *Id.*

Vanguard that he clearly knew were fake “Green Food.”<sup>416</sup> He sued the two grocery giants at Luohu District People’s Court in Shenzhen.<sup>417</sup> Despite the fact that the two stores marketed fake Green Food, the Court dismissed Mr. Feng’s petition on the ground that he suffered no actual injury.<sup>418</sup> Furthermore, the Court frowned upon Mr. Feng acting as a self-imposed private prosecutor and encroaching upon the government’s jurisdiction.<sup>419</sup>

#### *D. Beyond China*

China is only one of over a hundred countries that export organic products to the United States. The obstacles facing the Chinese government in regulating organic production are not unique to China. For example, Mexico, Guatemala, Ecuador, Thailand, Argentina, Honduras, and the Philippines all ranked lower than China on Transparency International’s 2010 Corruption Perceptions Index.<sup>420</sup> All of these countries are among the top ten suppliers of fruits and vegetables to the U.S. market.<sup>421</sup> As in China, corruption and related issues in these countries raise a significant risk that many of the U.S. food imports produced in these countries will not meet U.S. organics standards.

Unfortunately, there remains a lack of available data to know how much of

<sup>416</sup> *Id.*

<sup>417</sup> *Id.*

<sup>418</sup> *Id.*

<sup>419</sup> *Id.*

<sup>420</sup> TRANSPARENCY INTERNATIONAL, CORRUPTION PERCEPTIONS INDEX 2010 (2010), available at [http://www.transparency.org/policy\\_research/surveys\\_indices/cpi/2010/results](http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results)

<sup>421</sup> RENÉE JOHNSON, CONGR. RESEARCH SERV., RL 34468, THE U.S. TRADE SITUATION FOR FRUIT AND VEGETABLE PRODUCTS 4 (2011), available at <http://www.nationalaglawcenter.org/assets/crs/RL34468.pdf>.

The following chart juxtaposes the data on imports of fruits and vegetables to the U.S. with the data on corruption in exporting countries for comparison purposes:

Top 10 Suppliers of U.S. Fruit and Vegetable Imports in 2009	% Share of Fruit and Vegetable Imports	Corruption Perceptions Index 2010 Rankings among 178 Countries (with 1 being the least corrupt; U.S. ranked 22)
Mexico	34%	Ranked 98 out of 178
Canada	13%	Ranked 6 out of 178
Chile	9%	Ranked 21 out of 178
China	7%	Ranked 78 out of 178
Costa Rica	5%	Ranked 41 out of 178
Guatemala	4%	Ranked 91 out of 178
Ecuador	3%	Ranked 127 out of 178
Peru	3%	Ranked 78 out of 178
Thailand	2%	Ranked 78 out of 178
Spain	2%	Ranked 30 out of 178
Brazil	2%	Ranked 69 out of 178
Argentina	2%	Ranked 105 out of 178
Colombia	2%	Ranked 78 out of 178
Honduras	1%	Ranked 134 out of 178
Philippines	1%	Ranked 134 out of 178

these food imports consist of organics.<sup>422</sup> Further, no extensive studies of other countries have been conducted to understand the effectiveness—or even the existence—of their regulatory frameworks for food safety in general and organic production in particular. Therefore, this article underscores the need for further evaluation of foreign food regulatory systems to ensure consumer welfare in the United States.

#### IV. CONCLUSION: INFORMATION ASYMMETRY AND THE USDA'S SIGNALING EFFECT<sup>423</sup>

To a large extent, an unregulated organic market is analogous to Nobel Prize-winning economist George Akerlof's "market of lemons" theory.<sup>424</sup> In his widely cited article, Akerlof employed the used car market as an example to explain why some markets lead to lower quality goods through a phenomenon called "adverse selection."<sup>425</sup> In an unregulated organic market, consumers have no information about how organics are grown and whether chemicals are used, especially in foreign countries. Organic growers, however, know exactly how they produce their products. In the grocery stores, uninformed consumers cannot, based on appearance, discern the difference between organics produced by honest and dishonest growers. Dishonest growers can take advantage of this information asymmetry and label conventionally grown products as organic. As a result, the honest organic growers cannot compete with dishonest growers because all the hard work and extra expense to comply with organic standards does not reap a benefit from consumers. Because of the reduced production costs in disregarding organic standards, dishonest growers can gradually drive honest growers out of the organic market.<sup>426</sup>

One possible solution to this information asymmetry is to allow consumers to acquire undistorted information about products from trustworthy third parties.<sup>427</sup> Through field trips and inspections, third parties can observe production processes and issue certifications that credibly signal the quality of the products. Following the signals, consumers are able to tell the difference between the good products and the bad ones. As a result, third party certification could increase the welfare of both consumers and honest producers.<sup>428</sup>

Third party certification, however, is not a foolproof solution. For certification to generate consumer welfare, Akerlof emphasized that "the certifying establishment . . . must be credible."<sup>429</sup> If the third party certification signals the

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<sup>422</sup> See *supra* note 203 and accompanying text.

<sup>423</sup> This subtitle is inspired by Gregory Husisia, *What Standard of Care Should Govern The World's Shortest Editorials?: An Analysis of Bond Rating Agency Liability*, 75 CORNELL L. REV. 411 (1990).

<sup>424</sup> George Akerlof, *The Market For "Lemons": Quality Uncertainty and The Market Mechanism*, 84 Q. J. ECON., 488, 489 (1970).

<sup>425</sup> Wendy Wagner, *Using Competition-Based Regulation to Bridge the Toxics Data Gap*, 83 IND. L. J. 629, 637 (2008).

<sup>426</sup> Akerlof, *supra* note 424, at 490.

<sup>427</sup> Cf. Jonathan M. Barnett, *Certification Drag: The Opinion Puzzle and Other Transactional Curiosities*, 33 J. CORP. L. 95, 101 (2007).

<sup>428</sup> *Id.* at 100.

<sup>429</sup> Akerlof, *supra* note 424, at 494.

wrong information, consumers are plunged into a “second-order lemon market,”<sup>430</sup> in which consumers are misguided by certification and thus unable to make informed decisions. Misleading signals generate an even greater loss of consumer welfare than if there was no signal at all because consumers are less vigilant when they assume the signal is credible.

In essence, the “USDA Organic” seal is a signal designed to guide consumers to make informed food purchase decisions. The primary purpose of the OFPA is to ensure “consumers . . . get what they pay for.”<sup>431</sup> In practice, however, this purpose has not been achieved domestically because of inherent problems with the OFPA’s regulatory structure, as well as the USDA’s dearth of resources and inability to enforce its existing regulations. Further, when drafting the OFPA, lawmakers failed to anticipate the enormous impact that globalization would have on organic trade in the United States two decades later. While the law has significantly facilitated global trade, especially with regards to the importation of organics to the U.S. market, it does not provide a reliable system to ensure the integrity of organics from other countries. Under the current system, the USDA does not exercise any direct supervision over organic production. Rather, it accredits certifying agents, which conduct annual field inspections. In the context of foreign organic production, it is common for a USDA accredited agent from Germany to issue certifications in China. While outsourcing has become a norm in global trade, it is problematic for the USDA to outsource its regulatory power to foreign agents that it only audits once every several years.

There are two major flaws with the current system: First, USDA accredited certifying agents are not subject to rigorous supervision. Because of a limited budget and capacity, the USDA has failed to conduct timely inspections of its accredited agents operating internationally.<sup>432</sup> In the most egregious cases, the USDA granted foreign certifying agents conditional accreditations based only on paper applications and did not follow up to check on their compliance for up to seven years.<sup>433</sup> Functioning as an extended arm of the USDA, certifying agents are the first reviewers of organic production. Any lapse on the part of certifying agents will create loopholes for growers to cut costs at the expense of not complying with the law. Second, the OFPA naively assumes that the accreditation–certification system is sufficient to regulate foreign organic producers. Even if the USDA is capable of exercising supervision of accredited agents operating in foreign countries, the integrity of foreign organics cannot be guaranteed. This is because the OFPA fails to take into consideration a host of relevant issues in foreign countries such as China, including land tenure, pollution, and the regulatory environment, which are far beyond the reach of certifying agents. Unless these two flaws are corrected, the “USDA Organic” seal bears little, if any, value.

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<sup>430</sup> Barnett, *supra* note 427, at 101.

<sup>431</sup> 1990 U.S.C.C.A.N. 4943. S. Rep. 101–357, at 289.

<sup>432</sup> OFFICE OF INSPECTOR GEN., U.S. DEP’T OF AGRIC., AUDIT REPORT 01601-03-Hy, *supra* note 51, at 4.

<sup>433</sup> *Id.* at 29.