

REGULATING ORGANIC

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Even highly regulated labels, such as the organic label, have the potential for greenwashing. As recently as January 2023, a grain seller was indicted in federal court for a \$43 million scheme that involved the sale of non-organic grain as USDA-certified organic. But today's organic market is also full of sellers who follow the current federal organic regulations but fail to demonstrate the spirit of the organic movement—forgoing soil, animal welfare, and community for profit. I call this nuanced form of greenwashing quasi-greenwashing. It arises when a business complies with a rule or standard but takes advantage of consumer misunderstanding or confusion about that rule.

Using the organic label as an example, this Article examines how quasi-greenwashing has become common as large corporations move into a market space that was once viewed as “alternative.” Because of their size and influence, these corporations can easily meet the federal organic standards but fail to address the non-market—and unregulated—aspects of organic farming, including its social and environmental benefits. Because these corporations do not run afoul of the law, the harms felt by traditional organic farmers, unsuspecting consumers, and the environment persist.

As this Article explains, existing methods for addressing greenwashing, such as regulatory enforcement by the Federal Trade Commission, will not cure growing quasi-greenwashing concerns, nor will they transform our food system into a sustainable one. Increased efforts to detect and eliminate fraud will simply protect what is already regulated—the organic market. Instead, to address quasi-greenwashing, policymakers and advocates must work to remove the disconnect

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between consumers' values and producers' practices. Whatever approach is taken to achieve greater symmetry, advocates, attorneys, and agencies should take note: a new, more subtle form of deception is afoot. Quasi-greenwashing will emerge across business sectors, not just organics, as the federal government, in coordination with big business, plays a larger role in regulating (and defining) sustainable practices.

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“Once you understand that the purpose of a food company is to sell food products, then you look at the whole labeling issue in a very different way.”

—Dr. Marion Nestle¹

INTRODUCTION

Like many consumers, I do not have a lot of time to examine food labels, but one label I do look for is the U.S. Department of Agriculture (USDA) organic seal.² Recently, while making a salad at home, I noticed that in addition to the USDA organic seal, the packaging label said “Eat organic. Healthy plant, healthy you.” The label also had images of blue water droplets, a mound of brown dirt, and a yellow sun with rays. “Clean water, rich soil, pure sunshine” appeared beneath the images.³ These images and words made me feel good; I had made a positive purchase for myself and the planet. But I am also a bit of a skeptic. And, despite my feelings, I had some questions about the lettuce I was eating.⁴ Was it hydroponically grown in nutrient-rich water as opposed to soil?⁵ Was it grown under a heat lamp in a shipping container instead of outside? Because the organic regulations allow hydroponic products to carry the USDA organic seal when all the other certification requirements are met,⁶ the answer to my questions could have been yes. Lettuce grown inside, in water, under a heat lamp can carry the organic seal.⁷ Fortunately, my internet research revealed that I had not been duped; the company website confirmed that the lettuce

1. *What You’re Eating, Episode 5: Who Decides What’s Natural?*, FOODPRINT (Mar. 29, 2022), <https://foodprint.org/what-youre-eating/ep-5-natural-food> [<https://perma.cc/QYE8-V2L8>] (quoting Dr. Marion Nestle, Professor of Nutrition, Food Studies, and Public Health at New York University).

2. This is in part because my sister is the owner and operator of a USDA Certified Organic Farm outside Dayton, Ohio.

3. *Cf. Spring Mix*, BRIGHT FARMS, <https://www.brightfarms.com> [<https://perma.cc/37SX-ZQP7>] (depicting a large, yellow sun made up of leafy greens with the motto “cleaner and greener,” “clean and conscious,” and “pure and simple”).

4. Don’t get me started on the labels on egg or milk cartons!

5. Hydroponics is defined as a “technique of growing plants using a water-based nutrient solution rather than soil.” *Hydroponics*, USDA NAT’L AGRIC. LIBR., <https://www.nal.usda.gov/farms-and-agricultural-production-systems/hydroponics> [<https://perma.cc/U47K-NB6W>].

6. 7 C.F.R. § 205.105 (2022); *Ctr. for Food Safety v. Perdue*, 527 F. Supp. 3d 1130, 1142 (N.D. Cal. 2021), *aff’d*, No. 21-15883, 2022 U.S. App. LEXIS 26533 (9th Cir. 2022) (holding that USDA’s certification of hydroponic systems comply with the OFPA).

7. *See* 7 C.F.R. § 205.105 (2022) (identifying production and handling methods that disqualify a farm from receiving the organic seal).

was grown in soil and proclaimed all the benefits of traditional organic farming. “Phew,” I thought. It is not that hydroponics are inherently bad;⁸ it is just that, as a consumer, I, like many traditional organic advocates, want to support farmers who use soil-based practices. Additionally, I would like to think my purchases are helping the environment in some, albeit small, way.

The rise of conscious consumerism has created a growing market for sustainable, environmentally friendly products. I, along with many others, have been told that we can vote with our wallet, making purchases that will encourage more companies to embrace social and environmental practices that align with our values.⁹ But identifying products that live up to the words on a package is a challenge. And as more and more labels appear on more and more products—from fashion to finance to food—distinguishing between those claims that are truthful and those that are greenwashed has become a challenge for consumers and regulators alike.

The USDA organic seal or label provides a unique case study of how ecolabels fall subject to greenwashing, thereby harming consumers, legitimate businesses, and the environment. The organic story underscores the importance of enforcement and reveals the dangers of regulatory capture. But perhaps most importantly, the organic story demonstrates the importance of clearly defining the priorities—economic, environmental, and social—of a label at its inception.

As the following paragraphs explain, albeit in an abbreviated form, the standardization of organic included government involvement, garnered corporate interest, and created an expansive market that has impacted consumer and producer perceptions of what it means to be organic.

Over thirty years ago, in an effort to stabilize a growing, disparate organic market, the federal government began regulating the organic label through the Organic Foods Production Act of 1990¹⁰ (“OFPA” or “the Act”) and its subsequent regulations called The National Organic Program¹¹ (“NOP”); today, the USDA organic seal is considered the gold standard of food labels and one that carries significant cachet in

8. For example, because hydroponics can be grown indoors, they can be grown locally and require less space, thereby increasing access to organically grown produce.

9. Tracey M. Roberts, *The Rise of Rule Four Institutions: Voluntary Standards, Certification and Labeling Systems*, 40 *ECOLOGY L.Q.* 107, 117 (2013) (“[L]abeling systems give consumers an opportunity to vote with their wallets by highlighting for consumers the goods with lower social or environmental costs.”).

10. 7 U.S.C. §§ 6501–6524.

11. 7 C.F.R. § 205 (2000).

grocery stores, farmers markets, and online.¹² By 2020, the U.S. organic market—which includes both food and nonfood items—increased to \$61.9 billion.¹³ The global organic market is expected to grow to \$484 billion by 2030.¹⁴ Consumers are willing to pay more for organic products¹⁵ because consumers think organic products are superior.¹⁶

As demand for organic products grows, more and more producers, processors, and retailers are obtaining the USDA organic seal in hopes of distinguishing their products and appealing to consumers.¹⁷ Today's organic market landscape no longer consists primarily of a "fringe of countercultural farmers and food purists."¹⁸ Companies like Coca-Cola, Dole, General Mills, Kraft, Tyson Foods, and Kroger have

12. Consumer Reports recently rated the USDA organic seal "Excellent." Janet Lee, *Which Food to Buy Organic (and How to Spend Less When You Do)*, CONSUMER REPS. (June 9, 2022), <https://www.consumerreports.org/organic-foods/which-food-to-buy-organic-and-how-to-spend-less-when-you-do-a5815536309> [<https://perma.cc/PU6N-BRPF>].

13. See Maggie McNeil, *U.S. Organic Sales Soar to New High of Nearly \$62 Billion in 2020*, ORGANIC TRADE ASS'N (May 25, 2021), <https://ota.com/news/press-releases/21755> [<https://perma.cc/M9RN-MQU7>] (explaining that the popularity of organic foods increased during COVID and accompanying supply-chain issues led consumers to search for alternative retailers). Organic food items account for over 90% of the market, while nonfood items, like fiber, supplements, and beauty products account for a little less than 10%. See *id.*

14. Abhishek Paliwal, *Global Organic Food Market Anticipated to Generate a Revenue of \$484.0 Billion and Rise at a CAGR of 11.77% Over the Forecast Period from 2022 to 2030*, RSCH. DIVE (June 1, 2022), <https://www.prnewswire.com/news-releases/global-organic-food-market-anticipated-to-generate-a-revenue-of-484-0-billion-and-rise-at-a-cagr-of-11-77-over-the-forecast-period-from-2022-to-2030-220-pages-report-by-research-dive-301558622.html> [<https://perma.cc/SFR8-QZPH>].

15. For example, a 2018 study found that 41% of older millennials were willing to pay more for organic or natural products. *Consumer Willingness to Pay for a Premium for Natural or Organic Products in the United States in 2018, By Generation*, STATISTA (Jan. 13, 2022), <https://www.statista.com/statistics/912204/willingness-pay-premium-natural-organic-generational-us> [<https://perma.cc/LX44-QH9Z>].

16. Manuela Vega-Zamora, Manuel Parras-Rosa, Eva M. Murgado-Armenteros & Jose Francisco Torres-Ruiz, *The Influence of the Term 'Organic' on Organic Food Purchasing Behavior*, 81 *PROCEDIA: SOC. & BEHAV. SCI.* 660, 668 (2013) ("Simply using the term 'organic' in product communication evokes superiority creating a favorable attitude towards organic products.").

17. Catherine Greene, Gustavo Ferreira, Andrea Carlson, Bryce Cooke & Claudia Hitaj, *Growing Organic Demand Provides High-Value Opportunities for Many Types of Producers*, U.S.D.A. ECON. RSCH. SERV. (Feb. 6, 2017), <https://www.ers.usda.gov/amber-waves/2017/januaryfebruary/growing-organic-demand-provides-high-value-opportunities-for-many-types-of-producers> [<https://perma.cc/KG9L-2MSH>].

18. MICHAEL A. HAEDICKE, *ORGANIZING ORGANIC: CONFLICT AND COMPROMISE IN AN EMERGING MARKET*, 7 (2016).

entered the organic marketplace through partnerships or by starting their own organic lines.¹⁹ Walmart and Costco dominate the market, selling the most organic produce of any retailer.²⁰ Consumers can now buy organic bedding and lip balm in addition to organic fruits and vegetables.²¹

While the involvement of large entities like Walmart has helped to push organics mainstream, it has also created a bifurcated organic market, which, for the purposes of this Article, consists of *traditional* organic and *conventional or industrial* organic.²² Traditional organic farming includes the practice of growing crops in soil and raising livestock continuously in open pastures from birth—practices that are not currently mandated by the NOP regulations.²³ Traditional organic farmers are part of a movement focused on connecting consumers to farmers, producing nutritious food, and engaging in environmental stewardship.²⁴ This movement seeks to “revolutionize the structure of agriculture” in a “democratic and participatory way.”²⁵

In contrast, conventional organic includes corporations engaging in large-scale, specialized operations. They are the operations of which agricultural economist John Ikerd warned when, during the formation of the organic program he wrote, “[l]arge, specialized food systems will quickly dominate global production and distribution of organic foods,

19. See Sarah J. Morath, *Hydroponics: The End of Organic?*, 33 NAT. RES. & ENV'T 36, 38 (2018) (explaining how the popularity of organic food has led to larger brands entering the market).

20. Jennifer Chait, *Largest Organic Retailers in North America*, LIVEABOUT, <https://www.liveabout.com/organic-retailers-in-north-america-2011-2538129> [<https://perma.cc/286H-W5GK>].

21. See, e.g., *Organic Sheets*, CO. STORE, <https://www.thecompanystore.com/organic-sheets> [<https://perma.cc/54TW-J5JS>] (advertising “eco-friendly organic cotton sheets”); *Wild Crafted Lip Balm*, NURTURE MY BODY, <https://nurturemybody.com/collections/organic-lip-balm> [<https://perma.cc/M27F-DUL2>] (advertising the use of organic ingredients without any harmful chemicals).

22. Professor Endres divides these markets into an “industrialized” organic market and a “beyond-organic” market. A. 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, 58 (2007).

23. *Id.* at 45–48.

24. BRIAN K. OBACH, *ORGANIC STRUGGLE: THE MOVEMENT FOR SUSTAINABLE AGRICULTURE IN THE UNITED STATES* 39 (2015) (“Organic proponents had a mission; they sought to transform the way agriculture was done.”).

25. HAEDICKE, *supra* note 18, at 4.

if they are allowed free access to organic markets.”²⁶ These operations comply with the letter of law by engaging in federally approved organic agricultural processes, but they do not embody the values of traditional organic farming.²⁷ These operations emphasize efficiency and can meet the minimum standards at the lowest cost.²⁸

To some, a bifurcated market is the expected outcome of federalizing organic. Ikerd more recently wrote in 2018 that reducing organic farming to a “single specified production process” through the NOP rules, with no consideration of the ecological or social consequences, allowed organic farming operations to be “organized and routinized to run with the efficiency of factories.”²⁹ He continues: “organic foods are no longer defined by organic farmers’ commitments to the ecological, social, and economic integrity that characterize authentic organic production.”³⁰ Today’s traditional organic farmer competes with industrialized organic operations.³¹

Not only has federalizing organic increased competition between producers, but it has also led to abuse by producers seeking to mislead consumers for the sake of profit.³² High-profile cases of fraud and lax enforcement have raised concerns that some organic products may, in fact, be “fauxganic.”³³ And reports on organic fraud have caused consumers to question whether buying organic is worth it.³⁴

26. John Ikerd, *The Industrialization of Organics*, 8 J. AGRIC., FOOD SYS., & CMTY. DEV. 9, 10 (2018) (citing John Ikerd, Univ. of Mo., Presentation at Organic Agriculture Faces the Specialization of Production Systems: Specialized Systems and the Economical Stakes Presentation at the Organic Agriculture Faces the Specialization of Production Systems Sponsored International Conference by Jack Cartier Center, Lyon, France (Dec. 9, 1999) [hereinafter Ikerd Presentation], <https://docplayer.net/27895757-Organic-agriculture-faces-the-specialization-of-production-systems-specialized-systems-and-the-economical-stakes-john-ikerd-university-of-missouri.html> [<https://perma.cc/J9NG-KP6Y>]).

27. *Id.* at 11.

28. *Id.*

29. *Id.* at 10.

30. *Id.* at 11.

31. *Id.* at 10.

32. See *infra* Section I.A (discussing the USDA and lax enforcement).

33. See Linley Dixon, “Fauxganic” Takeover in Full Swing, CORNUCOPIA NEWS, <https://www.cornucopia.org/2018/10/fauxganic-takeover-in-full-swing> [<https://perma.cc/JCM2-DK3L>] (last updated Oct. 3, 2018) (discussing the dilution of the “organic” label due to agribusiness interests and lax enforcement).

34. See, e.g., Candice Choi, *With Disputes Over Labeling Rules and Questionable Practices, Is Buying “Organic” Worth It?*, CHI. TRIB., <http://www.chicagotribune.com/business/ct-biz-organic-food-label-dispute-20180711-story.html> [<https://perma.cc/7KEQ-U5T8>] (last updated July 11, 2018) (discussing concerns about adherence to USDA Organic standards and doubts regarding the price justification for organic products).

This damaging narrative has prompted a variety of responses from different stakeholders, including traditional organic farmers, trade groups, and the federal government.³⁵ For example, the Organic Trade Association³⁶ (“OTA”) launched a pilot program to detect and deter fraud³⁷ and the federal government is working to strengthen the organic program through rulemaking and increased enforcement.³⁸

But these discussions have revealed a growing disconnect between the spirit of the NOP and its implementation. The organic label provides product-related information about a process. That is, products that bear the organic seal have been produced and processed according to a set of processes that include, among other things, almost no synthetic materials to control pests and weeds and no hormones to promote livestock growth.³⁹ In promulgating these NOP rules, the USDA was explicit: “the emphasis and basis of these standards is on process, not product.”⁴⁰ At first glance, a process-focused statute might be embraced by those who view organic farming as a movement to transform our food system into one that is more equitable and sustainable.⁴¹ But in the case of organic food regulations, the “processes” authorized today do not align with the origins of organic farming, and many consumers are not familiar with the particulars of the organic regulations.⁴² The conversation has shifted

35. See *infra* Part II (discussing the USDA, agriculture industry, and government’s response to organic labeling).

36. ORGANIC TRADE ASS’N, <https://www.ota.com> [<https://perma.cc/LR27-MGUJ>].

37. Maggie McNeil, *Organic Trade Association Kicks Off Pilot Project to Deter Organic Fraud*, ORGANIC TRADE ASS’N (May 24, 2018), <https://www.ota.com/news/press-releases/20233> [<https://perma.cc/PVQ2-YLYD>].

38. Lisa Held, *USDA Moves Forward with Sweeping Plans to Prevent Fraud in Organics*, CIV. EATS (Aug. 17, 2020), <https://civileats.com/2020/08/17/usda-moves-forward-with-sweeping-plans-to-prevent-fraud-in-organics> [<https://perma.cc/6Q34-RE8E>] (rulemaking); *USDA Organic Oversight and Enforcement Update*, U.S.D.A. (Feb. 2021) <https://www.ams.usda.gov/sites/default/files/media/NOPEenforcementUpdateFebruary2021.pdf> [<https://perma.cc/D8ML-MZ7J>] (increased enforcement).

39. Michelle Friedland, *You Call That Organic?—The USDA’s Misleading Food Regulations*, 13 N.Y.U. ENV’T L.J. 379, 388 (2005).

40. National Organic Program, 65 Fed. Reg. 80549 (Dec. 21, 2000); see also Friedland, *supra* note 39, at 391 (explaining that rather than creating a set of quality standards for organic food, the USDA intentionally focused on creating specific actions for producers to perform or avoid).

41. See, e.g., Occupational Safety and Health Act, 29 U.S.C. §§ 651–678 (imposing obligations on employers to maintain a safe workplace through specific processes rather than outcomes).

42. Friedland, *supra* note 39, at 386.

from celebration to distrust and discontent as corporations compete with smaller operations and capitalize on consumer confusion.⁴³

Despite the confusion and competition, traditionalists are not advocating for the abandonment of the popular federal program, arguing that the alternative—conventional, non-organic agriculture—is significantly more harmful to the environment, farmworkers, and consumers.⁴⁴ Rather than scrapping the organic label, organic advocates are seeking to change rules that skirt some of the traditional organic practices.⁴⁵ Organic farmers who are part of the Real Organic Project have advocated for an “add-on” label to further distinguish their organic products from those grown using industrial organic practices.⁴⁶

The federal government, in contrast, has approached the weaknesses through enforcement—conducting more inspections, prosecuting those engaged in fraud, and imposing stiffer penalties. For example, the Federal Trade Commission (FTC) has signaled an interest in pursuing false claims against nonfood organic products,⁴⁷ such as beauty products, and the USDA revised rules to strengthen oversight and enforcement of the production, handling, and sale of organic products.⁴⁸ As recently as January 2023, the U.S. Department of Justice (DOJ) charged two individual farmers involved in a \$46

43. *Id.* at 409.

44. *See* Ikerd, *supra* note 26, at 11 (“I am not suggesting abandonment of USDA organic standards. The increased availability of industrial organic products has made more people aware of the environmental and public health risks of conventional agricultural products. Certified organic foods are still produced without toxic chemical pesticides and fertilizers, hormones, and antibiotics, or genetically engineered crops.”)

45. *See id.* (suggesting that, because of the decline in the integrity of the organic label, the USDA should shift its definition of organic to encompass the historical practices of organic farming and move away from the label as a marketing tool).

46. REAL ORGANIC PROJECT, <https://www.realorganicproject.org/home-draft> [<https://perma.cc/6VQT-DDZJ>]; *see infra* Part I (discussing the history of the organic label and issues of fraud arising from the current system).

47. Lesley Fair, *Deceptive “Certified Organic” Claims Leave Consumers Verklemt*, FED. TRADE COMM’N (Sept. 19, 2019), <https://www.ftc.gov/business-guidance/blog/2019/09/deceptive-certified-organic-claims-leave-consumers-verklemt> [<https://perma.cc/GTG4-HN8N>].

48. Press Release, U.S.D.A., U.S.D.A. Publishes Strengthening Organic Enforcement Final Rule (Jan. 18, 2023), <https://www.usda.gov/media/press-releases/2023/01/18/usda-publishes-strengthening-organic-enforcement-final-rule> [<https://perma.cc/EWX9-939T>]; Laura Reiley, *USDA Moves to Crack Down On ‘Organic’ Fraud*, WASH. POST (Jan. 19, 2023, 12:11 PM), <https://www.washingtonpost.com/business/2023/01/19/usda-rule-organic-fraud> [<https://perma.cc/RXG9-5AG6>].

million fraud scheme in which they sold non-organic grain as certified organic.⁴⁹

While fraud does happen, the reality is that organic certification process administered by the USDA is already “rigorous,” “extensive,” and even “excessive.”⁵⁰ The USDA program is also “nuanced and multivarious.”⁵¹ Large corporations, with their resources and influence, can easily enter the market and master the complexities of organic regulations. For the most part, these corporations comply with the letter of the law by following the current organic regulations (i.e., they are not violating any rules), but they fail to demonstrate the spirit of the organic movement.⁵² Recognizing that consumers’ understanding of the rules underlying the organic seal varies, these large corporations have exploited consumer confusion and ignorance. Industrial organics are engaging in what I call *quasi-greenwashing*,⁵³ a more nuanced form of greenwashing that occurs when a business complies with the law but exploits regulatory loopholes and consumer misunderstanding or confusion.

Quasi-greenwashing, which can exist in any sector, not just the organic sector, results from information asymmetry. That is, it arises in those situations where one party to a transaction (i.e., the seller) has more information than the other (i.e., the buyer) about an environmental term. The seller, unlike the consumer, may have even assisted in defining the term in a way that helps advance the seller’s goals. Producers/sellers can avoid liability under existing methods of

49. *Superseding Indictment Charges Two Cottonwood County Farmers in \$46 Million Organic Grain Fraud Scheme*, U.S. DEPT. OF JUST. (Jan. 13, 2023) [hereinafter *Superseding Indictment Charges*], <https://www.justice.gov/usao-mn/pr/superseding-indictment-charges-two-cottonwood-county-farmers-46-million-organic-grain> [https://perma.cc/WQ34-X8NL].

50. Rita-Marie Cain Reid, *Alternative Organic: Legal Issues in Marketing Uncertified Organic Products*, 73 FOOD & DRUG L.J., 570, 590 (2018).

51. *Id.*

52. Laura Reiley, *The Organic Food Industry is Booming, and that May be Bad for Consumers*, WASH. POST (Mar. 14, 2019, 12:58 PM), <https://www.washingtonpost.com/business/2019/03/14/organic-food-industry-is-booming-that-may-be-bad-consumers> [https://perma.cc/J57H-3XQJ].

53. Thank you to my colleague at Wake Forest University, Marie-Amelie George, for this phrasing of quasi-greenwashing, which is distinct from greenwashing. Greenwashing is “when a company purports to be environmentally conscious for marketing purposes but actually isn’t making any notable sustainability efforts.” Gillian Gilbert, *Greenwashing and the FTC*, FOX ROTHSCHILD LLP (Apr. 27, 2023), <https://advertisinglaw.foxrothschild.com/2022/04/greenwashing-and-the-ftc> [https://perma.cc/8797-JBLT].

addressing greenwashing, like FTC enforcement actions, by complying with the process.

As a result, greater enforcement will simply reinforce processes already sanctioned by the regulations. In the case of organics, it will not solve the concerns of traditional organic farmers, nor will it address consumer or environmental harms that are perpetuated through quasi-greenwashing.⁵⁴ More enforcement will not promote the ecological, social, or economic benefits of traditional organic farming; it will not transform our food system into a sustainable one.

Instead, policymakers and advocates must work to remove the disconnect between purchaser values and producer practices. Information symmetry will require aligning the NOP with consumer preferences and capturing non-market aspects of organic farming, better informing the consumers as to existing NOP regulations, or a little of both.⁵⁵

This Article proceeds in three Parts. Part I, What's in a Label, describes the history of the organic label and its status as a "gold star" ecolabel. It also provides details on the current structure and administration of the NOP and highlights growing concerns of fraud. Part II, How Labels Fail, explains how lax enforcement by the USDA, regulatory capture by Big Ag, and the use of the organic label on imports and nonfood items have threatened the label's integrity. This Part also describes quasi-greenwashing, a less noticeable, but growing practice of complying with the organic regulations, but not embracing the spirit of organic agriculture. These critiques of the organic program frame the discussion in Part III, When Labels Fail. This Part describes how current actions to address organic fraud—new enforcement measures, increased oversight, and greater involvement by government agencies—will not eliminate quasi-greenwashing. Instead, rule changes, education, or both are needed to alter quasi-

54. See, e.g., *Greenwashing: Organic Foods*, CTR. FOR ACCOUNTABILITY IN SCI. (Dec. 17, 2020), <https://accountablescience.com/greenwashing-organic-foods> [<https://perma.cc/98GP-RENQ>] (discussing how organic pesticides and fertilizers can harm the environment).

55. Richard Epstein, *The Neoclassical Economics of Consumer Contracts*, 92 MINN. L. REV. 803, 811 (2008) argues that learning can correct information asymmetry:

the neoclassical case for markets rests on the more qualified assumption that learning actually matters. To the extent that the issues that truly matter to them, people develop, if they do not already have them, good feedback mechanisms that lower the risk of loss, especially in standardized transactions where consumers are repeat players. People do so because they pay the price for their own error.

Id.

greenwashing behavior. Perhaps more importantly, this Article offers an opportunity to learn about a modified form of greenwashing. Advocates, attorneys, and agencies should be aware that a new form of deception is afoot. As with organic, “recycled,” “carbon neutral,” and “sustainable” are all terms that, once defined, could be subject to quasi-greenwashing. As the organic story illustrates, the success of an ecolabel depends on not just how it is enforced, but how it is defined.

I. WHAT’S IN A LABEL

The USDA Organic is one of several ecolabels that exist in the marketplace today.⁵⁶ Ecolabels convey information to the consumer about the product or the company selling the product.⁵⁷ More specifically, ecolabels visually communicate information through words or symbols about environmental or sustainability practices, making it easier for consumers to identify environmentally friendly products.⁵⁸ In addition to USDA Organic, Fair Trade,⁵⁹ Energy Star,⁶⁰ and Certified Humane⁶¹ are examples of ecolabels or marks.⁶² Products

56. USDA Organic is considered an “industry-leading ecolabel program[] that consumers recognize.” Megan S. Houston, *Ecolabel Programs and Green Consumerism: Preserving A Hybrid Approach to Environmental Regulation*, 7 BROOK. J. CORP. FIN. & COM. L. 225, 238 (2012).

57. *Introduction to Ecolabels and Standards for Greener Products*, ENV’T PROT. AGENCY (Sept. 12, 2022), <https://www.epa.gov/greenerproducts/introduction-ecolabels-and-standards-greener-products> [<https://perma.cc/5L7G-BA7Z>].

58. David E. Adelman & Graeme W. Austin, *Trademarks and Private Environmental Governance*, 93 NOTRE DAME L. REV. 709, 721 (2017) (“Ecolabels . . . operate as symbols, which may include simple scales or visual metrics, for environmental attributes that are either intangible to consumers or difficult for them to evaluate.”).

59. The Fair Trade Certification Mark “means the producers and traders have met . . . social, environmental and economic criteria, as well progress requirements and terms of trade.” *Fairtrade*, ECOLABEL INDEX, <https://www.ecolabelindex.com/ecolabel/fairtrade> [<https://perma.cc/EQ9Y-M8PW>] (last updated July 17, 2023).

60. The Energy Star Mark identifies energy-efficient products. *Energy Star: USA*, ECOLABEL INDEX, <https://www.ecolabelindex.com/ecolabel/energy-star-usa> [<https://perma.cc/T52H-2H5P>].

61. The Certified Humane Mark identifies dairy, poultry, lamb, and beef products from animals who had “[a]ccess to clean and sufficient food and water; and a safe and healthful living environment . . . from birth through slaughter. Producers also must comply with environmental standards.” *Certified Humane Raised and Handled*, ECOLABEL INDEX, <https://www.ecolabelindex.com/ecolabel/certified-humane-raised-and-handled> [<https://perma.cc/R8ER-JRHH>].

62. Scholars tend to use these terms—ecolabels, seals, certifications, and marks—interchangeably to mean a way in which a seller may communicate information to a consumer about the environmental attributes of a product. *See* Adelman, *supra* note

that bear these labels have undergone a voluntary certification process that usually involves a third party, like a non-governmental entity.⁶³ Federal involvement with the organic label makes it a unique ecolabel.

Businesses partake in voluntary certification processes to gain a competitive advantage in the marketplace.⁶⁴ In the context of ecolabels, businesses hope to capitalize on the growing number of conscious consumers looking to purchase environmentally sustainable products.⁶⁵ Additionally, many companies are feeling pressure from employees, shareholders, and investors to “go green”⁶⁶ as federal, and

58, at 710 n.2 (“We use the terms ‘green trademarks’ and ‘ecolabels’ interchangeably.”). See generally Jason Czarnezki, Andrew Homan & Meghan Jeans, *Creating Order Amidst Food Eco-Label Chaos*, 25 DUKE ENV'T L. & POL'Y F. 281, 281 (2015) (“Eco-labels, certifications, and seals of approval serve a variety of functions including communicating to businesses and consumers the environmental attributes of a particular product and incentivizing improvements in production.”). Many producers, like those who produce organic products, must undergo a certification process before they can bear the organic “seal” or ecolabel on their product. See, e.g., *WSDA Organic Program*, WASH. STATE DEP'T OF AGRIC., <https://agr.wa.gov/organic> [<https://perma.cc/6PUH-V4F2>] (explaining crops or products sold in Washington must undergo a certification process). Some labels and seals might also be trademarks. For example, “CarbonNeutral® is the registered trademark of The CarbonNeutral Company and is a global standard to certify that businesses have measured and reduced their CO2 emissions to net zero for their company, products, operations or services.” *CarbonNeutral*, ECOLABEL INDEX <https://www.ecolabelindex.com/ecolabel/carbonneutral> [<https://perma.cc/7T3J-M6XF>].

63. See Czarnezki et al., *supra* note 62, at 283 (describing “government sponsored,” “first-party,” and “third-party certifications”); see also Michael P. Vandenberg, *Private Environmental Governance*, 99 CORNELL L. REV. 129, 148–50 (2013) (describing certification and labeling systems in the context of private environmental governance activities).

64. DAVID P. CARTER, *REGULATION BY PROXY: HOW THE USDA RELIES ON PUBLIC, NONPROFIT, AND FOR-PROFIT INTERMEDIARIES TO OVERSEE ORGANIC FOOD IN THE U.S.* 40 (2019) (“Certification labels protect businesses from fraudulent competition—competitors seeking to capitalize on consumer demand for improved practices without substantively altering their processes—often creating a competitive advantage for certified businesses in the process.”).

65. See Dennis Mitzner, *Grocery Retailers and the Food Market: Trends and Future Prospects*, FORBES (July 31, 2022), <https://www.forbes.com/sites/dennismitzner/2022/07/31/grocery-retailers-and-the-food-market-trends-and-future-prospects> [<https://perma.cc/GG92-SKX2>] (discussing how businesses are capitalizing on the surge of health-conscious consumers).

66. See Seema Kakade & Matt Haber, *Detecting Corporate Environmental Cheating*, 47 ECOLOGY L.Q. 771, 780 (2020) (describing the different stakeholders who are pressuring businesses to engage in more corporate social and environmental responsibility); see also Pratima Bansal & Kendall Roth, *Why Companies Go Green: A Model of Ecological Responsiveness*, 43 ACAD. MGMT. J. 717, 718 (2000) (identifying the drivers

to a lesser degree, state efforts to address environmental problems have failed or stalled.⁶⁷ Ecolabels act as gap-fillers,⁶⁸ and with over 450 in existence,⁶⁹ they signal a growing public preference for environmental protection.⁷⁰

The expansion of ecolabels also mirrors the evolution of environmental law. Traditionally limited to common law, and then statutory law, environmental law has experienced several generations and is no longer limited to the use of command-and-control regulations to achieve environmental goals.⁷¹ While scholars may disagree over what “generation” environmental law finds itself in today,⁷² they agree that environmental law has entered a new era—one that includes voluntary action, such as the use of ecolabels, by industry, as well as the use of other policy instruments.⁷³

Ecolabels are a kind of “information regulation” that targets individual behavior,⁷⁴ a topic that has become increasingly popular

of “corporate ecological responsiveness” as legislation, stakeholder pressures, economic opportunities, and ethical motives).

67. See Vandenberg, *supra* note 63, at 132 (describing the lack of federal action on environmental issues including climate change and “the shift away from public governance” towards private governance).

68. See *id.* at 148 (describing certification programs like the Forest Stewardship Council as “an example of private governance emerging to fill a gap after a period of government inaction”); see also Adelman & Austin, *supra* note 58, at 719 (describing certifications’ “capacity to fill significant gaps in national and international environmental regulations”).

69. ECOLABEL INDEX, <https://www.ecolabelindex.com> [<https://perma.cc/EDU7-KG4H>].

70. See Vandenberg, *supra* note 63, at 141 (“This private governance activity suggests that public preferences for environmental protection often have been expressed through the marketplace and other private activities rather than through the political system.”).

71. The environmental statutes of the 1970s emphasized the “command-and-control” of certain industries as a way to regulate pollution and other environmental harms. See, e.g., Clean Air Act, 42 U.S.C. §§ 7401–7671 (regulating air pollution).

72. See Craig Anthony Arnold, *Fourth-Generation Environmental Law: Integrationist and Multimodal*, 35 WM. & MARY ENV’T L. & POL’Y REV. 771, 788–92 (2011) (describing the different “generations” of environmental law).

73. See Maïmouna Yokessa & Stephan Marette, *A Review of Eco-labels and Their Economic Impact*, 13 INT’L REV. ENV’T & RES. ECON., 119, 140 (2019) (“Eco-labels should thus be considered to complement standards banning/limiting non-green products and taxes/subsidies on green products.”).

74. Jason J. Czarnezki, K. Ingemar Jönsson & Katrina Kuh, *Crafting Next Generation Eco-Label Policy*, 48 ENV’T L. 409, 410 (2018) (“Eco-labeling policy sits at the intersection of three powerful developments in environmental law and policy—the effort to craft effective policies to address unsustainable consumption, increasing deployment

among scholars and policymakers.⁷⁵ Supporters of ecolabels argue that individuals can voluntarily change their behavior when presented with the proper information, which in turn can result in “consumer-driven environmental improvement.”⁷⁶ Ecolabels also allow sellers to distinguish themselves from competitors and protect a business’s environmental reputation.⁷⁷

In the context of organic labeling, then, the USDA organic label is a mechanism for improving our environment. If more consumers purchase organic products, fewer pesticides will be released into the environment.⁷⁸ Traditional organic farmers would also argue that the benefits extend beyond limiting pesticide exposure and include supporting broader ecological and social goals.⁷⁹ Thus, the organic label could play a role in solving some of today’s most pressing problems.

A. *The Organic Label: Past and Present*

“Organic” is “[a voluntary] labeling term that refers to an agricultural product produced in accordance with the [OFPA] and the

of informational regulation as a policy tool, and a new focus on individuals as potential targets of environmental regulation.”); see also Margot J. Pollans, *Bundling Public and Private Goods: The Market for Sustainable Organics*, 85 N.Y.U. L. REV. 621, 633–34 (2010) (describing ecolabels as a form of “information regulation” that seeks to alter consumer behavior by highlighting the “environmental implications” of certain products).

75. See, e.g., Czarnecki et al., *supra* note 74.

76. *Id.* at 414; see also Houston, *supra* note 56, at 225–26 (describing ecolabel programs as “a hybrid form of environmental law” that uses “standards, incentives, and information to implement change”).

77. See Adelman & Austin, *supra* note 58, at 721, 723 (using the example of a business that purchases or sells wood products to demonstrate how it benefits in reputation from certification programs that distinguish that business from other uncertified competitors engaging in destructive logging practices).

78. See ASHA SHARMA, MARGARET REEVES & CALISTA WASHBURN, PESTICIDE ACTION NETWORK, PESTICIDES AND CLIMATE CHANGE: A VICIOUS CYCLE 1, 6 (2022–23), <https://www.panna.org/wp-content/uploads/2023/02/202301ClimateChangeEngFINAL.pdf> [<https://perma.cc/UB47-483S>] (describing the link between pesticides and climate change).

79. See Aldea Roth & Yanchong Zheng, *A Tale of Two Food Chains: The Duality of Practices on Well-Being*, 30 PROD. & OPERATIONS MGMT. 783, 785, 797–98 (2021) (describing “financial equity, ecological, human, and socioeconomic well-being” as being more attainable through regenerative, organic practices rather than conventional agriculture: “[a]s we illustrate with food chains, what is good for the planet—a pristine ecosystem of air, water, and soil—is fundamental to our human, ecological, socioeconomic well-being, and financial security”).

[implementing] regulations.”⁸⁰ To carry the organic label, products must be produced according to certain rules and regulations of the OFPA, generally referred to as the NOP.⁸¹ The goal of the Act and its subsequent regulations is to stabilize the marketplace and promote interstate commerce by ensuring that only those products produced according to the USDA regulations are labeled organic.⁸²

The U.S. federal government, through the USDA and its third-party partners, oversees the certification process to ensure compliance with the NOP.⁸³ Certification, together with the authentication and labeling processes, make up the basis of the regulatory scheme of the NOP.⁸⁴ No company or product can display the organic label unless they have gone through the certification process.⁸⁵

The following Section describes the evolution of the organic food label from fringe to mainstream. As organic products have become more popular, a bifurcated market with two distinct units—an industrialized organic market and a more traditional organic market—has emerged. The tension between these two visions for organic, as well as some concerns over the administration of the program, have attracted media attention and raised doubts as to the value of purchasing organic.

1. *History of the organic label*

Organic farming is an outgrowth of the counterculture movement of the sixties and seventies, which offered an alternative to

80. 7 C.F.R. § 205.2 (2022).

81. See generally *OFPA & NOSB*, NAT'L ORGANIC COAL., <https://www.nationalorganiccoalition.org/ofpa-nosb> [<https://perma.cc/2KAV-UNDX>] (describing the history and main tenets of the National Organic Program (NOP) under the OFPA).

82. The statute lists three purposes for organic certification: “(1) to establish national standards governing the marketing of certain agricultural products as organically produced products; (2) to assure consumers that organically produced products meet a consistent standard; and (3) to facilitate interstate commerce in fresh and processed food that is organically produced.” 7 U.S.C. § 6501; see also Becky L. Jacobs & Chelsea Jacobs, *A Quixotic Quest for Definition: Perceptions of “Organic” and Implications for the Environment and for Market Participants*, 12 KY. J. EQUINE, AGRIC., & NAT. RES. L. 141, 162 (2020) (enumerating the goals of the USDA in the context of organic food labeling).

83. See *infra* Section I.A.2 (discussing the modern regulations of the “organic” food label).

84. Kate L. Harrison, Comment, *Organic Plus: Regulating Beyond the Current Organic Standards*, 25 PACE ENV'T L. REV. 211, 219 (2008).

85. AGRIC. MKTG. SERV., *Labeling Organic Products*, U.S.D.A., <https://www.ams.usda.gov/rules-regulations/organic/labeling> [<https://perma.cc/9XJQ-BHYU>] [hereinafter *Labeling Organic Products*].

conventional food and farming.⁸⁶ Back-to-the-land communes and food co-ops that engaged in organic farming practices were viewed as a “political strategy for radical social change.”⁸⁷

Initially, there were no state or federal regulations governing the organic food label.⁸⁸ But over time, a patchwork of state laws developed.⁸⁹ This decentralized system made defining and verifying organic practices in a uniform way increasingly challenging.⁹⁰ As consumers and farmers began to demand a standard label to make it easier for consumers to discern organic foods in the supermarket,⁹¹ third-party regulators emerged to assure consumers that the products they were purchasing were organic according to the certifying agents’ standards.⁹² Third-part regulators utilized “certifying agents” to ensure that products met relevant standards.

By the late eighties, there were a substantial number of certifying agents.⁹³ While certifiers adopted many of the same basic standards, they varied on more specific details such as pesticide residue testing, the goals of organic production, and livestock housing and healthcare.⁹⁴ Produce might be considered organic in one state but not another.⁹⁵ The need and desire for a single, national organic standard were clear.⁹⁶ The OFPA began this process when it was enacted under Title

86. GEORGE KUEPPER, A BRIEF OVERVIEW OF THE HISTORY AND PHILOSOPHY OF ORGANIC AGRICULTURE 9 (2010), <http://kerrcenter.com/wp-content/uploads/2014/08/organic-philosophy-report.pdf> [<https://perma.cc/2ZLC-79RF>]; *see also* OBACH, *supra* note 24, at 41 (detailing how 1960’s counterculture bolstered the organic farming movement).

87. OBACH, *supra* note 24, at 41.

88. ROBERT T. FETTER & JULIE A. CASWELL, VARIATION IN ORGANIC STANDARDS PRIOR TO THE NATIONAL ORGANIC PROGRAM I (2002).

89. *Id.*

90. *See* OBACH, *supra* note 24, at 44 (noting that competing definitions of organic and varying verification processes would become a “central” issue).

91. *See* DIANA FRIEDMAN, SUSTAINABLE AGRIC. RSCH. & EDUC., TRANSITIONING TO ORGANIC PROD. 4 (2003), <https://www.sare.org/wp-content/uploads/Transitioning-to-Organic-Production.pdf> [<https://perma.cc/KP2U-RLLJ>] (noting that increased environmental awareness and consumer demand led to the passage of the Organic Foods Production Act).

92. KUEPPER, *supra* note 86, at 10.

93. *Id.*

94. FETTER & CASWELL, *supra* note 88, at 25.

95. *See id.* at 1 (stating that certification requirements differed region by region, not product type by product type).

96. *See id.* (detailing some of the negative consequences associated with the lack of national organic standardization).

21 of the 1990 Farm Bill,⁹⁷ the primary food policy and agriculture legislation of the federal government.⁹⁸

The OFPA has three primary goals: to establish national standards surrounding the marketing of organic produce; to assure consumers that organic products meet a consistent standard; and to facilitate interstate commerce of organically produced products.⁹⁹ While the OFPA does not define the term “organic,” the term “organically produced” defines an organic product as an “agricultural product that is produced and handled in accordance with this chapter.”¹⁰⁰ Thus, whether something is organic turns on whether the production and handling standards of the OFPA are met. In accordance with the Act, the land on which the organic products are produced must be free from any prohibited substances for three years.¹⁰¹ Additionally, the organic products must be “produced and handled in compliance with an organic plan agreed to by the producer, the handler, and the certifying agent.”¹⁰² The OFPA also includes state organic certification guidelines, animal production practices, certifying agent requirements, and other guidelines and requirements.¹⁰³

The goals of the OFPA are achieved through the NOP, from which the national standards for organically produced agricultural products sold in the United States are developed and enforced.¹⁰⁴ Central to this enforcement is the use of third-party organizations accredited by the USDA to ensure that farms and businesses meet the national organic

97. Organic Foods Production Act of 1990, Pub. L. No. 101-624, 104 Stat. 3935.

98. The Organic Program is set out in Title 21 of the Farm Bill. *Id.* The Farm Bill is a large omnibus bill that deals with agriculture, including organic agriculture, conservation, food assistance, and rural development programs housed within the USDA. Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. 101-624, 104 Stat. 3359. The Farm Bill is reauthorized every five years or so. *See* RENÉE JOHNSON & JIM MONKE, CONG. RSCH. SERV., IFI2047, THE FARM BILL PRIMER: WHAT IS THE FARM BILL? (2022). Reauthorization last occurred in 2018 and is scheduled to occur in 2023. *See id.* (describing various attributes of the Farm Bill).

99. Jessica Ellsworth, *The History of Organic Food Regulation*, HARV. LIBR. 1, 7 (2001), <https://dash.harvard.edu/bitstream/handle/1/8889458/Ellsworth.pdf> [<https://perma.cc/54GF-3XQX>].

100. 7 U.S.C. § 6502(15).

101. *Id.* § 6504.

102. Ellsworth, *supra* note 99, at 7.

103. 7 U.S.C. §§ 6505–6516.

104. *See* 7 C.F.R. § 205 (2022) (containing provisions of the National Organic Program); *see also* *Organic Regulations*, U.S.D.A., <https://www.ams.usda.gov/rules-regulations/organic> [<https://perma.cc/8Y9P-XWPZ>] (summarizing the rulemaking process for organic products).

standards and can, therefore, be certified organic.¹⁰⁵ These middlemen compare the producer's practices to the rules set out in the NOP to determine if the products are in fact organic.¹⁰⁶ The certifiers and USDA work together to enforce the federal standards, ensuring a level playing field for producers and protecting consumer confidence in the integrity of the USDA Organic Seal.¹⁰⁷

Also unique to the Act is the National Organic Standards Board ("NOSB" or "the Board"), made up of fifteen representatives from different sectors of the organic market who advise the Secretary on issues involving the production, handling, and processing of organic products.¹⁰⁸ For example, sections 205.600–.607 of the regulations contain The National List of Allowed and Prohibited Substances ("the National List").¹⁰⁹ Individuals may petition the NOSB to evaluate substances for inclusion or deletion from the National List, so the list can change frequently.¹¹⁰ Similarly, the NOSB can review whether practices, such as growing crops in water instead of soil, should be considered organic.¹¹¹

The Board's composition is dictated by statute and must include individuals who own or operate organic farming or handling operations, retail establishments with significant business in organic products, experts in environmental protection and conservation, representatives of public and consumer interest groups, and an organic certifying agent.¹¹² Each NOSB member is appointed by the USDA Secretary for a five-year term.¹¹³ As explained later, the composition of the Board and its recent decisions have come under scrutiny.¹¹⁴

By 1997, the first iteration of the National Organic Standards was published. However, it was met with backlash from the NOSB for issues surrounding the allowance of food irradiation, the use of sewage

105. See 7 C.F.R. §§ 205.400–.406 (2022) (detailing the general requirements of certification using third-party certifying agents). One author calls this practice "regulation by proxy." CARTER, *supra* note 64, at 3.

106. 7 C.F.R. § 205.400 (2022).

107. See, e.g., *id.* §§ 205.311, 205.400 (reserving the USDA organic seal for products that comply with the NOP, detailing how the seal must be presented on products, and introducing the role of certifying agents).

108. 7 U.S.C. § 6518.

109. 7 C.F.R. § 205.600–.607 (2022).

110. *Id.* § 205.607.

111. Morath, *supra* note 19, at 36.

112. 7 U.S.C. § 6518(a)–(b).

113. Morath, *supra* note 19, at 36.

114. See *infra* Section II.B and notes 224–41.

sludge as fertilizer, and the inclusion of genetically engineered crops and other genetically modified organisms.¹¹⁵ In the winter of 2000, the final draft of the National Organic Standards was published and widely accepted by the organic community. The regulations were fully implemented by 2002,¹¹⁶ making “USDA Organic” twenty years old.

2. *The organic label today*

Today, the organic food label is entirely governed by OFPA and set out by the federal NOP.¹¹⁷ The NOP is housed within the Agricultural Marketing Services (“AMS”) branch of the USDA.¹¹⁸ AMS administers programs that “create domestic and international *marketing* opportunities for U.S. producers of food, fiber, and specialty crops,” making the NOP primarily a marketing program rather than an environmental or social program.¹¹⁹ To ensure consistency across producers and retailers, the NOP has processes to develop, review, implement, and interpret the organic standards; enforce organic production, handling, and labeling standards; and accredit, audit, and train third-party organic certifying agents.¹²⁰ The regulations focus on the process (growing, harvesting, preparing) of the food and not the final product.¹²¹ Further, the regulations are narrowly focused on one aspect of production—pesticide use.¹²²

Producers who meet the requirements of the NOP can carry the prized USDA organic seal.¹²³ There are four organic labels that a producer can use: 100% organic, organic, made with organic ____, and specific organic ingredient listing.¹²⁴ The “100%” organic label

115. KUEPPER, *supra* note 86, at 11–12.

116. *Id.* at 12.

117. Chenglin Liu, *Is “USDA Organic” a Seal of Deceit?: The Pitfalls of USDA Certified Organics Produced in the United States, China and Beyond*, 47 STAN. J. INT’L L. 333, 335 (2011).

118. *About AMS*, U.S.D.A., <https://www.ams.usda.gov/about-ams> [<https://perma.cc/E6EH-GYLW>].

119. *Id.* (emphasis added).

120. *Agricultural Marketing Service’s National Organic Program*, U.S.D.A. (2015), <https://www.ams.usda.gov/sites/default/files/media/About%20the%20National%20Organic%20Program.pdf> [<https://perma.cc/E6EH-GYLW>].

121. *See generally* 7 C.F.R. § 205 (2022) (listing regulations that focus mainly on the production of the food).

122. *See generally id.* § 205.670 (centering the testing of agricultural products labeled as organic on identifying pesticide residue or other prohibited substances).

123. *Id.* § 205.311.

124. *See id.* § 205.301 (providing the available organic designations); *see also Labeling Organic Products*, *supra* note 85 (listing the key requirements of organic labeling and answers to commonly asked questions).

requires that every ingredient be organic, excluding salt and water.¹²⁵ The “organic” label requires that the product contains no less than 95% organic ingredients (excluding salt and water).¹²⁶ A product that is “made with organic ____” must contain at least 70% organic ingredients (excluding salt and water) and specifically notate the organic and non-organic ingredients.¹²⁷ Under this level of labeling, a producer may not include the USDA organic seal anywhere, represent the product as organic, or state “made with organic ingredients” on the principal display panels.¹²⁸ The final label level for “specific organic ingredient listings” allows the producer to list the organic ingredients in the ingredient statement of products containing less than 70% organic content.¹²⁹

Enforcement of the program occurs through the third-party “certifying agent” who hires and trains “inspectors to implement the applicable organic certification program.”¹³⁰ Certifiers act on behalf of the USDA to ensure producers comply with the standards set out by the NOP.¹³¹ The certifying agents review “organic plans” for approval and inspect certified organic operations to ensure continued compliance with the standards.¹³² The inspection process depends on the type of facility, but it can include such things as reviewing soil conditions and touring fields.¹³³ Recertification of organic farms happens yearly.¹³⁴

According to the 2021 Organic Survey conducted by the USDA, there were 17,445 certified organic farms, a 5% increase from 2019.¹³⁵ A 2019 organic survey reported a 17% increase in the number of

125. 7 C.F.R. § 205.301(a) (2022).

126. *Id.* § 205.301(b).

127. *Id.* § 205.301(c).

128. *Id.* § 205.304.

129. *Id.* § 205.305.

130. 7 U.S.C. § 6515(b).

131. Harrison, *supra* note 84, at 219.

132. 7 U.S.C. § 6513(a) (“A producer or handler seeking certification under this chapter shall submit an organic plan to the certifying agent and the State organic certification program (if applicable), and such plan shall be reviewed by the certifying agent who shall determine if such plan meets the requirements of the programs.”).

133. See Miles McEvoy, *Organic 101: Five Steps to Organic Certification*, U.S.D.A. (Oct. 10, 2020), <https://www.usda.gov/media/blog/2012/10/10/organic-101-five-steps-organic-certification> [<https://perma.cc/P9ST-FBD8>] (describing the inspection process).

134. *Id.*

135. Press Release, U.S.D.A., U.S.D.A. Releases 2021 Organics Data (Dec. 15, 2022), <https://www.nass.usda.gov/Newsroom/2022/12-15-2022b.php> [<https://perma.cc/6Y33-Q8WA>].

organic farms between 2016 and 2019.¹³⁶ This growth reflects the increasing demand for organic products. In 2021, the total sale of organic food and nonfood products surpassed \$60 billion for the first time.¹³⁷ More than 15% of all fruits and vegetables sold in the United States were organic.¹³⁸

The process of growing and stabilizing the marketplace over the past twenty years, however, has splintered the meaning of organic. In his book, *Organic Struggle*, Brian Obach notes that “[p]erhaps the most fundamental and enduring question facing the organic community is that of defining what constitutes organic agriculture.”¹³⁹ Arguments over how best to “grow food in ecologically sound ways” were formalized through the enactment of these specific federal regulatory standards.¹⁴⁰ Organic activists were motivated to create a just and sustainable system of agriculture, while regulators sought to stabilize the market. Uniform standards reduce “the cost of market transactions between buyers and sellers—thus improving market efficiency.”¹⁴¹ However, “[g]overnment standards provide their greatest benefits to large-scale producers with large numbers of geographically dispersed customers supplied through multi-level marketing channels. Thus, establishment of government grades and standards helps create a competitive advantage for large-scale, industrial producers.”¹⁴²

Alternative markets, like the organic market, originated in part as social movements that developed to “reclaim ethical values that are being eroded by [the] status quo.”¹⁴³ The OFPA, its subsequent regulations, and the organic label provided a popular market-based alternative to non-organic products. As the market share for organic

136. Terry Matlock, *Organic: A Thriving Agriculture Segment*, U.S.D.A. (Oct. 28, 2020), <https://www.usda.gov/media/blog/2020/10/28/organic-thriving-agriculture-segment> [https://perma.cc/NP8L-52G3].

137. Chandler James, *Organic Trade Association Releases 2021 Organic Industry Survey; Organic Sales in Total Near \$62 Billion*, ANDNOWUKNOW (May 28, 2021), <https://www.andnowuknow.com/headlines/organic-trade-association-releases-2021-organic-industry-survey-organic-Laura-Batcha-Angela-Jagiello/chandler-james/73652> [https://perma.cc/GJL8-K8MA].

138. *Id.*

139. OBACH, *supra* note 24, at 27.

140. *Id.* at 28.

141. Ikerd, *The Industrialization of Organics*, *supra* note 26 (citing Ikerd Presentation, *supra* note 26). Organic agriculture faces the specialization of production systems; specialized systems and the economic stakes. Ikerd Presentation, *supra* note 26.

142. *Id.*

143. Daniel Jaffee & Philip H. Howard, *Corporate Cooptation of Organic and Fair Trade Standards*, 27 AGRIC. & HUM. VALUES 387, 388 (2010).

food has increased, so has corporate participation. While the “mass production” of organics can drive prices down by helping to make organics more affordable,¹⁴⁴ one scholar describes “a negative correlation between larger agribusinesses entering the organic market and the erosion of the organic standards.”¹⁴⁵ Complaints about the corporate nature of organics and the associated problems with an industrialized organic market have only grown louder.¹⁴⁶

As agricultural economist John Ikerd explained in 2018, “[t]he adoption in 2000 of USDA standards for certification of organic food production cleared the path for industrialization of organics.”¹⁴⁷ The word organic is “now in the hands of the government, which means it is subject to all the usual political and economic forces at play in Washington,” including the sway of agricultural and retail giants with deep pockets.¹⁴⁸ The design of the statute and regulations has “resulted in a ‘commodification’ of organic foods and a race to the bottom, where the market is dominated by firms that adhere to the lowest permissible standards rather than the founding spirit. . . .”¹⁴⁹ Today, Aldi, Costco, Kroger, Target, and Walmart all have their own organic lines.¹⁵⁰ The involvement of big businesses has helped to make organics

144. Julia Johnson, Note, *The Wal-Mart Effect on Organics: A Defense of Large-Scale Organic Production*, 24 DUKE ENV'T L. & POL'Y F. 241, 253–54 (2013).

145. Marne Coit, *Organic Agriculture Under the Trump Administration*, 13 J. FOOD L. & POL'Y 125, 125 (2017).

146. See A. Christine Green, *The Cost of Low-Price Organics: How Corporate Organics Have Weakened Organic Food Production Standards*, 59 ALA. L. REV. 799, 820 (2008) (arguing that “organic products [will] become less-organic as small-scale organic producers are forced out of business by the competition with corporate organics”); A. 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. AGRI. L. 17, 24–25 (2007) (noting that the industrialization of organic production will likely harm small-scale family farms). *But see* Johnson, *supra* note 144, at 242–43 (“[T]he advantages associated with large-scale organic production, including expanding organic food access to population groups previously unable to purchase organics and lowering cost premiums, exceed such drawbacks.”).

147. Ikerd, *supra* note 26, at 10.

148. Michael Pollan, *Wal-Mart Goes Organic: And Now for the Bad News*, N.Y. TIMES “ON THE TABLE” BLOG (May 15, 2006), <https://michaelpollan.com/articles-archive/wal-mart-goes-organic-and-now-for-the-bad-news> [<https://perma.cc/W5YA-U36L>].

149. David Conner, *Beyond Organic: Information Provision for Sustainable Agriculture in a Changing Market*, 35 J. FOOD DISTRIBUT. RSCH. 34, 38 (2004).

150. Janet Lee, *Which Food to Buy Organic (and How to Spend Less When You Do)*, CONSUMER REP. (June 9, 2022), <https://www.consumerreports.org/organic-foods/which-food-to-buy-organic-and-how-to-spend-less-when-you-do> [<https://perma.cc/QEZ8-QH8Q>].

more popular, but it has also led to concern that the meaning of organic has been diluted.

3. *Reports of fraud*

Organic fraud has been considered newsworthy for some time. And as the organic sector has grown, so has media coverage of fraud in the industry. Recently, in 2021, *The New Yorker* published *The Great Organic-Food Fraud*.¹⁵¹ This piece tells the story of farmer Randy Constant, who, in 2018, pled guilty to a \$142 million organic fraud scheme involving grain.¹⁵² On August 16, 2019, Mr. Constant was sentenced to ten years in prison.¹⁵³

The scheme, which involved Mr. Constant and a handful of other associates, is the largest-known fraud in the history of organic farming in the United States, and it is also the first time that the DOJ activated its enforcement powers for organic fraud.¹⁵⁴ Prosecutors were able to prove that for seven years, between 2010 and 2017, Mr. Constant sold allegedly organic animal feed to farmers throughout the Midwest, who, in turn, sold allegedly USDA-certified organic meat, dairy, and eggs.¹⁵⁵ At his sentencing, Judge Williams called the scheme a “massive fraud, perpetrated on consumers over a long period of time” and said that the harm “caused incalculable damage” to consumers.¹⁵⁶

This story is not unique; the media has exposed weaknesses in the organic program for some time now. For example, in 2010, *The New York Times* published an article entitled *USDA’s Organic Enforcers Let Offenders Slide, Audit Says*.¹⁵⁷ In 2014, *The Wall Street Journal* published an article that questioned the effectiveness of the certification

151. Ian Parker, *The Great Organic-Food Fraud*, NEW YORKER (Nov. 8, 2021), <https://www.newyorker.com/magazine/2021/11/15/the-great-organic-food-fraud> [https://perma.cc/FG5D-URFF].

152. *Id.*

153. *Id.*

154. As explained *infra* Sections III.A–B, enforcement usually occurs at the USDA level. Press Release, U.S. Attorney’s Office, N. Dist. Of Iowa, Field of Schemes Fraud Results in Over a Decade in Federal Prison for Leader of Largest Organic Fraud Case in U.S. History (Aug. 19, 2019) [hereinafter Press Release].

155. Parker, *supra* note 151.

156. Press Release, *supra* note 154.

157. Gabriel Nelson, *USDA’s Organic Enforcers Let Offenders Slide, Audit Says*, N.Y. TIMES (Mar. 19, 2010), <https://archive.nytimes.com/www.nytimes.com/gwire/2010/03/19/19greenwire-usdas-organic-enforcers-let-offenders-slide-au-12233.html> [https://perma.cc/NP8C-X7JC].

program,¹⁵⁸ and *National Public Radio* asked whether the organic label on imported food could be trusted.¹⁵⁹ In 2017, shipments of soybean and corn from Turkey were imported and sold in the United States under the USDA organic seal.¹⁶⁰ A *Washington Post* investigation of the health certificates accompanying the shipments revealed that these imports did not comply with USDA organic standards, in part because certain pesticides were listed on the health certificates.¹⁶¹ A year earlier, *The Washington Post* discovered that Aurora Organic Dairy, a dairy farm that supplies organic milk to major retailers like Walmart and Costco, was housing over 90% of its cows indoors in violation of the organic regulations for dairy livestock.¹⁶² As the *Washington Post* article explained, the USDA closed its investigation of this facility in 2017 finding no violations of USDA organic standards, even though chemical analysis of the milk revealed a composition more like conventional milk than other organic brands.¹⁶³ These and other reports have bolstered the narrative that organic is “fauxganic,”¹⁶⁴ and customers are beginning to question whether purchasing organic is worth it.¹⁶⁵

158. Caelainn Barr, *Organic-Farming Boom Stretches Certification System*, WALL ST. J. (Dec. 9, 2014, 12:53 PM), <https://www.wsj.com/articles/organic-farming-boom-stretches-certification-system-1418147586?alg=y> [https://perma.cc/WBQ9-986B].

159. Dan Charles, *Can You Trust That Organic Label on Imported Food?*, NAT'L PUBL. RADIO (July 23, 2014, 6:14 PM), <https://www.npr.org/sections/thesalt/2014/07/23/334073167/can-you-trust-that-organic-label-on-imported-food> [https://perma.cc/65S J-D8J6].

160. Peter Whoriskey, *The Labels Said 'Organic.' But These Massive Imports of Corn and Soybeans Weren't*, WASH. POST (May 12, 2017, 6:34 PM), https://www.washingtonpost.com/business/economy/the-labels-said-organic-but-these-massive-imports-of-corn-and-soybeans-were-not/2017/05/12/6d165984-2b76-11e7-a616-d7c8a68c1a66_story.html [https://perma.cc/MVJ5-HSAK].

161. *Id.*

162. 7 C.F.R. § 205.239 (2022); Peter Whoriskey, *Why Your 'Organic' Milk May Not Be Organic*, WASH. POST (May 1, 2017, 7:21 PM), https://www.washingtonpost.com/business/economy/why-your-organic-milk-may-not-be-organic/2017/05/01/708ce5bc-ed7z6-11e6-9662-6eedf1627882_story.html [https://perma.cc/R2TB-FTY6].

163. See Peter Whoriskey, *USDA Closes Investigation into a Massive Organic Farm—But What Did It Check?*, WASH. POST (Sept. 28, 2017, 12:52 PM), <https://www.washingtonpost.com/news/wonk/wp/2017/09/28/usda-closes-investigation-into-a-massive-organic-farm-but-what-did-it-check> [https://perma.cc/ZP8N-RBEH].

164. Dixon, *supra* note 33.

165. Consumer Reports, *Organic Food Costs More Than Conventional Food. Is It Worth the Extra Money?*, WASH. POST (July 21, 2014, 2:30 PM), <https://www.washingtonpost.com/national/health-science/organic-food-costs-more-than-conventional-food-is-it-worth-the-extra-money/2014/07/21/a80f93ea-aac6-11e3-98f6-8e3c562f9996> [https://perma.cc/HR4R-8GVE].

But the organic industry has tried to address weaknesses in the program and has pushed back against the “fauxganic” narrative. In response to the *New Yorker* story in 2021, the OTA submitted a letter to the editors of the magazine, which was published a few days later. In that letter, the OTA asserts that “organic is one of the most heavily regulated and closely monitored foodways in the U.S.”¹⁶⁶ To carry the organic seal, a “product has to be certified as following detailed regulations for growing, handling, and processing.”¹⁶⁷ Similar pushback came from the non-profit Beyond Pesticides who called the article “at best misleading[], and certainly sensational[].”¹⁶⁸ The Real Organic Project blamed the certifying agent for the fraud, explaining that “[s]ome organic certifiers have greater integrity than others. QAI, Constant’s certifier, didn’t do their job in overseeing Constant’s operations. In contrast, another certifier, OneCert, had filed multiple complaints about Constant (and others). These complaints were ignored or were not properly investigated.”¹⁶⁹ The OTA admits that fraud happens in many industries, not just organics, and that these reported instances are outliers rather than the norm.

Part II identifies the various sources of these competing narratives.

II. HOW LABELS FAIL

The story of the organic label illustrates not only how ecolabels grow, but also how they fail or at least give the perception of failure. Historically, complaints about the organic program centered around lax enforcement discovered through audits of the program. More recently, advocates have focused in on regulatory capture and the oversized influence of industrial organics on the federal program at the expense of traditional organic farming. A final area of concern is the expansion of the organic label to imported food as well as nonfood items. This Article next discusses how the effectiveness of the label has

166. *Organic Trade Association Responds to “The Great Organic-Food Fraud”*, ORGANIC TRADE ASS’N, <https://ota.com/organic-trade-association-responds-great-organic-food-fraud> [https://perma.cc/N9DK-86QN].

167. *Id.*

168. *Organic Takes on Existential Health and Environmental Crises, While Some Critics Lack Context (Response to New Yorker Piece)*, BEYOND PESTICIDES (Nov. 12, 2021, 9:00 AM), <https://beyondpesticides.org/dailynewsblog/2021/11/organic-takes-on-existential-environmental-and-health-crises-while-critics-lack-context> [https://perma.cc/L5C4-874D].

169. *The Great Organic Food Fraud: Some Surprises*, REAL ORGANIC PROJECT, <https://www.realorganicproject.org/new-yorker-organic-fraud-surprise> [https://perma.cc/J823-Z827].

been impacted by (1) lax enforcement, (2) regulatory capture, and (3) a proliferation of uses, making it susceptible to both greenwashing and quasi-greenwashing.

A. *The USDA and Lax Enforcement*

Since the beginning of the NOP, the USDA Office of Inspector General has conducted several audits, each focusing on different aspects of the NOP.¹⁷⁰ For example, one audit focused on organic milk while another focused on organic trade.¹⁷¹ Earlier audits of the NOP suggest that the Agency was aware that lax enforcement and oversight were a problem from the NOP's establishment.¹⁷²

The 2010 Audit focused on oversight of the NOP and was in response to an earlier audit that found that the AMS had not fully developed procedures for “resolving complaints and investigations” or for “providing guidance to certifying agents and their organic operators to ensure consistency” in meeting NOP requirements.¹⁷³ Because of this discovery and because of the growth of the organic market during this time,¹⁷⁴ the USDA conducted the 2010 Audit to “determine whether products marketed as organic met the requirements of NOP.”¹⁷⁵

170. OFF. INSPECTOR GEN., U.S.D.A., REPORTS—AUDIT, <https://usdaoig.oversight.gov/reports/list/audit> [<https://perma.cc/252J-7T9Z>]. All audits of the USDA, some of which include audits of the AMS, are available online. *See id.* Audits of some aspect of the organic program occurred in 2005, 2010, 2013 and 2017. *See id.*

171. *See, e.g.*, OFF. INSPECTOR GEN., AGRIC. MKTG. SERV., U.S.D.A., AUDIT REPORT 01601-0002-32, NATIONAL ORGANIC PROGRAM—ORGANIC MILK OPERATIONS (July 15, 2013) [hereinafter Milk Audit], <https://usdaoig.oversight.gov/reports/audit/agricultural-marketing-service-national-organic-program-organic-milk-operations> [<https://perma.cc/7PQ7-H79W>]; OFF. INSPECTOR GEN., AGRIC. MKTG. SERV., U.S.D.A., AUDIT REPORT 01601-0001-21, NAT'L ORGANIC PROGRAM INT'L TRADE ARRANGEMENTS & AGREEMENTS (Sept. 13, 2017) [hereinafter TRADE ARRANGEMENTS & AGREEMENTS], <https://www.oversight.gov/sites/default/files/oig-reports/01601-0001-21.pdf> [<https://perma.cc/RD64-U5UH>].

172. *See, e.g.*, 2010 USDA Management Challenges, U.S.D.A. OFF. INSPECTOR GEN., U.S.D.A. (July 15, 2010), <https://usdaoig.oversight.gov/reports/top-management-challenges/2010-usda-management-challenges> [<https://perma.cc/TZ72-WS49>] (“NOP officials need to strengthen their oversight of certifying agents and organic operations to ensure that organic products are consistently and uniformly meeting NOP standards.”).

173. OFF. INSPECTOR GEN., U.S.D.A., OVERSIGHT NAT'L ORGANIC PROGRAM, AUDIT REP. 01601-03-HY, 1 (Mar. 9, 2010), https://www.cornucopia.org/USDA/OIG_AuditofNOP.pdf [<https://perma.cc/RU8K-8FZN>].

174. *Id.* At the time of the 2010 Audit, the organic market had grown between 14 and 21% annually. *Id.*

175. *Id.* at 6.

The 2010 Audit exposed a program unresponsive to, and deficient in, enforcing violations. As the Audit explains:

Between January 2006 and February 2008, AMS Compliance provided its results from five investigations of certified organic operations to NOP. Although [AMS Compliance] recommended that NOP officials take enforcement actions against these operations, [the Inspector General] found that NOP did not respond to these in a timely or effective manner. In addition, in those cases where enforcement actions were issued, NOP did not monitor the organic operations to ensure compliance with those actions NOP never issued the recommended enforcement action against one of the five organic operations, which had marketed nonorganic mint under USDA's organic label for 2 years; in the other four cases, the enforcement actions took between 7 and 32 months to issue. During this time the operations continued to improperly market their products as certified organic. One of these four, even after signing a compliance agreement that it would not apply for and receive certification as an organic handler or producer for a period of 5 years, continued marketing its product as organic without AMS' knowledge.¹⁷⁶

Although the NOP Director at the time claimed that the lack of enforcement was due to insufficient resources, the Audit revealed that the NOP also lacked procedures for processing investigations from AMS Compliance. In addition, the NOP did not have a written process for determining which enforcement actions to implement or a timeline for initiating and completing these actions.¹⁷⁷

Beyond poor enforcement, the 2010 Audit also uncovered that those enforcement actions that did occur were not timely or uniform.¹⁷⁸ Again, insufficient procedures for processing complaints against certifying agents and organic operators were responsible for delays.¹⁷⁹ And failure by AMS to ensure consistent oversight of organic operations by its certifying agents led to organic operations being held to different requirements.

For example, the Inspector General reported that it visited four certifying agents and twenty of their certified organic operations and found that all four agents were enforcing different requirements.¹⁸⁰ The organic certificates evaluated by the Inspector General did not

176. *Id.* at 8.

177. *Id.* at 9.

178. *Id.* at 12.

179. *Id.*

180. *Id.* at 21.

contain the same information.¹⁸¹ Only one certifying agent required that the certified operation list the specific products the operation produced while the other three agents allowed certified operations to list the general type of product, such as crops or livestock.¹⁸² Finally, the 2010 Audit revealed that five of the forty-four foreign certifying agents did not have the required onsite reviews.¹⁸³

The 2010 Audit also found that while the NOP requires periodic residue testing, this testing was not occurring.¹⁸⁴ In response, the USDA launched a pilot program “to measure the presence of pesticide residues in products labeled as organic and displaying the USDA organic seal.”¹⁸⁵ The results of this pilot program were published in November 2012.¹⁸⁶ The pilot study, which was not meant to be representative of the organic industry as a whole, found that of the 571 samples, twenty-one had values that were in violation of the USDA organic regulations.¹⁸⁷ At the same time, the AMS issued a final rule, in response to the audit, clarifying that residue testing was required under the NOP.¹⁸⁸

In 2013, the USDA Office of Inspector General conducted an audit of organic milk operations (the “Milk Audit”)¹⁸⁹ and in 2017, it released an audit of international trade arrangements (the “Import

181. *See id.* at 24 (summarizing the differences found among the organic certificates reviewed).

182. *Id.*

183. *Id.* at 28.

184. *Id.* at 2, 16, 18. Residue testing has two purposes—to monitor compliance with the USDA organic regulations and to discourage the mislabeling of agricultural products. *Id.* at 2. 7 U.S.C. § 6506(a) (6) provides that the NOP:

require[s] periodic residue testing by certifying agents of agricultural products that have been produced on certified organic farms and handled through certified organic handling operations to determine whether such products contain any pesticide or other nonorganic residue or natural toxicants and to require certifying agents, to the extent that such agents are aware of a violation of applicable laws relating to food safety, to report such violation to the appropriate health agencies.

7 U.S.C. § 6506(a) (6).

185. *See* AGRIC. MKTG. SERV., U.S.D.A., 2010–2011 PILOT STUDY: PESTICIDE RESIDUE TESTING ORGANIC PRODUCE 2 (Nov. 2012), https://www.ams.usda.gov/sites/default/files/media/Pesticide%20Residue%20Testing_Org%20Produce_2010-11PilotStudy.pdf [<https://perma.cc/UX9P-SJQ6>].

186. *Id.*

187. *Id.* at 1, 6–7.

188. National Organic Program; Periodic Residue Testing, 77 Fed. Reg. 67239 (Nov. 9, 2012) (to be codified at 7 C.F.R. pt. 205).

189. Milk Audit, *supra* note 171, at 1.

Audit”).¹⁹⁰ The Code of Federal Regulations contains rules for organic livestock and requires that “[d]airy animals . . . [be] under continuous organic management beginning no later than [one] year prior to the production of the milk or milk products that are to be sold, labeled, or represented as organic.”¹⁹¹ The Milk Audit found that “certifying agents were interpreting USDA organic regulations differently”¹⁹² and that agents conducting inspections “did not take consistent enforcement actions when their inspectors or reviewers identified possible noncompliance issues with USDA organic regulations.”¹⁹³ The Milk Audit also revealed that “some of the small- or medium-sized organic milk operations did not comply with recordkeeping requirements of the access to pasture rule.”¹⁹⁴

The Import Audit was equally troubling, exposing weaknesses in the NOP’s ability to maintain the integrity of organic products imported into the United States. The USDA organic regulations require that all handling operations that sell, label, or represent products as organic, be certified in compliance with the federal rules.¹⁹⁵ This includes maintaining and implementing an Organic System Plan (“OSP”), maintaining records that demonstrate compliance, and undergoing annual on-site inspections.¹⁹⁶

The 2017 Import Audit explained that while the NOP had a process to “resolve identified differences between foreign and USDA organic standards,” it did not have a procedure in place to “disclose the results of that process to interested parties and the public.”¹⁹⁷ The Import Audit also asserted that AMS was not “reviewing and verifying the authenticity of organic import certificates at U.S. ports of entry to ensure imported agricultural products were produced and handled by certified operations.”¹⁹⁸ Overseeing compliance has proven difficult for imports, a large sector of the organic market.¹⁹⁹

190. TRADE ARRANGEMENTS & AGREEMENTS, *supra* note 171, at 1.

191. 7 C.F.R. § 205.236 (a) (2) (2022).

192. Milk Audit, *supra* note 171, at 4.

193. *Id.* at 9.

194. *Id.* at 13.

195. TRADE ARRANGEMENTS & AGREEMENTS, *supra* note 171, at 7.

196. AGRIC. MKTG. SERV., INTERIM INSTRUCTION MAINTAINING INTEGRITY ORGANIC IMPORTS, U.S.D.A. 1 (2017), <https://www.ams.usda.gov/sites/default/files/media/NOP4013IntegrityOrganicImports.pdf> [<https://perma.cc/F39M-8J4D>].

197. Milk Audit, *supra* note 171, at 4.

198. *Id.* at 7.

199. See *International Trade Data Reports*, ORGANIC TRADE ASS’N, <https://ota.com/tradedata> [<https://perma.cc/3BHS-2V3A>] (reporting that the United States imported

To understand the administrative struggles reported in these audits, one must understand the certification process. Today, according to the USDA, there are “nearly [eighty]” certifiers²⁰⁰ qualified to certify more than 37,000 organic farms and businesses across the globe.²⁰¹ Enforcement happens at two levels: through certifying agents and through the AMS. Certifying agents are expected to inspect organic farms at least once a year, and they can make unannounced inspections, collect samples and test for pesticides and authorized materials, and investigate allegations of fraud.²⁰² For example, in Ohio, one of the oldest and largest certifying agent is the Ohio Ecological Food and Farm Association (“OEFFA”).²⁰³ OEFFA then employs certification specialists who, on behalf of OEFFA, conduct inspections in Ohio and other Midwestern states.²⁰⁴ At last count, OEFFA had ten “certification specialists” and one “materials specialist[.]” on staff.²⁰⁵

Farmers are free to choose their certifier, and “[m]any of the largest certifiers (California Certified Organic Farmers, Quality Assurance International [“QAI”], Oregon Tilth, and others) have adopted the most liberal interpretations of the organic standards.”²⁰⁶ For example,

\$25 billion worth of organic crops in 2020, up 42% from 2016 using data from the USDA, Foreign Agriculture Services (“FAS”), and Global Agriculture Trade System (“GATS”).

200. *Organic Certifying Agents*, U.S.D.A. AGRIC. MKTG. SERV., <https://www.ams.usda.gov/resources/organic-certifying-agents> [<https://perma.cc/26FK-8VZN>].

201. *Organic Enforcement*, U.S.D.A. AGRIC. MKTG. SERV., <https://www.ams.usda.gov/services/enforcement/organic> [<https://perma.cc/NE66-RH3H>].

202. *Id.*

203. *Brown, Colleagues Introduce New Bill to Support Ohio’s Organic Farmers*, SHERROD BROWN U.S. SENATOR FOR OHIO (Jul. 13, 2023), <https://www.brown.senate.gov/newsroom/press/release/sherrod-brown-colleagues-bill-support-ohio-organic-farmers> [<https://perma.cc/UK5F-SH6V>]; see *About OEFFA*, OHIO ECOLOGICAL FOOD & FARM ASS’N, <https://grow.oeffa.org/about-oeffa> [<https://perma.cc/4AXV-3PWZ>] (stating that OEFFA is one of the oldest and most respected certifying agents in the nation).

204. *Certification*, OHIO ECOLOGICAL FOOD & FARM ASS’N, <https://certification.oeffa.org> [<https://perma.cc/4Y9S-ZHFZ>].

205. *OEFFA Staff*, OHIO ECOLOGICAL FOOD & FARM ASS’N, <https://grow.oeffa.org/oeffa-staff> [<https://perma.cc/5RVP-PMNT>].

206. MARIE BURCHAM & MARK KASTEL, CORNUCOPIA INST., *THE INDUSTRIALIZATION OF ORGANIC DAIRY: GIANT LIVESTOCK FACTORIES AND FAMILY FARMS SHARING THE SAME ORGANIC LABEL 2*, 6 (Rachel Zegerius ed., 2018), <https://www.cornucopia.org/wp-content/uploads/2018/08/DairyReport2018-full-report.pdf> [<https://perma.cc/CP9B-JD56>].

QAI, the certifier involved in *The Great Organic-Food Fraud* story, has been called the “corporate certifier of convenience.”²⁰⁷

AMS, in turn, oversees certifiers, conducting audits of their work, but their inspection and review are discretionary.²⁰⁸ AMS can also investigate complaints and, depending on audit or investigation outcomes, can issue Notices of Warning and Cease and Desist Orders.²⁰⁹ In addition, AMS can impose financial penalties of up to \$21,689 per violation when farms violate organic regulations or represent products as organic without certification.²¹⁰

The USDA publishes the outcomes of these enforcement activities quarterly on its website.²¹¹ Enforcement actions since 2015 are posted on the USDA Organic Enforcement Page.²¹² This suggests that, while enforcement may have been happening in the early years of the organic program, reporting the results was not a priority of the AMS. The table below summarizes the data that can be found on the USDA enforcement page from the first five years.²¹³

Year	2015	2016	2017	2018	2019
Incoming complaints (now new investigations)	548	508	395	370	374
Completed complaint reviews and investigations	390	360	470	335	413

207. *Factory Farm Producing “Organic” Milk Shut Down*, CORNUCOPIA INST., <https://www.cornucopia.org/2007/06/factory-farm-producing-organic> [<https://perma.cc/U7AC-EELN>] (last updated July 3, 2013); Parker, *supra* note 151.

208. See 7 C.F.R. § 205.660 (2022). (“The National Organic Program’s Program Manager, on behalf of the Secretary, may inspect and review certified production and handling operations and accredited certifying agents for compliance with the Act or regulations in this part.”).

209. *Id.*; *Organic Enforcement*, *supra* note 201.

210. 7 C.F.R. § 3.91(b)(1)(xxxvi) (2023).

211. *Organic Enforcement Activity*, U.S.D.A. AGRIC. MKTG. SERV., <https://www.ams.usda.gov/services/enforcement/organic-enforcement-activity> [<https://perma.cc/FX7H-65HK>].

212. *Id.*

213. *Id.* In 2020, the USDA changed how it reports this data, moving from annual to quarterly reports. *Id.*

Appeals ²¹⁴	36	32	40	44	79
Decisions ²¹⁵	15	8	13	15	13
Dismissals	8	3	0	0	16
Closures ²¹⁶	4	14	10	24	34
Cease and Desist Orders	36	31	18	11	8
Notices of Warnings	121	111	100	95	152
Investigation Referrals	64	58	162	154	105
Suspensions	N/A	N/A	294	548	595

214. AGRIC. MKTG. SERV., U.S.D.A., ADVERSE ACTION APPEAL PROCESS FOR THE NATIONAL ORGANIC PROGRAM 1 (2014) [hereinafter ADVERSE ACTION APPEAL PROCESS], <https://www.ams.usda.gov/sites/default/files/media/4011.pdf> [<https://perma.cc/S6TS-RJ5W>].

The [OFPA] calls for an expedited appeals procedure that gives persons adversely affected by a proposed action the opportunity to appeal that adverse action. The [NOP], in conjunction with the [AMS] Office of the Administrator, implements the expedited appeals procedure pursuant to §§ 205.680 and 205.681 of the [USDA] organic regulations.

Id.

215. *Id.* at 4–5.

The AMS Administrator may determine that it is more likely than not that the appellant violated the USDA organic regulations. Consequently, the Administrator signs a Decision denying the appeal (i.e., upholding the adverse action). The appellant is then provided an opportunity to request a hearing before an Administrative Law Judge. If the hearing is waived, then the Administrator’s Decision is implemented.

The AMS Administrator may determine that it is more likely than not that the appellant’s arguments are correct. Consequently, the Administrator signs a Decision upholding the appeal, and the adverse action is overturned and must be withdrawn.

Id.

216. *Id.* at 4 (“In certain cases, the NOP or LPS-ADD may close an appeal without a formal Administrator’s Decision The closure letter explains the reasons for closing the appeal and the implications of this outcome.”).

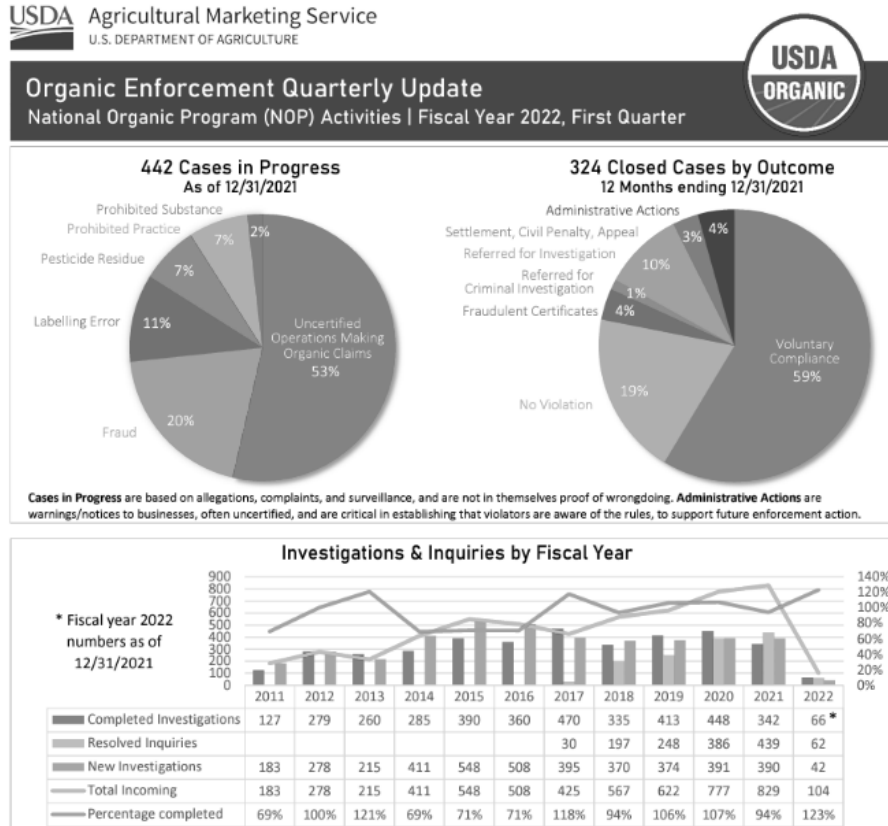
Revocations	N/A	N/A	17	16	14
Settlement Agreements	13	19	33	14	36
Consent Decisions	N/A	1	2	5	2
Total Amount Civil Penalties Levied	\$1,872,815	\$397,750	\$58,750	\$30,750	\$804,300

While the USDA collects similar data, it separates the data into two groups: cases closed by outcome and cases in progress.²¹⁷ Within the cases closed by outcome, the information reported includes voluntary compliance; no violation; administrative actions; surrender of certification; fraudulent certificates posted; settlement; civil penalty; appeal; insufficient evidence; outside NOP authority/other; referrals; and referrals for criminal investigation. Over the last three years, over 50% of the cases have been resolved through voluntary compliance, or no violation was found.²¹⁸

217. U.S.D.A., ORGANIC INTEGRITY DASHBOARD – 9/30/2022 (2022), <https://www.ams.usda.gov/sites/default/files/media/QuarterlyEnforcementReportQ4.pdf> [<https://perma.cc/G5SR-XDJ5>].

218. *Id.*; *Organic Enforcement Activity*, *supra* note 211.

With respect to cases in progress, most cases involve uncertified organic claims or fraud.²¹⁹



The USDA has been working hard to address the concerns surrounding enforcement. As explained in Part III, the USDA has introduced new rules to improve transparency and prevent fraud²²⁰

219. AGRIC. MKTG. SERV., U.S.D.A., ORGANIC ENFORCEMENT QUARTERLY UPDATE: NATIONAL ORGANIC PROGRAM (NOP) ACTIVITIES—FISCAL YEAR 2022, FIRST QUARTER, <https://www.ams.usda.gov/sites/default/files/media/QuarterlyEnforcementReport1qt2022.pdf> [<https://perma.cc/SH2W-TD76>].

220. Lana Bandoim, *USDA Wants to Change Organic Regulations to Prevent Fraud*, FORBES (Aug. 9, 2020, 1:50 AM), <https://www.forbes.com/sites/lanabandoim/2020/08/09/usda-wants-to-change-organic-regulations-to-prevent-fraud> [<https://perma.cc/NUN6-9GST>]. As stated in the proposed rule, the amendments “will close gaps in the current regulations to build consistent certification practices to deter and detect organic fraud, and improve transparency and product traceability. In addition, the proposed amendments will assure consumers that organic products meet a robust,

and Congress enacted the Organic Farmer and Consumer Protection Act²²¹ as part of the 2018 Farm Bill,²²² giving the NOP more resources and authority to fight global fraud in the organic trade. For the organic label, the audits and enforcement updates have been useful for identifying areas for improvement and demonstrate the first reason labels fail: poor enforcement.²²³

B. *The NOSB and Regulatory Capture*

Separate from enforcement concerns are the standards themselves, which come about with the help and guidance of the NOSB. Traditional organic farming advocates, who claim that the NOSB's actions and membership represent the interests of large entities, have criticized the NOSB's decisions and composition.²²⁴ The NOSB is now tilted toward members who work for industrial organic companies. Some argue that the Board is stacked and susceptible to the influence

consistent standard and reinforce the value of the organic label.” National Organic Program; Strengthening Organic Enforcement, 85 Fed. Reg. 47536 (Aug. 5, 2020) (to be codified at 7 C.F.R. pt. 205). The rule is currently under review by the Office of Management and Budget per an email I received from Jennifer Tucker, Deputy Administrator of the USDA National Organic Program. E-mail from Jennifer Tucker, Deputy Adm’r of the USDA Nat’l Organic Program, to Author (Oct. 28, 2022, 2:52 PM) (on file with Author).

221. Organic Farmer and Consumer Protection Act of 2018, S. 2927, 115th Cong. (2018), <https://www.congress.gov/bill/115th-congress/senate-bill/2927> [<https://perma.cc/BDC4-DLLT>].

222. Organic Farmer and Consumer Protection Act of 2017, H.R. 3871, 115th Cong. (2017), <https://www.congress.gov/bill/115th-congress/house-bill/3871> [<https://perma.cc/5EF3-92G3>]; Press Release, Tammy Baldwin, Senator, U.S. Senate, U.S. Senator Tammy Baldwin Introduces Legislation to Fight Back Against Fraudulent Organic Imports, Ensure Fair Playing Field for American Farmers (May 23, 2018), <https://www.baldwin.senate.gov/news/press-releases/organic-farmer-and-consumer-protection-act> [<https://perma.cc/NY8D-HEW4>].

223. See Liu, *supra* note 117, at 350–51 (explaining that the NOP does not have a formal method to track complaints and violations of the law and that fines are not enforced upon finding a violation of the law); Scott Thill, *Audit Reveals Weaknesses in USDA Organic Program Oversight*, CIV. EATS (Sept. 25, 2017), <https://civileats.com/2017/09/25/audit-reveals-weaknesses-in-usda-organic-program-oversight> [<https://perma.cc/U6D4-3EWR>] (stating that millions of pounds of products known to have been fumigated with pesticides were still labeled and sold as organic).

224. Mark Kastel, *Regulatory Capture: USDA’s Organic Governance Board Dominated by Affiliates of Corporate Lobby*, ORGANICEYE (Jan. 22, 2020), <https://organiceye.org/usdas-organic-governance-board-dominated-by-affiliates-corporate-lobby> [<https://perma.cc/3EGZ-SBQC>].

of “Big Organic.”²²⁵ The NOSB in turn encourages the USDA to adopt rules that favor large corporations, leading to the second reason labels fail.²²⁶

For example, in 2019, when the NOSB announced its new members, *Beyond Pesticides* published an article on regulatory capture, highlighting the new Board members’ affiliations with corporate lobbyists.²²⁷ The letter claims that such lobbyists’ past behavior has led to a “loosen[ing of] the organic regulatory standards, resulting in hydroponic (soilless) produce production, livestock factories, and copious amounts of imported feed and ingredients of dubious pedigree flooding the market.”²²⁸

As one longtime traditional organic farmer put it, the Board is made up of people who “[e]ither [] don’t have a clue, or their interest in making money is more important than their interest in maintaining the integrity of organics.”²²⁹ A former NOSB member who retired from the Board in 2021 observed: “industry has an outsized and growing influence on [the] USDA—and on the NOSB (including through NOSB appointments)—compared to the influence of organic farmers, who started this organic farming movement.”²³⁰ This regulatory capture of the organic market, as observed by the former NOSB member, is a product of reduced democratic input and reduced influence of traditional organics.²³¹

225. Stephanie Strom, *Has ‘Organic’ Been Oversized?*, N.Y. TIMES (July 7, 2012), <https://www.nytimes.com/2012/07/08/business/organic-food-purists-worry-about-big-companies-influence.html> [<https://perma.cc/E89M-HUX5>].

226. See Jasper Craven, *Is the USDA the Latest Site of Corporate Takeover in the Trump Administration?*, NATION (Mar. 13, 2018), <https://www.thenation.com/article/archive/is-the-usda-the-latest-site-of-corporate-takeover-in-the-trump-administration> [<https://perma.cc/Q9ZQ-226L>] (describing problems associated with “multinational food companies [that are] eager to take advantage of the profitability associated with the organic label,” including such companies’ efforts to influence the NOSB).

227. Kastel, *supra* note 224.

228. *Id.*

229. Strom, *supra* note 225.

230. Francis Thicke, *Closing Comments of Francis Thicke at End of NOSB Term*, CORNUCOPIA INST., <https://www.cornucopia.org/2017/11/closing-comments-francis-thicke-end-nosb-term> [<https://perma.cc/JJM9-UMZC>] (last updated Nov. 3, 2017).

231. Jaffee & Howard, *supra* note 143, at 389, 391, 393.

The concept of regulatory capture describes a situation in which parties with a strong interest in the outcome of regulatory decisions attempt to influence the bodies making such decisions, and in which those entities—entrusted with protecting the public interest—instead come to serve the commercial or special interests they are charged with regulating.

Id.

Since the enactment of OFPA and the promulgation of its rules, farmers, trade organizations, and the government have been at odds over organic regulations. In *Organizing Organic*, Michael Haedicke distills these competing visions of the organic market as either expansionary or transformative.²³² Those calling for transformation seek to restructure the food and agriculture system, while those pushing for expansion focus on market growth and quantifiable environmental goals.²³³ The expansionary vision now dominates federal thinking about the OFPA and the NOP.²³⁴ In some ways, this dominance is an expected outcome of a statute designed to standardize the marketing of organic products and their economic benefits over their environmental and societal benefits.²³⁵

Rather than giving in to corporate forces, traditional organic farmers are continually trying to reorient the NOP to address this imbalance.²³⁶ On Earth Day April 22, 2021, forty-three current and former NOSB members sent a letter to the USDA Secretary, Tom Vilsack.²³⁷ The letter's signatories raised concerns over the "integrity of the [NOS]."²³⁸ Erosion of these standards, they assert, "is undermining consumer confidence in the integrity of organic food and the confidence of real organic farmers in the integrity of the USDA [NOP]."²³⁹ The NOP, they argue, "can only thrive if it is built on public trust."²⁴⁰ Two controversial NOSB decisions have crystallized a preference for more industrialized organic operations and have

232. HAEDICKE, *supra* note 18, at 11–12. Other books have explored this tension, including *Agrarian Dreams: The Paradox of Organic Farming in California* by Julie Guthman and *Organic Struggle: The Movement for Sustainable Agriculture in the United States* by Brian K. Obach. See JULIE GUTHMAN, *AGRARIAN DREAMS: THE PARADOX OF ORGANIC FARMING IN CALIFORNIA* 3, 11, 21, 154 (2d ed. 2014); OBACH, *supra* note 24, at 4, 10, 17, 24. In 2007, Professor A. Bryan Endres warned that "by the end of the next decade, the 'organic' market may well bifurcate into two district units:" an industrialized organic market and a beyond-organic market. Endres, *supra* note 146, at 58.

233. HAEDICKE, *supra* note 18, at 10–13.

234. *Id.* at 20, 23.

235. This paper does not rehash the expansionary versus transformative debate. Instead, it accepts that the organic label's purpose from the federal government's perspective is that of a market stabilizer.

236. Letter from the NOSB to the Honorable Tom Vilsack, U.S. Sec'y Agric. (Apr. 22, 2021), https://www.realorganicproject.org/wp-content/uploads/2021/05/NOSB_letter_2021.pdf [<https://perma.cc/YY3E-USNE>].

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

opened the door for quasi-greenwashing.²⁴¹ The first involves the NOSB approval of hydroponically grown products as organic; the second involves animal welfare standards for animals used in the production of dairy and meat products.

1. *Hydroponics and Driscoll's strawberries*

Driscoll's is the world's largest berry company²⁴² and owns 64% of the U.S. organic berry market.²⁴³ Driscoll's also draws the ire of traditional organic farmers, as does any operation that grows plants in water instead of soil through a process called hydroponics.²⁴⁴ With hydroponic production, plants sit in nutrient-rich water solutions rather than soil. This process usually occurs indoors in vertical farm operations. Provided that all the requirements of the NOP are met, hydroponic produce can be labeled organic.²⁴⁵

Traditionalists argue that organic farming has always focused on soil health and that when producers take soil out of the equation, the product should no longer be considered "organic."²⁴⁶ For support,

241. *Controversial USDA National Organic Standards Board to Meet in Tuscon*, CORNUCOPIA INST., <https://www.cornucopia.org/2018/04/controversial-usda-national-organic-standards-board-meet-tucson> [<https://perma.cc/6U8W-FMLJ>] (last updated Apr. 20, 2018) (highlighting how recent decisions by the NOSB have been criticized because they demonstrate a clear preference against the organic community).

242. Dana Goodyear, *How Driscoll's Reinvented the Strawberry*, NEW YORKER (Aug. 14, 2017), <https://www.newyorker.com/magazine/2017/08/21/how-driscolls-reinvented-the-strawberry> [<https://perma.cc/WT5W-F2K5>] ("Driscoll's, a fourth-generation family business, says that it controls roughly a third of the six-billion-dollar U.S. berry market, including 60% of organic strawberries, 46% of blackberries, 14% of blueberries, and just about every raspberry you don't pick yourself.")

243. Alison Rose Levy, *Hydroponically Grown Produce Threatens Real Organic Agriculture*, TRUTHOUT (May 2, 2019), <https://truthout.org/articles/hydroponically-grown-produce-threatens-real-organic-agriculture> [<https://perma.cc/K8X4-EKY7>].

244. Driscoll's has also come under fire for its exploitation of farm workers. *Boycott Driscoll's! Global Action on September 29, 2018*, ENEMIGO COMÚN (Sept. 21, 2018), <https://elenemigocomun.net/2018/09/boycott-driscolls-action-2018> [<https://perma.cc/X6NL-6S6F>]. The National Democratic Independent Farmer Workers Union has called for a boycott of this and other berry companies. *See id.*

245. *See, e.g., Labeling Organic Products, supra* note 85.

246. This argument can be summarized as follows:

Organic food is about an entire ecosystem: taking care of the soil, recharging nutrients with crop rotation, providing for natural pollinators and pest control. It is a way for farming, which can often be ecologically destructive, to work *with* the planet. And massive hydroponic and container operations like Driscoll's do not do that: they are willfully separate from the environment.

these advocates argue the regulations define organic to include “practices that foster cycling of resources, promote ecological balance, and conserve biodiversity.”²⁴⁷ The drafters of the legislation must have deemed soil to be significant, given the statute’s emphasis on nutrient cycling and ecological systems.²⁴⁸ Organic producers must use practices that maintain and enhance healthy soil²⁴⁹ and avoid the use of synthetic pesticides and fertilizers.²⁵⁰

Farmers who use hydroponic methods argue that if they follow the NOP with respect to pesticide use and comply with the letter of the law, their products can carry the organic seal even when not grown in the ground.²⁵¹ Traditionalists call this a loophole in the NOP.²⁵²

After a fierce debate, the traditionalists lost this argument, and in 2017, the NOSB approved hydroponic practices.²⁵³ In 2019, the Center for Food Safety petitioned the USDA to initiate rulemaking to prohibit organic certification of hydroponically produced foods.²⁵⁴ The USDA denied the petition, and in 2020, the Center for Food Safety sued the USDA, alleging that the denial violated the Administrative Procedure Act, the NOP, and “undermine[d] the very integrity of the [NOP] and the Organic label that consumers trust and that organic farmers rely

They do not contribute to soil health (partly because they don’t use soil) nor to the overall health of the natural world.

Dan Nosowitz, *National Organic Standards Board Decrees That Hydroponic Can Be Organic*, MOD. FARMER (Nov. 2, 2017), <https://modernfarmer.com/2017/11/national-organic-standards-board-decrees-hydroponic-can-organic> [<https://perma.cc/B6VF-96WM>]; see also 7 U.S.C. § 6513(b)(1) (requiring farmers to have an organic plan that fosters “soil fertility”).

247. 7 C.F.R. § 205.2 (2022).

248. *Id.* § 205.203.

249. *Id.* § 205.200 (stating “[p]roduction practices implemented in accordance with this subpart must maintain or improve the natural resources of the operation, including soil and water quality”).

250. *Id.* § 205.105.

251. Mike Pomranz, *Hydroponics Can Keep Their Organic Status, Court Rules*, FOOD & WINE (Mar. 23, 2021), <https://www.foodandwine.com/news/hydroponics-organic-status-federal-judge-ruling> [<https://perma.cc/8TTQ-6A4E>].

252. See Levy, *supra* note 243 (discussing the hydroponic debate including Driscoll’s practices); see also Nosowitz, *supra* note 246 (noting that organic activists consider hydroponic systems like Driscoll’s to be a loophole to escape the traditional farming goal of caring for the soil).

253. See Nosowitz, *supra* note 246 (some called this debate a “battle for the soul of the organic movement”).

254. Petition to U.S.D.A. Seeking Rulemaking Excluding Organic Certification of Hydroponic Agricultural Production Systems and Products at 4–5 (Jan. 16, 2019), https://www.centerforfoodsafety.org/files/1_16_19_cfs-hydroponics-petition_final_11376_94809.pdf [<https://perma.cc/B83C-5FHV>].

upon.”²⁵⁵ Farmer-plaintiffs such as Swanton Berry Farm argued that “market competitiveness is injured by the confusion caused by the availability of hydroponically produced strawberries labeled and sold as ‘Organic’ at lower prices than those that soil-based organic strawberry farmers can afford to match.”²⁵⁶ Full Belly Farm argued that its “credibility as an organic producer [wa]s being compromised by [the] USDA’s creation of an entirely new type of organic production, without any regard [for] the historical role and principal importance of caring for a soil system and feeding the complex ecology of soil in order to build healthy plants that are resistant to diseases, more nutrient-dense, and that are healthier.”²⁵⁷ All farmers argued that their “vocational, reputational, and financial interests in farming organically [we]re injured by [the] USDA’s Petition Denial and its decision to allow the ongoing organic certification of hydroponic crops without due regard for the principles of organic farming required by OFPA.”²⁵⁸

In March 2021, the Northern District of California ruled against the Center for Food Safety.²⁵⁹ In September 2022, the Center appealed to the Ninth Circuit, which upheld the District Court’s opinion.²⁶⁰ As it stands today, hydroponic produce can bear the organic label without running afoul of NOP regulations.²⁶¹ Driscoll’s Strawberries offers the first example of quasi-greenwashing. The practice of hydroponics complies with organic regulations, but it fails to align with the original purposes behind organic, thus frustrating the goal of food system transformation that motivates many consumers to purchase organic products.²⁶²

Traditionalists argue that the authorization of hydroponic practices has further allowed Driscoll’s and other larger producers to dominate the organic berry market.²⁶³ Many traditional organic farmers believe

255. Complaint for Declaratory and Injunctive Relief at 2, Ctr. for Food Safety v. Perdue, 527 F. Supp. 3d 1130 (N.D. Cal. 2021), *aff’d*, Ctr. for Food Safety v. Vilsack, No. 21-15883, 2022 WL 4376415 (9th Cir. Sept. 22, 2022).

256. *Id.* at 7.

257. *Id.* at 9–10.

258. *Id.* at 7–8.

259. *Perdue*, 527 F. Supp. 3d at 1134.

260. *Vilsack*, 2022 WL 4376415, at *2.

261. See *Perdue*, 527 F. Supp. 3d 1130 at 1141; Pomranz, *supra* note 251.

262. See *Vilsack*, 2022 WL 4376415, at *2; Nosowitz, *supra* note 246.

263. For example, Ocean Spray is also developing a line of hydroponic strawberries. See *New Hydroponic Strawberry Line Sets Optimistic Tone for Trio of Partners*, FRUIT GROWERS NEWS (Apr. 1, 2021), <https://fruitgrowersnews.com/news/new-hydroponic-strawberry-line-sets-optimistic-tone-for-trio-of-partners> [<https://perma.cc/B4KP-8LM4>].

that Driscoll's uses hydroponics, a claim the company disputes.²⁶⁴ Driscoll's, however, admits to using “[c]ontainerized production” and vertical farming practices,²⁶⁵ which are often associated with hydroponics. Moreover, Driscoll's has partnered with Plenty Unlimited, a company known for using hydroponic processes in its vertical farms, to create more indoor berry vertical farms across the country.²⁶⁶

Many traditional organic farmers believe that using the organic label on produce that is hydroponically grown is “perpetrating a fraud on organic customers.”²⁶⁷ While this practice might not be greenwashing in the traditional sense, since hydroponic methods have been approved by the NOSB, hydroponics is an example of the quasi-greenwashing that results from information asymmetry about organic practices. Market research on hydroponics, while relatively new, supports the notion that consumers like information about products and know relatively little about hydroponics.²⁶⁸

Unlike research on the terms “local” or “natural,” willingness to pay and consumer preference research on hydroponics and organics is relatively undeveloped.²⁶⁹ In 2019, the first study investigating “how consumers may evaluate hydroponics over and/or in combination with sustainability labels like organic certification” was published in

264. See Nosowitz, *supra* note 246 (noting that Driscoll's operates “gigantic hydroponic operations”); *Driscoll's Organic Container Production Update*, DRISCOLL'S, <https://www.driscolls.com/article/organics-update> [<https://perma.cc/2C83-QNJ6>] (purporting that Driscoll's “does not grow hydroponic . . . crops”).

265. See *Driscoll's Organic Container Production Update*, *supra* note 264 (containerized production); Marian Zboraj, *Driscoll's to Build 1st Strawberry Indoor Vertical Farm*, PROGRESSIVE GROCER (Mar. 14, 2022), <https://www.progressivegrocer.com/driscolls-build-1st-strawberry-indoor-vertical-farm> [<https://perma.cc/4PT8-7E2U>] (vertical farming practices).

266. Mary Ellen Shoup, *Plenty Rolls Out Hydroponic Leafy Greens to Albertsons California Stores*, FOOD NAVIGATOR-USA (Aug. 12, 2020), <https://www.foodnavigator-usa.com/Article/2020/08/12/Plenty-rolls-out-hydroponic-leafy-greens-to-Albertsons-California-stores> [<https://perma.cc/LH7X-562S>].

267. Levy, *supra* note 243.

268. See Daniel N. Gilmour, Claudia Bazzani, Rodolfo M. Nayga Jr. & Heather A. Snell, *Do Consumers Value Hydroponics? Implications for Organic Certification*, 50 AGRIC. ECON. 707, 714–17 (2019) (discussing consumer opinions on hydroponic farming after receiving information about the practice); Maya Nikolovski, *The Ultimate Guide to Hydroponic Farming*, GROWCER (Aug. 18, 2021), <https://www.thegrowcer.ca/blog/hydroponic-farming> [<https://perma.cc/4UNL-J86H>] (noting that there is a lot of misinformation around hydroponic farming).

269. Gilmour et al., *supra* note 268, at 708.

Agricultural Economics.²⁷⁰ The study revealed a low level of familiarity with hydroponics, with 49% of the participants “being ‘slightly’ or ‘not at all’” familiar with hydroponics” and only 18% “being ‘very’ or ‘extremely’ familiar” with this growing technique.²⁷¹ The results also showed that most consumers are undecided about hydroponics’ inclusion in the organic program, with a majority of the control group participants selecting “neither agree or disagree” when asked their opinion about labeling hydroponics as organic.²⁷² The study ultimately concluded that “[g]iven consumers’ current limited knowledge toward hydroponics and the significant [willingness to pay] effects from providing additional information, . . . it might be important for the organic program to consider giving U.S. organic consumers this information by labeling hydroponic products as such.”²⁷³

A 2021 study “examine[d] how small-scale, [soil-based] farmers in the agricultural region surrounding the city of Montréal, Québec, Canada, have perceived and responded to a recently established urban commercial rooftop [hydroponic] greenhouse and online marketplace enterprise.”²⁷⁴ Of the twenty-two small-scale farms in the study, fourteen were certified organic and six were in the process of obtaining certification.²⁷⁵ The two remaining farms did not use chemicals or pesticides in their production but could not be certified as organic due to specific circumstances.²⁷⁶

This study reviewed tensions between the small-scale farms and the larger and more commercial urban farms, focusing on marketing and competition, community supported agriculture perceptions, and organic and local food production. With respect to organic and local food production, farmers were concerned with hydroponics, which is not allowed to be labeled as organic under Canadian law.²⁷⁷ The study notes that “[t]here was a strong sentiment amongst farmers that some consumers may not fully understand the distinction between

270. *Id.* at 709. This study was, to the Author’s knowledge, the first non-hypothetical study to assess “consumer valuations for food with a ‘hydroponic’ label.” The study “tests hydroponic valuations in the same context as the organic label, allowing [the authors] to compare the relative importance of both labels.” *Id.* at 716.

271. *Id.* at 716.

272. *Id.*

273. *Id.* at 717.

274. Monica Allaby, Graham K. MacDonald & Sarah Turner, *Growing Pains: Small-Scale Farmer Responses to an Urban Rooftop Farming and Online Marketplace Enterprise in Montréal, Canada*, 38 *AGRIC. & HUM. VALUES* 677, 678 (2021).

275. *Id.* at 683.

276. *Id.*

277. *Id.* at 686.

sustainability benefits of hydroponic production and organic standards.”²⁷⁸ “Farmers argued that consumers cannot necessarily distinguish the nuances between terms such as ‘organic’, ‘sustainable’, and ‘ecological’ used in the company’s marketing.”²⁷⁹ One farmer commented “[w]hen you’re doing hydroponics, you’re not [organic].”²⁸⁰

While these are only two studies, one of which takes place outside the United States, they illustrate the existence of consumer misunderstanding of hydroponics. They also highlight a desire to protect the broader goals of organic farming from corporate, large-scale farming enterprises.²⁸¹ Absent any change in the rule by the NOSB, hydroponic growers who use the USDA organic label could engage in a public information campaign to explain hydroponic practices. However, doing so would be costly and if such a campaign led consumers to choose an alternative, it might not benefit hydroponic growers. Furthermore, voluntary industry engagement in a public information campaign might not be sufficient to remedy the information issues at play.

2. *Animal welfare and Horizon Organic milk*

The animal welfare standards for organic products that come from livestock and poultry have also been an ongoing issue for the NOSB.²⁸² The earliest organic regulations only contained broad and general requirements about living conditions for livestock.²⁸³ For example, regulations required “[y]ear-round access for all animals to the outdoors, shade, shelter, exercise areas, fresh air, clean water for

278. *Id.*

279. *Id.*

280. *Id.*

281. Stocking rate is defined as the number of animals on a given amount of land over a certain period of time. See Daren D. Redfearn & Terrence G. Bidwell, *Stocking Rate: The Key to Successful Livestock Production*, OKLA. STATE UNIV. COOP. EXTENSION SERV. (2017), <https://extension.okstate.edu/fact-sheets/stocking-rate-the-key-to-successful-livestock-production.html> [<https://perma.cc/9MZE-EZQJ>].

282. See *New Push to Include Animal Welfare Standards to Organic Program*, ANIMAL WELFARE INST. (2021), <https://awionline.org/awi-quarterly/summer-2021/new-push-include-animal-welfare-standards-organic-program> [<https://perma.cc/Z8UF-MCY6>]; Jean Richardson, *NOSB Update*, NE. ORGANIC DAIRY PRODUCERS ALL., <https://nodpa.com/n/137/NOSB-Update> [<https://perma.cc/GY2E-28LR>] (last modified Oct. 16, 2018) (expressing hope that animal welfare standards will be responsive to the concerns expressed by the NOSB and the public).

283. See, e.g., 7 C.F.R. §§ 205.239–272 (2022) (listing appropriate year-round living conditions for livestock, including access to the outdoors, grazing conditions, bedding, and shelter).

drinking, and direct sunlight, suitable to the species, its stage of life, the climate, and the environment,”²⁸⁴ but they did not specify an outdoor space allowance or stocking rate, nor did they require that all animals in the herd or flock have access to the outdoors at the same time.²⁸⁵ This led to some questionable practices. For example, some organic egg producers interpreted “outdoor access” to include enclosed porches such that poultry were never in contact with soil or pasture.²⁸⁶

In 2010, the USDA published the Pasture Rule, which sets pasture access requirements for grazing and livestock.²⁸⁷ The rule requires that organic dairy cows graze on organic pastures for the “grazing season,” which is 120 days²⁸⁸ and 30% of a dairy cow’s feed must come from organic pastureland.²⁸⁹ Organic advocates argue that these organic requirements are a “low bar” and “should be easy to meet.”²⁹⁰

In 2016, the USDA began the administrative rulemaking process to provide clarity on the minimum welfare standards for organic livestock and poultry, including the Pasture Rule.²⁹¹ Specifically, the Organic Livestock and Poultry Practices (“OLPP”) rule would establish indoor and outdoor space and enrichment requirements for organic livestock and poultry, prohibit certain physical alterations such as debeaking of

284. *Id.* § 205.239(a)(1).

285. National Organic Program (NOP), Organic Livestock and Poultry Standards, 87 Fed. Reg. 48562, 48567 (Aug. 9, 2022) (to be codified at 7 C.F.R. pt. 205).

286. *Id.*

287. 7 C.F.R. § 205.239 (2022).

288. *Id.* § 205.237(c)(1) (“Ruminant animals must be grazed throughout the entire grazing season for the geographical region, which shall be not less than 120 days per calendar year. Due to weather, season, and/or climate, the grazing season may or may not be continuous.”).

289. *Id.* § 205.237(c)(2) (stating that during the grazing season, producers must “[p]rovide pasture of a sufficient quality and quantity to graze throughout the grazing season and to provide all ruminants under the organic system plan with an average of not less than 30[%] of their dry matter intake from grazing throughout the grazing season”).

290. Kestrel Burcham, *The “Organic Pasture Rule”: How the Law Sets Minimum Standards for Grazing*, CORNUCOPIA INST., <https://www.cornucopia.org/2018/12/the-organic-pasture-rule-how-the-law-sets-minimum-standards-for-grazing> [<https://perma.cc/CPZ9-487U>] (last updated Dec. 5, 2018).

291. National Organic Program (NOP), Organic Livestock and Poultry Practices, 81 Fed. Reg. 21956, 21958 (Apr. 13, 2016) (to be codified at 7 C.F.R. pt. 205).

birds and tail docking of cattle, and require group housing for pigs in most circumstances and for dairy calves after they are weaned.²⁹²

Like the hydroponics rule, OLPP Rule has a complicated history. The USDA introduced the rule in 2016, finalized it in the last days of the Obama administration in January 2017, and withdrew it under the Trump administration in March 2018.²⁹³

Weak animal welfare standards have allowed for what some call “organic” concentrated animal feeding operations” or CAFOs.²⁹⁴ For example, there are only six organic dairies in Texas as compared to the 450 organic dairies in Wisconsin.²⁹⁵ But the Texas dairies produce significantly more milk than those in Wisconsin.²⁹⁶ This can only happen through high density farming operations. Organic dairy has “grown beyond being a niche product to a full-blown commodity.”²⁹⁷

Organic dairy is the second example of quasi-greenwashing. A specific illustration is the 2021 contract cancellation between Danone and organic dairy farmers in New England.²⁹⁸ In 2021, Danone North America announced that its subsidiary, Horizon Organic, would be

292. See generally National Organic Program (NOP), Organic Livestock and Poultry Standards, 87 Fed. Reg. 48562, 48574, 48593 (Aug. 9, 2022) (to be codified at 7 C.F.R. pt. 205).

293. See, e.g., AGRIC. MKTG. SERV., *Organic Livestock and Poultry Practices*, U.S.D.A., <https://www.ams.usda.gov/rules-regulations/organic-livestock-and-poultry-practices> [<https://perma.cc/8PLX-SZPS>].

294. See BEYOND PESTICIDES, *Danone (Horizon Organic) Threatens the Backbone of Organic Dairy—Family Farms and Their Consumer Supporters* (Sept. 3, 2021), <https://beyondpesticides.org/dailynewsblog/2021/09/danone-horizon-organic-threatens-the-backbone-of-organic-dairy-family-farms-and-their-consumer-supporters> [<https://perma.cc/V583-WUBQ>] (describing how the lack of specificity in organic regulations has allowed industrial producers, or “organic” CAFO’s to exploit the ambiguity); Dave Chapman, *Which Came First—The Organic Chicken Or the Organic CAFO?*, REAL ORGANIC PROJECT, <https://www.realorganicproject.org/which-came-first-the-organic-chicken-or-the-organic-cafo> [<https://perma.cc/5DWD-9WH7>].

295. See Marc Eisen, *Organic Food Crisis Threatens Wisconsin Dairy Farmers*, WIS. EXAM’R (Jan. 31, 2020, 9:00 AM), <https://wisconsinexaminer.com/2020/01/31/organic-food-crisis-threatens-wisconsin-dairy-farmers> [<https://perma.cc/ZH43-694M>]; Mark Kastel, *The Healthful Mirage: Milk Versus Milk Analogues*, FOOD TANK, <https://foodtank.com/news/2022/07/oped-the-healthful-mirage-milk-versus-milk-analogues> [<https://perma.cc/B94Q-KLKL>].

296. See Eisen, *supra* note 295.

297. *Id.*

298. Sherry Bunting, *Danone May Dump Horizon Organic—Announcement Follows Northeast Contract Terminations, Big Investments in Fake-Milk*, AG MOOS (Feb. 6, 2023), <https://agmoos.com/2023/02/06/danone-may-dump-horizon-organic-announcement-follows-northeast-contract-terminations-big-investments-in-fake-milk> [<https://perma.cc/26Z6-Y9C6>].

terminating its contracts with eighty-nine small organic dairies in four New England states in what critics called a devastating blow to independent dairies and local economies.²⁹⁹ Advocates argue that this decision runs contrary to Danone's stated values and its status as a B Corp, a third-party certification that attests the company meets certain environmental and social standards.³⁰⁰ Danone cited rising costs as necessitating the contract cancellation.³⁰¹ Because the Pasture Rule and the Organic Livestock and Poultry Practices have interpretations that allow for high density operations, Danone would be able to continue with the organic label even though it would be sourcing milk from larger dairies in the West. The contract cancellation was reported in *The New York Times*³⁰² and other food/farming-specific publications.³⁰³ Senators from New England and New York became involved, and eventually, some contracts were restored temporarily.³⁰⁴

299. See Lisa Held, *Losing Danone Contracts Compounds the Dairy Crisis for Small Farms in the Northeast*, CIV. EATS, (Nov. 8, 2021), <https://civileats.com/2021/11/08/losing-danone-contract-compounds-dairy-crisis-small-farms-northeast> [<https://perma.cc/P7NX-RN2W>].

300. Max Goldberg, *With Danone Cutting the Contracts of 89 Small Organic Dairy Farmers, B Corp Has Made a Decision About the Company's Certification Status*, ORGANIC INSIDER, (Oct. 27, 2021), <https://organicinsider.com/newsletter/b-corp-danone-certification-status-cut-contracts-89-organic-dairy-farmers-new-york-new-england-your-weekly-organic-insider> [<https://perma.cc/H86G-K2EF>].

301. Held, *supra* note 299.

302. Murray Carpenter, *Milk Companies Look West, Pressuring Northeast Dairy Farmers*, N.Y. TIMES, <https://www.nytimes.com/2022/01/05/business/organic-dairy-farms-new-england.html> [<https://perma.cc/8KWB-YWVZ>] (last modified Jan. 10, 2022).

303. Chris Casey, *Stonyfield Co-Founder Enlists Consumers, Retailers to Help Northeast Organic Dairy Farms*, FOOD DIVE (Jan. 12, 2022), <https://www.fooddiver.com/news/stonyfield-co-founder-enlists-consumers-retailers-to-help-northeast-organic-dairy-farms> [<https://perma.cc/Q4JV-SANM>].

304. See, e.g., Senator Chuck Schumer, *As Upstate NY Organic Dairy Farmers Continue to Recover from Pandemic, Schumer Fights for Answers on Terminated Danone Contracts; With Impacted Farms Left Searching for Answers, Senator Calls on Danone for Explanation and Aid for Impacted New York Organic Dairy Farms*, SENATE MAJORITY LEADER CHUCK SCHUMER: U.S. SENATOR N.Y. (Oct. 19, 2021), <https://www.schumer.senate.gov/newsroom/press-releases/as-upstate-ny-organic-dairy-farmers-continue-to-recover-from-pandemic-schumer-fights-for-answers-on-terminated-danone-contracts-with-impacted-farms-left-searching-for-answers-senator-calls-on-danone-for-explanation-and-aid-for-impacted-new-york-organic-dairy-farms> [<https://perma.cc/B5DA-GN4F>] (discussing Senator Schumer's concerns and questions for Danone); Lisa Rathke, *Horizon Organic to Extend Northeast Milk Contracts 6 Months*, ASSOCIATED PRESS (Dec. 15, 2021, 1:51 PM), <https://www.mynbc5.com/article/horizon-organic-to-extend-northeast-milk-contract-6-months/38528787> [<https://perma.cc/KYJ4-L6NW>] (discussing Danone's offer to extend contracts through February 2023 and provide transition payments).

Danone was technically not in violation of the organic rules.³⁰⁵ But when consumers see an image of a smiling cow in a grassy field, as appears on Horizon milk cartons, and purchase this product in part because of the image on the carton, they have wrongly assumed the cows were raised in a pasture rather than a feedlot.³⁰⁶

In June 2021, under a new administration, USDA Secretary Tom Vilsack stated that the agency would reconsider the rationale behind the withdrawal of the OLPP and instruct the NOP to begin the rulemaking process on issues pertaining to animal welfare.³⁰⁷ In August 2022, the agency published a proposed rule aimed at amending the OLPP requirements.³⁰⁸ The comment period closed in November 2022.

The 2022 proposed rule is almost identical to the rule withdrawn in 2017.³⁰⁹ The Agency decided to engage in the rulemaking process again instead of striking the withdrawal order, which would have made the 2017 rule effective immediately, to allow organic producers to come into compliance with the new rule.³¹⁰ The 2022 proposed rule includes definitions for terms like “indoors or indoor space” and “outdoors and outdoor space,” prohibits certain physical alteration

305. See 7 C.F.R. § 205.300(a) (providing that the term “organic” may only be used on labels with ingredients that have been produced and handled according to the appropriate regulations).

306. Paul Michael, *Horizon Organic Milk: Is it All Just Lies?*, WISEBREAD, <https://www.wisebread.com/horizon-organic-milk-is-it-all-just-lies> [https://perma.cc/AXG9-289B].

307. *Statement from Agriculture Secretary Tom Vilsack on Organic Livestock and Poultry Practices Final Rule*, U.S.D.A., (June 17, 2021), <https://www.usda.gov/media/press-releases/2021/06/17/statement-agriculture-secretary-tom-vilsack-organic-livestock-and> [https://perma.cc/6U2A-852D].

308. National Organic Program (NOP); Organic Livestock and Poultry Standards, 87 Fed. Reg. 48562 (proposed Aug. 9, 2022) (to be codified at 7 C.F.R. pt. 205).

309. Compare *id.* (requiring specific livestock care and production practices), with 82 Fed. Reg. 7042 (Jan. 19, 2017) (to be codified at 7 C.F.R. pt. 205) (requiring nearly identical standards), and 83 Fed. Reg. 10775 (Mar. 13, 2018) (to be codified at 7 C.F.R. pt. 205) (publishing the withdrawal of the 2017 Organic Livestock and Poultry Practices rule).

310. Jana Caracciolo, *Proposed Updates to the Organic Livestock and Poultry Practices Rule*, NAT'L AGRIC. L. CTR., (Aug. 16, 2022), <https://nationalaglawcenter.org/proposed-updates-to-the-organic-livestock-and-poultry-practices-rule> [https://perma.cc/M526-78ML].

procedures, and requires euthanasia for other processes to reduce pain, suffering, and stress on animals.³¹¹

A second rule, separate from OLPP, that has also been a concern to dairy operators is the Origin of Livestock Rule.³¹² This rule allows non-organically raised animals to transition into organic milk production.³¹³ To be considered organic, the livestock must be under continuous organic management for at least one year.³¹⁴ This one-year transition period is applicable solely in circumstances where a conventional herd is being converted to an organic herd. Afterwards, organic management must oversee all dairy animals from the last third of gestation.³¹⁵ Varying interpretations of the rule allowed some farmers to “continuously transition[] and/or cycl[e] dairy animals in and out of organic production.”³¹⁶

Hydroponics and animal welfare standards for the organic program are two examples that traditional organic advocates use to demonstrate industrial organics’ hold on the NOSB and thus, the organic program.³¹⁷ While traditional organic farmers and advocates recognize that organic has drifted away from some of its original ideals, many consumers have been left in the dark. These examples illustrate a second reason why labels fail: information asymmetry created through regulatory capture.³¹⁸

Consumers purchase organic products for a variety of reasons and their understanding of these underlying organic regulations varies.

311. *Id.*; see also National Organic Program (NOP); Organic Livestock and Poultry Standards, 87 Fed. Reg. 48562 (proposed Aug. 9, 2022) (to be codified at 7 C.F.R. pt. 205) (amending organic livestock and poultry production requirements by adding new handling, transport, and slaughter provisions and expanding and clarifying existing requirements regarding livestock and mammalian care and production).

312. 7 C.F.R. pt. 205.236 (2022).

313. AGRIC. MKTG. SERV., U.S.D.A., ORIGIN OF LIVESTOCK PROPOSED RULE QUESTIONS AND ANSWERS, (Apr. 27, 2015), https://ota.com/sites/default/files/indexed_files/2015%20NOP%20Proposed%20Rule%20Origin%20of%20Livestock%20-%20QandA.pdf [<https://perma.cc/DYX8-SA6G>].

314. *Id.*

315. *Origin of Organic Dairy Livestock*, ORGANIC TRADE ASS’N, <https://ota.com/advocacy/critical-issues/origin-organic-dairy-livestock> [<https://perma.cc/YQ73-6V5Q>].

316. *Id.* This rule was amended in 2022. Press Release, U.S.D.A., USDA Publishes Origin of Livestock Final Rule for Organic Dairy, (Mar. 29, 2022), <https://www.usda.gov/media/press-releases/2022/03/29/usda-publishes-origin-livestock-final-rule-organic-dairy> [<https://perma.cc/AA9K-CNAJ>] (announcing that the USDA National Organic Program will oversee the rule that allows a dairy livestock operation to transition non-organic animals to organic).

317. HAEDICKE, *supra* note 18, at 19–20.

318. Epstein, *supra* note 55.

Many of the organic practices of today do not necessarily match consumer preferences, especially those consumers who have ethical or philosophical, as opposed to simply safety or health, reasons for purchasing organic products.³¹⁹ While most consumers understand that organic means that the product is free from certain pesticides, buying organic does not ensure that other consumer preferences—like soil health or animal welfare, for example—are met.³²⁰ Similarly, while many organic farmers focus on broader ecological and social concerns, the USDA organic seal does not necessarily mean production was local or occurred in a sustainable manner. This confusion is reflected in a recent study which found that “22% of the [study] participants perceive organic food [as] sharing the same characteristics as local food.”³²¹ Sustainable agriculture is broader than organic agriculture, and “aims to address both the ecological and social problems associated with modern industrialized agriculture.”³²² In short, “consumer understanding of the organic market is muddled.”³²³ And the confusion works in the seller’s favor.

C. Imports and Nonfood Items

Labels can also fail when their use proliferates. Today, the organic label is widely used on imports and nonfood items, both of which have experienced fraud.

319. See Becky L. Jacobs & Chelsea Jacobs, *A Quixotic Quest for Definition: Perceptions of “Organic” and Implications for the Environment and for Market Participants*, 12 KY. J. EQUINE, AGRIC. & NAT. RES. L. 141, 162 (2020) (discussing how different motivations and perceptions have drawn attention to potential alterations to USDA standards).

320. See David Conner & Ralph Christy, *The Organic Label: How to Reconcile its Meaning with Consumer Preferences*, 35 J. FOOD DISTRIBUT. RSCH 40, 42 (2004).

[T]he organic label provides, at best, information on the environmental impacts at the production site. It does nothing to address pollution from transporting food over great distances, for example, let alone social-justice and community issues. Furthermore, with the entry into the organic market (and acquisition of once-small, independent organic firms) by large agri-business corporations, it is clear that buying organic does not necessarily imply supporting small family farms or a local sustainable food system, as many surveyed consumers stated.

Id.

321. Junhong Chen, John Lai, Xuqi Chen & Zhifeng Gao, *Effects of Shared Characteristics Between Eco-labels: A Case for Organic and Local Food*, 47 INT’L J. CONSUMER STUD. 285, 293 (2022).

322. Conner & Christy, *supra* note 320, at 42.

323. Reid, *supra* note 50, at 588.

As demand for organic has grown in the United States, U.S. suppliers are turning to foreign organic firms.³²⁴ In the United States, the international trade of organic products is governed by a series of trade agreements. For example, recognition agreements allow foreign countries to accredit certifying agents who can certify that products from the country comply with the USDA organic standard.³²⁵ The United States has such an agreement in place with New Zealand, India, and Israel.³²⁶ Another kind of trade agreement used by the United States is called an equivalency agreement, whereby trade partners who produce and certify products as organic, according to that country's standard, are allowed access to the market in the United States (and vice versa). Such trade agreements are in place with Canada, the EU, Japan, South Korea, Switzerland, Taiwan, and the United Kingdom.³²⁷ Thus, some products that bear the USDA organic seal have been certified outside of the United States by some other entity. As discussed earlier, fraudulent organic imports were exposed through audits and investigative reporting,³²⁸ and have been the source of greenwashing claims.

A final aspect contributing to label failure is the extension of the term organic to nonfood products. This is a “largely undefined and unregulated space where inaccurate or misleading organic claims are made on non-agricultural or partially non-agricultural products.”³²⁹ In 2015, the OTA reported that sales of nonfood organic products were about \$3.6 billion, up 13% from the year before.³³⁰ The most popular nonfood organic products include household cleaners, cosmetics,

324. See Kathryn A. Boys, Siqi Zhang & Neal H. Hooker, *The International Trade of U.S. Organic Agri-food Products: Export Opportunities, Import Competition and Policy Impacts*, 37 RENEWABLE AGRIC. & FOOD SYS. 603, 603 (2022) (“As domestic organic producers cannot satisfy this demand, organic agri-food products are increasingly imported for either resale as a raw, fresh product or for use as an ingredient in manufactured food products.”).

325. See *id.* at 605 (explaining how recognition agreements allow foreign products to be labeled and sold as organic in the United States when farms and processing facilities meet or exceed USDA regulations).

326. See *id.* at 605 tbl.1.

327. See *id.*

328. See *supra* Section II.A (explaining how the use of the organic label on imports has threatened the integrity of the label).

329. Letter from Organic Trade Ass’n to FTC, Off. of the Sec’y (Oct. 27, 2017), https://ota.com/sites/default/files/indexed_files/OTA_FTC_ConsentAgreement_File%20No.%201623128.pdf [<https://perma.cc/M5JU-SUA3>].

330. *U.S. Organic Sales Post New Record of \$43.3 Billion in 2015*, ORGANIC TRADE ASS’N (May 19, 2016), <https://www.ota.com/news/press-releases/19031> [<https://perma.cc/WMY7-UWE5>].

gardening products, clothing, sheets, and mattresses.³³¹ In November 2018, market research firms reported that the global demand “for natural and organic personal care products [grew] nearly 10[%] annually and [was] projected to hit \$17.6 billion by 2021.”³³² The global organic personal care products market alone is projected to reach \$11.1 billion by 2025, exhibiting an annual growth rate of 5.5% during the forecast period.³³³

The OTA has argued that “such products should not be labeled as ‘organic.’”³³⁴ The NOP’s enforcement authority, however, does not extend to nonagricultural products. Instead, the FTC has the authority to investigate false or misleading *organic* claims on nonagricultural products through the Federal Trade Commission Act (“FTC Act”),³³⁵ which protects consumers from false and misleading advertisements and business practices.³³⁶

In 2017, the FTC stepped in for the first time to evaluate deceptive claims on a baby mattress. According to the consent order, Moonlight

331. Sarah J. Morath, *Buyers Should Beware of Organic Labels on Nonfood Products*, CONVERSATION (Jan. 3, 2020, 8:49 AM), <https://theconversation.com/buyers-should-beware-of-organic-labels-on-nonfood-products-128838> [<https://perma.cc/8DD7-BSHK>].

332. Barrett J. Brunsmann, *P&G’s Gillette Going ‘Natural’ with Pure Shave Gel, Cream*, CINCINNATI BUS. COURIER (Nov. 16, 2018, 11:15 AM), <https://www.bizjournals.com/cincinnati/news/2018/11/16/p-gs-gillette-going-natural-with-pure-shave-gel.html> [<https://perma.cc/ZBL6-PS5S>].

333. *Global Organic Personal Care Ingredients Market: Size, Share & Trends (2018-2025)*—ResearchAndMarkets.com, ASSOCIATED PRESS (Dec. 6, 2018, 6:03 AM), <https://www.apnews.com/d9e31e9bc3e24450a4d7c29f49b2ad69> [<https://perma.cc/SNN3-JMAT>].

334. Randy Hutchinson, *FTC Lands on False Organic Claims*, JACKSON SUN (Apr. 17, 2018, 4:29 PM), <https://www.jacksonsun.com/story/money/business/columnists/2018/04/17/ftc-lands-false-organic-claims/526027002> [<https://perma.cc/PR8Y-BQM6>].

335. The FTC is an independent agency of the U.S. Government created by statute. 15 U.S.C. §§ 41–58. The FTC enforces section 5(a) of the FTC Act, 15 U.S.C. § 45(a)(1), which prohibits unfair or deceptive acts or practices in or affecting commerce. 15 U.S.C. § 45. The FTC is authorized to initiate federal district court proceedings, by its own attorneys, to enjoin violations of the FTC Act and to secure such equitable relief as may be appropriate in each case, including rescission or reformation of contracts, restitution, the refund of monies paid, and the disgorgement of ill-gotten monies. 15 U.S.C. § 53(b).

336. See *supra* note 335.

Slumber, LLC made unsubstantiated representations that its mattresses are organic, natural, or plant-based as well as other claims.³³⁷

In October 2019, the FTC fined another company, Truly Organic, \$1.76 million for falsely advertising its body washes, lotions, baby, haircare, bath, “and cleaning products as ‘certified organic,’ ‘USDA certified organic,’ and ‘Truly Organic.’”³³⁸ Despite having some ingredients that could be organically sourced, Truly Organic products either contained ingredients that were not approved by NOP or contained ingredients that were not organically sourced.³³⁹

More recently, in May 2021, a consumer complaint alleging false and deceptive advertising was filed against LA Baby for its use of the phrase “naturally organic.”³⁴⁰ Commentators suggest that this activity “may indicate . . . that the FTC will be looking more closely at ‘organic’ claims.”³⁴¹

Additionally, in advance of consideration of the 2023 Farm Bill,³⁴² CEO and Executive Director of the OTA argued that:

USDA’s scope of authority must be expanded to combat the improper use of the term organic on uncertified products such as personal care, textiles, dietary supplements and businesses such as grocery stores, dry cleaners, and restaurants. The fraudulent use of the term organic [on nonfood items] misleads consumers and hurts the USDA organic label and brand.³⁴³

337. Agreement Containing Consent Order at 7, Moonlight Slumber, L.L.C., F.T.C. No. 162-128, <https://www.ftc.gov/system/files/documents/cases/1623128moonlightslumberorder.pdf> [<https://perma.cc/F9ZU-VQG3>].

338. Sheila A. Millar, *Truly Organic? Not Really, Says FTC*, NAT’L L. REV. (Oct. 2, 2019), <https://www.natlawreview.com/article/truly-organic-not-really-says-ftc> [<https://perma.cc/96PQ-U643>].

339. *Id.*

340. *Id.* (attaching the official complaint alleging that Truly Organic made false and misleading representations of its products); see Complaint at 9, Fed. Trade Comm’n v. Truly Organic, Inc., No. 1:19-cv-23832 (S.D. Fla. Sept. 13, 2019).

341. Dana B. Rosenfeld, *Moonlight Slumber Says “Goodnight” to Misleading and Unsubstantiated “Organic” Advertising Claims After Settlement with FTC*, KELLEY DRYE (Oct. 12, 2017), <https://www.adlawaccess.com/2017/10/articles/moonlight-slumber-says-goodnight-to-misleading-and-unsubstantiated-organic-advertising-claims-after-settlement-with-ftc> [<https://perma.cc/X3NC-5K7T>].

342. See *The Latest Updates on the 2023 Farm Bill*, FARMAID (July 18, 2023), <https://www.farmaid.org/issues/farm-policy/the-latest-updates-on-the-2023-farm-bill> [<https://perma.cc/7FWX-4CLP>] (stating that Congress may propose a first draft of the 2023 Farm Bill in late 2023).

343. Statement of Laura Batcha, CEO and Executive Director, The Organic Trade Association, House Committee on Agriculture, Subcommittee on Biotechnology,

Lax enforcement, regulatory capture, and the expansive and widespread use of the USDA organic label have contributed to greenwashing.

D. Greenwashing vs. Quasi-Greenwashing

While lax enforcement and expansive use have led to greenwashing, regulatory capture and information asymmetry³⁴⁴ have created the opportunity for quasi-greenwashing.³⁴⁵ Recognizing the power of labels to influence consumer behavior, many businesses use positive information to induce purchasing decisions with products that do not provide an environmental benefit.³⁴⁶ This conduct—making false or misleading statements to customers about the environmental benefits of a product or business practices for monetary gain—has been labeled greenwashing.³⁴⁷ Greenwashing has become a buzz word for

Horticulture, and Research, 2022 Review of the Farm Bill: Horticulture and Urban Agriculture (Mar. 29, 2022), https://ota.com/sites/default/files/indexed_files/Laura%20Batcha%20Testimony%20%28002%29.pdf [<https://perma.cc/2NJW-8SJH>].

344. Wim Verbeke, *Agriculture and the Food Industry in the Information Age*, 32 EUR. REV. AGRIC. ECON. 347, 350 (2005), https://www.researchgate.net/profile/Wim-Verbeke-2/publication/5212262_Agriculture_and_the_Food_Industry_in_the_Information_Age/links/00b7d52777e3467493000000/Agriculture-and-the-Food-Industry-in-the-Information-Age.pdf [<https://perma.cc/AX5A-9QZF>] (“[P]otential market failures from information asymmetry arise because consumers face uncertainty regarding the true nature of product attributes, and as a result, make choices that are not well aligned with their preferences Market failures arise when sellers have more knowledge than buyers do (e.g. concerning the production process, product origin, nutritional content, or safety issues), which means that information is asymmetrically distributed.”).

345. This is the first Article, to the Author’s knowledge, that uses the term quasi-greenwashing to describe instances where products meet a certain standard, but consumers lack complete understanding of that standard.

346. See Michelle Diffenderfer & Keri-Ann C. Baker, *Greenwashing: What Your Client Should Know to Avoid Costly Litigation and Consumer Backlash*, 25 NAT’L RES & ENV’T 21, 21 (2011) (“Many companies are using green messages to label and advertise their products as ones that are good for the environment when their products have little or no positive environmental benefits.”).

347. See Greg Northen, *Greenwashing the Organic Label: Abusive Green Marketing in an Increasingly Eco-Friendly Marketplace*, 7 J. FOOD L. & POL’Y 101, 103 (2011) (describing greenwashing as “advertising and labeling practices that are perceived to be ‘false, deceptive, misleading or vague’”). More recent literature suggests that greenwashing is more complex. See, e.g., Menno D. T. de Jong, Gabriel Huluba & Ardion D. Beldad, *Different Shades of Greenwashing: Consumers’ Reactions to Environmental Lies, Half-Lies, and Organizations Taking Credit for Following Legal Obligations*, 34 J. BUS. & TECH. COMM’N 38, 43 (2020), <https://journals.sagepub.com/doi/full/10.1177/1050651919874105> [<https://perma.cc/L27D-AU8N>] (describing greenwashing as “a broad and

consumers, advocacy organizations, and trade groups when it comes to organic products.

The OTA defines organic fraud as:

an intentional[ly] misleading or deceptive action carried out for illicit financial gain. Fraudulent acts may include adulteration, substitution, falsified records and the deliberate mislabeling of goods, as well as false statements made on applications, organic system plans, and during inspections. Of primary concern are intentional and economically motivated substitutions and the fraudulent mislabeling of organic products, including fabrication of fraudulent organic certificates.³⁴⁸

Moonlight Slumber and Truly Organic are examples of classic greenwashing because neither product contained organic ingredients; each company was not complying with the organic regulations.

In general, private parties, states, and the federal government can bring claims against companies engaging in greenwashing in a variety of ways.³⁴⁹ First, the Council of Better Business Bureau (BBB) and its National Advertising Division can investigate greenwashing claims against businesses that are part of the BBB.³⁵⁰ Second, state laws may allow a state attorney general or a consumer protection agency to regulate greenwashing.³⁵¹ Third, private parties, including consumers and competitors, can bring actions under state or federal laws like common law fraud or the Lanham Act.³⁵² Fourth, the FTC can regulate through the FTC Act, with the other three kinds of regulation taking

multifaceted phenomenon, and intentionally misleading stakeholders is only part of it”).

348. ORGANIC TRADE ASS'N, ENSURING GLOBAL ORGANIC SUPPLY CHAIN INTEGRITY: A GUIDE TO DEVELOPING AN ORGANIC FRAUD PREVENTION PLAN 4 (2019), https://ota.com/sites/default/files/indexed_files/ExecSummary-OTA-GOSCI-Guide-0304.pdf [<https://perma.cc/7YZZ-SXF8>].

349. Brook Detterman, Lauren Hopkins, Allyn Stern, Deepti Gage & Kate Tipple, *Environmental Marketing Claims: Regulatory and Litigation Outlook*, BEVERIDGE & DIAMOND (Aug. 12, 2021), <https://www.bdlaw.com/publications/environmental-marketing-claims-regulatory-and-litigation-outlook> [<https://perma.cc/DPM3-TCHU>].

350. *National Advertising Division (NAD)*, COUNCIL BETTER BUS. BUREAU (Oct. 22, 2020, 9:34 PM), <https://bbbprograms.org/programs/all-programs/national-advertising-division> [<https://perma.cc/CB4MCR4N>].

351. Robert B. White, *Preemption in Green Marketing: The Case for Uniform Federal Marketing Definitions*, 85 IND. L. J. 325, 331 (2010) (“States regulate green-marketing claims either by general consumer protection acts, or, in a few states, by specific green-marketing acts.”).

352. *See, e.g.*, Lanham Act, 15 U.S.C. § 1125(a) (stating that any person may be liable in a civil action by another person).

cues from the FTC.³⁵³ In the context of deceptive advertising, the FTC considers the content of the advertisement, whether the representations made are false, misleading or unsubstantiated, and whether a consumer would find those representations to be material in deciding whether to purchase the product.³⁵⁴

Quasi-greenwashing is slightly different from classic greenwashing in that quasi-greenwashing marketing statements are not false, misleading, or unsubstantiated. Quasi-greenwashing arises when marketing statements are accurate, but the consumer's understanding of the statement is flawed. In quasi-greenwashing practices, the seller is relying on the consumer's ignorance or misunderstanding of a word, phrase, or practice to sell products.³⁵⁵ This mismatch between producer/seller and consumer/buyer knowledge about an ecolabel allows producers to act "green" while avoiding behavior that runs afoul of consumer protection laws. Certified organic hydroponic strawberries and CAFO-like dairy farms are two situations where quasi-greenwashing may arise.

Information asymmetry arises when "one party to a transaction has more information than another party does."³⁵⁶ When the seller knows more than the buyer, the situation is ripe for the seller to take advantage of the buyer's lack of knowledge.³⁵⁷ While some scholars argue that certifications can help to "alleviate the market failures that result from information asymmetry,"³⁵⁸ this argument assumes that consumers understand what the certification or label means. Both the traditional organic farmer and the industrial organic farmer understand the standards and allowable practices, but only the most

353. 15 U.S.C. § 45(a)(1).

354. See *Business Guidance Concerning Multi-Level Marketing*, F.T.C. (Jan. 2018), <https://www.ftc.gov/business-guidance/resources/business-guidance-concerning-multi-level-marketing> [<https://perma.cc/MF33-J7HK>]. Section 5(a) of the FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1). Misrepresentations or deceptive omissions of material fact constitute deceptive acts or practices prohibited by section 5(a) of the FTC Act. FED. TRADE COMM'N ACT SECTION 5: UNFAIR OR DECEPTIVE ACTS OR PRACTICES, CONSUMER HANDBOOK, 1 (2008).

355. Quasi-greenwashing could also arise when a business exploits an existing statutory or regulatory loophole.

356. Troy S. Brown, *Legal Political Moral Hazard: Does the Dodd-Frank Act End Too Big to Fail?*, 3 ALA. C.R. & C.L. L. REV. 1, 37 (2012).

357. *Id.* at 37 n.157.

358. Ariel Katz, *Pharmaceutical Lemons: Innovation and Regulation in the Drug Industry*, 14 MICH. TELECOMM. & TECH. L. REV. 1, 29 (2007) (describing a range of credence quality certificates, including Kosher certification, environmental certificates, organic products, Fair Trade, and Fair Employment marks).

educated consumers understand the nuances at play in organic certification, and only the industrialized organic farmer has the means to capitalize on this gap.³⁵⁹ USDA Organic may be useful to the consumer who understands the complexities of organic regulations, but what about the average consumer or the consumer who thinks organic addresses broader ecological or social goals? For these consumers, an information gap still exists.

While the USDA, FTC, and DOJ can work together to combat the fraudulent use of the term organic, their actions will always be constrained by how the term organic is defined and who controls this definition. If the term is focused on the market aspects of organic, and not on broader ecological or community dimensions of organic farming, the harms presented in the next Section will persist.

III. WHEN LABELS FAIL

Who and what is harmed when labels fail to live up to stated objectives and goals? Although greenwashing and quasi-greenwashing are slightly different practices, the harms they perpetuate are the same. Regardless of whether the product is hydroponic strawberries or non-organic mattresses labeled as organic, as this Part explains, consumers, competitors, and the environment are all similarly harmed. But the tactics for addressing the harm will be different depending on whether the harm arises from greenwashing or quasi-greenwashing.

This Part describes the harm experienced when greenwashing or quasi-greenwashing occurs. It then describes current efforts to address organic greenwashing (e.g., the non-organic mattresses) and compares those efforts to ways to address quasi-greenwashing (e.g., the organic, but hydroponic, strawberry).

359. Although the focus of this Article is on the use of the term organic, quasi-greenwashing can arise in other contexts as well. Take, for example, the terms recycling or biodegradable. Many products carry these labels, but only a small percentage of these products undergo processes that allow them to biodegrade or be recycled. This is because the infrastructure, from collection to processing to reselling, is insufficient. In fact, current estimates report the recycling of plastic bottles at 5% even though most bottles carry the recycling symbol. Are sellers who put plastic bottles into the marketplace with the recycling symbol engaging in greenwashing? Perhaps not, as these bottles technically can be recycled. Are they engaging in quasi-greenwashing? Probably yes, because most consumers are not aware that most plastic bottles are not in fact recycled. Organic and recyclable are terms not fully understood by consumers, and sellers are capitalizing on this ignorance.

A. Harms

Because it arises in the context of advertising or marketing a product, greenwashing claims focus on the harm felt by consumers and competitors. While consumers and competitors are obvious victims of greenwashing schemes, the environment is also harmed. This Section describes how greenwashing and quasi-greenwashing harm consumers, traditional organic farmers, and the environment.

1. Consumer harm

Survey after survey demonstrates that consumers welcome information, in the form of labels, on their food and use the information on food labels when deciding whether to purchase food items.³⁶⁰ Additionally, consumers have “high expectations of those food labels.”³⁶¹ These surveys also reflect the rise of conscious consumerism³⁶²—that is, consumers who purchase food with a variety of environmental, safety, and social responsibility objectives in mind including supporting local farmers, supporting companies who provide good working conditions and fair pay to their workers, reducing exposure to pesticides, protecting the environment from chemicals, providing better living conditions for animals, and reducing antibiotic use in food.³⁶³

The organic labels offer “positive” information, in that they provide environmentally friendly information to the consumer.³⁶⁴ Many consumers believe organic products are healthier³⁶⁵ or better for the

360. See, e.g., CONSUMER REPS. NAT'L RSCH. CTR., FOOD LABELS SURVEY: 2016 NATIONALLY-REPRESENTED PHONE SURVEY 16 (2016); see also Label Insight, *Study: Nearly Three-Fourths of Consumers Would Pay More for Products that Offer Complete Transparency*, CISION (Aug. 30, 2016), <https://www.prnewswire.com/news-releases/study-nearly-three-fourths-of-consumers-would-pay-more-for-products-that-offer-complete-transparency-300318901.html> [<https://perma.cc/4B4B-ZD6U>] (noting a “clear correlation between transparency and improved consumer trust, enhanced brand loyalty, and overall long term value in repeat purchase.”).

361. CONSUMER REPS. NAT'L RSCH. CTR., *supra* note 360, at 16.

362. See Janet Forgive, *How Chipotle Plans to Feed Consumers' Growing Craving for Sustainable Food*, FORBES (Aug. 29, 2018, 7:57 AM), <https://www.forbes.com/sites/janetforgive/2018/08/29/how-chipotle-plans-to-feed-consumers-growing-craving-for-sustainable-food/#6841d38129f0> [<https://perma.cc/RQ6A-WAY9>].

363. CONSUMER REPS. NAT'L RSCH. CTR., NATURAL FOOD LABELS SURVEY: 2015 NATIONALLY-REPRESENTED PHONE SURVEY 2 (2015).

364. See Czarnecki, *supra* note 62 (“A 2009 survey identified about 600 labels that denote some definition of ‘environmentally friendly’ worldwide, including more than 80 on products sold in the United States.”).

365. See Jyoti Rana & Justin Paul, *Consumer Behavior and Purchase Intention for Organic Food: A Review and Research Agenda*, 38 J. RETAILING & CONSUMER SERVS. 157, 157 (2017).

environment.³⁶⁶ Studies show that consumers primarily purchase organic foods for health reasons (consumers think organic is more nutritious because it is produced without pesticides), but they also purchase organic food thinking it is safer, fresher, eco-friendly, and more ethical towards animals and farm workers.³⁶⁷ “Organic means better, not because the manufacturer communicates it, but because the consumer thinks it.”³⁶⁸

Organic is also a “credence-based” label in that “organic food is purchased on institutional trust (certification, logos, standards) rather than on relational trust.”³⁶⁹ Consumers in grocery stores cannot independently verify credence characteristics such as the environmental benefits of their purchase; instead, they rely on trust.³⁷⁰ A 2021 study published in *Foods* found that “institutional trust is particularly vulnerable to fraud.”³⁷¹

As explained, the organic label focuses on pesticide use as opposed to other aspects of sustainability.³⁷² The term organic does not guarantee that the product was grown in soil, is from a producer nearby, or is from an animal that had continuous access to pasture. As such, this label can lead to confusion by consumers who think organic means all those things (local, humane, grown in soil).

Misplaced consumer trust can lead to economic harm and noneconomic or personal harm.³⁷³ Separate and distinct from the economic harm is the noneconomic or “identity harm” that results from greenwashing. Professor Sarah Dadush defines identity harm as “the anguish experienced by a consumer who learns that her efforts to consume in line with her personal values have been undermined by a business’s exaggerated or false promises about its wares.”³⁷⁴ She notes that “a range of promises can elicit identity harm (e.g., organic, animal

366. See Vega-Zamora et al., *supra* note 16, at 668.

367. See Rana & Paul, *supra* note 365, at 159.

368. See Vega-Zamora et al., *supra* note 16.

369. Louise Manning & Aleksandra Kowalska, *Considering Fraud Vulnerability Associated with Credence-Based Products Such as Organic Food*, 10 *FOODS* 1879, 1879 (2021).

370. Adelman & Austin, *supra* note 58, at 722 (“[B]ecause few consumers examine the details of certification programs, they must rely on the reputation of the certifying entity—which may be an independent third-party organization, an industry-sponsored group, or an individual company—and what they can glean from the certification mark about its meaning.”)

371. Manning & Kowalska, *supra* note 369.

372. See *supra* Section I.A.

373. See Northen, *supra* note 347.

374. Sarah Dadush, *Identity Harm*, 89 *U. COLO. L. REV.* 863, 865 (2018).

cruelty-free, Kosher, Made in the U.S.A., etc.)”³⁷⁵ In the environmental context, “identity harm arises when a consumer learns that a purchase made her unwittingly complicit in hurting another human being or the planet.”³⁷⁶

2. *Traditional organic farmer harm*

Consumers often cite their support of small, local farms as a reason for purchasing organic food, failing to recognize that giant corporations have come to dominate organic food. Today, however, most organic produce comes from global industrial farming operations.³⁷⁷ In 2021, organic trade reached \$3.4 billion, with \$2.7 billion being the total value of imports.³⁷⁸ It is becoming increasingly difficult for small farmers to compete in the marketplace.

Organic farming was built on nonmonetary outcomes and focuses on ecologically stable and socially sustainable agricultural systems.³⁷⁹ But organic farming has always been more than just about how you farm. As agricultural economist John Ikerd stated in 1999, the “organic farming movement is as much a philosophy of life as a method of production.”³⁸⁰

When the food industry noticed the success of this niche market, it quickly moved in, reaping the benefits without embracing the true spirit of organic farming.³⁸¹ Industrial organic operations prioritize growth and profit over customer relationships and sustainable practices and engage in what some call the free rider problem.³⁸²

375. *Id.*

376. *Id.*

377. *Organic Farming: Results from the 2019 Organic Survey*, U.S.D.A. NAT’L AGRIC. STATISTICS SERV. (Oct. 2020), <https://www.nass.usda.gov/Publications/Highlights/2020/census-organics.pdf> [<https://perma.cc/P797-8EYP>]. Even within the United States, large organic farms dominate the market. *Id.* A 2019 census conducted by the USDA found that “[t]he largest organic farms (sales of \$500,000 or more) accounted for fewer than 20% of farms but more than 80% of sales.” *Id.*

378. *Organic Trade Reaches \$3.4 Billion in 2021*, U.S.D.A. ECON. RSCH. SERV., <https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=104688> [<https://perma.cc/NU2N-NXX4>] (last updated Sept. 13, 2022).

379. Anne C. Bellows, Benjamin Onyango, Adam Diamond & William K. Hallman, *Understanding Consumer Interest in Organics: Production Values vs. Purchasing Behavior*, 6 J. AGRIC. & FOOD INDUS. ORG. 1, 23 (2008).

380. Ikerd Presentation, *supra* note 26.

381. *See supra* Section I.A.2.

382. *See, e.g.*, David Barnhizer, *Waking from Sustainability’s “Impossible Dream”: The Decision-making Realities of Business and Government*, 18 GEO. INT’L ENV’T L. REV. 595, 685 (2006) (describing the free rider problem as “[o]ne problem with certification systems

Small organic farmers cannot compete with industrialized organic operations and will eventually be squeezed out.³⁸³ This is particularly true for organic dairy farms where lax regulations allow CAFOs to dominate the industry.³⁸⁴ USDA reported in February 2018 that the number of U.S. dairy farms, including organic and conventional, fell nearly 4% year-over-year to 40,219.³⁸⁵ The number of dairy farms declined 32% in the last decade.³⁸⁶

3. *Public and environmental harm*

Finally, both greenwashing and quasi-greenwashing can prevent the societal goal of social change for the benefit of our environment. If the current status quo persists, the harm to human health, worker health, the environment, and our communities will continue, and the environmental and social benefits of traditional organic farming will not be realized. Specific to organics, greenwashing and quasi-greenwashing can undermine trust in the organic label and what it stands for, be it market integrity or broader environmental and societal goals.

B. *Addressing Greenwashing*

Recognizing these harms, trade organizations and governmental agencies have responded to greenwashing claims. Both groups recognize the value of the organic label and are committed to providing more enforcement and transparency, especially with respect to imported food. For example, in 2017, shortly after the Import Audit was released, the OTA created an Anti-Fraud Task Force³⁸⁷ and

is that as soon as a standard is created offering a competitive premium, ‘free riders’ attempt to gain the benefits without having accepted the responsibility of conforming to the standards”).

383. See Endres, *supra* note 146, at 26 (explaining that [t]he so-called “Wal-Mart Effect” may squeeze out “smaller, higher-cost producers from the organic marketplace”).

384. See generally *infra* Section III.B (discussing USDA’s rulemaking around livestock farming).

385. *Milk Production (February 2018)*, U.S.D.A. NAT’L AGRIC. STATISTICS SERV. (Feb. 21, 2018), <https://downloads.usda.library.cornell.edu/usda-esmis/files/h989r321c/4m90dw738/rx913r04v/MilkProd-02-21-2018.pdf> [<https://perma.cc/D8FB-BB33>].

386. David Pitt, *Small Organic Dairy Farms Fight to Stay in Business*, CHRISTIAN SCI. MONITOR (Aug. 10, 2018), <https://www.csmonitor.com/Business/2018/0810/Small-organic-dairy-farms-fight-to-stay-in-business> [<https://perma.cc/T2P2-XHDT>].

387. Dan Flynn, *Organic Trade Association Guards Against Food Fraud Schemes*, FOOD SAFETY NEWS (June 13, 2017), <https://www.foodsafetynews.com/2017/06/organic-trade-association-guards-against-food-fraud-schemes> [<https://perma.cc/GE56-HAZK>].

launched a pilot program focused on verifying international supply chains.³⁸⁸ In 2019, it formalized this program with the creation of the Organic Fraud Prevention Solutions program.³⁸⁹ This Section describes these, and other actions by the legislature and federal agencies, to strengthen the NOP program and reduce opportunities for fraud. This Section also describes ways in which quasi-greenwashing can be addressed, thereby better achieving some of the non-market goals of organic farming.

1. Trade organization action

The OTA has been a vocal supporter of fraud prevention. It was quick to respond to *The Great Organic-Food Fraud* article in *The New Yorker*, writing that the author of that story neglected some facts and got other facts wrong.³⁹⁰ The press release it issued stated:

We cannot and should not shy away from acknowledging that fraud happens; in the case of Randy Constant, it happened in a big way. But the claim that organic is nothing more than “a story” is not only false, it erases decades of hard work by organic producers and advocates to continuously improve and cultivate a more sustainable, climate-smart food and farm system.³⁹¹

The OTA has been continuously working with the USDA to improve the enforcement process. Its website today lists “organic fraud prevention” and “strengthening organic enforcement” as two critical areas for the organization.³⁹²

In 2020, it launched the Organic Fraud Prevention Solutions program, described as a “ground-breaking” fraud prevention scheme, designed to help buyers and suppliers in the organic sector detect fraud along the supply chain.³⁹³ Those who enroll in the voluntary

388. *Id.*

389. *Organic Trade Association Launches Organic Fraud Prevention Solutions Program*, ORGANIC TRADE ASS'N (Mar. 6, 2019), <https://www.ota.com/news/press-releases/20518> [<https://perma.cc/LRW5-SHTR>].

390. Reanna Kovalcik, *Organic Trade Association Responds to “the Great Organic-Food Fraud”*, ORGANIC TRADE ASS'N (Nov. 10, 2021), <https://ota.com/organic-trade-association-responds-great-organic-food-fraud> [<https://perma.cc/Y2JM-YV7N>]; see Parker, *supra* note 151.

391. Kovalcik, *supra* note 390.

392. See *Critical Issues*, ORGANIC TRADE ASS'N, <https://ota.com/advocacy/critical-issues> [<https://perma.cc/LY2W-E3CJ>] (highlighting the organization's commitment to organic fraud prevention and strengthening organic enforcement).

393. *Organic Trade Association Fraud Fighting Program Draws Robust Interest*, ORGANIC TRADE ASS'N (June 30, 2021), <https://ota.com/news/press-releases/21790> [<https://perma.cc/QR77-PJJJ>].

program participate in “an online training course that provides detailed background and instruction on how to carry out an organic fraud vulnerability assessment, and how to implement an effective organic fraud prevention plan.”³⁹⁴ The program has been described as an effective private initiative to prevent fraud in the organic supply chain and was established in anticipation of USDA Strengthening Organic Enforcement Rule, which requires a fraud prevention plan as part of a certified organic operation’s Organic Systems Plan.³⁹⁵

2. *Legislative action*

The federal legislature has recognized that organic fraud is a problem. To address the issue, Rep. John Faso (R-NY), introduced the Organic Farmer and Consumer Protection Act of 2017³⁹⁶ in September 2017.³⁹⁷ A slightly different version of the Act was introduced in May 2018 by Senator Tammy Baldwin (D-WI).³⁹⁸ Both Acts would amend the OFPA and authorize funding for tracking and gathering data from international organics as part of the NOP. The 2018 Farm Bill increased funding for USDA’s regulatory program “to help maintain consumer confidence in the organic label.”³⁹⁹

In April 2021, the Continuous Improvement and Accountability in Organic Standards Act⁴⁰⁰ (“CIAO”) was introduced, which, among other things, would improve oversight and ensure consistent enforcement.⁴⁰¹

3. *Administrative action: oversight and enforcement*

In August 2020, the AMS proposed amending the USDA organic regulations to strengthen oversight and enforcement of the

394. *Id.*

395. *Id.*; National Organic Program (NOP); Strengthening Organic Enforcement, 88 Fed. Reg. 3548, 3622 (Jan. 19, 2023) (to be codified at 7 C.F.R. pt. 205).

396. Organic Farmer and Consumer Protection Act of 2017, H.R. 3871, 115th Cong. (2017).

397. *Id.*

398. Organic Farmer and Consumer Protection Act of 2018, S. 2927, 115th Cong. (2018).

399. *Organic Agriculture*, U.S.D.A. ECON. RSCH. SERV., <https://www.ers.usda.gov/agriculture-improvement-act-of-2018-highlights-and-implications/organic-agriculture> [<https://perma.cc/PY32-4DRR>] (last updated Aug. 20, 2019).

400. Continuous Improvement and Accountability in Organic Standards Act, H.R. 2918, 117th Cong. (2021).

401. *Id.*

program.⁴⁰² The rule, which was finalized in March 2023 as the USDA Strengthening Organic Enforcement Rule, amended several sections of the USDA organic regulations, Title 7 of the Code of Federal Regulations part 205. It strengthens oversight of the production, handling, certification, marketing, and sale of organic agricultural products as established by the OFPA.⁴⁰³ The goal of this rule is to create tougher accreditation and certification requirements, as well as create a new electronic import certificate system.⁴⁰⁴

The USDA states that the new rule will protect the organic seal's integrity and bolster farmer and consumer confidence in the USDA organic seal by "supporting strong organic control systems, improving farm to market traceability, increasing import oversight authority, and providing robust enforcement of the organic regulations."⁴⁰⁵ Specifically, the new rule requires certification of more of the businesses, like brokers and traders, at critical links in organic supply chains, and authorizes more rigorous on-site inspections of certified operations.⁴⁰⁶

4. DOJ enforcement

As illustrated in *The Great Organic-Food Fraud*, the DOJ can prosecute those who fraudulently sell products as a financial fraud claim.⁴⁰⁷ In January 2023, the DOJ in Minnesota charged two men in a scheme to sell non-GMO grains as organic.⁴⁰⁸ The charges, which include three counts of wire fraud and one count of conspiracy, describe a conspiracy to defraud grain purchasers out of more than \$46,000,000.⁴⁰⁹ In a separate case in the District of Maryland, a January 2023 indictment charged two Dubai entities and several individuals from Turkey with smuggling, conspiracy, and wire fraud.⁴¹⁰ According to the indictment,

402. National Organic Program (NOP); Strengthening Organic Enforcement, 88 Fed. Reg. 3548, 3548 (Jan. 19, 2023) (to be codified at 7 C.F.R. pt. 205) (establishing more strict certification requirements for organic products).

403. *Id.*

404. *Id.*

405. *USDA Publishes Strengthening Organic Enforcement Final Rule*, U.S.D.A. (Jan. 18, 2023), <https://www.usda.gov/media/press-releases/2023/01/18/usda-publishes-strengthening-organic-enforcement-final-rule> [<https://perma.cc/BQS3-6YU7>].

406. *Id.*

407. See Parker, *supra* note 151 (discussing Constant's conviction for wire fraud).

408. *Superseding Indictment Charges*, *supra* note 49.

409. *Id.*

410. *Multinational Corporation and Several Individuals Charged with Multimillion-Dollar Organic Grain Fraud Scheme*, DOJ (Jan. 6, 2023), <https://www.justice.gov/opa/pr/mult>

the defendants shipped non-organic soybeans and corn from Eastern Europe to the United States as “organic,” allowing them to charge the higher prices associated with organic grains.⁴¹¹ These indictments, together with the prosecution from 2019, illustrate that the DOJ is more actively working with the USDA to investigate and prosecute organic fraud both domestically and internationally.

5. *Trademark action*

In early 2022, the USDA Organic Oversight and Enforcement Update reported that the U.S. Patent and Trademark Office granted the AMS final trademark approval for the USDA organic seal.⁴¹² Trademark approval gives the agency greater authority to penalize those who attempt to misuse the organic seal. According to the USDA Under Secretary for Marketing and Regulatory Programs, “registering the seal with the U.S. Patent and Trademark Office significantly increases the cost of fraud and helps . . . better protect U.S. consumers and farmers.”⁴¹³

The USDA can now seek additional civil remedies such as injunctive relief and monetary damages under the Lanham Act,⁴¹⁴ as well as fines and imprisonment under the Trademark Counterfeiting Act.⁴¹⁵ This also means the U.S. Customs and Border Protection can now detain, reject, or re-export imported products confirmed to be fraudulently using the USDA organic seal.⁴¹⁶

6. *FTC and Green Guides*

A final option for pursuing fraud is the FTC. In the context of deceptive advertising, the FTC considers the content of the advertisement, whether the representations made are “false, misleading, or unsubstantiated,” and whether a consumer would find those representations to be material in deciding whether to purchase

inational-corporation-and-several-individuals-charged-multimillion-dollar-organic-grain [https://perma.cc/8LUY-FBBJ].

411. *Id.*

412. *USDA Organic Oversight and Enforcement Update*, U.S.D.A. AGRIC. MKTG. SERV., <https://www.ams.usda.gov/sites/default/files/media/NOPEenforcementReport2022.pdf> [https://perma.cc/S4UV-KC5K].

413. *Trademark Registration Increases Cost of Misusing the USDA Organic Seal*, U.S.D.A. AGRIC. MKTG. SERV. (Dec. 20, 2022), <https://content.govdelivery.com/accounts/USDAAMS/bulletins/33e76a9> [https://perma.cc/PB2P-6MVF].

414. 15 U.S.C. §§ 1116–1117.

415. 18 U.S.C. § 2320.

416. *Trademark Registration Increases Cost of Misusing the USDA Organic Seal*, *supra* note 413.

the product.⁴¹⁷ Although the FTC can investigate and sue companies for making false, misleading, or deceptive organic claims, it has been reluctant to do so in the context of organic, partly to avoid duplicating the USDA's efforts and partly claiming uncertainty over what consumers think when they see the term organic.⁴¹⁸

This reluctance changed in December 2022, when the FTC began the administrative process of receiving comments on the updates to The Green Guides.⁴¹⁹ The Green Guides, formally known as Guides for the Use of Environmental Marketing Claims, are the primary way the federal government combats greenwashing in advertising.⁴²⁰ The FTC published The Green Guides in 1992 pursuant to its authority to enforce section 5 of the FTC Act, which generally prohibits, among other things, deceptive-advertising practices.⁴²¹ The Green Guides have subsequently been updated several times, most recently in 2012.⁴²² At that time, the FTC explicitly declined to issue guidance on the term organic.⁴²³ This time, the FTC specifically asked for comments on organic.⁴²⁴

417. *POM Wonderful, L.L.C. v. Fed. Trade Comm'n*, 777 F.3d 478, 490 (D.C. Cir. 2015).

418. *Cf. OTA Calls for Federal Policies to Ensure "Organic" Always Means "Organic"*, ORGANIC TRADE ASS'N (Oct. 19, 2016), <https://www.ota.com/news/press-releases/19336> [<https://perma.cc/B44L-L6ZB>] (discussing the collaborative approach taken by the USDA and FTC).

419. *Guides for the Use of Environmental Marketing Claims*, 87 Fed. Reg. 77766, 77766 (Dec. 20, 2022).

420. *Environmentally Friendly Products: FTC's Green Guides*, FEDERAL TRADE COMM'N, <https://www.ftc.gov/news-events/topics/truth-advertising/green-guides> [<https://perma.cc/S8QL-4SRR>]. Private parties including consumers and competitors can also pursue greenwashing claims through consumer protection laws. Eric L. Lane, *Consumer Protection in the Eco-Mark Era: A Preliminary Survey and Assessment of Anti-Greenwashing Activity and Eco-Mark Enforcement*, 9 J. MARSHALL REV. INTELL. PROP. L. 742, 752, 760–61 (2010). Defendants whose environmental marketing claims run afoul of states' deceptive advertising and unfair-trade-practice statutes may be liable for damages and attorneys' fees. *See id.* at 756 (discussing a case where a company was found liable for millions of dollars in damages and attorneys' fees).

421. 15 U.S.C. § 45(a).

422. The FTC issued the first Green Guides (16 C.F.R. pt. 260) in 1992 (57 Fed. Reg. 36363 (Aug. 13, 1992)) and revised them in 1996 (61 Fed. Reg. 53311 (Oct. 11, 1996)) and 1998 (63 Fed. Reg. 24240 (May 1, 1998)).

423. *See* *Guides for the Use of Environmental Marketing Claims*, 87 Fed. Reg. 77766, 77769 (Dec. 20, 2022) (requesting comments on whether the Commission should issue guidance on the use of organic labels for nonagricultural products).

424. *Id.* ("What evidence supports making your proposed revision(s);" "[w]hat evidence is available concerning consumer understanding of the term "organic" with

Actions by trade groups, legislatures, and various government agencies to address concerns about fraudulent operations, and statements made by government officials and industry groups reflect a motive to reduce organic fraud. The government recognizes that organic fraud occurs and is addressing this problem. While these actions will help to protect the integrity of the label, they will not protect or promote organic farming as a social or environmental movement. To address those concerns, regulators and producers must consider the issue of quasi-greenwashing.

C. Addressing Quasi-Greenwashing

While these federal and trade group actions help to deter and limit greenwashing, they do not alleviate the information asymmetry and quasi-greenwashing concerns addressed earlier in the Article.⁴²⁵ This asymmetry is the result of two things: (1) authorized and sanctioned organic practices that allow industrial organics to dominate the market and (2) consumer misunderstanding of what it means to be organic. Hydroponic strawberries and CAFO-like dairies are two examples brought about by information asymmetry.

Commentators are beginning to recognize this as well. For example, when asked about the USDA's Strengthening Organic Enforcement Rule, Laura Reiley, a reporter for *The Washington Post* who writes about the business of food, responded:

Certainly some manufacturers will be afraid of retribution from USDA. . . . Some of the advocates that I spoke with said, you know, this has been problematic for decades and we have no confidence that [the new guidelines] will really curtail some of the problems.

I mean, for instance, most of the organic milk in the United States comes from these huge dairies in California that are organic in that they're not using, you know, growth hormones and antibiotics and those kinds of things. But they're kind of organic in name only, not in spirit. Because a lot of these animals, they don't

respect to non-agricultural products;" "[w]hat evidence constitutes a reasonable basis to support an "organic" claim in this context?")

425. See *supra* Section II.D. In a recent article in *The Washington Post*, Mark Kastel, founder of OrganicEye, an advocacy group, stated that he is "quite concerned that everyone is going to declare victory and go home." Reiley, *supra* note 48. When speaking about the labeling of milk from large scale dairies as organic, Kastel remarked that the practice was "a betrayal to the values that justifies consumers paying a premium price for organic dairy products." *Id.*

have access to pasture, they don't have some of the fundamental animal husbandry practices that are essential to that organic label.⁴²⁶

Getting at the "spirit" of organic and eliminating quasi-greenwashing and information asymmetry could occur by changing the organic regulations to conform to consumer preferences and expectations, by providing consumers with more information so that their purchases reflected informed choices, or by engaging in both activities. These additional actions are needed because the organic fraud solutions being advanced by trade groups and the federal government will not capture the producer who conforms to the law but exploits the public's lack of knowledge about organic regulations.

1. *Reform rules*

One way to achieve information symmetry would be to have the organic rules reflect consumer expectations. Doing so would require that the NOSB recommend USDA change rules to require more stringent animal welfare standards or to prohibit practices like hydroponics. As explained above, this approach has occurred in the past and is ongoing, and it is certainly one being advanced by the traditional organic community.

Such changes would also require that administrators view the organic program as something more than a marketing program. If organic farming were seen as a way to better achieve environmental and societal goals, perhaps rules about soil and animal welfare would be more appealing.

There are several barriers to rulemaking as the sole solution. First is the unchangeable fact that consumer preferences vary. It might not bother some consumers that their lettuce was grown inside a container, or that the dairy cows for the organic milk only spent some time outside grazing. If these products meet what the federal government says is organic, the consumer might be satisfied. Second, the rulemaking process is long and involved and would require the fifteen members of the NOSB to agree and present the recommended changes to the USDA. As described earlier, the corporate interests of the NOSB might adopt rules that reflect concerns beyond market stability.

Another approach that has been advocated is to return the regulation of organic to the states, where it resided before the federal

426. Niala Boodhoo, *Cautious Optimism at the Fed*, AXIOS (Jan. 24, 2023), <https://www.axios.com/2023/01/24/cautious-optimism-at-the-fed> [<https://perma.cc/6626-DZT5>] (quoting Laura Reiley).

program was established in the 1990s.⁴²⁷ But most traditional organic advocates are not looking to scrap the federal organic program. In fact, many are applauding the new USDA rules that will increase unannounced inspections, increase record-keeping requirements, and require supply chain audits for some operations.⁴²⁸ The National Organic Coalition in a press release wrote that it “strongly supports provisions in this [Strengthening Organic Enforcement Rule] that will give USDA and certification agencies more authority to crack down on bad actors.”⁴²⁹

That said, the current reforms have focused on organic fraud and what is traditionally thought of as greenwashing. Traditional organic farmers have taken to educating consumers about hydroponics and large organic dairies,⁴³⁰ and what they call the foundational values and practices of organic farming.

3. *Inform consumers*

Another way to alleviate information asymmetry is through informing consumers. Consumers can acquire more information through labels that appear on products as well as social media, a modern source for information.

a. *Add on labels or no organic label*

As organic advocates continue to work with USDA on rules surrounding hydroponics, CAFOs, and grain fraud, they are simultaneously working to better educate consumers about a holistic understanding of organic. To do so, traditional organic advocates have developed an “add-on” label called the Real Organic Project, which would be added onto products with the USDA organic label to better

427. Baylen Linnekin, *The USDA Can't Stop Organic Food Fraud*, REASON (Feb. 4, 2023, 8:30 AM), <https://reason.com/2023/02/04/the-usda-cant-stop-organic-food-fraud> [<https://perma.cc/5SAQ-FZL9>].

428. Lisa Held, *The Field Report: The Future of Organic Food Is Taking Shape at the USDA—And Beyond*, CIV. EATS (Jan. 25, 2023), <https://civileats.com/2023/01/25/the-field-report-future-of-organic-food-cafo-runoff-lead-in-baby-food-snap-alaska-fda-usda> [<https://perma.cc/C658-LMBS>].

429. USDA Finalizes Rule to Stamp out Fraud in Organic Supply Chains, NAT'L ORGANIC COAL. (Jan. 18, 2023), <https://www.nationalorganiccoalition.org/blog/2023/1/17/usda-finalizes-rule-to-stamp-out-fraud-in-organic-supply-chains-nbsp> [<https://perma.cc/LW4M-MH26>].

430. Dave Chapman acknowledged that the new USDA rule does “address one threat to organic integrity,” but sees the organic certification of hydroponic farms and of large, confined livestock operations as contrary to what organic stands for. Held, *supra* note 428.

reflect the “transformative perspective” of organic.⁴³¹ One former NOSB shared with USDA Secretary Vilsack, that a thousand American farms will be certified with the Real Organic Project in 2021, “[b]ut our dream is to fail because we hope the USDA steps up and does its job. Then there is no reason for an add-on label.”⁴³² Advocates are asking Vilsack to “take back” the organic label and end the need for a Real Organic Project.⁴³³

The Real Organic Project mission “is to grow people’s understanding of foundational organic values and practices; crops grown in soil and livestock raised on pasture are *fundamental* to organic farming.”⁴³⁴

And its first goal is “to create an add-on label to USDA certified organic to provide more transparency on organic farming practices.”⁴³⁵

Another approach is for certifying agents to deny certifications to producers engaging in practices that do not conform to traditional organic values. For example, OEFFA is refusing to certify hydroponic produce as organic.⁴³⁶ While OEFFA is just one of eighty-plus certifiers, their position against hydroponic operations could shift other certifiers away from hydroponics.

b. Social media campaigns

In addition to procuring the help of prominent senators like Chuck Schumer and Patrick Leahy who objected to the Horizon contract cancelations, New England dairy farmers also had the help of social media.⁴³⁷ Marion Nestle, a prominent food studies professor and commentator, wrote about the controversy in her blog, *Food Politics*, which she then tweeted.⁴³⁸ GMO-Free USA, asked in a tweet “[s]hould

431. See REAL ORGANIC PROJECT, <https://www.realorganicproject.org> [<https://perma.cc/XB2X-XDW4>] (stating the organization’s mission and first goal).

432. *Secretary Vilsack’s Response*, REAL ORGANIC PROJECT, <https://www.realorganicproject.org/secretary-vilsack-responds> [<https://perma.cc/4VL8-KJ7A>].

433. *Id.*

434. REAL ORGANIC PROJECT, *supra* note 431.

435. *Id.*

436. OEFFA’s opposition to hydroponics being certified as organic is public and my sister informs me that they are not certifying hydroponic operations. Jim Riddle, *The End of Organic Farming . . . As We Know It*, OEFFA (Nov. 1, 2022), <https://action.oeffa.com/the-end-of-organic-farming-as-we-know-it> [<https://perma.cc/8K9Y-96LF>].

437. Steve Gilman, *On the Organic Dairy Horizon: The Danone Debacle*, NE. ORGANIC FARMING ASS’N (Nov. 30, 2021), <https://nofa.org/2021/11/30/on-the-organic-dairy-horizon> [<https://perma.cc/KZ4Y-USLQ>] (describing the “grassroots retort”).

438. Marion Nestle, *Bad Move: Danone Drops Organic Dairy Contracts in Northeast*, FOOD POL. (Aug. 31, 2021), <https://www.foodpolitics.com/2021/08/24686> [<https://perma.cc/WCF7-B4ZY>].

milk from factory farms even carry an organic label”?⁴³⁹ Social media and online avenues will continue to play a role in educating consumers about food and agricultural business operations.

CONCLUSION

The fact remains that the organic label’s primary purpose is to stabilize the market, not transform our food system. And if a market focus persists, strengthening the organic label through more enforcement and oversight will only result in marginal improvements to our food system. This is not to say that the federal government should not act. It can and it is. Congress can close loopholes through legislation and agencies can deter fraud with enforcement actions, both of which could restore consumer confidence but only for those who understand what organic means. Instead, and perhaps more importantly, however, federal efforts should help level the playing field between organic goliaths and organic farmers and improve the morale of traditional organic farmers who, unlike the giants, rely on the organic seal to make a living. And if rulemaking addresses things like animal welfare, soil health, fairness, and resilience, broader food system change is possible.

But rule change is not the only way to create information symmetry in the organic market; consumers can also acquire the information they need to reduce information asymmetry and avoid quasi-greenwashing. This Article illustrates two ways consumers can become more informed—add-on labels and social media campaigns.

As one of the few federally regulated ecolabels, organic is a cautionary tale of what can happen when environmental terms are federalized. It is a tale of express greenwashing, but it is also a tale that reveals the more subtle practice of quasi-greenwashing. It is a tale of competing philosophies and values, inconsistent enforcement, and poor transparency.

Lawmakers and regulators should be thoughtful in defining environmental claims, recognizing that regulating a term starts the race to the bottom. As the federal government, along with big businesses, play a larger role in regulating sustainable practices like recycling or carbon offsets, quasi-greenwashing will increase. By using social and environmental objectives as guiding principles instead of solely concentrating on market stability, not only will the integrity of

439. @GMOfreeUSA, TWITTER (Mar. 31, 2022, 10:04 AM), <https://twitter.com/GMOfreeUSA/status/1509532116597583873> [<https://perma.cc/WM6F-TVUE>].

the label be improved, but so will outcomes for our environment and communities.

For the past twenty years, the government arm of the organic program has focused on market stabilization, addressing issues of fraud, remedying inconsistencies, and increasing enforcement. Perhaps now is the time to consider the broader aims of organic farming. The regulation of the organic label has shown that the strength of a term depends not only on how it is enforced and understood but also on how it is defined. They who define the term, control the market.