



## Consumer Federation of America

November 9, 2022

Bruce Summers  
Administrator  
Agricultural Marketing Service  
U.S. Department of Agriculture  
1400 Independence Avenue, SW  
Washington, DC 20250

*VIA ONLINE SUBMISSION*

**RE: Docket ID: AMS-NOP-21-0073—Proposed rule to amend the organic livestock and poultry production requirements by adding new provisions for livestock handling and transport for slaughter and avian living conditions; and expanding and clarifying existing requirements covering livestock care and production practices and mammalian living conditions.**

Dear Administrator Summers:

Consumer Federation of America (CFA) appreciates the opportunity to submit comments on the above referenced United States Department of Agriculture's (USDA) Agricultural Marketing Service (AMS) proposed rule. CFA is an association of non-profit consumer organizations that was established in 1968 to advance the consumer interest through research, advocacy, and education.

CFA is a longtime supporter of organic farming, the development of markets for organically grown products, and the active involvement of small to medium organic producers, processors, and retailers in USDA's standards and accreditation processes. For these reasons, CFA urges AMS to move expeditiously towards implementing the proposed rule, and in particular, to limit the timeframe to comply with outdoor access and density requirements for organic poultry to no longer than three years.

### **Background**

Consumers depend on the integrity of the National Organic Program (NOP). Consistent with the Organic Foods Production Act, certified organic farms and processors must follow a defined set of standards governing soil and water quality, pest control, livestock practices, and allowable food additives. USDA verifies producers' adherence to those standards via annual onsite inspections by third parties.<sup>1</sup> Maintaining the NOP represents a significant public investment. USDA spends millions of dollars each year on initiatives such as help for farms transitioning to organic practices, certification cost assistance, seed breeding and other organic agriculture research, and risk management tools. This investment has resulted in a rapidly growing, globally recognized standard

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<sup>1</sup> See <https://www.ams.usda.gov/about-ams/programs-offices/national-organic-program>

and a U.S. organic food market projected to exceed \$125 billion in annual sales by 2026,<sup>2</sup> with nearly a quarter of consumers reporting that they always or often buy organic food, according to a nationally representative 2017 *Consumer Reports* survey of over a thousand respondents.<sup>3</sup> Eggs are the second most commonly purchased organic food product, after fresh fruits and vegetables, according to one industry survey.<sup>4</sup>

Under the rules, organic producers must provide “year-round access for all animals to the outdoors, shade, shelter, exercise areas, fresh air, clean water for drinking, and direct sunlight, suitable to the species, its stage of life, the climate, and the environment.”<sup>5</sup> Exceptions apply, but they contemplate “temporary confinement or shelter.”<sup>6</sup> In 2002, however, the egg producer “The Country Hen” sought to certify eggs from its Massachusetts facility, which allowed laying hens “outdoor access” only in the form of screened, roofed enclosures, i.e. porches. In May of 2002, the National Organic Standards Board (NOSB) recommended that “outdoor access” should mean access to open air and sunshine and exclude porches. Nevertheless, after an independent certifier rejected Country Hen’s application for organic certification, the company appealed the denial to a USDA administrative judge, and won.<sup>7</sup> For the past twenty years, USDA leadership has neglected to act on the NOSB’s recommendation.

### The Organic Egg Market Failure

Today, a large proportion of the nation’s roughly 15.7 million organic laying hens never go outside.<sup>8</sup> As the AMS notice references, many large organic production facilities “use screened, covered enclosures commonly called ‘porches’” to satisfy the rules’ outdoor access provisions.<sup>9</sup> The estimated proportion of organic egg production attributable to these large-scale facilities varies. According to the 2013 NAHMS survey cited in the proposed rule, “35% of hens have outdoor access via a porch system or covered area.”<sup>10</sup> According to more recent estimates, more than half of certified organic eggs may originate from facilities exploiting this loophole.<sup>11</sup> Yet 83% of consumers who buy organic products say it is “extremely” or “very” important that eggs labeled “organic” come from hens that were able to go outdoors and move freely outdoors, according to the *Consumer*

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<sup>2</sup> See <https://www.globenewswire.com/en/news-release/2022/03/11/2401707/28124/en/United-States-125-Billion-Organic-Food-Markets-Competition-Forecast-Opportunities-2027.html>

<sup>3</sup> See [https://advocacy.consumerreports.org/press\\_release/consumer-reports-survey-finds-consumers-think-its-important-to-have-high-animal-welfare-standards-for-organic-food/](https://advocacy.consumerreports.org/press_release/consumer-reports-survey-finds-consumers-think-its-important-to-have-high-animal-welfare-standards-for-organic-food/)

<sup>4</sup> See <https://www.prnewswire.com/news-releases/survey-finds-organic-consumers-lifestyle-choices-bust-stereotypes-300790175.html>

<sup>5</sup> 7 C.F.R. 205.239.

<sup>6</sup> *Id.* (emphasis added).

<sup>7</sup> Daniel Jaffee and Philip H. Howard. 2010. “Corporate Cooptation of Organic and Fair Trade Standards.” *Agriculture and Human Values* 27(4): 387-399. Doi: 10.1007/s10460-009-9231-8.

<sup>8</sup> See <https://www.agmrc.org/commodities-products/livestock/poultry/organic-poultry-profile-625> (estimate of certified organic layer hens being raised as of December 31, 2016).

<sup>9</sup> A picture of the type of porch that the rule change would disallow is available here: <https://www.cornucopia.org/photo-gallery/industrial-scale-egg-production-masquerading-as-organic/>

<sup>10</sup> [https://www.aphis.usda.gov/aphis/ourfocus/animalhealth/monitoring-and-surveillance/naahms/NAHMS\\_Poultry\\_Studies](https://www.aphis.usda.gov/aphis/ourfocus/animalhealth/monitoring-and-surveillance/naahms/NAHMS_Poultry_Studies)

<sup>11</sup> Georgina Gustin. “Animal Welfare Rule Exposes Cracks in Organic Egg Industry,” *National Geographic*, April 15, 2016, accessed July 13, 2016, <http://theplate.nationalgeographic.com/2016/04/15/animal-welfare-rule-expose-cracks-in-organic-egg-industry/>.

*Reports* survey. This is a classic example of market failure, where a few unscrupulous companies are taking advantage of consumers' incomplete information.

## **The Proposed Rule**

The proposed regulation rightly aims “to ensure that porches and similar structures are not considered outdoor areas.”<sup>12</sup> However, it presents three options, suggesting that currently certified producers might continue marketing the eggs produced in these facilities as “organic” for five years (Option 1), or as long as *fifteen years* (Option 2) following publication of the final rule. CFA vigorously supports an alternative timeframe (Option 3), not to exceed three years.

A shorter compliance period for the rule’s “outdoor access” provisions would strike a better balance between the interests of consumers and the companies affected by the rule clarification. Companies relying on porches to satisfy the NOP’s animal welfare standards have been on notice that change is coming for over two decades now. Again, the NOSB recommended to eliminate this loophole in 2002. As the proposed rule points out, “[t]he disparities in amount and quality of outdoor access have economic implications for producers,” and the resulting consumer confusion “could result in reduced confidence in and demand for organic eggs, as the organic label may inconsistently signal its attributes and provide less-consistent value.” Prolonging the disparity for another five years—never mind 15 years!—will continue to penalize compliant producers and erode consumers’ trust. The plain language of the existing organic regulations gave producers sufficient warning that relying on “porches” to meet outdoor access requirements was a risky business strategy.

## **Trust in the Organic Label**

The NOP’s tremendous economic value has grown upon a foundation of consumer trust. Trust in the organic label hinges in large part on the role of the 15-member NOSB. Under the Organic Foods Production Act, NOSB members must include consumer interest advocates, environmental protection experts, and organic farmers, among others. The NOSB’s composition provides some assurance to the public that it will resist industry capture as it makes its policy recommendations. But the Act designates the NOSB as a mere advisory body “to assist in the development of standards for substances to be used in organic production and to advise the Secretary on any other aspects of the implementation of this chapter.” AMS must ultimately decide how to run the NOP.

Currently, the burden is on consumers to investigate whether eggs labeled “organic” comply with the plain language of the NOP regulations. The market has responded with claims like “pasture raised” and “regenerative organic certified,” but many consumers are unwilling to spend more on these lesser-known certifications. By accommodating companies that do not fully comply with the rules, AMS has devalued the organic standard. Rather than obliging producers that meet the letter and spirit of the organic rules to differentiate themselves with new certifications, AMS should uphold the organic standards, and encourage companies that cannot meet them to seek out other ways to distinguish themselves from conventionally produced foods.

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<sup>12</sup> “Organic Livestock and Poultry Practices Proposed Rule,” *AMS.USDA.Gov*, last modified April 6, 2016, <https://www.ams.usda.gov/sites/default/files/media/NOP%20Livestock%20Poultry%20Practices%20Proposed%20Rule%20QAs.pdf>.

## Alternative Labeling Claims Can Offset Costs to Industry and Consumers

With food inflation continuing to soar, reluctance to take any action that will increase prices is understandable. However, disqualified egg producers can make alternative marketing claims that still allow them to command a premium for their products. Specifically, they may avail themselves of USDA's Process Verified Program to establish and implement a "100% organic diet" or "produced with organic feed" labeling claim. A "100% organic diet" or "produced with organic feed" labeling claim would segment the market without undermining consumer confidence in the organic label. For consumers with concerns about pesticide residues in conventional eggs, who may care less about animal welfare and find themselves struggling to afford USDA certified organic eggs, a "100% organic diet" or "produced with organic feed" claim could present real value, and command a premium.

The evidence suggests that many consumers would pay such a premium. Consumers cite health concerns as the main motivation driving their purchase of organic products.<sup>13</sup> In particular, many organic consumers seek to avoid exposure to pesticides, a concern that arguably drove the creation of the NOP.<sup>14</sup> Skeptics of organic food question whether pesticide residues on conventionally produced food pose a significant health risk,<sup>15</sup> and recent USDA testing failed to detect a single egg product in violation of pesticide residue standards.<sup>16</sup> Nevertheless, a broad consensus holds that "the presence of pesticide residues in conventional food is the main difference between organic and conventional food."<sup>17</sup> Because pesticide residues on food crops bioaccumulate in animal tissue, including chicken eggs, many consumers have heightened concerns about pesticide exposure from animal products.

Companies like The Country Hen Eggs, Herbruck's Poultry Ranch, and Kreher Family Farms could take advantage of USDA's Process Verified Program to market eggs from layer hens fed an exclusively organic diet, but without the outdoor access required by a commonsense reading of NOP rules. The Process Verified Program allows companies to develop promotional materials associated with their process verified points, use the USDA PVP shield on their product, and market themselves as "USDA Process Verified." Allowable process points include "a production and/or handling practice that provides specific information to consumers to enable them to make informed decisions on the products that they buy."<sup>18</sup> One example of such a process point: many egg companies participate in the process verified program to make the claim that their hens eat a "100% Vegetarian Diet."<sup>19</sup>

A "100% organic diet" or "produced with organic feed" labeling claim would first need to be approved by USDA AMS, but three years should suffice to complete that process if the companies affected by this rulemaking choose to embark upon it. These companies have coordinated in the

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<sup>13</sup> See *supra* note 4.

<sup>14</sup> See, e.g. Robert Paarlberg. *Setting the Table*; see also (explaining that "the presence of pesticide residues in conventional food is the main difference between organic and conventional food.").

<sup>15</sup> See *id.*; see also Tamar Haspel. [https://www.washingtonpost.com/lifestyle/food/the-truth-about-organic-produce-and-pesticides/2018/05/18/8294296e-5940-11e8-858f-12becb4d6067\\_story.html](https://www.washingtonpost.com/lifestyle/food/the-truth-about-organic-produce-and-pesticides/2018/05/18/8294296e-5940-11e8-858f-12becb4d6067_story.html)

<sup>16</sup> See [US National Residue Program for Meat, Poultry, and Egg Products FY19 \(usda.gov\)](https://www.usda.gov/press-releases/2019/01/23/US-National-Residue-Program-for-Meat-Poultry-and-Egg-Products-FY19) ("In FY 2019, FSIS sampled and analyzed [19] egg products and did not find any violation.").

<sup>17</sup> <https://dspace.emu.ee/bitstream/handle/10492/4496/Matt2011.pdf?sequence=1&isAllowed=y>

<sup>18</sup> <https://www.ams.usda.gov/services/auditing/process-verified-programs>

<sup>19</sup> See, e.g., <https://www.ams.usda.gov/content/alatrade-foods-llc-process-verified-program>.

past to fund research arguing that their egg production systems reduce food safety risks (from dioxins in the environment and microbiological contamination), and also, counterintuitively, improve animal welfare. Timely implementation of this rule may encourage these companies to collaborate in efforts that promote consumer understanding of food production practices, rather than sow confusion.

## **Conclusion**

The proposed rule takes many important steps towards implementing the NOSB's recommendations on outdoor access for poultry, and on animal welfare standards more broadly. CFA applauds these steps forward. CFA recommends that AMS limit the timeframe to comply with outdoor access and density requirements for organic poultry to no longer than three years. To the extent that AMS projects that costs to the affected industry might support a longer timeline, the agency should consider mitigation factors associated with an alternative "100% organic diet" or "produced with organic feed" marketing claim by affected companies. The agency should also consider factors that go beyond immediate economic impacts, such as consumer confidence in the organic standard, the need to foster a competitive organic market that encourages new entries of small and medium size producers, and the need to maintain consistency with organic standards in other jurisdictions, such as Europe and Canada.

Sincerely,

A handwritten signature in black ink, appearing to read 'Thomas Gremillion', with a stylized flourish at the end.

Thomas Gremillion  
Director, Food Policy Institute  
Consumer Federation of America