Note: The following recommendation received one public comment, which supported it. Consequently, it is being submitted unchanged.

Subpart D – Labels, Labeling, and Market Information

The word "certified" should be inserted in the following three sections of Subpart D:

1. Section 205.303(b): Agricultural products in packages described in Sec. 205.301(a) and (b) must: … (2) On the information panel, below the information identifying the <u>certified</u> handler or distributor of the product and preceded by the statement, "Certified organic by ***,"…;

2. Section 205.304(b): Agricultural products in packages described in Sec. 205.301(c) must: … (2) On the information panel, below the information identifying the <u>certified</u> handler or distributor of the product and preceded by the statement, "Certified organic by ***,"…; and,

3. Section 205.306(b)(1): Livestock feed products described in Section 205.301(e)(1) and (e)(2) must: (1) On the information panel, below the information identifying the <u>certified </u>handler or distributor of the product and preceded by the statement, "Certified organic by ***," ...

Rationale:

Under the rule as written, companies that commission the production and handling of organic products do not have to be certified if they do not physically "handle" products. The processing operations that manufacture the products must be certified, however. For the sake of this discussion, companies, such as private label operations, who commission such products will be referred to as "commission merchants". Handlers who manufacture products for such operations will be called "co-packers".

As stated, co-packers must be certified, but commission merchants are excluded from certification under 205.101(b)(1), since they do not physically "handle" or package the products. This overlooks the fact that many commission merchants control significant information needed to assess the audit trails of co-packers. In many instances, commission merchants order ingredients, obtain organic certificates, retain invoices and sales records, and control the wording of product labels.

Under the current rule, the name of the certifying agent must appear on the label. There is nothing in the rule, however, that requires that the name of the final handler appear on the label along with the name of the certifying agent. If the final handler is a co-packer who manufactures for a private brand or retailer, the name of the private brand or retailer (commission merchant) will appear on the label along with the name of the certifying agent, even though the private label company or retailer is not certified. There is no connection to the certified handler who manufactured the product. The product is not traceable back to the certified operation that manufactured it. The audit trail is not complete.

The proposed change would require that name of the certified handler appear on the product label. The effect of this change would be that either the name of the certified manufacturer (co-packer) would appear on the label, or else the private brand company (commission merchant) would choose to get certified. Either way, the audit trail would be intact. A product could be tracked back to its point of manufacture. Parties identified on product labels would be part of the certification loop. In addition, the name of the certifying agent would be used in conjunction with the name of a company that it certified.

The proposed change is consistent with the intent of the OFPA, which states in 2106(a)(1)(B), "No person may affix a label to, or provide other market information concerning, an agricultural product if such label or information implies, directly or indirectly, that such product is produced and handled using organic methods, except in accordance with this title." This statement presumes that operations that label products as organic must comply with the NOP, including being certified by an accredited certifying agent.

The December 21, 2000, Federal Register, on page 80581, 3rd column, in the Labeling discussion under Exempt or Excluded Operations, states:

"Any such operation that is exempt or excluded from certification or which chooses not to be certified may not label its organically produced products in a way which indicates that the operation has been certified..."

This same intent should cover private label commission merchants. If a non-certified commission merchant places only its own name on a product, along with the name of the certifying agent (and optionally the USDA Organic Seal), the product is certainly labeled to imply that "the operation" (i.e., the commission merchant) has been certified.

The name of the certified operation should appear on final consumer product labels because:
- This was the intent of the OFPA, requiring certification and full disclosure;
- This labeling requirement was assumed, but not discussed, during the rule-making process;
- All other regulatory systems require that the registrant or certified operation appear on the product label, including FDA drug, EPA pesticide, and State feed and fertilizer programs; and
- This will help solve problems that are now appearing in organic labeling and in audit trails.

The proposed change will help assure a successful National Organic Program in several ways:
- Consumer confidence will be protected because there will be clear certification;
- Most of the current tracking problems will be avoided because the audit trail will be clear;
- Regarding commissioned products, the label will either identify the certified operation that packaged the product, or the private labeler can choose to be certified;
- Exemptions and exclusions from certification will remain in place and these operations will not be required to be certified; and
- Enforcement agents and the public will be able to verify the integrity of the product through either the certified operation or the certifying agent and perform their functions more easily.