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Legal Implications of “Organic” Seafood Labeling Based on Foreign Standards

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This guide is a product of the Marine Affairs Institute at Roger Williams University School of Law and the Rhode Island Sea Grant Legal Program. The authors of this report are Read Porter, Senior Staff Attorney, and Kathryn Kulaga, Ph.D., Rhode Island Sea Grant Law Fellow. All errors and omissions are the responsibility of the Marine Affairs Institute. This study is provided only for informational and educational purposes and is not legal advice.

Organic food products are a substantial and growing market segment, but the U.S. has not established any organic standards for seafood. As a result, U.S. seafood producers may find it difficult to satisfy consumer demand or participate in market growth for organic products. To overcome this challenge, aquaculture producers may seek to be certified under a foreign organic standard and to advertise that status on their packaging when selling products in the U.S.

This study explores potential legal restrictions on such seafood labeling in the United States. It specifically considers labels based on Canada’s organic aquaculture standards and assumes that marketing is limited to the U.S. The first section provides background information regarding the organic food market and the development of organic aquaculture. Part two outlines the existing framework of organics regulation in the United States and Canada, including the status of proposed and existing organic aquaculture standards, respectively. Part three discusses possible liability associated with labeling seafood with organic claims. Part four provides findings and conclusions.

1 Background

The organic food industry is booming. Organic U.S. food sales totaled \$45.2 billion in 2017, an increase of 6.4 percent from 2016,¹ and organics now account for 5.5 percent of the food sold in retail channels in the United States.² Consumers believe that organic products are in line with their social values, such as environmental sustainability and animal welfare, and that organics are better for their health than conventionally produced food.³ Organic food sales are expected to continue to rise as consumers show a willingness to pay price premiums in the marketplace for these products.⁴

¹ *Maturing U.S. Organic Sector Sees Steady Growth of 6.4 Percent in 2017*, ORGANIC TRADE ASSOCIATION, <http://ota.com/news/press-releases/20236>.

² *U.S. Organic Industry Survey 2018*, ORGANIC TRADE ASSOCIATION, <http://ota.com/resources/organic-industry-survey>.

³ *Organic Market Overview*, USDA ECONOMIC RESEARCH SERVICE, <https://www.ers.usda.gov/topics/natural-resources-environment/organic-agriculture/organic-market-overview.aspx>; Arielle Lessing, *A Supplemental Labeling Regime for Organic Products: How the Food, Drug, and Cosmetic Act Hampers a Market Solution to an Organic Transparency Problem*, 18 MO. ENVTL. L. & POL’Y REV. 415, 426 (2011).

⁴ Lessing, *supra* note 3, at 425-26.



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Animal protein is a small but growing segment of the organic market,⁵ but seafood has played a limited role in this segment to date. The U.S. organic meat and poultry industry increased its sales an estimated 18.3 percent from 2016 to 2017, making it the fastest growing organic food category on the market.⁶ This growth indicates “that U.S. shoppers are increasingly interested in choosing protein that carries the weight of the USDA [U.S. Department of Agriculture] Organic seal.”⁷ Seafood cannot be sold with the USDA seal in the absence of relevant national organic standards, which industry sources suggest has limited sales to date.⁸

In the absence of USDA standards for organic aquaculture, producers and markets are considering alternative approaches. Some markets sell “organic” seafood, which may be certified under a foreign organic standard, such as those created by the European Union or Canada, or under a private, third-party certification system.⁹ For example, Wegman’s sells European Union-certified organic shrimp and salmon and Canadian-certified organic mussels.¹⁰ Other retailers have declined to advertise seafood as organic. Whole Foods, for example, will not sell imported certified seafood as “organic” until the United States has enacted organic aquaculture rules.¹¹ To provide a consistent branding option for “organic” seafood labeling, private certification organizations are contemplating development of new labels that indicate certification to a foreign organic certification standard. This study evaluates potential legal challenges associated with this approach.

2 Organic Programs

This section provides an overview of how organic products are regulated and certified in the United States and Canada. It also reviews the status of aquaculture organic standards in each country and the extent to which these programs allow the use of “organic” or similar expressions on certified products absent an accepted national organic standard.

2.1 Aquaculture under the United States Organic Regulations

The USDA and associated entities are responsible for implementation of the U.S. organics program. The USDA sets national standards to regulate the organic food market pursuant to the Organic

⁵ USDA ECONOMIC RESEARCH SERVICE, *supra* note 3 (noting that the meat, fish, and poultry category accounted for three percent of organic sales in 2012).

⁶ Jenna Blumenfeld, *It’s Time for USDA Organic Aquaculture Regulations*, SUPERMARKET NEWS (Feb. 22, 2018), <http://www.supermarketnews.com/seafood/its-time-usda-organic-aquaculture-regulations>.

⁷ *Id.*

⁸ Aaron Orłowski, *Organic standards for US farmed seafood going nowhere despite market demand*, SEAFOOD SOURCE (Dec. 19, 2017), <http://www.seafoodsource.com/features/organic-standards-for-us-farmed-seafood-going-nowhere-despite-market-demand> (quoting George Lockwood estimate of USDA organic aquaculture products to “exceed five percent of the market, with demand of more than 100 million pounds per year and perhaps more than 300 million”).

⁹ *Id.* (“Aquaculture products with an organic label are commonly sold on store shelves, with estimates showing that organic-labeled products account for between 0.5 percent and one percent of the North American seafood market”); Andrew Homan & Ding Tingting, *Making Aquaculture Accountable Through Third-Party Certification and Consumer Protection Law in The United States and China*, 39 VT. L. REV. 135, 137 (2014).

¹⁰ Blumenfeld, *supra* note 6.

¹¹ Mary Clare Jalonick, *USDA to Propose Standards for Organic Seafood Raised in U.S.*, PBS NEWS HOUR (Apr. 16, 2015), <https://www.pbs.org/newshour/politics/usda-propose-standards-organic-seafood-raised-u-s>.

Foods Production Act of 1990 (“OFPA”).¹² The National Organics Program (“NOP”), within the USDA Agricultural Marketing Service, is responsible for implementation of the Act and USDA regulations.¹³ The National Organic Standards Board (NOSB) is responsible for assisting the NOP in implementing the Act, including in developing standards.¹⁴

The OFPA statute and NOP regulations limit how the term “organic” can be used in the labeling and marketing of agricultural products. Agricultural products may be sold or labeled as “organically produced” only if they are “produced and handled in accordance with” OFPA,¹⁵ and labels cannot “impl[y], directly or indirectly, that such product is produced and handled using organic methods, except in accordance with” OFPA.¹⁶ The NOP regulations further explain that “the term, ‘organic,’ may only be used on labels and in labeling of raw or processed agricultural products . . . that have been produced and handled in accordance with the regulations in this part.”¹⁷ In the preamble to the rule establishing the regulations, USDA was even more explicit: “No claims, statements, or marks using the term, ‘organic,’ or *display of certification seals*, other than as provided in this regulation, may be used.”¹⁸ The regulations allow “organic” to be used on the label solely of products that are at least 95% composed of organically produced ingredients.¹⁹ As a result, the statute and regulations suggest that use of the term “organic” is unlawful except where used on a product certified under a U.S. standard.²⁰

Products that violate the organic labeling rules may be subject to enforcement action by USDA.²¹ “The NOP is ultimately responsible for the oversight and enforcement of the program, including . . . cases of fraudulent or misleading labeling.”²² It investigates and initiates enforcement actions against suspected violations such as organic label misuse and making false statements, which may result in civil penalties of up to \$10,000.²³ The USDA accepts consumer and business complaints alleging OFPA violations, but it does not permit private enforcement action.²⁴ As a result, only the USDA is

¹² 7 U.S.C. §§ 6501-6522.

¹³ National Organic Program, 7 C.F.R. pt. 205; *see also* National Organic Program, 65 Fed. Reg. 80,548 (Dec. 21, 2000) (final rule).

¹⁴ 7 U.S.C. § 6518.

¹⁵ 7 U.S.C. §§ 6505(a)(1)(A). “Organically produced” means “produced and handled in accordance with” OFPA. *Id.* § 6502(14).

¹⁶ *Id.* § 6505(a)(1)(B).

¹⁷ 7 C.F.R. § 205.300.

¹⁸ 65 Fed. Reg. 80,548, 80,576 (Dec. 21, 2000) (emphasis added).

¹⁹ 7 C.F.R. § 205.301 (“A raw or processed agricultural product sold, labeled, or represented as ‘organic’ must contain (by weight or fluid volume, excluding water and salt) not less than 95 percent organically produced raw or processed agricultural products.”); *id.* § 205.303 (labeling requirements for products labeled as organic).

²⁰ *See* *Birdsong v. Nurture, Inc.*, 275 F.Supp.3d 384, 389 (E.D.N.Y. 2017) (“[U]se of an ‘Organic’ label requires certification, which may be issued only by a federally approved certifying agent who ensures that organic operations ‘produce and handle’ products in compliance with the uniform federal standard set forth in the OFPA and the NOP regulations.”).

²¹ 7 U.S.C. § 6519(c).

²² National Organic Program, 65 Fed. Reg. 80,548, 80,557 (Dec. 21, 2000).

²³ 7 U.S.C. §§ 6519(b),(c).

²⁴ 65 Fed. Reg. 80,548, 80,627 (Dec. 21, 2000).

authorized to enforce the OFPA.²⁵ However, as discussed in section 3, sales of “organic” products that do not comply with OFPA or the regulations may result in legal action based on violations of other laws.

The current NOP regulations do not cover seafood, but the agency has taken steps towards organic aquaculture standards. USDA has been considering organic aquaculture since 1999.²⁶ In 2003, the agency created an Aquaculture Working Group (AWG) to draft new certification standards for marine-based farming methods.²⁷ Based on the AWG report,²⁸ the NOSB developed five recommendations for organic aquaculture standards, which the AWG reviewed in 2010.²⁹ From 2014 until 2016, the USDA regulatory agenda indicated an intention to develop regulations to implement the recommendations, but the agency did not publish a notice of proposed rulemaking or issue any draft regulations for public comment during that time.³⁰ The proposed organic standard is currently on the USDA regulatory “inactive” list, indicating that the agency does not plan to issue regulations.³¹ Until USDA establishes organic aquaculture standards, products cannot be certified as organic based on U.S. standards. In the interim, the status of “organic” fish is unclear.

Certification to a foreign or third-party aquaculture standard does not allow use of the USDA Organic Seal. The USDA Organic Seal can be placed on products certified under a foreign organic standard if USDA has established an organic equivalency agreement with the foreign government.³² Once an equivalency agreement for a product is reached, that product can be sold under organic labels in either country with just one organic certification.³³ No equivalency agreements exist for aquaculture: while other jurisdictions, including Canada and the European Union, have established standards for organic aquaculture products (see *infra*), the United States has not. Thus, acceptance of foreign organic certification of seafood products as equivalent will require completion of USDA’s organic aquaculture standard.

²⁵ All One God Faith v. Hain Celestial Grp., No. 09-3517, 2012 WL 3257660, *6-8 (N.D. Cal. 2012) (“Congress expressly declined to create a private right of action to enforce the OFPA or its implementing regulations.”).

²⁶ Orłowski, *supra* note 8.

²⁷ AWG, [PROPOSED NATIONAL ORGANIC STANDARDS FOR FARMED-AQUATIC ANIMALS AND PLANTS \(AQUACULTURE\) WITH SUPPORTING DOCUMENTATION AND INFORMATION](#) 1 (George Lockwood et al., eds., 2005).

²⁸ AWG, [INTERIM FINAL REPORT OF THE AQUACULTURE WORKING GROUP](#) (2006).

²⁹ AWG, [COMMENTS AND PROPOSED REVISIONS BY THE AQUACULTURE WORKING GROUP PERTAINING TO THE RECOMMENDATIONS OF THE USDA NATIONAL ORGANIC STANDARDS BOARD FOR ORGANIC AQUACULTURE STANDARDS](#) 4 (2010) (reviewing history).

³⁰ Semiannual Regulatory Agenda, Spring 2016, 81 Fed. Reg. 37,250, 37,252 (June 9, 2016) (most recent entry); Introduction to the Unified Agenda of Federal Regulatory and Deregulatory Actions, 79 Fed. Reg. 76,456, 76,476 (Dec. 22, 2014) (first entry).

³¹ OFFICE OF INFORMATION AND REGULATORY AFFAIRS, INACTIVE ACTIONS (2017), at https://www.reginfo.gov/public/jsp/eAgenda/InactiveRINs_2017_Agenda_Update.pdf (listing organic aquaculture standards as inactive).

³² 7 C.F.R. § 205.300(c). An agreement is possible only when foreign standards, organic control system oversight, and enforcement programs meet or exceed U.S. requirements. *How Does USDA Assess Organic Equivalency with other Countries?*, USDA, <https://www.ams.usda.gov/services/organic-certification/international-trade/how-does-usda-assess-organic-equivalency-other-countries>.

³³ *Id.*

2.2 Aquaculture under the Canadian Organic Regulations

The Canadian Food Inspection Agency (CFIA) regulates organic products in Canada³⁴ under a regulatory system that was recently overhauled. In 2018, the CFIA finalized the Safe Foods for Canadians Regulations (SFCR), which replaced the former Organic Products Regulations and will take effect gradually during a transitional period.³⁵ The SFCR adopts existing organic standards developed by the Canadian National Standards Board.³⁶ The regulatory overhaul thus maintains key elements of existing organics certification, while incorporating organics into a broader food safety regulatory system.

The SFCR establishes the process by which food commodities may be deemed organic, which is similar to that used in the U.S. An “organic product” means “an agricultural product that has been certified as organic” under the regulations “or certified as organic by an entity accredited by a foreign state that is referred to in” the regulations.³⁷ Producers wishing to have their products certified must apply to a certification body, providing information identified by the statute—including evidence that the product was produced with substances, methods and controls needed to conform to the relevant organic standard.³⁸ An accredited certification body must conduct an inspection and determine whether the product is at least 95% organic.³⁹

Once certified as organic, the regulations govern labeling and advertising. A food commodity can be sold and advertised with the CFIA organic “product legend” and words like “‘organic’ . . . , ‘organically grown’ . . . , ‘organically raised’ . . . and ‘organically produced’ . . . and any similar expressions.”⁴⁰ Thus, the new SFCR specifically prohibits the use of “organic” or like terms on products not certified in accordance with Canadian organic standards or approved foreign equivalents. On the other hand, products certified under the SFCR may be sold with the Canada Organic Logo both within and outside Canada.⁴¹

The new organic regime covers aquaculture, which were beyond the scope of the predecessor Organic Products Regulations.⁴² Canada published organic aquaculture standards in 2012 to meet national consumer demand and “level the playing field internationally.”⁴³ It considered U.S. draft

³⁴ *Organic Products*, CFIA, <http://www.inspection.gc.ca/food/general-food-requirements-and-guidance/organic-products/eng/1526652186199/1526652186496>.

³⁵ Safe Foods for Canadians Regulations, SOR/2018-108 § 411(j) (Can.), *repealing* Organic Products Regulations, SOR/2009-176 (Can.); SOR/2018-108 § 373 (transitional period for aquaculture products).

³⁶ SOR/2018-108 § 340 *et seq.* (Can.) (defining and applying existing standards).

³⁷ SOR/2018-108 § 1.

³⁸ *Id.* § 344.

³⁹ *Id.* § 345.

⁴⁰ *Id.* §§ 359 (product legend), 353 (expressions).

⁴¹ *Organic aquaculture products*, CFIA, <http://www.inspection.gc.ca/food/sfcr/general-food-requirements-and-guidance/organic-products/aquaculture-products/eng/1526564977758/1526565100440>.

⁴² CFIA, [DIRECTIVE 10-02: SCOPE OF THE ORGANIC PRODUCTS REGULATIONS AND USE OF THE CANADA ORGANIC LOGO](#) § 4.0 (2010).

⁴³ Tim Rundle, *Canadian Organic Seafood*, THE CANADIAN ORGANIC GROWER (Apr. 2016), <http://magazine.cog.ca/article/canadian-organic-seafood-aquaculture/>.

language when developing this standard.⁴⁴ The standard, *Organic production systems — Aquaculture — General principles, management standards and permitted substances lists*,⁴⁵ allowed aquaculture products to be certified by an independent certifying body, to be labelled as “organic,” and to display the logo of the certification body—but not the Canada Organic Logo.⁴⁶ The new SFCR, by contrast, directly incorporates the organic aquaculture standard as a national standard.⁴⁷ As a result, once certified in compliance with the SFCR, producers can use the Canada Organic Logo on aquaculture products sold within and outside of Canada. The SFCR will take effect for aquaculture products for 24 months after January 15, 2019, except for newly certified products and certain seaweed products.⁴⁸ Producers seeking to comply with the SFCR prior to that time may do so voluntarily.

Products certified to Canada’s organic aquaculture standard currently cannot be sold with a foreign organic seal in other countries under an equivalency agreement.⁴⁹ However, having the Canadian standards in place allows for potential inclusion of aquaculture products in future bilateral equivalency negotiations.⁵⁰ Canada has expressed interest in developing equivalency arrangements with the European Union and the United States.⁵¹ If successful, Canadian-certified organic products could then be sold in these jurisdictions under a foreign organic logo.

3 Potential Legal Actions Associated with Organic Aquaculture Sales

The sale of aquaculture products in the U.S. with “organic” claims raises the potential for liability under a variety of legal theories. While no cases have been decided to date in the U.S. related to organic claims on seafood products, plaintiffs have challenged organic claims on other types of products. This section evaluates potential organic aquaculture claims based on organic program requirements and other causes of action under U.S., Canadian, and state law.

3.1 Organic Food Claims

Violation of organic program requirements may result in liability. This section discusses potential liabilities under OFPA and associated state organic programs, as well as whether the use of language indicating Canadian organic certification on products sold in the U.S. would violate the SFCR.

3.1.1 OFPA Claims

The use of the term “organic” on aquaculture products appears to violate OFPA and the NOP regulations, but to be unenforceable under current agency policy. As noted previously, the NOP regulations prohibit the use of the term “organic” except in compliance with OFPA and the

⁴⁴ *Id.*

⁴⁵ CAN/CGSB-32.312-2018 (Can.) (on file with author).

⁴⁶ CFIA, *supra* note 42, at § 4.0 (“Products that are excluded from the scope cannot be certified under the Canada Organic Regime and cannot bear the Canada Organic Logo.”)

⁴⁷ SOR/2018-108 § 340 (defining “aquaculture product” and organic aquaculture standard).

⁴⁸ *Id.* §§ 373 (transitional period), 412 (coming into force).

⁴⁹ *Organic aquaculture products*, CFIA, <http://www.inspection.gc.ca/food/sfcr/general-food-requirements-and-guidance/organic-products/aquaculture-products/eng/1526564977758/1526565100440>.

⁵⁰ *Id.*

⁵¹ Rundle, *supra* note 43.

regulations.⁵² The regulations state that “organic” can only be used on products certified under an existing U.S. organic standard.⁵³ As there is no current organic standard for seafood, organic claims on aquaculture products cannot meet this requirement. As a result, seafood products labeled with the term “organic” would appear to violate the plain language of the Act and its implementing regulations. However, there are two areas of ambiguity that may limit liability for organic aquaculture labeling under OFPA.

First, fish used for food have a uniquely uncertain status under OFPA and the NOP regulations. Fish are explicitly included in the definition of “livestock” under OFPA,⁵⁴ and as such are “agricultural products” subject to the Act.⁵⁵ However, the NOP regulations explicitly exclude “aquatic animals for the production of food” from the definition of “livestock.”⁵⁶ This exclusion introduces ambiguity into whether fish are “agricultural products” under the regulations.⁵⁷ Aquaculture is a form of agriculture under many USDA programs,⁵⁸ suggesting that aquaculture products are agricultural products even if not “livestock” under the regulations. However, USDA guidance on classification of products for livestock production and handling indicates that “[i]n the absence of standards for organic aquatic animal production, products derived from aquatic animals (e.g., fish and crab meal) may be considered non-agricultural when used as livestock feed additives.”⁵⁹ If aquatic animals are not “agricultural products,” then *regulatory* restrictions on the use of the term “organic” on their labeling do not apply; however, OFPA’s *statutory* restrictions on that term are unaffected and clearly apply to the labeling of seafood products.

Second, USDA enforcement authority over organic-labeled seafood in the absence of a standard is unclear. Some OFPA enforcement provisions apply only to certified entities. For example, the NOP Program Manager has the authority to inspect certified producers and accreditation agents and to revoke certification.⁶⁰ Limits on applicability of enforcement provisions to non-certified entities led USDA to conclude that it cannot enforce restrictions on the use of the term “organic” on fish products.⁶¹ However, this conclusion is legally debatable. The Center for Food Safety petitioned USDA to amend its position, arguing that it is contrary to the purpose of OFPA and that OFPA

⁵² 7 C.F.R. § 205.300.

⁵³ *Id.* §§ 205.301, 205.303.

⁵⁴ 7 U.S.C. § 6502(11).

⁵⁵ *Id.* § 2502(1) (defining agricultural product).

⁵⁶ 7 C.F.R. § 205.2.

⁵⁷ *Id.* (defining “agricultural product” as “[a]ny agricultural commodity or product, whether raw or processed, including any commodity or product derived from livestock, that is marketed in the United States for human or livestock consumption.”). While fish are clearly an agricultural commodity marketed for consumption, their exclusion from livestock suggests USDA may not intend for aquatic animals to be covered by this provision.

⁵⁸ *See, e.g.*, 7 C.F.R. §§ 701.2 (agricultural conservation program); 760.802 (crop assistance programs); 761.2 (farm loan program); 3430.309 (agriculture and food research).

⁵⁹ USDA, [GUIDANCE: DECISION TREE FOR CLASSIFICATION OF AGRICULTURAL AND NONAGRICULTURAL MATERIALS FOR ORGANIC LIVESTOCK PRODUCTION OR HANDLING](#) 1 (2016).

⁶⁰ 7 C.F.R. § 205.660.

⁶¹ Center for Food Safety, [Consumer Complaint and Petition for Rulemaking and Collateral Relief in the Matter of: Fish and Seafood Labeled and Sold in the United States as “Organic”](#) 9-10 (July 11, 2007) (quoting agency and NOSB statements); AWG, *supra* note 27, at 1-2 (“[B]ecause USDA has no national regulation for organic aquaculture products, no enforcement action can be taken relative to organic-labeled aquaculture products.”).

includes enforcement provisions that cover *any* person selling food products—not just certified producers.⁶² For example, the civil penalty provision applies to any violations of OFPA—not just to those committed by certified producers.⁶³ While the scope of USDA’s enforcement authority is debated, the agency has clearly indicated that it does not plan to enforce against the use of “organic” on aquaculture products notwithstanding disputes about whether it *can* do so. Specifically, in 2004, the NOSB directed that fish and seafood products:

may not display the USDA organic seal and may not imply that they are produced or handled to the USDA NOP standards. Consumers should be aware that the use of labeling terms such as “100% organic,” “organic,” or “made with organic ingredients” on these products may be truthful statements. But these statements do not imply that the product was produced in accordance with the USDA NOP standards nor that the producer is certified under the NOP standards.⁶⁴

Based on this position statement, USDA will not bring an OFPA enforcement action as long as a seafood product label does not suggest that the product was certified under a USDA standard. In practice, this stance has allowed seafood products routinely to be sold with “organic” labels in U.S. markets.⁶⁵ As long as USDA maintains the position that it lacks enforcement authority over organic seafood, seafood marketers will continue to be able to sell seafood as organic without prosecution.

3.1.2 California Organic Products Act Claims

OFPA authorizes states to develop their own organic program with USDA approval.⁶⁶ State organic programs may have more restrictive requirements than those established by USDA but must be consistent with OFPA and further its purpose.⁶⁷ In addition, approved states must assume responsibility for enforcing all organic regulations in the state.⁶⁸ Thus, approved states may interpret and enforce violations of OFPA differently than the federal government.

California is the only state with an approved organic program.⁶⁹ The California State Organic Program oversees and enforces organic production and handling operations pursuant to the California Organic Products Act of 2003 (COPA), as amended.⁷⁰ COPA governs the use of “the terms ‘organic,’ ‘organically grown,’ or grammatical variations of those terms, whether orally or in writing, in connection with any product” for sale in the state.⁷¹ California may levy a civil penalty of

⁶² Center for Food Safety, *supra* note 61, at 13-14.

⁶³ 7 U.S.C. § 6519(c).

⁶⁴ NOSB POLICY DEVELOPMENT COMMITTEE, [NATIONAL ORGANIC PROGRAM SCOPE](#) 7 (2004).

⁶⁵ *See* Center for Food Safety, *supra* note 61, at 7 (collecting companies selling seafood as “organic”).

⁶⁶ 7 C.F.R. § 205.620.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *California State Organic Program*, USDA, <https://www.ams.usda.gov/services/enforcement/organic/state-compliance-ca>.

⁷⁰ *Id.*; CAL. HEALTH & SAFETY CODE §§ 110810-110959.

⁷¹ CAL. HEALTH & SAFETY CODE § 110839.

up to \$5,000 for each violation of COPA, OFPA, or the NOP regulations.⁷² In addition, any person may bring actions to enjoin violations of COPA, and courts may award attorney's fees in these actions.⁷³

California prohibits the sale of seafood with organic claims. COPA specifies that “no aquaculture, fish, or seafood product, including, but not limited to, farmed and wild caught species, shall be labeled or represented as ‘organic’ until formal organic certification standards have been developed and implemented by the United States Department of Agriculture's National Organic Program or the California Department of Food and Agriculture.”⁷⁴ Under this section, any organic claim on a seafood product sold in California is illegal, regardless of whether it suggests that the product is certified under U.S. standards.

3.1.3 Claims Under Canadian Law

Sale of aquaculture products in the U.S. under labels asserting Canadian organic certification does not appear to violate Canadian organic products law, assuming certain conditions are met. The SFCR authorizes the sale of certified aquaculture products (including the use of the Canada Organic Seal) in foreign markets.⁷⁵ Canadian law thus authorizes the sale of organic aquaculture products certified under the SFCR with a Canada organic seal or the seal of a certification body.

3.2 Claims Under Federal Law

OFPA is only one of a variety of federal statutes governing product labeling. Other relevant statutes for potential federal claims include the Food, Drug, and Cosmetic Act (FD&C Act),⁷⁶ Lanham Act, Federal Trade Commission Act (FTC Act),⁷⁷ and Fair Packaging and Labeling Act (FPLA). This section introduces these laws and their implications for potential liability related to organic claims.

3.2.1 Food, Drug, and Cosmetic Act

The FD&C Act is a complex regulatory regime that protects public health and safety by, in part, banning the misbranding of food and drink.⁷⁸ “A food or drink is deemed misbranded if “its labeling is false or misleading.”⁷⁹ The Food and Drug Administration (FDA) implements the FD&C Act and has issued extensive food packaging and labeling regulations.⁸⁰

⁷² CAL. HEALTH & SAFETY CODE § 110915; USDA AMS, [NATIONAL ORGANIC PROGRAM REVIEW OF THE CALIFORNIA STATE ORGANIC PROGRAM](#) § 1.2 (2016).

⁷³ CAL. HEALTH & SAFETY CODE § 111910.

⁷⁴ CAL. HEALTH & SAFETY CODE § 110827.

⁷⁵ *Organic aquaculture products*, CFIA, <http://www.inspection.gc.ca/food/sfcr/general-food-requirements-and-guidance/organic-products/aquaculture-products/eng/1526564977758/1526565100440>.

⁷⁶ 21 U.S.C.S. §§ 301 *et seq.*

⁷⁷ 15 U.S.C. §§ 41-58.

⁷⁸ 21 U.S.C. §§ 321(f), 331.

⁷⁹ *POM Wonderful LLC v. Coca-Cola Co.*, 573 U.S. 102, 108 (2014); 21 U.S.C. § 343.

⁸⁰ 21 C.F.R. pt. 101.

A product that violates the Act or these regulations may be subject to enforcement action. However, as under OFPA, the government alone can bring suit to enforce the FD&C Act.⁸¹ The FDA has not defined “organic” and “does not regulate the use of the term ‘organic’ on food labels.”⁸² Consistent with this statement, research for this study identified no litigation involving organic claims under the FD&C Act. As a result, labels that make organic claims in the absence of a USDA certification may be unlikely to be challenged by the FDA unless they violate specific FDA regulations.

3.2.2 FPLA

The FPLA⁸³ requires that labels “should enable consumers to obtain accurate information as to the quantity of the contents and should facilitate value comparisons.”⁸⁴ The Act and associated regulations require that labels include specific information about package contents to meet this purpose.⁸⁵ The FDA administers the FPLA with respect to food products.⁸⁶ Food labels that violate the FPLA are misbranded by statute and enforced by FDA under the FD&C Act.⁸⁷ The FDA’s position on enforcement of “organic” claims thus applies equally to FPLA claims, and this statute is not likely to result in liability associated with organic seafood label claims.

3.2.3 Lanham Act

The Lanham Act prohibits false advertising and could provide a remedy for competitors injured by organic claims that are found to be misleading.⁸⁸ Lanham Act claims are based on unfair competition protection and are therefore only available to competitors, not consumers.⁸⁹ Injured entities can bring suit under the Lanham Act for labels that are “not literally false but nonetheless [are] misleading, deceiving, or confusing to consumers.”⁹⁰ Organic products may be able to meet the Lanham Act standard because consumers and marketers have different understandings of the meaning of “organic” “far [more often] than the frequency of consumer confusion that triggers liability under the Lanham Act.”⁹¹ As a result, it is possible that organic claims could enable Lanham Act challenges for certain plaintiffs, particularly in categories not governed by the NOP.

⁸¹ Kathryn B. Armstrong & Jennifer A. Staman, [ENFORCEMENT OF THE FOOD, DRUG, AND COSMETIC ACT: SELECT LEGAL ISSUES](#) 6, Cong. Res. Serv. No. 7-5700, at 6 (Feb. 9, 2018) (noting lack of private right of action under the FD&C Act).

⁸² LISA BENSON & KAREN RECZEK, NAT’L INST. STDS. & TECH., NISTIR 8178, A GUIDE TO UNITED STATES COSMETIC PRODUCTS COMPLIANCE REQUIREMENTS 21 (2017).

⁸³ 15 U.S.C. §§ 1451-1461.

⁸⁴ *Id.* § 1451.

⁸⁵ *Id.* § 1453.

⁸⁶ *Id.* § 1454. The FPLA applies food, which is defined as a type of “consumer commodity.” *Id.* § 1459.

⁸⁷ *Id.* § 1456.

⁸⁸ 15 U.S.C. § 1125(a).

⁸⁹ *POM Wonderful, LLC v. Coca-Cola Co.*, 573 U.S. 102, 107 (2014) (“Though in the end consumers also benefit from the Act’s proper enforcement, the cause of action is for competitors, not consumers.”).

⁹⁰ Michelle T. Friedland, *You Call That Organic? - The USDA’s Misleading Food Regulations*, 13 N.Y.U. ENVTL. L.J. 379, 405-06 (2005) (noting cases). Compliance with the FD&C Act or other labeling laws does not shield companies from Lanham Act liability. *POM Wonderful LLC v. Coca-Cola Co.*, 573 U.S. 102, 113 (2014) (“food and beverage labels regulated by the FDCA are not, under the terms of either statute, off limits to Lanham Act claims.”).

⁹¹ *Id.* at 407 (discussing consumer understanding of “organic”).

One case to date has asserted a Lanham Act claim in the context of organic labeling. In *All One God Faith v. Hain Celestial Group*, the plaintiff, known as Dr. Bronner’s Magic Soaps (“Dr. Bronner’s”), alleged (among other claims) that the defendants had engaged in false advertising under the Lanham Act because Hain Celestial’s personal care products labeled as “organic” were actually not “organic” as that term is understood by consumers.⁹² Dr. Bronner’s also sued Ecocert, which certifies products to its own organic standards, alleging that its certification is “inconsistent with consumer expectations.”⁹³ Thus, both producers and certifiers may be subject to suit under the Lanham Act.

The “primary jurisdiction doctrine” has often been used as a defense against Lanham Act claims involving “organic” products. The primary jurisdiction doctrine “permits courts to determine ‘that an otherwise cognizable claim implicates technical and policy questions that should be addressed in the first instance by the agency with regulatory authority over the relevant industry rather than by the judicial branch.’”⁹⁴ Courts have used the primary jurisdiction doctrine to dismiss both “organic” and “natural” label claims—including in *All One God Faith v. Hain Celestial Group*—because they would require the court to determine what these terms mean, a task best left to USDA or FDA.⁹⁵

While the primary jurisdiction defense has been successful in the past, it may not be in the future against these claims. The Ninth Circuit Court of Appeals recently cautioned that it cannot be used to disadvantage plaintiffs.⁹⁶ Instead, it only results in a dismissal without prejudice to pursue administrative remedies or in a stay.⁹⁷ In addition, courts are unlikely to accept a primary jurisdiction argument unless an agency is actively considering making an administrative determination, which is no longer the case with respect to aquaculture organic standards. As a result, the primary jurisdiction may no longer apply in this context, and it can only postpone, not prevent, claims under the Lanham Act or other statutes.

3.2.4 Federal Trade Commission Act

The FTC Act created the Federal Trade Commission (FTC) and charged it with consumer protection related to commerce.⁹⁸ Section 5 of the Act prohibits unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.⁹⁹ The FTC has issued “green guides” for environmental marketing claims in compliance with the Act.¹⁰⁰ Violation of the green guides may result in enforcement action by the FTC.¹⁰¹

⁹² *All One God Faith, Inc. v. Hain Celestial Grp.*, No. 09-3517, 2012 WL 3257660 (N.D. Cal. Aug. 8, 2012).

⁹³ *Id.*

⁹⁴ *Astiana v. Hain Celestial Grp.*, 783 F.3d 753, 760 (9th Cir. 2015) (quoting *Clark v. Time Warner Cable*, 523 F.3d 1110, 1114 (9th Cir. 2008)).

⁹⁵ *Id.* at 761-62, 761 n.5 (natural claims, collecting cases invoking primary jurisdiction for food products); *All One God Faith v. Hain Celestial Grp.*, No. 09-3517, 2012 WL 3257660, at *8-*10 (N.D. Cal. 2012) (organic claims).

⁹⁶ *Astiana v. Hain Celestial Grp.*, 783 F.3d 753, 761-62 (9th Cir. 2015) (reversing dismissal of natural cosmetic claim on primary jurisdiction grounds).

⁹⁷ *Id.*

⁹⁸ 15 U.S.C. §§ 41-58.

⁹⁹ 15 U.S.C. § 45.

¹⁰⁰ 21 C.F.R. pt. 260.

¹⁰¹ *Id.* § 260.1.

FTC treatment of organic certification claims is evolving. While they do provide guidance on certification claims,¹⁰² the green guides currently do not address “organic, sustainable, and natural claims” in order to avoid duplication or inconsistency with the NOP and due to a lack of sufficient evidence.¹⁰³ More recently, the FTC completed a study on consumer preferences related to organic claims to determine whether the green guides should include material on organic claims.¹⁰⁴ While focused on non-food items, the report found sufficient evidence of consumer confusion to support further investigation.¹⁰⁵ The FTC held an October 2016 roundtable to further investigate the issues, but has not taken additional action since that time.

A claim may violate the FTC Act even without a green guide in place. For example, the Commission filed a complaint against a mattress manufacturer selling an “organic” mattress that was almost entirely composed of non-organic materials.¹⁰⁶ While the FTC has not indicated that it will issue guidance on organic claims, it may thus intervene on a case-by-case basis where the activity violates the Act. Such complaints are most likely to be brought against companies making organic claims that are objectively false or for which there is good evidence that they are misleading to consumers.

3.3 Claims Under State Law

State laws provide a wide variety of potential claims that have been used to challenge “organic” labels. These laws have been used to support challenges by both consumers and competitors in the marketplace. Consumer protection laws provide a potential avenue for consumers to challenge entities selling products making unjustified organic claims. Unfair competition claims are similar but involve claims by competitors rather than by consumers. Cases making state law claims have arisen in the context of both personal care products¹⁰⁷ and food products¹⁰⁸ and are based on the idea that customers have a different perception of what “organic” means than what the manufacturers intend to convey on a product label, and that the use of the word “organic” is therefore misleading. Indeed, OFPA was enacted to limit consumer confusion about the meaning of “organic” foods by establishing consistent, uniform national standards.¹⁰⁹ Because “organic” now has a consistent

¹⁰² 16 C.F.R. § 260.6.

¹⁰³ Guides for the Use of Environmental Marketing Claims, 77 Fed. Reg. 62,122, 62,124 (Oct. 11, 2012).

¹⁰⁴ JOINT STAFF REPORT OF THE BUREAU OF ECONOMICS AND BUREAU OF CONSUMER PROTECTION, FTC, [CONSUMER PERCEPTION OF “RECYCLED CONTENT” AND “ORGANIC” CLAIMS](#) (Aug. 10, 2016).

¹⁰⁵ *Id.* at 4.

¹⁰⁶ Decision and Order, [Moonlight Slumber, LLC](#), 162 F.T.C. 3128, No. C-4634 (Dec. 11, 2017).

¹⁰⁷ *See, e.g.*, [Dronkers v. Kiss My Face, LLC](#), No. 12cv1151 JAH (WMC), 2013 WL 12108663 (S.D. Cal. Sept. 26, 2013); [All One God Faith, Inc. v. Organic & Sustainable Industry Standards, Inc.](#), 107 Cal. Rptr. 3d 861 (Cal. Ct. App. 2010).

¹⁰⁸ *See, e.g.*, [In re Aurora Dairy Corp. Organic Milk Mktg. & Sales Practices Litig.](#), 621 F.3d 781 (8th Cir. 2010) (milk); [Marentette v. Abbott Labs., Inc.](#), 886 F.3d 112 (2nd Cir. 2018) (infant formula); [Birdsong v. Nurture, Inc.](#), 275 F. Supp. 3d 384 (E.D.N.Y. 2017) (infant formula); [Quesada v. Herb Thyme Farms, Inc.](#), 361 P.3d 868 (Cal. 2015); [Brown v. Danone North America, LLC](#), No. 17-cv-07325-JST, 2018 WL 2021340 (N.D. Cal. May 1, 2018) (milk); [Pac. Botanicals v. Sego’s Herb Farm](#), No. 1:15-cv-00407-CL, 2016 WL 11187249 (D. Or. Dec. 6, 2016) (ginseng); [Organic Consumers Ass’n v. Hain Celestial Grp.](#), 285 F. Supp.3d 100 (D.D.C. 2018) (infant formula); [Brown v. Hain Celestial Grp.](#), 913 F. Supp.2d 881 (N.D. Cal. 2012); [Segedie v. Hain Celestial Grp.](#), 14-CV-5029 (NSR), 2015 WL 2168374 (S.D.N.Y. May 7, 2015) (infant formula).

¹⁰⁹ 7 U.S.C. § 6501.

regulatory meaning, plaintiffs can argue that its use on products that do not meet the definition of that term may be misleading in violation of a bevy of state laws.

Dronkers v. Kiss My Face is a good example of a case alleging state law violations in the organic product context. In *Dronkers*, the plaintiff claimed that the defendant’s “organic” labeled products, such as shampoo and toothpaste, misrepresented “the character and quality of its products” in a way that was “designed to and did, lead Plaintiff and others similarly situated to believe the products were organic.”¹¹⁰ The plaintiff asserted that the products did not meet the “reasonable consumer’s” belief that organic products are produced without pesticides, synthetic fertilizers, or petrochemical compounds—a different and more restrictive meaning of “organic” than established by OFPA.¹¹¹ Thus, the plaintiff claimed the defendant’s use of the word “organic” in its product labeling was misleading and false to the “reasonable consumer” under the California False Advertising Laws, Unfair Competition Laws, and Consumer Legal Remedies Act.¹¹² Similar cases have alleged similar and additional claims, including violation of express and implied warranties, breach of contract, unjust enrichment, and fraud, both in California and other jurisdictions.¹¹³

Certification entities may be subject to lawsuits as well as marketers. In *All One God Faith v. Organic & Sustainable Industry Standards*, the defendant trade association Organic and Sustainable Industry Standards, Inc. (OASIS) sought to develop its own organic standard and seal specific to beauty and personal care products that would allow its members to then advertise with the seal on member products.¹¹⁴ The plaintiff, Dr. Bronner’s, sells organic personal care products that are labeled according to the NOP criteria.¹¹⁵ It sued OASIS, alleging that the certification program would violate California’s unfair competition statute because it would lose business if cosmetics producers began selling products with the OASIS organic seal instead of meeting the more-restrictive NOP standard.¹¹⁶ The court did not decide on the merits of the unfair competition claim, so the significance of this case is limited. However, it does highlight the relevance of similar claims against entities creating or managing certification standards entities as well as companies engaged in certification or marketing of products.

Defendants commonly argue they are not liable in state consumer protection cases because OFPA preempts state laws. Courts agree that OFPA “did *not* expressly preempt state tort claims, consumer protection statutes, or common law claims” and did not intend to preempt all consumer protection

¹¹⁰ No. 12cv1151 JAH (WMc), 2013 WL 12108663, *1 (S.D. Cal. Sept. 26, 2013).

¹¹¹ *Id.* at *2.

¹¹² *Id.* at *1 (citing CAL. BUS. & PROF. CODE § 17500 et seq. (false advertising); CAL. BUS. & PROF. CODE § 17200 et seq. (unfair competition); CAL. CIV. CODE § 1750 (Consumer Legal Remedies Act)).

¹¹³ See generally *supra* notes 107-108.

¹¹⁴ *All One God Faith, Inc. v. Organic & Sustainable Industry Standards, Inc.*, 107 Cal. Rptr. 3d 861 (Cal. Ct. App. 2010).

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 1192-94 (citing CAL. BUS. & PROF. CODE § 17200 et seq.).

law, an area traditionally regulated by the states.¹¹⁷ As a result, OFPA preempts state law claims only when the state law conflicts with the purpose of the federal law.

Courts have come to different conclusions about whether state claims are in conflict with OFPA. In *Dronkers*, the court found that OFPA did not preempt the label misrepresentation claims because the NOP specifically excluded cosmetic products, and subsequent USDA policy statements and recommendations related to organic certification of personal care products “are informal agency actions lacking a rulemaking or adjudicatory process.”¹¹⁸ Other cases in the personal care products context have also declined to find claims preempted.¹¹⁹ However, courts have often found claims preempted in cases related to food products. For example, in *Organic Consumers Association v. Hain Celestial Group*, the plaintiffs alleged that the labels on “Earth’s Best” infant formula products violated D.C. law because they misrepresented the products as “organic” even though they contained synthetic ingredients that are not permitted under OFPA.¹²⁰ The court held that the claim “is squarely premised on the allegation that Hain Celestial is selling infant formula ‘as organic when in fact it was not organic,’” and that it therefore conflicted with the purposes of OFPA.¹²¹ As such, it would undermine the national certification system, undermine faith in the organic labeling system, and interfere with interstate commerce.¹²² Although one court has disagreed, most courts have found similar claims preempted.¹²³ As a result, most claims alleging state law violations arising from improper labeling of food products as “organic” in violation of OFPA will be preempted.

The question of whether challenges to “organic” aquaculture claims would be preempted has not been answered to date, but there are reasons to suspect that these claims could succeed. Aquaculture products are food products, and in this sense are similar to other food products involved in cases finding state law challenges preempted. On the other hand, unlike other food products, USDA has excluded aquaculture products from the NOP and has declined to enforce OFPA in this context—yielding a situation analogous to the personal care products litigation in *Dronkers*. Indeed, the NOSB statement on aquaculture notes that it is up to consumers, not the agency, to be on notice that “organic” claims on seafood do not imply compliance with OFPA.¹²⁴ As a result, state law claims

¹¹⁷ *In re Aurora Dairy Corp. Organic Milk Mktg. & Sales Practices Litig.*, 621 F.3d 781, 792-794 (8th Cir. 2010) (emphasis in original).

¹¹⁸ *Id.* at *10-*13.

¹¹⁹ *See also* *Brown v. Hain Celestial Grp.*, No. C 11–03082 LB, 2012 WL 3138013, *9 (N.D. Cal. Aug. 1, 2012 (order denying motion to dismiss) (“[T]he court cannot discern an obvious substantive conflict between the state and federal definitions of the term ‘organic’ as it is at issue in this case.”); *Segedie*, *supra* note 107, at *5 (“[S]tate-level enforcement would enhance rather than obstruct the OFPA’s creation and enforcement of a national standard, and complement the role of certifying agents by providing a damages remedy for violations of the OFPA.”).

¹²⁰ 285 F. Supp. 3d 100, 101-02 (D.D.C. 2018).

¹²¹ *Id.* at 107-08 (quoting *In re Aurora Dairy Corp. Organic Milk Mktg. & Sales Practices Litig.*, 621 F.3d 781 (8th Cir. 2010)); *see also* 7 U.S.C. § 6501 (purposes of OFPA).

¹²² 285 F. Supp. 3d at 107-08.

¹²³ *Segedie v. Hain Celestial Grp.*, 14-CV-5029 (NSR), 2015 WL 2168374 (S.D.N.Y. May 7, 2015) (declining to find preemption); *but see* *In re Aurora Dairy Corp. Organic Milk Mktg. & Sales Practices Litig.*, 621 F.3d 781 (8th Cir. 2010); *Marentette v. Abbott Labs., Inc.*, 886 F.3d 112 (2nd Cir. 2018); *Birdsong v. Nurture, Inc.*, 275 F. Supp. 3d 384 (E.D.N.Y. 2017).

¹²⁴ NOSB POLICY DEVELOPMENT COMMITTEE, *supra* note 64, at 7 (“Consumers should be aware that the use of labeling terms such as ‘100% organic,’ ‘organic,’ or ‘made with organic ingredients’ on these products may be truthful

would not interfere with a uniform certification process for these products. Given the similarities between aquaculture and personal care product labeling, there is substantial uncertainty regarding whether courts would find state law challenges to organic labeling to conflict with OFPA, and it is possible that such claims would survive a preemption challenge until and unless USDA issues aquaculture certification standards.

4 Findings and Conclusion

The absence of a USDA organic aquaculture standard, in the face of strong market demand from both consumers and producers, has created incentives for third-party labels indicating organic certification based on foreign standards. This study reviewed the potential liability associated with these labeling initiatives in the U.S. under OFPA, Canadian law, state consumer protection and unfair competition laws, and federal packaging and labeling laws.

This study identifies a number of potential sources of liability for entities labeling or marketing aquaculture products as organic, including certifiers and producers. The study considered four categories of claims, including those arising from organic products law, claims under other federal laws, and claims under other state laws.

- Organic aquaculture label claims appear to violate OFPA, although the USDA has indicated that it will not enforce against such labels as long as they do not suggest that the product is USDA-certified. However, California’s organic program does explicitly prohibit the sale of organic aquaculture and could face enforcement action there.
- Canadian law does not prohibit advertisement of products based on its organic certification, and its new SFCR regime allows properly-certified organic aquaculture products to bear the Canadian Organic Seal even when exported.
- Food product labeling must comply with a variety of federal laws other than OFPA. Of the laws considered here, only the Lanham Act currently appears to present liability considerations with respect to organic claims on seafood. These claims could give rise to claims by competitors under an unfair competition theory.
- State unfair competition and consumer protection laws could apply to organic aquaculture claims. Plaintiffs have asserted such claims in a variety of states, and courts have allowed them to proceed in the context of personal care products. While uncertain, it is possible that courts would also allow similar claims for organic seafood.

These findings suggest that entities marketing “organic” seafood may face a variety of legal challenges to the sale of their products. As a result, entities considering labeling “organic” aquaculture products—and the markets selling these products—must weigh these risks carefully.

statements. But these statements do not imply that the product was produced in accordance with the USDA NOP standards nor that the producer is certified under the NOP standards.”).