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May 7, 2008

State of Alabama
Office of the Attorney General
Consumer Affairs Section
11 South Union Street
Montgomery, Alabama 36130

Re: Fish & Seafood Labeled and Sold in the United States as Organic

To Whom It May Concern:

As described below, the Center for Food Safety (“CFS”)¹ and Food & Water Watch (“FWW”) believe that the presence of seafood in Alabama marketed and/or labeled as “organic” violates the Alabama Deceptive Trade Practices Act. Accordingly, CFS and FWW request that the state’s Attorney General take immediate action to enforce its consumer protection laws to protect consumers from misleading and mislabeled products by taking action consistent with the state’s consumer protection statute including, but not limited to:

- (A) Issuing a publicly available legal opinion explaining the scope of the state’s enforcement authority concerning use of the term “organic” on product labels and labeling. This document should be published on the Attorney General’s website.
- (B) Commencing enforcement by the state Consumer Protection Division of the state’s consumer protection laws against those misleadingly using the term “organic” through restraining orders, injunctive or declaratory relief, and/or monetary penalties.

¹ The CFS is a non-profit, membership organization located at 660 Pennsylvania Ave., SE, Suite 302, Washington, DC 20003. The organization works to protect human health and the environment by curbing the proliferation of harmful food production technologies and by promoting organic and other forms of sustainable agriculture. It is supported by 45,000 members of the public concerned about environmental and food safety issues including the implementation of the National Organic Program. See generally www.centerforfoodsafety.org.

- (C) Detailing private citizens’ rights to seek remedial measures under state’s consumer protection laws against those complicit in deceiving consumers with misleading and mislabeled “organic” products, including rescinding transactions, recovering damages, and obtaining declaratory and/or injunctive relief. These rights should be published on the attorney General’s website.

DISCUSSION

I. The Term “Organic”

Congress passed the Organic Foods Protection Act (“OFPA”) with a purpose of assuring consumers that organically produced products would meet a consistent standard.² Congress further recognized that even slight departures from consistent use of the term “organic” would yield confusion among consumers.³ Thus, in order to use the word “organic” on a food label or in marketplace information, the National Organic Program (“NOP”) has held that the product must comply with existing U.S. regulations. These regulations set standards for labeling agricultural products with the word “organic.”⁴ Additionally, the U.S. Department of Agriculture (“USDA”) intends to enforce against misuses of the word “organic,” stating that “we intend to monitor the use of the term ‘organic’ . . . [and if it is] used on product packages to represent ‘organic’ when the products are not produced to the requirements of this regulation, we will proceed to restrict their use.”⁵

Consistent with this expression of enforcement intent, the agency’s implementing regulations state that “no claims, statements, or marks using the term ‘organic’ or display of certification seals, other than as provided in this regulation may be used.”⁶ To further drive home this point, the OFPA implementing regulations note that “food products that are not organically produced and handled cannot be modified, described, or identified with the term ‘organic’ on any package pane or market information in any way that implies the product is organically produced.”⁷ Congress recognized the breadth of this enforcement power by providing the USDA with authority to levy civil and criminal penalties against “any person who knowingly sells or labels a product as organic.”⁸

² 7 U.S.C. §6501(2); See House Conf. Rep. No 101-916, 1990 U.S.C.C.A.N. 5700 (adopting House version of legislation for the purposes of “assur[ing] consumers that organically produced products meet a consistent standard”); 101 Cong. Rec. H569 (daily ed. Mar. 1, 1990) (statement of Rep. DeFazio) (a goal of the OFPA is to “set standards for use of the word ‘organic’ on foods.”).

³ See, e.g., Sen. Rep. No. 101-357, 1990 U.S.C.C.A.N. 4943 (discussing that even minor differences in standards create an array of “organic” labels that cause consumer confusion).

⁴ 65 Fed. Reg. 80548, 80577, 80576/3 (Dec. 21, 2000) (“[T]he term “organic” may be used only on labels and in market information as a modifier of agricultural products and ingredients that have been certified as produced and handled in accordance with these regulations”).

⁵ 65 Fed. Reg. 80548, 80580 (Dec. 21, 2000)(emphasis added).

⁶ Id. at 80576/1.

⁷ Id.

⁸ 7 U.S.C. §6519(a).

II. Congress Has Not Implemented Regulations for Labeling Seafood “Organic.”

The OFPA was passed to establish organic standards for all livestock, including “fish used for food.”⁹ Congress recognized, however, that standards for aquaculture did not yet exist.¹⁰ The National Organic Standards Board (“NOSB”) made a final recommendation for initial aquaculture regulations on March 29, 2007.¹¹ Despite completion of these recommendations, the NOP has not initiated any rulemaking to adopt in whole or part the NOSB recommendations. As a result, there are still no regulatory standards for seafood and no organic certification organization can be accredited to certify aquatic animal production as “organic.”¹²

III. Many Seafood Products Are Being Misabeled and Marketed as “Organic.”

Despite the absence of regulatory standards for livestock that are aquatic animals, seafood is currently being sold and marketed in the U.S. as “organic” over the Internet, in print advertisements, on labels and in point-of-sale displays. There is no shortage of companies that are marketing seafood in the U.S. as “organic.”¹³ CFS has provided examples of these “organic” marketing claims in Appendix A. Many of these companies marketing or labeling aquatic animal products in U.S. markets as “organic” are selling products certified as “organic” by the following certifying agencies: Naturland E.V., Organic Food Federation, Soil Association Certification Ltd. CFS’s limited ability to fully survey the marketplace suggests that there are more companies marketing such products and certifiers providing such certification services. CFS has provided contact, production and certification information for those companies it has identified in Appendix B.

IV. Consumers Are Misled by this Labeling, Believing Use of the Word “Organic” Means the Product is USDA Approved.

Since the passage of the OFPA and the NOP’s completion of implementing regulations, consumers have come to understand the term “organic” to signify that the agricultural product was grown and raised according to certain practices which reflect a greater emphasis on sustainable agriculture, environmentalism and public health.¹⁴ Customers look for foods labeled

⁹ 7 U.S.C. §6502(11).

¹⁰ Sen. Rep. No. 101-357, 1990 U.S.C.C.A.N. 4946 (“The Committee recommends as well, that over time, USDA and the Organic Standards Board develop standards for aquaculture products.”)

¹¹ NOSB, Aquaculture Standards Recommendation (March 29, 2007) available at <http://www.ams.usda.gov/nosb/FinalRecommendations/Mar07/NOSB%20Final%20Aquaculture%203-29-07.pdf> (last visited May 5, 2007).

¹² Recommendations made by the NOSB are not official policy until they are approved and adopted by USDA. See NOSB website available at <http://www.ams.usda.gov/nosb/index.htm> (last visited May 8, 2007).

¹³ Companies marketing seafood as “organic” include Bio Centinela, Black Pearl, Blue Horizon, Blue Origins, Creative Salmon, Delicious Organics, Dom International Ltd., EcoFish, Eighth Sea, Hannaford Supermarkets, Harris Teeter Supermarkets, Johnson Seafarms. Marine Harvest, Martin International Corp., OceanBoy Farms, Polar Seafood, LLC, Sustainable Seafood, and Wild Oats Markets.

¹⁴ See, e.g., Strohlic, California Institute of Rural Studies, “Regulating Organic: Impacts of the National Organic Standards on Consumer Awareness and Organic Consumption Patterns (Dec. 2005) available at http://www.cirsinc.org/docs/Regulating_Organic.pdf (last visited May 30, 2007) (USDA, AMS funded study finding that 79.1% of consumers that have seen the USDA organic seal reported increased confidence in the integrity of organic products as a result of the U.S. national organic standards).

as “organic” under the assumption that the word reflects the underlying production and handling history of the food.¹⁵ Many consumers, believing that organic foods are environmentally, ethically, or nutritionally superior, actively seek out and pay a premium for foods labeled as “organic.”¹⁶ The NOP recognizes that consumers look for the word “organic” when purchasing food and, in a consumer outreach brochure, stated that “only food labeled ‘organic’ has been certified as meeting USDA organic standards.”¹⁷

Seafood is no different. According to a consumer study undertaken by New Jersey Department of Agriculture, 72% of consumers from a variety of U.S. states indicated that they believed “organic” seafood to be “better” than conventionally farm-raised seafood.¹⁸ This interest in “organic” seafood resulted from distrust of conventional aquaculture practices, a desire for chemical, pesticide, and antibiotic-free food, a belief that the food is “ecologically sound,” and an interest in higher animal welfare standards.¹⁹

Marketers are well aware of consumers’ expectations of the “organic” label. The data show that consumers rely on the use of the term “organic” in order to obtain perceived benefits from seafood products produced under exacting “organic” food regulations. Absent such regulations, it is clearly misleading to consumers to allow seafood to be marketed or labeled as “organic” when there are no assurances that the production standards expected by consumers were met.²⁰

V. The USDA Is Allowing Seafood To Be Mislabeled as “Organic.”

As justification for its inaction on misleading “organic” seafood labels, NOP has interpreted the OFPA as providing limited authority to police the use of only the “USDA Organic” seal for the agricultural products currently regulated.²¹ The NOP incorrectly assumes

¹⁵ O’Dierno, et al., N.J. Dept. of Agriculture, The United States Market for Organic Seafood (hereinafter NJ Study) (Feb. 2006) at 23 available at <http://www.jerseyseafood.nj.gov/OrganicSumm.pdf> (32% say they are committed to buying organic; 46% say they purchase from time to time).

¹⁶ Greene, USDA, Economic Research Service, Economics of Food Labeling at 26-29 available at <http://www.ers.usda.gov/publications/aer793/aer793g.pdf> (last visited May 8, 2007).

¹⁷ National Organic Program, “Organic Food Standards and Labels: The Facts” available at <http://ams.usda.gov/nop/Consumers/brochure.html> (last visited May 8, 2007).

¹⁸ O’Dierno, New Jersey Dept of Agric, Identification and Evaluation of viable Market Opportunities for Organically-Grown Aquatic Products (NJ Study) (Feb. 2006) at 24 available at <http://www.jerseyseafood.nj.gov/Organic%20AquaFocusReport.pdf> (last visit May 30, 2007).

¹⁹ *Id.* at 25.

²⁰ Indeed, the California legislature has found that the labeling of seafood as “organic” without federal standards misleads consumers. In 2005, the state’s legislature recognized that “[t]here are currently no standards in place for what organic seafood must mean and, at this time, any seafood can be claimed as organic. This is a serious deviation from what consumers expect from other organic food that meets strict federal standards for organic production and is verified by an organic certifier.” In response, the legislature passed SB 730 which provides in pertinent part that “[n]o 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” The measure was signed into law on October 7, 2005. The legislation is available at http://info.sen.ca.gov/cgi-bin/postquery?bill_number=sb_730&sess=PREV&house=B&site=sen (last visited May 8, 2007).

²¹ NOSB Meeting, Transcript of Proceeding, Statement of Barbara Robinson at 63-64 (Oct 14, 2004) available at http://www.ams.usda.gov/nosb/transcripts/Oct2004/10_14_04.pdf (last Visited May 5, 2007) (denying that USDA

that the requirements of the OFPA extend only as far as products produced under the established regulations and bearing the USDA organic seal.²² As discussed at length supra, the organic program was established to enforce the use of the term “organic” on all products and not be limited to products using the USDA organic seal. The NOP is well aware of the existence of seafood products that are improperly using the term “organic,” but has not acted to prevent consumer fraud and enforce the OFPA’s prohibitions.

VI. Mislabeling Seafood as “Organic” Deceives Consumers.

The average consumer believes that the word “organic” on food products reflects consistent methods and standards of production. Consumers rely on this belief in making purchasing decisions that may include paying a price premium for “organic” seafood they believe meets these standards. This deception will continue until the use of the word “organic” is restricted to those goods that have been actually produced in accordance with USDA organic standards for aquatic animals.

In the absence of U.S. organic aquaculture regulations, consumers are left to assume that U.S. “organic” seafood is being produced consistent with current livestock standards or the recent NOSB aquaculture recommendations. However, these seafood products labeled as “organic” are being produced in ways that conflict with what Americans expect of “organic” food. In particular, there are at least four areas where consumers are misled by use of the term “organic”: (1) antibiotic administration; (2) use of parasiticides; (3) use of certified organic feed; and (4) the accommodation of the animal’s natural behavior.

1. Antibiotics

Under the OFPA, the use of antibiotics is a prohibited animal production practice.²³ As a result, U.S. consumers have come to expect that organic food will be free of antibiotics and this belief extends to “organic” seafood.²⁴ However, a number of the “organic” seafood products are being produced under foreign standards that allow the use of antibiotics. For example, some marketed “organic” seafood is being certified by the Organic Food Federation (OFF) and the U.K. Soil Association (Soil Association), which permit the use of antibiotics in aquaculture.²⁵ Thus, consumers purchasing “organic” fish certified by either of these certification agents are being misled as to the use and presence of antibiotics in their seafood.

has legal authority to restrict use of the word “organic).

²² Of additional concern, this agency enforcement interpretation has also been recognized by the NOSB. NOSB, Livestock Committee, Aquaculture Standards, Feb 20, 2007 at 1.

²³ 7 U.S.C. §6509(c)(3).

²⁴ NJ Study, supra, at 28.

²⁵ Pursuant to 7 C.F.R. §205.500(c), the NOP allows agricultural products to be exported to the U.S. if the products are certified by non-NOP accredited foreign certification agents so long as those agents are operating under recognition of foreign equivalency. The NOP has entered into an equivalency agreement with the United Kingdom. See <http://www.ams.usda.gov/nop/NOP/TradeIssues/UnitedKingdom.html> (last visited May 8, 2007). OFF and the Soil Association operate under this equivalency agreement. See <http://www.defra.gov.uk/farm/organic/standards/certbodies/approved.htm> (last visited May 8, 2007). Given that no U.S. aquaculture standards exist, the NOP recognition and equivalency determinations cannot cover aquaculture production.

2. Parasiticides

Under the NOP regulations the use of parasiticides is limited to non-slaughter stock.²⁶ Similar to the situation with antibiotics, consumer expectation is that “organic” seafood is not produced using any such chemicals.²⁷ Regardless, seafood is being labeled and sold in the U.S. as “organic” via foreign certification allowing production with parasiticides. For example, seafood marketed as “organic” that has been certified by the Soil Association or OFF is permitted to utilize chloramines T,²⁸ a chemical parasiticide that is not found on the NOP list.²⁹

3. Feed Requirements

The OFPA requires that, in order to be certified as organic, livestock must be fed “organically produced feed that meets the requirements of this title.”³⁰ Nonetheless, seafood is being labeled and marketed as “organic” in U.S. markets without meeting the 100% organic feed requirement.³¹ A number of the foreign certifying agents have certified seafood products now appearing in the U.S. that do not require their seafood-based feed ingredients to be certified organic.³² These feed ingredients are usually required to come from trimmings of wild fish caught for human consumption.³³ It is clear, however, that under existing U.S. regulations there are currently no organically caught wild fish. Indeed, the NOSB has deferred setting standards for the organic certification of wild seafood, wild fish, and wild aquatic animals in fish meal and fish oil for organic aquatic animal production.³⁴ Therefore, consumers relying on the assumption that seafood labeled as “organic” meets the basic standards of the current U.S. regulatory scheme are being misled.

²⁶ 7 C.F.R. §205.238(b)(1)-(2).

²⁷ NJ Study, *supra* at 25.

²⁸ See generally <http://www.fishdoc.co.uk/treatments/chloramine-T.htm> (last visited May 8, 2007) (briefly describing the drug).

²⁹ See UK Soil Association Organic Aquaculture Standards, rule 30.10.12 (Jan. 2007); Organic Food Federation Aquaculture Standards 6a Salmonids Version 4, section 1.11.10(b) (Jun. 2004); see also 7 C.F.R. 205.603(12) (limited use of parasiticides in organic livestock production).

³⁰ 7 U.S.C. §6509 (c)(1).

³¹ A federal court has interpreted these provisions to require organic livestock to have a fed ration that is 100% organic. See *Harvey v. Johanns*, 396 F.3d 28, 43, n.7 (1st Cir. 2005).

³² See e.g. UK Soil Assn.’s Aquaculture Standards, rule 30.8.2 (Jan. 2007); Organic Food Federation Aquaculture Standards, rule 1.9(Jun. 2004); and Naturland Standards for Organic Aquaculture, Section II, provision 8 (Jan. 2006).

³³ *Id.*

³⁴ See NOSB, Aquaculture Standards Recommendation (March 29, 2007) at 2-3 available at <http://www.ams.usda.gov/nosb/FinalRecommendations/Mar07/NOSB%20Final%20Aquaculture%203-29-07.pdf> (last visited May 8, 2007).

4. Accommodation of Natural Behavior

Many U.S. consumers have come to associate the word “organic” with more humane living conditions for animals.³⁵ Current U.S. livestock regulations reflect this belief, requiring that a “producer of a livestock operation must establish and maintain livestock living conditions which accommodate the health and natural behavior of animals.”³⁶ For example, many non-USDA “organic” certification standards do not accommodate the free movement required by anadromous fish in order to migrate and spawn per their natural behavior. As such, to the extent that consumers seek the “organic” label in order to purchase seafood produced in a manner consistent with the natural behaviors of the fish species, they are being misled by current labeling.

VII. USDA Has Refused Enforcement Authority, so the States Must Take Action

CFS petitioned the USDA and the Federal Trade Commission (“FTC”) on July 17, 2007 to enforce the OFPA, restrict the U.S. marketing and sale of seafood labeled “organic” by bringing action against producers, certifying agents and others engaged in this deceptive and illegal misuse of the term “organic,” and protect consumers from the misleading use of “organic” food labels. Although discussions have taken place, both the USDA and the FTC have failed to take action on this matter. This inaction raises consumer protection issues for several reasons. First, consumers are being induced to purchase agricultural products labeled as “organic” that do not meet U.S. statutory and regulatory requirements. Second, continued misleading use of an “organic” label on seafood will lead to more deceptive “organic” labeling on other products. Third, continued allowance of “organic” labeling undermines the integrity of those products accurately labeled as “organic” and allows producers to enjoy the price premium connected to organic foods. Ultimately, if the “organic” label ceases to be premised upon a consistently and rigorously enforced standard, the entire organic marketplace is at risk.

As a consumer of seafood and fish improperly labeled as “organic,” your state must take action to enforce its own consumer protection laws and prevent the ongoing deception of its residents. The Alabama Deceptive Trade Practices Act, Ala. Code § 8-18-1, *et seq.* (“Act”) regulates the conduct of businesses engaged in potentially deceptive trade practices that are harmful to consumers in Alabama. Specifically, § 8-18-5 of the Act declares “deceptive acts or practice in the conduct of any trade or commerce . . . unlawful [including] (2) Causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services.; (3) Causing confusion or misunderstanding as to the affiliation, connection, or association with, or certification by another, provided that this section shall not prohibit the private labeling of goods or services.; . . . (5) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or qualities that they do not have or that a person has sponsorship, approval, status, affiliation, or connection that he or she does not have; . . . (7) Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another.; . . . (27) Engaging in any other unconscionable, false, misleading, or deceptive act or practice in the conduct of trade or commerce.” The state’s consumer protection statute clearly prohibits the inaccurate

³⁵ NJ Study, *supra* at 25.

³⁶ 7 C.F.R. §205.239(a).

labeling of fish and seafood products described above, and the Attorney General's office must take action to restrict the harm caused to Alabama consumers by these deceptive and misleading practices.

Accordingly, CFS and the undersigned petitioners specifically request that the state's Attorney General take the following actions, including but not limited to:

- (A) Issuing a publicly available legal opinion explaining the scope of the state's enforcement authority concerning use of the term "organic" on product labels and labeling. This document should be published on the Attorney General's website.
- (B) Commencing enforcement by the state Consumer Protection Division of the state's consumer protection laws against those misleadingly using the term "organic" through restraining orders, injunctive or declaratory relief, and/or monetary penalties.
- (C) Detailing private citizens' rights to seek remedial measures under state's consumer protection law against those complicit in deceiving consumers with misleading and mislabeled "organic" products, including rescinding transactions, recovering damages, and obtaining declaratory and/or injunctive relief. These rights should be published on the attorney General's website.

CONCLUSION

The Center for Food Safety and Food & Water Watch request an answer to this complaint within a reasonable time. Failure to respond within a reasonable time will be construed as constructive denial of the requests contained here and may require CFS to take further action.

Respectfully submitted,



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Attach.