

TECHNICAL SOLUTIONS TO A HUMAN PROBLEM: ORGANIC IMPORT REFORMS IN THE UNITED STATES AND EU ARE INADEQUATE TO PREVENT FRAUD

JACOB MOHR*

ABSTRACT

This paper argues that the current European Union and United States regulations concerning organic imports do not provide adequate safeguards against organic fraud, and that the recently implemented EU regulation requiring an electronic certificate of inspection¹ and newly proposed legislation in the United States for the “modernization and improvement of [organic] international trade technology systems,”² will not provide those adequate safeguards. This paper will compare and contrast the EU and U.S. third-country organic certification schemes, their import procedures, the gaps in regulatory coverage that allow fraud to occur in both markets, and how the proposed solutions to cover these gaps are inadequate.

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* Jacob Mohr is a J.D Candidate at the University of Wisconsin Law School.

¹ Commission Implement Regulation 2016/1842/EU Amending Regulation 1235/2008 as Regards the Electronic Certificate of Inspection for Imported Organic Products and Certain Other Elements, and Regulation 889/2008 as Regards the Requirements for Preserved or Processed Organic Products and the Transmission of Information, O.J. (L 282) 19.

² Organic Farmer and Consumer Protection Act of 2017, H.R. 3871, 115th Cong. (2017).

INTRODUCTION

Organic food has moved from a niche market to a more prevalent component of the average consumer's diet. Annual per capita expenditure on organic products in the United States has risen from \$15.00 in 1995³ to \$133.00 in 2016.⁴ The EU has seen a similar increase, with annual per capita expenditure on organic products growing from roughly \$13.70 in 1995 to around \$50.00 in 2014.⁵ Consumers in the United States are willing to pay more for organic products, sometimes substantially more. Depending on the product, the price difference between organic and conventional food can range from 7 percent (spinach) to 82 percent (eggs).⁶ In the EU, organic prices range from being 15 percent to 30 percent higher than those of the same conventional products.⁷ Consumers cite the perceived healthiness of organic products and worries about genetically modified organisms and pesticide residue as motivating factors for their organic purchases.⁸

Organic products present a difficult regulatory challenge. If you go to the supermarket and select a pound of organic tomatoes, but write the conventional tomato stock keeping unit number on the twisty-tie, the cashier would be none the wiser. There are no visual differences between a conventional tomato and an organic tomato. The same oversight issue arises at customs. Tons of conventional corn will look no different than tons of organic corn. An organic certificate issued by an accredited certifying body is the only way to quickly distinguish between organic

³ Gary Thompson, *International Consumer Demand for Organic Foods*, 10 HORTTECHNOLOGY 663, 664 (2000).

⁴ Press Release, Organic Trade Ass'n, Robust Organic Sector Stays on Upward Climb, Posts New Records in U.S. Sales (May 24, 2017), <https://www.ota.com/news/press-releases/19681>. The organic food market in the United States was worth \$43 billion, whereas the population of the United States in 2016 was estimated at 324.1 million. Thus dividing \$43 billion by 324.1 million is \$132.60. *See id.*; POPULATIONPYRAMID.NET, UNITED STATES OF AMERICA 2016, <https://www.populationpyramid.net/united-states-of-america/2016/> (last visited Oct. 2, 2018).

⁵ Thompson, *supra* note 3; INT'L FED'N OF ORGANIC AGRIC. MOVEMENTS EU GROUP (IFOAM), ORGANIC IN EUROPE: PROSPECTS AND DEVELOPMENTS 28 (2016).

⁶ Andrea Carlson, *Investigating Retail Price Premiums for Organic Foods*, AMBER WAVES (May 24, 2016), <https://www.ers.usda.gov/amber-waves/2016/may/investigating-retail-price-premiums-for-organic-foods/>.

⁷ Niamh Michail, *Europe's Struggle to Match Organic Supply and Demand—Without Compromising Standards*, FOODNAVIGATOR.COM (Dec. 2, 2016), <https://www.foodnavigator.com/Article/2016/12/02/Europe-s-struggle-to-match-organic-supply-and-demand-without-compromising-standards>.

⁸ *See* CARY FUNK & BRIAN KENNEDY, PEW RESEARCH CENTER, THE NEW FOOD FIGHTS: U.S. PUBLIC DIVIDES OVER FOOD SCIENCE 34–40 (2016).

and conventional products. Tests for banned pesticides and herbicides are not performed on all imported crops and foods; upon import to the United States or EU, inspections concerning the organic nature of the goods are typically limited to an examination of the organic certificate accompanying the goods, except when goods originate in certain countries with an increased risk of fraud.⁹ Overall, only 1 percent of food imports are inspected upon entry to the United States.¹⁰

A further wrinkle is added when organic products require organic inputs. For example, organic dairy products, organic meat, and organic eggs all require organic feed for the livestock. Inspectors of organic steak can test for banned hormones, antibiotics, and preservatives, but these tests cannot discern if the cow consumed genetically modified feed.¹¹ Organic milk can be tested for the presence of linoleic acid, which can indicate if the cow was grazing on grass as required by organic standards,¹² but if the rest of the feed consumed by the cow was genetically modified, it will not be evident in the milk.¹³ Pesticides can appear in milk, but the USDA only tests milk for pesticides periodically.¹⁴ An on-site inspection of the farm can confirm whether the animals are allotted the required amount of space, but only a laboratory test of the feed can determine whether their feed is truly organic.¹⁵ On-site inspectors will review the organic producer's records

⁹ USDA, OFFICE OF INSPECTOR GENERAL, AUDIT REPORT 01601-0001-21, NATIONAL ORGANIC PROGRAM INTERNATIONAL TRADE ARRANGEMENTS AND AGREEMENTS 8 (2017) [hereinafter OIG AUDIT 2017]; European Comm'n, Directorate-General for Agric. & Rural Dev., *Communication Guidelines on Additional Official Controls on Products Originating from Ukraine, Kazakhstan and Russian Federation*, at 3 (Nov. 29, 2016), https://ec.europa.eu/agriculture/organic/sites/orgfarming/files/guidelines_addoffctrl_ukraine_russian_federation_and_kazakhstan_final.pdf.

¹⁰ James Andrews, *IAFP 2015: Interview with Mitchell Weinberg, CEO of Food Fraud Firm INSCATECH*, CORNUCOPIA INST. (Aug. 28, 2015), <https://www.cornucopia.org/2015/08/iafp-2015-interview-with-mitchell-weinberg-ceo-of-food-fraud-firm-inscatech/>.

¹¹ Leo Benedictus, *How Can You Tell If Your Meat Is Organic?*, GUARDIAN, May 15, 2006.

¹² Peter Whoriskey, *Why Your 'Organic' Milk May Not Be Organic*, WASH. POST, May 1, 2017.

¹³ "In studies on animals fed genetically modified soya, maize and cottonseed, transgenic plant DNA has not been detected in eggs, milk and blood." M M. De Giacomo et al., *Carry-over of DNA from Genetically Modified Soybean and Maize to Cow's Milk*, 25 J. ANIMAL & FEED SCIS. 109-15 (2016).

¹⁴ USDA, PDP SPECIAL PROJECTS, <https://www.ams.usda.gov/datasets/pdp/pdp-special-projects>.

¹⁵ Miles McEvoy, *Organic 101: Strengthening Organic Integrity Through Increased Residue Testing*, USDA BLOG (Feb. 20, 2013), <https://www.usda.gov/media/blog/2013/02/20/organic-101-strengthening-organic-integrity-through-increased-residue-testing>.

of inputs to verify that only certified organic inputs were used,¹⁶ but organic certifiers in both the United States and EU are required to take samples for residues from only 5% of the operations they certify.¹⁷ Thus, unless samples are taken, the record of organic certificate accompanying an input is the only evidence of the organic nature of an input.

Organic regulations on the production of organic food impose a holistic regime on all stages of production. Organic farms and other operations are not allowed to use banned substances or production methods in order to preserve soil health, protect animal welfare, reduce the use of harmful pesticides or herbicides, and safeguard biodiversity.¹⁸ In the United States, organic production is defined in Title 7 of the Code of Federal Regulations as: “[a] production system that is managed in accordance with the Act and regulations in this part to respond to site-specific conditions by integrating cultural, biological, and mechanical practices that foster cycling of resources, promote ecological balance, and conserve biodiversity.”¹⁹ The EU legislation setting forth organic regulations has a similar definition:

Organic production is an overall system of farm management and food production that combines best environmental practices, a high level of biodiversity, the preservation of natural resources, the application of high animal welfare standards and a production method in line with the preference of certain consumers for products produced using natural substances and processes.²⁰

Consumers’ willingness to pay a premium for organic goods is linked to their belief that the production systems utilized are sustainable, healthy, and humane.²¹

¹⁶ Miles McEvoy, *Organic 101: Ensuring Organic Integrity Through Inspections*, USDA BLOG (Feb. 26, 2014), <https://www.usda.gov/media/blog/2014/02/26/organic-101-ensuring-organic-integrity-through-inspections>.

¹⁷ European Comm’n, Directorate-General for Health & Food Safety, *Pesticide Residue Control in Organic Production*, at 1 (May 31, 2017); 7 C.F.R. § 205.670 (2018).

¹⁸ See M. Sligh & T. Cierpka, *Organic Values*, in *ORGANIC FARMING: AN INTERNATIONAL HISTORY* 30–31 (William Lockertz ed., 2007).

¹⁹ 7 C.F.R. § 205.2 (2018).

²⁰ Council Regulation 834/2007/EC on Organic Production and Labelling of Organic Products and Repealing Regulation 2092/91, 2007 O.J. (L 189) 1 [hereinafter EU Org. Reg. 834].

²¹ Lydia Zepeda & Jinghan Li, *Characteristics of Organic Food Shoppers*, 39 J. OF AGRIC. & APPLIED ECONS. 17–28, 18 (2007).

I. MARKET BACKGROUND

The markets for organic food in the EU and the United States have grown considerably since those two markets first passed legislation regulating organic food production. When the United States passed the Organic Foods Production Act²² in 1990, the organic food market was worth roughly \$1 billion.²³ In 2016, U.S. organic food sales surpassed \$43 billion.²⁴ In 1997, six years after the European Economic Community adopted EEC No. 2092/91, a regulation on organic production and labelling of organic products,²⁵ the organic market in western Europe was worth 5.3 billion euros.²⁶ By 2015, it had grown to 27.1 billion euros²⁷ and is not expected to slow down.²⁸

Domestic production in both countries has not been able to keep pace with this rapid increase in consumer demand. The EU allows and encourages member states to provide subsidies to farmers who are converting their production from conventional to organic,²⁹ but these incentives have not been able to spur enough farmers to convert to organic. Between 2005 and 2014, organic farmland increased in the EU by 60 percent,³⁰ but organic food sales during the same timeframe grew by 116 percent.³¹ In the United States, where government-funded conversion incentives exist as well, farmland conversion rates have held

²² 7 U.S.C. § 6501 (2012).

²³ CATHERINE GREENE & CAROLYN DIMITRI, USDA, AGRICULTURE INFORMATION BULLETIN NO. 777: RECENT GROWTH PATTERNS IN THE U.S. ORGANIC FOODS MARKET 3 (2002).

²⁴ Organic Trade Ass'n, *supra* note 4.

²⁵ Council Regulation 2092/91/EEC on Organic Production of Agricultural Products and Indications Referring Thereto on Agricultural Products and Foodstuffs, 1991 O.J. (L 198) 1.

²⁶ Thompson, *supra* note 3.

²⁷ Katy Askew, *IFOAM EU Talks Getting 'Organic on Every Table'*, FOODNAVIGATOR.COM (Sept. 21, 2017), <https://www.foodnavigator.com/Article/2017/09/21/IFOAM-EU-talks-getting-organic-on-every-table>.

²⁸ *Id.*

²⁹ THÜNEN INST. OF FARM ECONS., EVALUATION OF LEGISLATION ON EU ORGANIC FARMING 31 (J. Sanders ed., 2013).

³⁰ IFOAM, *supra* note 5, at 45.

³¹ *Id.* at 12.

at a steady 1 percent per year since 2008,³² while the organic food market increased at an average yearly rate of 9.3 percent.³³

This ever-increasing production gap has led producers who rely on organic inputs to turn to imports to meet their demand and to avoid the high domestic prices created by production shortages. The United States has seen a dramatic increase in organic corn and soybean imports over the past five years; imports of each have grown respectively at an average rate of 63.6 percent and 29.1 percent since 2012,³⁴ much to the chagrin of American organic farmers,³⁵ who have seen prices drop by “more than 25 percent.”³⁶ Since “almost no relevant data exists”³⁷ concerning EU organic imports and exports, it is difficult to quantify how production lag has impacted import levels in the EU. Denmark, the only EU country that distinguishes between organic and conventional imports and exports, saw a quadrupling of the value of organic imports between 2005 and 2014, from 400 million Danish crowns to 1.9 billion.³⁸

Suspensions have been raised concerning the rapidity of farmland conversion from conventional to organic in countries that export to the EU and the United States.³⁹ To become certified organic in the United States, farms must undergo a three-year transition period.⁴⁰ The EU

³² Peter Golbitz, *Organic Production Shortfall in U.S. Encourages Imports, Creates Risk*, OILSEED & GRAIN NEWS, (June 13, 2017), <http://www.oilseedandgrain.com/single-post/2017/06/13/Organic-Production-Shortfall-in-US-Encourages-Imports-Creates-Risk>.

³³ Sales in 2008 were \$21.1 billion. USDA, ECON. RESEARCH INST., MARKETING U.S. ORGANIC FOODS: RECENT TRENDS FROM FARMS TO CONSUMERS EIB-58 (2009). Sales in 2016 were \$43 billion: Organic Trade Ass’n, *supra* note 4. $9.3\%: 1.093 = \sqrt[8]{\$43 \text{ billion}/\$21.1 \text{ billion}}$.

³⁴ Golbitz, *supra* note 32.

³⁵ “‘If foreign producers are beating us at our own game, so be it. But, damn it, if they are bringing in crap that’s not properly certified, that’s not acceptable,’ said Hughes, whose farm produces the corn for Blue Farm organic corn chips.” Rick Barret, *All Foods Labeled Organic Aren’t Necessarily the Same; Suspensions Raised over Imports*, MILWAUKEE J. SENTINEL, Oct. 2, 2017.

³⁶ Peter Whoriskey, *The Labels Said ‘Organic.’ But These Massive Imports of Corn and Soybeans Weren’t*, WASH. POST (May 12, 2017), https://www.washingtonpost.com/business/economy/the-labels-said-organic-but-these-massive-imports-of-corn-and-soybeans-werent/2017/05/12/6d165984-2b76-11e7-a616-d7c8a68c1a66_story.html?utm_term=.78aae112c4f2.

³⁷ Helga Willer, Diana Schaack, & Julia Lernoud, *Organic Farming and Market Development in Europe and the European Union*, in THE WORLD OF ORGANIC AGRICULTURE, STATISTICS AND EMERGING TRENDS 234 (Helga Willer & Julia Lernoud eds., 2017).

³⁸ IFOAM, *supra* note 5, at 35.

³⁹ “‘Where did all this big production come from? Where are these organic farmers?’ Miles McEvoy, chief of the USDA’s organic program, said to a group of U.S. organic farmers earlier this year.” Whoriskey, *supra* note 36.

⁴⁰ 7 C.F.R. § 205.202(b) (2018).

requires a period of two years.⁴¹ As noted above, farmland conversion rates in the EU and the United States have been low, even with high domestic demand for organic goods. Turkey has not seen such limited organic growth; between 2008 and 2014, hectares certified as organic increased by 400 percent, with 56,000 new organic producers coming online in the same period.⁴² The United States Department of Agriculture (USDA) cautioned that “the integrity of organic farming, production, shipping and marketing is not always guaranteed”⁴³ in Turkey due to relabeling of goods, unapproved production methods, and fraudulent organic certificates.⁴⁴ The dramatic increase in organic farmland must be viewed with caution, and enhanced scrutiny is necessary to ensure that overworked organic certifiers are properly carrying out their duties.

II. REGULATORY FRAMEWORK

The EU and the United States have roughly similar organic certification procedures for both domestic and international producers and processors. A central authority creates organic standards, to which producers and processors conform during a transition period before being inspected by an accredited organic control body.⁴⁵ If the control body determines that the producer or processor has met the central authority’s organic standards, they will issue a certificate that allows the entity to market their goods as organic.⁴⁶ Both regulatory regimes allow accredited control bodies to certify producers and processors in third countries.⁴⁷ In addition, both regimes allow for equivalency arrangements that

⁴¹ Commission Regulation 889/2008/EC Laying Down Detailed Rules for the Implementation of Council Regulation 834/2007 on Organic Production and Labelling of Organic Products With Regard to Organic Production, Labelling, and Control, 2008 O.J. (L 250) 18.

⁴² USDA, GAIN REPORT TR6005, TURKISH ORGANIC MARKET OVERVIEW tbl.1 (2016).

⁴³ *Id.* at 4.

⁴⁴ *Id.*

⁴⁵ *Compare* Commission Regulation 889/2008/EC Laying Down Detailed Rules for the Implementation of Council Regulation 834/2007 on Organic Production and Labelling of Organic Products With Regard to Organic Production, Labelling, and Control, 2008 O.J. (L 250) 18 with 7 C.F.R. § 205 (2018).

⁴⁶ EUROPEAN COMM’N, AGRIC. & RURAL DEV., U.S.—EUROPEAN UNION ORGANIC EQUIVALENCE ARRANGEMENT: FREQUENTLY ASKED QUESTIONS AND ANSWERS, https://ec.europa.eu/agriculture/organic/sites/orgfarming/files/docs/body/faqs-eu-us-equivalence-2012_en.pdf.

⁴⁷ Commission Regulation 1235/2008/EC Laying Down Detailed Rules For Implementation of Council Regulation 834/2007 as Regards the Arrangements for Imports of Organic Products from Third Countries, 2008 O.J. (L 334) 25 [hereinafter EU Org. Import Reg. 1235]; 7 U.S.C. § 6505(b) (2012).

recognize organic regimes of third countries as equivalent to the importing country.⁴⁸ This allows for greater trade efficiency, as potential exporters do not have to adhere to potentially conflicting domestic and export market standards.

The government bodies tasked with overseeing organic production and trade have not grown apace with their markets. The National Organic Program (NOP), the organic regulatory body in the United States, has a mere thirty-five staffers to oversee the \$43 billion organic food market,⁴⁹ and fewer than ten of those are responsible for enforcement of organic regulations.⁵⁰ A recent audit of the NOP's import procedures discovered that there are no controls at U.S. ports of entry for ensuring compliance with NOP requirements.⁵¹

There is no centralized body actively monitoring the organic trade in the EU.⁵² The EU's Committee on Organic Production, comprised of representatives from Member States' agricultural ministries, passively relies on reports from Member States' organic control bodies—often sub-ministries within the larger agricultural ministries—to discover “irregularities” in the organic market.⁵³ Since an organic product can be sent to any Member State without any subsequent controls after it clears customs in the importing Member State,⁵⁴ a weak link in the organic oversight scheme of one Member State can place the entire EU market at risk of exposure to fraudulently labelled organic goods. Some Member State oversight bodies are woefully understaffed. For example, Ireland's Department of Agriculture, Food, and the Marine, charged with overseeing Ireland's 143 million euro organic food market,

⁴⁸ USDA, AGRIC. MKTG SERV., IMPORTING ORGANIC PRODUCTS INTO THE U.S. (2016), <https://www.ams.usda.gov/sites/default/files/media/Importing%20Organic%20Products%20Factsheet.pdf>; EUROPEAN COURT OF AUDITORS, AUDIT OF THE CONTROL SYSTEM GOVERNING THE PRODUCTION, PROCESSING, DISTRIBUTION AND IMPORTS OF ORGANIC PRODUCTS SPECIAL REPORT No. 9 ¶ 16 (2012) [hereinafter ECA AUDIT 2012].

⁴⁹ OIG AUDIT 2017, *supra* note 9, at 1 of AMS Response to OIG Audit.

⁵⁰ *Opportunities in Global and Local Markets, Specialty Crops, and Organics: Perspectives for the 2018 Farm Bill Before the S. Comm. on Agric, Nutrition, and Forestry*, 115th Cong. (2017) (statement of Kenneth A. Dallmier, President and C.E.O., Clarkson Grain Co., Inc.) *citing* USDA-AMS NATIONAL ORGANIC PROGRAM STAFF DIRECTORY REVISED 10/23/17, [http://www.ams.usda.gov/sites/default/files/NOP_Contacts\[1\].pdf](http://www.ams.usda.gov/sites/default/files/NOP_Contacts[1].pdf).

⁵¹ OIG AUDIT 2017, *supra* note 9, at 7 (“The lack of controls at U.S. ports of entry increases the risk that non-organic products may be imported as organic into the United States and could create an unfair economic environment for U.S. organic producers.”).

⁵² ECA AUDIT 2012, *supra* note 48, ¶ 12.

⁵³ *Id.* ¶ 30.

⁵⁴ *Id.* ¶ 78.

does not have any dedicated staff assigned to supervise organic food processors.⁵⁵

III. ORGANIC IMPORT FRAUD IS AN INCREASING PROBLEM

The high, unmet demand for organic products and the low-level of government oversight have created the incentives and conditions that are conducive to fraud. The United States and EU have experienced high profile cases of organic fraud. In May 2017, the *Washington Post* published an article exposing the “remarkable”⁵⁶ mid-ocean transformation of grain from conventional to organic while *en route* to the United States. Tons of soybeans and corn that were purchased from companies not certified for trade in organic goods at conventional prices in Ukraine and Romania, respectively, were sold at organic prices after being unloaded at various ports in the United States.⁵⁷ These grains made their way from their country of harvest through Turkey.⁵⁸ The *Washington Post* calculated that the three shipments amounted to 7% of the United States’s corn imports, and 4% of the organic soybean imports.⁵⁹ One month later, the USDA revoked the organic certification of one of the Turkish companies involved in shipping the fraudulent goods to the United States.⁶⁰

The EU has uncovered several cases of similarly remarkable transformations of conventional goods to organic. The Italian Financial Guard uncovered a ring of EU-based companies and organic certifiers that conspired to fraudulently label 700,000 tons of conventional goods as organic between 2007 and 2011.⁶¹ The counterfeit goods are estimated

⁵⁵ Seán McCárthaigh, *Audit: Some Foods Allowed [sic] Keep Organic Certification After Breaches*, IRISH EXAMINER (May 29, 2017), <http://www.irishexaminer.com/ireland/audit-some-foods-allowed-keep-organic-certification-after-breaches-451117.html>.

⁵⁶ Whoriskey *supra* note 36.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Aerin Einstein-Curtis, *USDA Pulls Organic Importer Certification from Turkish Company Beyaz Agro After Fraud Questions*, FEEDNAVIGATOR.COM (Jun. 19, 2017), <https://www.feednavigator.com/Article/2017/06/17/USDA-pulls-organic-importer-certification-from-Turkish-company-Beyaz-Agro-after-fraud-questions>.

⁶¹ Serge Massart, *How to Achieve Reliable Imports of Organic Products from Third Countries at Anti-Fraud Workshop: Improving Integrity of Organic Arable Production in Ukraine* (Kyiv, Sept. 24–25, 2015) at 5 (slides available at http://www.organic-integrity.org/fileadmin/afi/docs/afi10/08_Reliable-Imports-of-Organic-Products-from-third-Countries-into-EU.pdf).

to have had a value of 200 million euros.⁶² In Operation Green War, the Italian Ministry of Agriculture seized 1,500 tons of corn from Ukraine and thirty tons of soybeans from India that were allegedly fraudulently certified by organic control bodies in those countries.⁶³

High profile cases like these impact the organic sector's credibility and degrade consumer confidence. Organic consumers purchase organic products due to their mistrust of the safety of conventional goods and the perceived health and environmental benefits of organic agriculture.⁶⁴ Domestic organic producers cannot compete with fraudulent organic imports and may have to abandon their organic farming operations altogether due to the drastic decrease in prices in the last few years.⁶⁵ Consumers are at risk of ingesting substances banned from organic goods or paying more for food they assume is actually organic. Diminished consumer confidence will gut the organic market and may lead to negative environmental and health effects.

To ensure that organic goods are truly organic, more oversight needs to be exercised over the control bodies in charge of inspecting and certifying organic producers. Both the EU and the United States have identified problems with their oversight of certifiers,⁶⁶ but the new and proposed regulations do not take meaningful steps to address these issues. Instead, the purported solutions are aimed at increasing the use of electronic certificates, which does not address the problem of corrupt, inefficient, or lazy certifiers.

IV. EU ORGANIC REGULATORY STRUCTURE

The EU's organic regulations are set forth and enforced by a multitude of bodies. Three regulations lay out the structure and enforcement mechanisms for organic production, processing, retail, and importation.⁶⁷ Council Regulation (EC) 834/2007 requires that a committee be established to assist the European Commission with the

⁶² *Id.*

⁶³ *Id.* at 7.

⁶⁴ Zepeda & Li, *supra* note 21.

⁶⁵ "The rise of imports has helped drop [organic] prices by more than 25 percent." Whoriskey, *supra* note 36.

⁶⁶ OIG AUDIT 2017, *supra* note 9; ECA AUDIT 2012, *supra* note 48, ¶¶ 25–54.

⁶⁷ EU Org. Reg. 834, *supra* note 20; Commission Regulation 889/2008/EC, *supra* note 41; EU Org. Import Reg. 1235, *supra* note 47.

implementation of organic standards.⁶⁸ This committee—the Committee on Organic Production (COP)—cooperates with the European Parliament and Council to establish regulations for the Commission.⁶⁹ The Committee is comprised of representatives from each Member State, and coordinates with those representatives to work towards the consistent application of the EU’s organic regulations.⁷⁰

Each Member State determines how to structure its organic regulatory regime.⁷¹ Member States are given the choice to either accredit private control bodies, who then carry out the inspection and certification process; or, perform the inspections and certifications themselves through a public control body.⁷² Control body accreditation is performed under the supervision of a Member State’s competent authority, which is typically a division within the state’s department of agriculture or public health.⁷³ Accreditation must be performed by a public body; a State cannot delegate accreditation duties to private bodies.⁷⁴ Some States have only one competent authority for the whole country, while others have regional competent authorities.⁷⁵ For example, France, which has the fourth most organic acreage in the EU,⁷⁶ has only two competent authorities overseeing control bodies,⁷⁷ while Germany, with the third most organic acreage,⁷⁸ has one federal authority and fifteen state authorities conducting control body oversight.⁷⁹

⁶⁸ EU Org. Reg. 834, *supra* note 20, art. 37.

⁶⁹ COMMITTEE ON ORGANIC PRODUCTION, https://ec.europa.eu/agriculture/organic/eu-policy/eu-legislation/regulatory-committee_en (last visited Oct. 3, 2019).

⁷⁰ ECA Audit 2012 *supra* note 48, ¶ 8.

⁷¹ *Id.* ¶ 12.

⁷² *Id.*

⁷³ See Authorities in Charge of Organic Production and Labelling of Organic Products in the EU Member States: Information Submitted to the Commission According to Article 35 of Regulation 834/2007 and Article 94 of Regulation 889/2008 (Dec. 31, 2015), https://ec.europa.eu/agriculture/organic/sites/orgfarming/files/docs/body/list-of-competent-authorities-201512_en.pdf.

⁷⁴ Regulation 765/2008 of the European Parliament and of the Council of 9 July 2008 Setting out the Requirements for Accreditation and Market Surveillance Relating to the Marketing of Products and Repealing Regulation 339/93, 2008 O.J. (L 218) 30.

⁷⁵ Authorities in Charge, *supra* note 73.

⁷⁶ EUROPEAN COMM’N, COMM. ON AGRIC. & RURAL DEV., FACTS AND FIGURES ON ORGANIC AGRICULTURE IN THE EUROPEAN UNION (2016), http://ec.europa.eu/agriculture/rca/pdf/Organic_2016_web_new.pdf.

⁷⁷ Authorities in Charge, *supra* note 73.

⁷⁸ COMM. ON AGRIC. & RURAL DEV., *supra* note 76.

⁷⁹ Authorities in Charge, *supra* note 73.

The freedom given to Member States to structure their organic regimes as they see fit leads to a diverse range of regulatory schemes. Nineteen Member States have only private control bodies.⁸⁰ Spain, Poland, Malta, and Luxembourg have mixes of private and public control bodies, while Denmark, the Netherlands, Finland, Estonia, and Latvia have only public control authorities.⁸¹ The number of control bodies within a state can range from one to fifty.⁸² Control bodies may either have state-wide authority or be limited to conducting operations in only a certain region.⁸³

Private control bodies are independent third-party organizations that charge prospective organic operators for their inspection and certification services.⁸⁴ In markets where there are multiple control bodies, these organizations must compete for clients. This competition can lead to cost-cutting measures by control bodies in order to reduce costs and certification prices, which, in turn, impacts the overall quality of their oversight.

Competent authorities are tasked with ensuring that the control bodies are adequately performing their inspection, certification, and oversight duties.⁸⁵ Competent authorities rely on control body reports to determine if control bodies are fulfilling their statutory duties.⁸⁶ Control bodies are required, by EU law, to physically verify that the operators they have certified are in compliance with organic regulations once a year.⁸⁷ An EU audit of six Member States' competent authorities conducted in 2012 found the authorities did not receive adequate information from control bodies under their supervision to verify that these annual checks were being carried out.⁸⁸

⁸⁰ EUROPEAN COMM'N, COMM. ON AGRIC. & RURAL DEV., ORGANIC FARMING: CONTROL SYSTEM, https://ec.europa.eu/agriculture/organic/consumer-trust/certification-and-confidence/controls-and-inspections/control-system_en (last visited Nov. 16, 2017).

⁸¹ *Id.*

⁸² Malta has one control body, Spain has 44. European Comm'n, Directorate-General for Agric. & Rural Dev., *List of Control Bodies and Control Authorities in the Organic Sector* (June 19, 2017), https://www.ble.de/SharedDocs/Downloads/DE/Landwirtschaft/Oekologischer-Landbau/ListeKontrollstellenEU.pdf?__blob=publicationFile&v=1.

⁸³ *Id.*

⁸⁴ See EU Org. Reg. 834, *supra* note 20, art. 2(p).

⁸⁵ *Id.* art. 27.

⁸⁶ ECA AUDIT 2012, *supra* note 48, ¶ 29.

⁸⁷ EU Org. Reg. 834, *supra* note 20, art. 27, ¶ 3.

⁸⁸ ECA Audit 2012, *supra* note 48, ¶¶ 23, 29.

Certified organic products cannot be restricted from being marketed in other Member States if they meet the requirements set forth in EC Regulation 834/2007.⁸⁹ This can lead to issues if a Member State takes a more relaxed approach towards auditing control bodies, or if a control body within a Member State is not diligent in performing the requisite annual physical inspections of certified operators. Indeed, the *mélange* of organic control authorities and control bodies has led to the inconsistent application of standards depending on who is doing the inspection.⁹⁰

V. EU ORGANIC IMPORT REGIME

The EU's organic import regime is currently structured in two ways. First, organic products from non-EU countries that the EU has recognized as possessing equivalent organic standards to those of the EU may be admitted without being certified by a control body accredited by an EU Member State.⁹¹ The EU has recognized twelve countries as having equivalent organic production rules and equally effective control measures.⁹² An equivalence recognition effectively means that organic products from a third country can bear both the domestic organic logo and the EU's organic logo after undergoing only the domestic inspection and certification process.⁹³

Second, EU-recognized control authorities and control bodies in third countries can certify operators who can then export their products to the EU.⁹⁴ Control authorities and bodies abroad must submit an assessment report from an accreditation body or competent authority, as well as a detailed technical dossier demonstrating the methods and techniques they will utilize to ensure compliance with EU organic

⁸⁹ EU Org. Reg. 834, *supra* note 20, art. 34 (free movement of organic products).

⁹⁰ ECA Audit 2012, *supra* note 48, ¶ 35.

⁹¹ EU Org. Reg. 834, *supra* note 20, art. 33.

⁹² Argentina, Australia, Canada, Costa Rica, India, Israel, Japan, New Zealand, Republic of Korea, Switzerland, Tunisia, and the United States of America. Commission Regulation 1235/2008 Laying Down Detailed Rules for Implementation of Council Regulation 834/2007 as Regards the Arrangements for Imports of Organic Products from Third Countries, 2008 O.J. (L 334) 25, Annex IV.

⁹³ Press Release, USDA, Foreign Agric. Serv., U.S.–EU Organic Equivalence Trade Arrangement Opens New Markets (June 23, 2014), <https://www.fas.usda.gov/newsroom/us-eu-organic-equivalence-trade-arrangement-opens-new-markets>.

⁹⁴ EU Org. Reg. 834, *supra* note 20, art. 32.

production regulations.⁹⁵ Alternatively, exporters may be certified by a control body or control authority which the EU has recognized as equivalent.⁹⁶

Accredited control bodies, inspecting under EU standards or standards recognized as equivalent, may perform their inspections in a wide range of countries if they can prove they have complied with the laws of that country.⁹⁷ Control bodies may operate in just one third country, or in fifty.⁹⁸ The recognition of varying standards has led to nearly sixty different organic standards that allow for export to the EU.⁹⁹ This disparity in standards, however, will be eliminated in 2021 with the implementation of legislation that will require all organic operators to adhere to a single standard, unless there is a reciprocal agreement between the EU and operator's country.¹⁰⁰

Functionally, this system of equivalence recognition means that two organic operators in a third country without an equivalence agreement with the EU could be adhering to two different standards if they are certified by different control bodies.¹⁰¹ This mish-mash of control bodies and standards, combined with the inability of competent authorities in the EU to supervise control body activities, has enabled the levels of fraud discussed earlier.

Prior to October 19, 2017, organic products imported into the EU were required to have their certificate of inspection verified and endorsed by the customs authority of the importing country.¹⁰² The goods did not

⁹⁵ *Id.*

⁹⁶ *Id.* ¶ 3.

⁹⁷ EU Org. Import Reg. 1235, *supra* note 47, art. 4.

⁹⁸ Commission Implementing Regulation 2016/1330 Amending Regulation 1235/2008 Laying Down Detailed Rules for Implementation of Council Regulation 834/2007 as Regards the Arrangements for Imports of Organic Products from Third Countries, 2016 O.J. (L 210) 43, 53, 59.

⁹⁹ *Id.* See also European Commission Memoranda Memo/17/4686, The New Organic Regulation (Apr. 19, 2018).

¹⁰⁰ European Council Press Release 268/18, Organic Farming: New EU Rules Adopted (May 22, 2018).

¹⁰¹ Editorial Team, *Organic Farming: European Council Endorses New Rules*, FOOD INGREDIENTS FIRST (Nov. 21, 2017), <http://www.foodingredientsfirst.com/news/organic-farming-european-council-endorses-new-rules.html>.

¹⁰² Bundesanstalt für Landwirtschaft & Ernährung, *Guidelines for Imports of Organic Products from Third Countries into the European Union* (July 25, 2014), <https://www.oekolandbau.de/fileadmin/redaktion/dokumente/Bio-Siegel/Broschueren/GuidelinesImportsOrganicProductsThirdCountries.pdf>; USDA, FOREIGN AGRIC. SERV., GAIN REPORT NO. E17064, ELECTRONIC CERTIFICATE OF INSPECTION REQUIRED FOR EU ORGANICS TRADE (2018) [hereinafter GAIN REPORT].

have to be “directly accompanied” by the paper certificate, but they would not be released for circulation until the customs authority endorsed the certificate.¹⁰³ When a quantity of imported goods was to be split into smaller lots, an inspection certificate extract had to be issued for each lot.¹⁰⁴ Each extract required endorsement by the customs authority of the importing body.¹⁰⁵ These extracts must then have accompanied the lots, and a copy of the extract must have stayed with the original inspection certificate.¹⁰⁶

As of October 19, 2017, organic goods are no longer required to have a paper certificate, but must be registered with the EU’s Trade Control & Expert System (TRACES).¹⁰⁷ TRACES was implemented after swine flu swept through Europe in 1997.¹⁰⁸ TRACES allows agricultural products to be tracked across the EU, from producer to consumer, and makes recalls of suspected fraudulent or dangerous products much more efficient.¹⁰⁹ TRACES and its implications will be explored in depth below.

VI. U.S. ORGANIC IMPORT REGIME

In the United States, organic production is governed by the Organic Foods Production Act of 1990.¹¹⁰ The standards were established by the USDA via the Agricultural Marketing Service’s NOP.¹¹¹ The U.S. oversight regime is significantly less complex than that of the EU, as the NOP is the only competent authority in the United States. The NOP is responsible for organic control body accreditation in the United States and abroad.¹¹² All organic producers, unless in a country with a

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ GAIN REPORT, *supra* note 102.

¹⁰⁸ Directorate-General for Health and Food Safety, TRACES Annual Report 2014, (2014), https://ec.europa.eu/food/sites/food/files/animals/docs/traces_report_annual_2014_final_eng.pdf

¹⁰⁹ Commission Implementing Regulation 2016/1842 Amending Regulation 1235/2008 as Regards the Electronic Certificate of Inspection for Imported Organic Products and Certain Other Elements, and Regulation 889/2008 as Regards the Requirements for Preserved or Processed Organic Products and the Transmission of Information, 2016 O.J. (L 282) 19, 20–21.

¹¹⁰ 7 U.S.C §§ 6501, 6503.

¹¹¹ National Organic Program, 65 Fed. Reg. 80,548 (Dec. 21, 2000) (codified in 7 C.F.R. pt. 205).

¹¹² 7 CFR § 205.500 (2018).

recognition or equivalency agreement with the United States, must adhere to NOP standards.¹¹³

There are three ways for foreign produced goods to be marketed as organic in the United States. They can be certified by an NOP-accredited control body, be produced by a certified operator in a country that is authorized to certify producers as compliant with USDA organic standards, or be produced by a certified operator in a country with which the United States has an equivalency agreement.¹¹⁴ Unlike the EU's current regime, foreign control bodies may only certify operators under the NOP's organic standards; the United States does not recognize foreign control body's standards as equivalent without an agreement with a foreign government.¹¹⁵

NOP-accredited control bodies undergo a rigorous process to become accredited. Applicants for accreditation must submit a package containing a fee schedule; estimates of the number of operators they will inspect for certification; the types of activities these operators carry out; lists of personnel; conflict of interest disclosures; detailed information about various procedures for sampling, inspecting, auditing, etc.; as well as other information.¹¹⁶ Generally, the more countries an agent operates in, the longer its application and audit process, as the USDA estimates that each country adds one day to an audit.¹¹⁷ The process is costly, for the USDA charges by the hour for document review and on-site inspections.¹¹⁸ In 2010, the average cost of document review and an onsite visit for a foreign applicant was over \$28,000.¹¹⁹ Accreditation lasts for five years, and certifiers are subject to a midterm audit halfway through the five-year term.¹²⁰

Once accredited and upon reaching the effective date of the accreditation,¹²¹ the control body may conduct inspections in the countries listed on their application. Currently, there are fifty-two

¹¹³ 7 CFR § 205.200 (2018).

¹¹⁴ OIG AUDIT 2017, *supra* note 9, at 1.

¹¹⁵ 7 C.F.R. § 205.400 (2018).

¹¹⁶ USDA, AGRIC. MKTG SERV., FAQ: BECOMING A CERTIFYING AGENT, <https://www.ams.usda.gov/services/organic-certification/faq-becoming-certifying-agent> (accessed Nov. 20, 2017).

¹¹⁷ USDA, AGRIC. MKTG SERV., INSTRUCTION: ACCREDITATION POLICIES & PROCEDURES 7 (2015), <https://www.ams.usda.gov/sites/default/files/media/General%20Accreditation%20Policies%20and%20Procedures.pdf> [hereinafter ACCREDITATION POLICIES & PROCEDURES].

¹¹⁸ FAQ: BECOMING A CERTIFYING AGENT, *supra* note 116.

¹¹⁹ *Id.*

¹²⁰ ACCREDITATION POLICIES & PROCEDURES, *supra* note 117, at 6, 13.

¹²¹ 7 CFR § 205.506(b)(2) (2018).

accredited control bodies that may certify foreign operators.¹²² Some of these agents only conduct inspections in one country, while others work in as many as ninety-two.¹²³ Once a foreign operator is certified NOP compliant they may export to the United States under a USDA organic seal.¹²⁴

The United States currently has organic equivalence agreements with five different countries.¹²⁵ The EU, Canada, Republic of Korea, Japan, and Switzerland all recognize the USDA organic seal as equivalent to their seal, and the United States recognizes goods certified in those countries as meeting USDA organic standards. These equivalency agreements can vary in the additional requirements that they may impose on the exporter. For example, EU certified organic operators may not export agricultural products derived from animals treated with antibiotics.¹²⁶

The United States also has recognition agreements with three countries. These agreements allow the foreign governments to accredit certifying agents to USDA standards.¹²⁷ Currently, the United States recognizes organic products certified by government-accredited control bodies in New Zealand, India, and Israel.¹²⁸ These countries' competent authorities in charge of overseeing organic standards are recognized as capable of accrediting control bodies to USDA standards.

Currently, only organic goods coming into the United States from countries with which the United States has an equivalency arrangement, or Mexico, must be accompanied by an import certificate.¹²⁹ Organic goods from other countries do not require an import certificate to be presented for inspection at the border. The USDA requires companies dealing in organic goods to keep adequate records of a product's journey from producer to consumer, but such documents are

¹²² USDA, AGRIC. MKTG SERV., ORGANIC INTEGRITY DATABASE (accessed on Feb 16, 2018).

¹²³ *Id.*

¹²⁴ 7 CFR § 205.300(c) (2018).

¹²⁵ OIG AUDIT 2017, *supra* note 9, at 4.

¹²⁶ USDA, NAT'L ORGANIC PROGRAM, U.S.–EUROPEAN UNION ORGANIC EQUIVALENCE ARRANGEMENT QUESTIONS AND ANSWERS (<https://www.ams.usda.gov/sites/default/files/media/U.S.%20%20Equivalency%20FAQ.pdf>)

¹²⁷ 7 C.F.R. § 205.500.

¹²⁸ ORGANIC PRODUCTS IN INTERNATIONAL TRADE, PRACTICE LAW PRACTICAL NOTE 7-578-4605 (2018), Westlaw.

¹²⁹ OIG AUDIT 2017, *supra* note 9, at 7; USDA, USDA IMPLEMENTS IMPORT CERTIFICATE REQUIREMENTS FOR ORGANIC PRODUCTS SHIPPED FROM MEXICO (Dec. 22, 2016), <https://www.ams.usda.gov/content/usda-implements-import-certificate-requirement-organic-products-shipped-mexico>.

not inspected at the border by U.S. Customs.¹³⁰ This puts all of the burden of uncovering document fraud on organic producers, consumers, and certifiers.

VII. THE EU'S ORGANIC IMPORT REGIME WEAKNESSES AND REFORM ATTEMPTS

The problems with the import regimes of the EU and the United States are well known by the agencies and commissions charged with oversight of the organic market. Both the EU and the United States have conducted audits of their organic control systems and have discovered flaws in either how the import regime was structured or was being practiced.¹³¹ These audits have led to recommendations for reforms,¹³² but it has yet to be seen how effective these reforms will be at reducing organic import fraud.

In 2012, the European Court of Auditors (COA) published the results of an audit of the organic control systems of six Member States.¹³³ In each state the auditors visited with the competent authorities and two private control bodies as well as producers, processors, and importers.¹³⁴ The auditors observed control body inspections, conducted traceability checks on eighty-five products, and required laboratory checks on seventy-three products for heavy metals, genetically modified organisms, and pesticides.¹³⁵

The audit uncovered numerous issues. The audit found “weaknesses”¹³⁶ in Members States’ practices when approving and supervising control bodies, in the management of the list of equivalent third countries, and in the inspections made by control bodies on importers and imported products. In addition, the audit discovered issues

¹³⁰ USDA, NAT’L ORGANIC PROGRAM, INTERIM INSTRUCTION: MAINTAINING THE INTEGRITY OF ORGANIC IMPORTS (Oct. 25, 2017), <https://www.ams.usda.gov/sites/default/files/media/NOP4013IntegrityOrganicImports.pdf>.

¹³¹ OIG AUDIT 2017, *supra* note 9; ECA AUDIT 2012 *supra* note 48.

¹³² OIG AUDIT 2017, *supra* note 9, at 6, 10, 11, 14, 17, 18; ECA AUDIT 2012, *supra* note 48, at 80–86.

¹³³ ECA AUDIT 2012, *supra* note 48, ¶ 23. The six member states were the United Kingdom, Germany, Italy, Spain, Ireland, and France.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ ECA AUDIT 2012, *supra* note 48, ¶ 25.

with the now-defunct import authorization scheme and the traceability of products throughout the EU.¹³⁷

First, the auditors took issue with the systems set in place by the competent authorities for the supervision of control bodies. Regulation (EC) No. 834/2007, Article 27 requires that producers, processors, and importers be inspected at least once a year by control bodies to ensure compliance with organic regulations.¹³⁸ In turn, these control bodies must report annually to the competent authority of their state a list of operators, producers, and importers subject to their control.¹³⁹ The information submitted by control bodies to competent authorities, according to the auditors, was inadequate to determine if these annual inspections were being carried out.¹⁴⁰ However, the Commission noted in its response to the audit findings that there is no requirement for competent authorities to verify that annual inspections are carried out; the competent authorities only need to be made aware of the organic operators that are certified organic.¹⁴¹ In addition, the Commission noted that there is no requirement for competent authorities to conduct regular audits of control bodies.¹⁴² Instead, competent authorities are to “organise audits or inspections of control bodies as necessary.”¹⁴³

Second, the auditors found that the Commission had inadequate procedures in place to ensure that third countries with EU-equivalent standards performed the requisite control activities.¹⁴⁴ The auditors noted there was no formalized procedure in place for the management, review, and assessment of third countries.¹⁴⁵ The auditors highlighted the fact that some annual reports submitted by third countries did not appear to have been reviewed, nor did it appear that Member States had provided any input to assist with the oversight process (as required by EC Reg. 1235/2008).¹⁴⁶ More troublingly, the auditors found that the reports submitted by third countries were inadequate to determine if the countries were adhering to EU organic regulations.¹⁴⁷ In addition, it was

¹³⁷ *Id.*

¹³⁸ EU Org. Reg. 834, *supra* note 20, art. 27, ¶ 3.

¹³⁹ *Id.* at para. 14.

¹⁴⁰ ECA AUDIT 2012, *supra* note 48, ¶ 29.

¹⁴¹ *Id.* at 61.

¹⁴² *Id.*

¹⁴³ EU Org. Reg. 834, *supra* note 20, art. 27, ¶ 8.

¹⁴⁴ ECA AUDIT 2012, *supra* note 48, ¶ 60.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* ¶ 61.

¹⁴⁷ *Id.* ¶ 62.

discovered that the Commission had also failed to inspect several of the countries since their certifications of equivalency.¹⁴⁸ Seven of the ten countries on the list had not had an on-the-spot audit in the past seven years.¹⁴⁹

Third, the auditors discovered issues with the traceability of organic products. Only 40 percent of the products sampled could not be traced back to the producer level within three months of the beginning of the exercise.¹⁵⁰ Only 56 percent of the products at the end of six months had complete documentation.¹⁵¹ This is worrying, for if a product enters the market as organic and is discovered to have pesticide residues, the probability of tracking down similar lots distributed over the EU is less than 50/50. The audit noted that a “major explanation” for the information deficiency is the fact that Member States’ competent authorities have no authority over organic operators outside of their jurisdiction.¹⁵² Member States can only act to discover fraud or organic regulation violations and warn their fellow Member States and the Commission, and the Member States cannot take proactive measures on their own to stop fraud beyond their borders.¹⁵³

Lastly, the audit highlighted substantial issues with the now-defunct import authorization scheme. Import authorizations were a process by which individual Member States could grant import rights to products, provided that the importers sufficiently demonstrated that they had been manufactured in accordance with EU regulations, or regulations deemed equivalent.¹⁵⁴ To demonstrate adherence to EU organic regulations, or equivalent regulations, importers would need a certificate of inspection from a control body in the exporting state.¹⁵⁵ This control body did not need to be accredited by a competent authority of a Member State; the import certificate merely needed to be endorsed by the competent authority, and this could be done without the competent authority ever inspecting the control body.¹⁵⁶ Effectively, this meant that as long as an uninspected control body was not flagged as problematic,

¹⁴⁸ *Id.* ¶ 63.

¹⁴⁹ *Id.* tbl. 4.

¹⁵⁰ *Id.* ¶ 48.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* ¶ 68.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

the products certified by them would be allowed into the EU. The audit reported that around 4,000 such authorizations were granted annually by EU member states.¹⁵⁷

In addition to the verification problems with the import authorization scheme, recordkeeping of authorizations of Member States was found to be problematic, as well as the Commission's oversight of issuing Member States. Member States were not required to report their import authorizations in their annual reports to the Commission,¹⁵⁸ and the authorizations reported in the Organic Farming Information System were often unreliable and incomplete.¹⁵⁹ The Commission had never requested that a Member State withdraw an import authorization, even when unauthorized substances were discovered on products.¹⁶⁰ The auditors also found that the Commission had been derelict in its inspection duties, having failed to inspect any Member State's competent authority for a decade.¹⁶¹

In response to this audit, the Commission acknowledged that its oversight mechanisms had certain weaknesses, and that these weaknesses risked damaging consumer confidence in products bearing an EU organic seal.¹⁶² The Commission, addressing the problems with the import authorization scheme, claimed that they were phasing out the scheme altogether, aiming for a complete cessation by 2015.¹⁶³ Additionally, the Commission noted it had started inspecting Member State's competent authorities,¹⁶⁴ as well as those in third countries.¹⁶⁵ The Commission also noted that the Food and Veterinary Office was inspecting the Commission's control system for tracing goods across the EU, and hoped to be able to implement those recommendations once the findings were made clear.¹⁶⁶

Since the audit, the Commission has made good on some of its promises for reform. It has phased out the import authorization scheme, which means products will no longer be allowed entry into the EU on

¹⁵⁷ *Id.* ¶ 67.

¹⁵⁸ *Id.* ¶ 72.

¹⁵⁹ *Id.* ¶ 74.

¹⁶⁰ *Id.* ¶ 77.

¹⁶¹ *Id.* ¶ 76.

¹⁶² *Id.* at 58.

¹⁶³ *Id.* at 59.

¹⁶⁴ *Id.* at 60.

¹⁶⁵ *Id.* at 65.

¹⁶⁶ *Id.* at 63.

faith that the certifying control bodies in third countries were adhering to the proper regulations. Currently, only countries with accredited control bodies, or those with standards recognized as equivalent, may import to the EU.

The Commission, echoing the audit's call for better traceability of organic goods,¹⁶⁷ also supported the push for the implementation of the TRACES system into organic commerce in order to prevent fraud and increase traceability of products across the EU.¹⁶⁸ Use of the TRACES system is now required for the trade of any organic good in the EU, regardless of where it originates. TRACES is expected to reduce fraud and increase traceability,¹⁶⁹ but it remains to be seen how effective it will prove as an anti-fraud tool. TRACES was designed to track goods containing animal by-products in order to limit an outbreak of a disease, not prevent fraud.¹⁷⁰

TRACES is an online database that is now accessible by all operators within the organic supply chain. Largely, the process proceeds in the following manner. A producer will request an e-certificate from their certifier.¹⁷¹ The certifier issues an e-certificate of inspection for the producer, certifying that the goods coming from this producer are indeed organic.¹⁷² Once an order is made, this certificate is then forwarded to the "relevant Member State's competent authority,"¹⁷³ which will verify that the certifying body is accredited to EU standards and that it has not been flagged by other Member States as problematic.¹⁷⁴ The goods will then be shipped to the EU, where the customs authority of the country whose border is being crossed will verify that the goods shipped have the

¹⁶⁷ *Id.* ¶ 83.

¹⁶⁸ Serge Massart, Directorate General of Agric. & Rural Dev., The Perspective of the EU Commission: How to Achieve Reliable Imports of Organic Products from Third Countries (Sept. 2015), http://www.organic-integrity.org/fileadmin/afi/docs/afi10/08_Reliable-Imports-of-Organic-Products-from-third-Countries-into-EU.pdf.

¹⁶⁹ European Commission Press Release IP/17/963, Imports of Organic Products Subject to New EU Electronic Certification System (Apr. 18, 2017).

¹⁷⁰ Commission Decision 2003/623 of Aug. 19, 2003, Concerning the Development of an Integrated Computerised Veterinary Systems Known as Traces, 2003 O.J. (L 216) (EC).

¹⁷¹ USDA, *supra* note 107.

¹⁷² *Id.*

¹⁷³ Commission Implementing Regulation 2016/1842 of 14 October 2016 Amending Regulation 1235/2008, 2016 O.J. (L 282/19), art. 1(1)(a)6.

¹⁷⁴ *Id.* art. 1(9)(a).

necessary authentication associated with its ID number in the TRACES database.¹⁷⁵

In addition to seeking to improve traceability by implementing the TRACES system, the Commission has increased its oversight activities. It has audited twenty-three of the twenty-seven Member States' organic control systems, finding weaknesses with the competent authorities therein, such as their oversight of control bodies importing goods to the EU.¹⁷⁶ The Commission has also audited control bodies in twenty-two different third countries; some, such as China, Peru, India, and Ukraine have been audited more than once.¹⁷⁷ These visits also discovered weaknesses and deficiencies with control bodies and competent authorities, but the final reports only made recommendations and did not pull accreditation from control bodies.¹⁷⁸

The increased traceability of organic products will prove to be beneficial, but it does not completely address the fraud issue. A single certificate database will streamline the traceability of fraudulent organic products, but TRACES will not discover fraud on its own. It will be impossible to forge an organic certificate while the goods are in transit, but some of the biggest cases of fraud in the EU have been committed through control body corruption, in both Member States and third-countries.¹⁷⁹ A corrupted control body can circumvent the fraud protections of TRACES by issuing an import certificate to non-organic products. If the goods are not tested once they have entered the EU, then there will be no way of discovering the fraud with TRACES.

Even if TRACES limits the willingness of certifiers to commit fraud, it will not compel control bodies to be more diligent with their inspection and oversight duties. The competent authorities and the Commission will need to audit control bodies and third country's competent authorities more rigorously if import fraud is to be curtailed. This is a very time-consuming exercise, because auditors must fly to third countries to inspect records and observe procedures, and then

¹⁷⁵ *How Does TRACES Work*, EUROPEAN COMMISSION, https://ec.europa.eu/food/animals/traces/how-does-traces-work_en (last visited Oct. 9, 2018).

¹⁷⁶ *See, e.g.*, EUROPEAN COMM'N, HEALTH & CONSUMERS DIRECTORATE GENERAL, FINAL REPORT OF AN AUDIT CARRIED OUT IN ITALY FROM 15 TO 26 APRIL 2013 IN ORDER TO EVALUATE THE CONTROL SYSTEMS FOR ORGANIC PRODUCTION AND LABELLING OF ORGANIC PRODUCTS (Dec. 13, 2013).

¹⁷⁷ EUROPEAN COMM'N, *Audit Reports*, http://ec.europa.eu/food/audits-analysis/audit_reports/index.cfm (last accessed Oct. 7, 2018).

¹⁷⁸ *See id.*

¹⁷⁹ *See Massart, supra* note 168.

compile the information gathered into reports that are issued months later.¹⁸⁰ Implementing a technical solution to a niche issue such as organic fraud is a simple, band-aid solution for a multi-state enterprise such as the EU. Harnessing the will of competent Member State authorities to be eternally vigilant against organic fraud is a Sisyphean task, and TRACES can be sold to the public as an effective measure against fraud. However, it only changes the calculus of the fraud and does not address the lax enforcement of control bodies and similarly lax oversight of competent authorities.

VIII. U.S. IMPORT REGIME WEAKNESSES AND REFORM ATTEMPTS

In September 2017, the USDA's Office of the Inspector General (OIG) published the results of an audit of the Agricultural Marketing Service's control system for organic imports and the oversight of international agreements recognizing organic standards in third countries.¹⁸¹ Nestled within the Agricultural Marketing Service is the NOP, the body tasked with organic oversight. The NOP's procedures were reviewed and found wanting in many instances.

First, the OIG found that the review systems in place for determining the equivalency of organic standards in third countries were lackluster and lacked the rigor required for a broad and detailed regulatory program such as the U.S. organic standards.¹⁸² The OIG found that the NOP had not sufficiently documented why the differences between NOP standards and the standards in the five existing equivalency agreements with the EU, Canada, the Republic of Korea, Japan, and Switzerland were resolved as acceptable.¹⁸³ As these are equivalency agreements, there needs to be a documented procedure in place to reconcile these differences in order to ensure that American producers are not competing with organic goods produced according to

¹⁸⁰ See, e.g., Food and Veterinary Office, *Final Report of an Audit Carried out in Control Bodies from 17 November to 28 November 2014 in Order to Evaluate the Application of Organic Production Standards and Control Measures Applied by a Recognized Control Body Operating in Vietnam*, at 6–11, COM (2015) 4242403 (Oct. 12, 2015). This audit was carried out in November 2014, yet the report was not issued until October 2015. This holds true for other audits such as ones performed in India (2015) and China (2013). See *Audit Reports*, *supra* note 177.

¹⁸¹ OIG AUDIT, *supra* note 9.

¹⁸² *Id.* at 4.

¹⁸³ *Id.* at 3–5.

more lax standards, and that American consumers are assured that the products they are purchasing meet their expectations.

Secondly, and more pertinent to this analysis, the OIG found that NOP-required import documents are not verified at U.S. ports of entry.¹⁸⁴ Customs and Border Patrol (CBP) officials, at the seven ports of entry audited, did not have procedures in place to verify that the imported goods were accompanied by the requisite import certificate.¹⁸⁵ NOP had not coordinated with any of the federal bodies tasked with import controls, such as CBP or the Animal and Plant Health Inspection Service (APHIS).¹⁸⁶ APHIS officials routinely fumigate goods coming into the United States in order to prevent diseases and pests from spreading, and there have been reported cases of organic goods being fumigated at the border and released to the purchaser without alerting NOP or the purchaser that the goods were now technically non-organic.¹⁸⁷ The OIG found that there was a lack of coordination between NOP, APHIS, and CBP, and recommended implementing channels of communication between the three agencies.¹⁸⁸

Lastly, the OIG found that NOP had not conducted timely on-site audits of third-country certifiers in countries with equivalency agreements.¹⁸⁹ The OIG discovered that NOP did not have requirements in place to ensure that third countries with recognition or equivalency agreements were reviewed regularly.¹⁹⁰ The NOP conducts regular on-site audits of certifiers in third countries without equivalency or recognition agreements with the United States, but lacks the procedures to ensure that equivalent and recognized third countries adhere to the agreed upon standards.¹⁹¹

The NOP largely agreed with the recommendations made by the OIG.¹⁹² It agreed that it needed to coordinate better with border authorities, and that the oversight of agreement countries was not

¹⁸⁴ *Id.* at 7.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 12.

¹⁸⁷ Peter Whoriskey, *Bogus 'Organic' Foods Reach the US Because of Lax Enforcement at Ports, Inspectors Say*, WASH. POST (Sept. 18, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/09/18/lax-enforcement-at-ports-allows-bogus-organic-foods-to-reach-u-s-government-report-says/?utm_term=.81bba65c3f90.

¹⁸⁸ OIG AUDIT, *supra* note 9, at 8, 13.

¹⁸⁹ *Id.* at 16.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* at 22.

systematized to the degree it needed to be to ensure compliance.¹⁹³ However, the NOP noted that CBP officials, when contacted, disputed that they had the requisite authority to check NOP organic certificates and import certificates.¹⁹⁴

This troubling gap in import oversight makes it easier for fraudulent import certificates to be used to allow non-organic goods labelled as organic to enter the United States and places the burden of organic enforcement on operators within the organic supply chain, rather than government officials who are better placed to inspect these documents for irregularities. The NOP stated that it would work with CBP to determine how to inspect organic certificates under existing authorities but did not offer a legal solution to extend coverage over this gap.¹⁹⁵ If no existing authority can be found to extend NOP authority to CBP, then Congress will need to pass a law that grants the CBP authority to inspect certificates, or NOP will have to staff U.S ports of entry to conduct inspections independently of the CBP.

The only current organic legislation that could address this issue is the Organic Farmer and Consumer Protection Act of 2018.¹⁹⁶ This bill, by amending the Organic Foods Production Act of 1990, would authorize the USDA to “modernize” the import tracking system, “such as through an electronic trade document exchange system” and authorizes \$5 million in 2019 for this purpose.¹⁹⁷ The bill envisions extending the NOP import certificate program currently required for organic goods coming from Mexico, EU, Switzerland, Japan, and Korea.¹⁹⁸ These certificates would be available as an electronic record.¹⁹⁹ The bill increases the funding of the NOP from \$15 million in 2018 to \$24 million in 2023.²⁰⁰ The bill will also require an annual accreditation for each certifying agent that intends to operate in a foreign country.²⁰¹

The bill is short, running only six pages, and vague on details, leaving the Secretary of the USDA with significant leeway on the

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 25.

¹⁹⁵ *Id.*

¹⁹⁶ Organic Farmer and Consumer Protection Act of 2018, S. 2927, 115th Cong. (2018).

¹⁹⁷ *Id.* § 4(2).

¹⁹⁸ *Id.* § 4(3)(a); California Certified Organic Farmers, *NOP Import Certificate Update for Mexico and Other Countries* (Jan. 23, 2017), <https://www.ccof.org/nop-import-certificate-update-mexico-and-other-countries>.

¹⁹⁹ Organic Farmer and Consumer Protection Act of 2018, S. 2927, 115th Cong. § 4(2) (2018).

²⁰⁰ *Id.* § 9(2).

²⁰¹ *Id.* § 5(2).

measures to be taken to fulfill the new mandate. The electronic tracking system suggested conceivably would mirror the EU's TRACES program, but the scant details shed no light on what kind of system is envisioned, and how it would affect producers and certifiers in foreign countries. Worryingly, the bill does not extend authority to CBP to inspect organic certificates, but merely increases funding for the NOP and creates a working group to determine the existing barriers that prevent coordination between the USDA, CBP, the Food and Drug Administration, and Homeland Security.²⁰²

The NOP can use the funding, as its audit schedule is already packed with visits and document reviews. As mentioned above, the NOP only has thirty-five staffers to monitor U.S. and foreign organic operations.²⁰³ In 2017, the NOP had fifty-three scheduled accreditation audit events.²⁰⁴ Seventeen of these were in foreign countries, down five from the twenty-two audited in 2016.²⁰⁵ There are fifty-two accredited certifying bodies operating in foreign countries, but the majority of them operate in more than one country.²⁰⁶ For example, Control Union Certifications operates in seventy different countries.²⁰⁷ Seventeen certifying bodies operate in 10 or more countries, with five operating in more than fifty.²⁰⁸

The NOP does not clarify if its foreign country audits investigate one certifying body's operations in multiple countries, or if a different certifying body is audited in each country. The sheer number of accredited certifying bodies and the requirement for mid-accreditation audits indicates that a breakneck pace of audits is necessary, and most likely cannot be met with the limited number of staff. Indeed, a 2010

²⁰² Organic Farmer and Consumer Protection Act of 2018, S. 2927, 115th Cong. §§ 8–9(2) (2018).

²⁰³ OIG AUDIT, *supra* note 9.

²⁰⁴ USDA, AGRIC. MKTG SERV., NAT'L ORGANIC PROGRAM, 2017 AUDIT PRIORITIES, at 3 (2017).

²⁰⁵ *Id.*

²⁰⁶ ORGANIC INTEGRITY DATABASE, *supra* note 122.

²⁰⁷ Algeria, Belgium, Benin, Bermuda, Brazil, Bulgaria, Burkina Faso, Cabo Verde, Cambodia, China, Colombia, Costa Rica, Côte d'Ivoire, Dominican Republic, Ecuador, Egypt, Ethiopia, Germany, Ghana, Greece, Hong Kong, India, Indonesia, Iran (Islamic Republic of), Israel, Japan, Kazakhstan, Korea (the Republic of), Kyrgyzstan, Lao People's Democratic Republic, Macedonia (the former Yugoslav Republic of), Malawi, Malaysia, Mexico, Moldova (the Republic of), Mozambique, Myanmar, Netherlands, Nigeria, Pakistan, Palestine, State of, Panama, Paraguay, Peru, Philippines, Russian Federation, Rwanda, São Tomé and Príncipe, Serbia, Sierra Leone, Singapore, Somalia, South Africa, Spain, Sri Lanka, Switzerland, Tajikistan, Tanzania, United Republic of, Thailand, Timor-Leste, Turkey, Uganda, Ukraine, United Arab Emirates, United States of America, Uruguay, Uzbekistan, and Viet Nam. *Id.*

²⁰⁸ *Id.*

OIG audit of the NOP's foreign audit process found the need for "significant improvement."²⁰⁹ The OIG discovered that five of the forty-four sampled accredited certifying bodies had never received an onsite audit, and that twenty-four of the forty-four had not been subject to the required mid-accreditation review.²¹⁰ The OIG recommended that the NOP merely set in place a procedure for revoking accreditation if inspections could not be completed.²¹¹ NOP responded that it would implement such procedures in its forthcoming Quality Manual.²¹² However, the NOP's current "Instructions: Accreditation Policies and Procedures" contains no such procedures for revoking or suspending an accreditation of a certifying body that has not had its mid-term review.²¹³ The NOP increased the timeframe for this review from two years to twenty-four to thirty-six months, but did not implement a procedure for determining what would happen if the review was not conducted.²¹⁴

The Organic Farmer and Consumer Protection Act will increase this audit backlog and confusion. The bill limits organic certifying agents operating abroad to a period of accreditation of only one year.²¹⁵ It is not clear if these foreign operators will require a mid-accreditation review after six months. Conceivably, this could mean a foreign certifier is being inspected every six months. This increased level of oversight would be a better solution than mere reliance on a tracking system, but without further clarification we are left to speculate as to how the bill would change audit realities on the ground.

IX. SUGGESTED REFORMS

With the promotion of electronic-tracing systems over actual human oversight, both the EU and the United States are falling into the trap of relying too much on technology. Certifier oversight is the key to ensuring compliance with organic regulations. An electronic certificate system will eliminate some of the gaps discovered by both the EU and

²⁰⁹ USDA, OFFICE OF INSPECTOR GENERAL, AUDIT REPORT 01601-03-HY, OVERSIGHT OF THE NATIONAL ORGANIC PROGRAM 28 (2010).

²¹⁰ *Id.*

²¹¹ *Id.* at 30.

²¹² *Id.* at 30–31.

²¹³ ACCREDITATION POLICIES & PROCEDURES, *supra* note 117.

²¹⁴ *Id.*

²¹⁵ Organic Farmer and Consumer Protection Act of 2018, S. 2927, 115th Cong. § 5(2).

OIG audits but will not ensure that certifiers are regularly fulfilling their oversight duties.

Audits of certifying bodies by the USDA and EU Food and Veterinary Office regularly find non-compliance issues.²¹⁶ Issues that have been discovered range from procedural issues, such as poorly documented procedures for tracking paperwork, to more serious issues, such as failures to conduct timely on-site audits or to consistently apply standards to all operators.²¹⁷ Control bodies have been found to issue export certificates without the necessary batch identifiers,²¹⁸ which would allow goods that are produced before organic certification is granted to be exported as organic. Control bodies that fail to comply with accreditation requirements may be given recommendations and prescribed future follow-up visits, or have their accreditation suspended and revoked.²¹⁹

As demonstrated in the EU's "Gatto con gli stivali" organic fraud case, where over 700,000 metric tons of fraudulent organic goods—worth over 200 million euros—made their way into the stream of commerce, control bodies can be corrupted into falsifying organic certificates.²²⁰ In the "Gatto" case, officials of a regional control body in Italy were bribed into issuing false organic certificates for conventional goods.²²¹ If this can occur so easily within the EU, it can occur in other places where bribes and corrupt legal practices are part and parcel of doing business.

Even if the control bodies are not corrupt, their lax practices can lead to non-organic food being certified and marketed as such. In Ireland, an EU audit of the organic control system there found that organic control bodies regularly classified non-compliance with organic regulations as "deviations" instead of suspending the license of the operator and ensuring that the goods could not be marketed as organic.²²²

²¹⁶ See *Audit Reports*, *supra* note 177; see also ORGANIC INTEGRITY DATABASE, *supra* note 122.

²¹⁷ *Final Report of an Audit Carried out in Control Bodies from 17 November to 28 November 2014 in Order to Evaluate the Application of Organic Production Standards and Control Measures Applied by a Recognized Control Body Operating in Vietnam*, at 6–11, COM (2015) 4242403 (Oct. 12, 2015) (EC).

²¹⁸ *Id.* at 12.

²¹⁹ See 7 C.F.R. § 205.662; see also Commission Regulation 889/2008/EC, *supra* note 41, art. 91(2).

²²⁰ See Massart, *supra* note 168.

²²¹ *Id.* at 5.

²²² *Final Report of an Audit Carried Out in Ireland from 05 September 2016 to 16 September 2016 in Order to Evaluate the Control Systems for Organic Production and Labelling of Organic Products*, at 21, COM (2017) 879173 final (Feb. 17, 2016) (EC).

Further, control bodies were found to only notify the Irish government's competent organic authority of an operator's de-certification for non-compliance *after* an internal appeal procedure was completed, contra to Article 30(2)'s of Regulation (EC) No 834/2007 requirement of immediate notification of non-compliance.²²³ In addition, these same control bodies were found to only notify authorities of the use of banned substances *after* the control body had confirmed it, contra to Article 27(5)(d)'s of Regulation (EC) 834/2007 requirement for immediate notification if there is even a *likelihood* of non-compliance.²²⁴ These examples of lax enforcement happened in the EU, under the supervision of a Member State's "competent" authority. Electronic tracking systems will only be reliable if control bodies record irregularities in the system, which they are failing to do now. Control bodies must be regularly audited to ensure that they are holding their operators to their import market's standards and that they themselves are performing their legally required duties. These systems will not serve as a stand-alone fraud preventer without commensurate effort by the control bodies.

Certifying bodies are taking the initiative to prevent fraud, but their systems largely mirror what would be in place with an e-tracking system.²²⁵ Operators would be required to track their shipments all the way back to the producer. The certifying body California Certified Organic Farmers (CCOF) is implementing such a process.²²⁶ However, CCOF only certifies operations in the United States.²²⁷ Private action to prevent fraud should be applauded, but patchwork stopgaps will not address the root of the problem.

Many grains can be stored for months before a purchaser is found,²²⁸ requiring strict recordkeeping to prevent non-organic goods from being mixed with certified organic goods.²²⁹ The inability or

²²³ *Id.* at 21.

²²⁴ *Id.*

²²⁵ Catherine Boudreau, *Organic Industry Forming Anti-Fraud Task Force*, POLITICO, (June 12, 2017, 6:06 PM), <https://www.politico.com/tipsheets/morning-agriculture/2017/06/12/organic-industry-forming-anti-fraud-task-force-220780>.

²²⁶ *Id.*

²²⁷ ORGANIC INTEGRITY DATABASE, *supra* note 122.

²²⁸ *Corn and Soybean Grain Storage*, ASGROW AND DEKALB, at 1, <http://www.aganytime.com/Documents/ArticlePDFs/Corn%20and%20Soybean%20Grain%20Storage%20-%20NB%20-%20Spotlight.pdf> (last updated Oct. 31, 2015).

²²⁹ See MIDWEST ORGANIC SERVS. ASS'N, MOSA PROGRAM MANUAL APPENDIX B. RECORDKEEPING REQUIREMENTS FOR PRODUCERS (July 1, 2015), <https://mosaorganic.org/images/forms/Master-Cert-Forms/Recordkeeping-Requirements-for-Producers.pdf>.

unwillingness of control bodies to strictly supervise organic production and handling facilitates avenues for fraud that cannot be prevented with an electronic certificate. Control bodies may well be aware that they will only be punished with a slap on the wrist for lax enforcement and will not increase pressure on their operators without robust punishment for failing to enforce U.S. or EU standards. Punishment for fraud traced to an operator should fall not only on the operator, but the certifier who can be shown to have been negligent in following EU and USDA standards.

Calls have been made by U.S. organic interest groups to extend the requirements for organic certification to any entity that “ships, transports, manages, directs the movement, or receives shipments of grain at ports, docks, or border crossing for import into the United States”²³⁰ This would require that any shipper, broker, or transportation company, regardless if they open a container with organic goods inside, be certified as organic. Facilities that handle both conventional and organic goods have strict requirements for keeping goods separate and must have detailed plans for how they would prevent intermixing from occurring.²³¹ These recommendations are too strict and would vastly increase the cost of importing organic goods. Mandating that each and every operation in a supply chain be certified organic would force importers to ensure that any operation handling their goods are certified organic. Since goods in international transit can pass through as many as thirty organizations,²³² importers would be forced to ensure their shippers did not use any uncertified handlers throughout the entire shipment. A lightener—a ship that takes goods from larger cargo ships moored outside of shallow harbors and transfers them to the dock—would be required to be certified organic before a container holding organic goods could be transferred aboard. Companies along the supply chain may be reluctant to take on liability for transferring organic goods to an uncertified third party and may choose to forgo shipping organic goods entirely to avoid possible USDA-imposed fines. Shipping interests hold considerable sway over Congress,²³³ and they will not allow such a far-reaching reform to be implemented without pushback.

²³⁰ Petition for Rulemaking and NOSB Action from Anne Ross, Farm Policy Analyst, Cornucopia Inst., to Tom Chapman, Chair, Nat’l Organic Standards Bd. at 2 (July 18, 2017).

²³¹ 7 C.F.R. § 205.201 (2018).

²³² Marex, *ZIM Trials Blockchain Bill of Lading*, MARITIME EXECUTIVE (Nov. 20, 2017, 6:41 PM), <https://www.maritime-executive.com/article/zim-trials-blockchain-bill-of-lading>.

²³³ See Lee Fang, *U.S. Shipping Lobby: Letting Foreign Ships Bring Goods to Puerto Rico Could Endanger National Security*, INTERCEPT (Sept. 28, 2017, 6:08 AM), <https://theintercept.com/>

Funding increases for additional audit staff in the EU and the United States is an easier reform to push through. Increased audits are necessary to ensure oversight of control bodies, but the short-staffed NOP cannot handle its current workload, and countries within the EU are similarly short-staffed.²³⁴ Increasing the number of audit staffers will make it harder for certifying bodies to cut corners and will reduce the amount of time between audits. The existing oversight infrastructure is not being exploited to its fullest extent due to staff shortages; solving this requires a cash infusion to expand its capabilities to match the ever-expanding organic market.

In the absence of new legislation or funding increases, NOP and FVO audits should be focused on countries with more than one organic certifying body. Would-be organic operators in countries with multiple certifying bodies are liable to shop around for bodies that are laxer in their enforcement of organic standards, forcing a race-to-the-bottom for certifiers. Special attention should be directed to ensure the even, consistent application of standards by all control bodies in countries with certifier competition.

Electronic tracking of imports does not go far enough and only serves a limited fraud deterrence function. Regulatory agencies and legislatures need to show that they are willing to increase their oversight of organic imports by requiring control bodies to comply with their accreditation requirements. The price difference between organic and conventional goods is too large to only implement a technological solution. Humans, not paperwork, are the weak link in the system, and the solutions implemented need to be reinforced.

X. CONCLUSION

Consumers in the EU and the United States are willing to pay a premium for organic goods because of the perceived nutritional advantages over conventional goods, production practices, and the environmental benefits.²³⁵ Consumers will only continue to support organic agriculture if they can be assured that the products they are purchasing were produced according to the regulations set forth by the

2017/09/28/u-s-shipping-lobby-letting-foreign-ships-bring-goods-to-puerto-rico-could-endanger-national-security/.

²³⁴ See McCárthaigh, *supra* note 55.

²³⁵ See *supra* Introduction.

EU and NOP. Organic e-certificates may appear to worried consumers as a high-tech, fool-proof solution to stopping organic fraud, but they are inadequate to curtail the problem. A high-profile fraud case after the implementation of these electronic systems could do irreparable harm to consumer's faith in organic products.

Both the EU and the United States need to enact legislation that increases funding for the government bodies that are tasked with organic oversight. Current staffing levels have not kept pace with the expansion of the organic market and need to catchup and overtake this expansion. The proposed e-certificates will make it harder to create a fraudulent organic certificate mid-shipment, but they will not cause organic control bodies to increase their oversight of producers. As audits from both the EU and USDA show, foreign control bodies are lax in applying rigorous standards to their producers. This may be due to competition by other control bodies, inattention, or inadequacies. Regardless of the cause, the competent authorities in the EU and the United States need to crack the whip and enforce their own policies against control bodies that are shirking their duties. This cannot be done without increased staff levels.

Organic agriculture has many positive effects for people, animals, and soils. It is a holistic approach to farming that takes into account a myriad of factors and balances those accordingly. To let enthusiasm for organic agriculture wither due to an overreliance on techno-solutions would be ironic in the extreme.