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Best Practices for Evaluating Changes in Ownership

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Purpose

This document is to be used by accredited certification agencies to assist with meeting the requirements of NOP Instruction 2603, Organic Certificates, specifically, Section 3.3 – Organic certificates are not transferrable. The 8.7.2017 version of this document was sent to the National Organic Program (NOP) for feedback. This revised version has been updated to reflect suggestions from the NOP.

Summary

Section 3.3 of NOP Instruction 2603 states that certificates are not transferrable to new owners “in the cases of mergers, acquisitions, or other transfers of ownership.” Due to a lack of further explanation or clarity in this section, ACAs have been implementing a wide range of policies in attempt to reasonably comply with this instruction. In an effort to unite certifiers with a sound and sensible approach, a working group was formed to outline common themes and ways of addressing changes of ownership.

The ACA Working Group noted that each change-of-ownership situation is different, and there are innumerable variations on each theme. While this Best Practices document cannot address each possible permutation, its guiding principles lay the groundwork for sound and sensible steps certifiers can take. These guiding principles are organized into three categories:

- Initial Information Gathering: How can certifiers ensure the Organic System Plan (OSP) and application paperwork contain the information necessary to adequately evaluate changes in ownership?
- Questions to Consider at the Time of Ownership Change: What do certifiers need to ascertain when considering whether a change of ownership has occurred and what should happen next?
- Appropriate Action for Certifiers: What are the appropriate outcomes or consequences in various ownership change situations?

A. Initial Information Gathering

In order to properly capture changes in ownership and management within an organization, it is critical that the OSP and/or application paperwork capture some key pieces of information from the very beginning so that it is clear who exactly is being certified. As such:

- Applications for organic certification should identify the type of person/business requesting certification (examples: individual, partnership, corporation, association, cooperative, or other entity).

- Applications should also include the names and roles of other responsibly-connected people and authorized contacts. This information must be updated annually or as significant changes occur.
- All facility addresses must be identified.

Certifiers must use reasonable diligence to ensure that the legal status and contact information provided on an application is accurate, but the applicant is primarily responsible for the information they provide.

B. Questions to Consider at the Time of Ownership Change

To determine what actions are needed in relation to an ownership change, the certifier must ask several key questions:

- Is there a change in legal owner? (In some cases, the Employer Identification Number or state-level equivalent can be used for verification.)
- Is there a change to the business name?
- Is there a change in facility location?
- Is there a change in the person(s) responsible for the day-to-day execution of the OSP?
- Is the new owner knowledgeable of and actively involved with the OSP? (To a greater or lesser degree than the previous owner?)
- Is there any change in other responsibly connected individuals?
- When does the change take place? Is the change announced in advance, or does the certifier learn about it in retrospect?
- Where in the certification cycle does the previously certified entity leave off? (Has there been an initial review? An inspection? A final review?)
- Is organic product still being manufactured and/or sold?
- Is the originally certified entity in a state of noncompliance or adverse action?
- Are there additional OSP changes, and what risks to organic integrity are introduced by these?

Once these questions have been answered, the certifier should have most of the information needed to proceed in a path that is sound and sensible.

C. Appropriate Actions for Certifiers

All OSP and ownership changes must be evaluated and acted upon in a timely manner by all parties. Although any number of responsibly-connected people in a business may interface with aspects of an OSP, certification is primarily concerned with management of day-to-day operations.

The following outline demonstrates how this principle can be put into practice and enumerates specific outcomes for each level.

Level 1: It is determined that there is no change in ownership:

For example, if the primary contact person changes, but other responsibly connected individuals, the business legal status, and daily operations remain the same, it may be concluded there was no actual change of ownership. Another example may be when an organization takes on a new “doing business as” name, but no other aspect of the business changes. In cases like these, changes are recorded in the OSP, but the certificate does not need to change in regard to NOP 2603.

Level 2: There is a change in ownership, but staff and management responsible remain the same, and the OSP is not otherwise significantly affected:

- Application and Contract:
 - If responsibly connected parties, operational activities, and business name remain the same, a new certification contract (or comparable document) and application might not be needed. If the previous owner was the one who signed the original contract or application, the new owner's signature will be needed. However, if someone else at the business is responsible for signing contracts, and that person remains the same, then the certifier may determine that a new application and contract are not necessary.
 - If the business name changes, a new contract (or comparable document) and informational updates to the OSP may be needed. An entirely new OSP is typically not needed.
- Inspection:
 - If responsibly connected parties, operational activities, or business name remain the same, a new inspection and review process might not be needed outside of what is routinely scheduled or already in process. For example, if the certifier ascertains that the old owner and the new owner were not involved with the OSP and can solidly confirm that operational activities will remain the same, then no additional review or inspection activities might be needed. However, if the new owner decides to be more involved with the operation of the OSP, then additional review and/or inspection may be needed to ascertain whether operational changes may result. It is at the discretion of the agency whether to issue a different certificate number.
- If there are no significant changes to the practices outlined in the OSP and no risks to organic integrity are identified, it is at the certifier's discretion whether organic production or processing can continue while the applicable contact information and certificate are updated.
- Certifiers may issue a Notice of Noncompliance if changes in ownership were not brought to the attention of the certifier as required by §205.400(f)(2), §205.401(b), or §205.406(a).
- If the prior operation had outstanding Noncompliances or Adverse Actions, the new applicant does not need to resolve them *per se*; however, the new person/operation needs to show full compliance or ability to comply, and additional scrutiny may be applied to previously identified problems during the process of inspection and review.

Level 3. There is a change in ownership, change in staff or management responsible for the OSP, and changes to the management practices described in the OSP:

- A new contract and application are required.
- A new OSP is required.
- A new inspection and review process are required.
- The Organic Certificate for the previous operation should be voluntarily surrendered.
- Products must not be sold, labeled or represented as organic by the new entity until an inspection occurs and the new certificate is issued.
- A new certificate is issued once the new entity completes the certification process.

Summary

Changes in ownership will continue to pose challenges as the organic certification industry grows and evolves. These Best Practices, while not exhaustive, can help provide sound and sensible outcomes.

Resources

- NOP 2603 – Organic Certificates
- NOP 4009 – Who Needs to Be Certified
- NOP 2604 – Responsibilities of Certified Operations Changing Certifying Agents