

# The European Union Solution: Fighting the American Epidemic of Consumer Confusion in the Organic Food Industry

## **I. Introduction**

While the organic food movement has, by default, been around since the beginning of the development of agriculture, the United States has since seen a recent surge in its popularity.<sup>1</sup> At its onset, nature cultivated by humans for the purpose of consumption was essentially all organic.<sup>2</sup> We no longer live in a time where the existence of our next meal is questionable and thus, we have had time to develop new and innovative, albeit not always safer, ways to provide sustenance to the growing population.<sup>3</sup> These innovative developments range from technologically advanced cooking processes, to genetically modified organisms, and natural pesticides, with numerous steps in between. Presently, consumers are showing their desire to revert back to the original state of the agricultural industry as a result of many contributing factors.<sup>4</sup>

This note will suggest that the regulations which have developed alongside this ever-changing market are insufficient to effectively protect consumers when they choose to buy organic. The use of natural pesticides, a prominent practice within the organic food industry, is a prime example through which the issue of consumer confusion manifests itself. The proposed

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<sup>1</sup> Amanda Suutari, *USA/Canada – The Organic Farming Movement in North America: Moving Towards Sustainable Agriculture*, THE ECOTIPPING POINTS PROJECT (Nov. 2007), <http://ecotippingpoints.org/our-stories/indepth/usa-canada-sustainable-organic-farming.html> (attributing to the surge for the desire of organic foods in the United States to a 1989 scandal involving a harmful ripening agent used in apples. See Elliot Negin, *The Alar “Scare” Was for Real; and So is That “Veggie Hate-Crime” Movement*, PBS, <http://www.pbs.org/tradesecrets/docs/alarscarenegin.html>. (last visited Dec. 30, 2016).

<sup>2</sup> *History of the Organic Movement*, THE ORGANICS INSTITUTE, <http://theorganicsinstitute.com/organic/history-of-the-organic-movement>. (last visited Dec. 30, 2016).

<sup>3</sup> See David Biello, *Will Organic Food Fail to Feed the World?*, SCIENTIFIC AMERICAN, (Apr. 25, 2012), <http://www.scientificamerican.com/article/organic-farming-yields-and-feeding-the-world-under-climate-change/> (“large doses of synthetic fertilizer can keep up with high demand from crops during the growing season better than the slow release from compost, manure or nitrogen-fixing cover crops”).

<sup>4</sup> CINDY BURKE, *TO BUY OR NOT TO BUY ORGANIC: WHAT YOU NEED TO KNOW TO CHOOSE THE HEALTHIEST, SAFEST, MOST EARTH-FRIENDLY FOOD 2* (2007).

solution to this issue of consumer confusion is to mirror the European Union's proposed solution to the problem. In order to maintain both economic growth and safety within this industry, it is imperative that changes be made.

The resurgence in the organic food industry is coming at a time where certain portions of the population are more concerned about what is going into their bodies, or more specifically what is not going in, than what is coming out of their wallets.<sup>5</sup> There are many factors influencing the consumer's choice of organic over conventional products; these factors include not only the increased accessibility of organic food products,<sup>6</sup> but also concerns over the detrimental effects that consuming conventionally grown food can have.<sup>7</sup> Whether these, and any other motives, are warranted or not, the organic food movement and its regulations must keep up in order to accommodate this ever-changing business.

With this flux in interest, the regulations placed on the organic food industry are being closely evaluated.<sup>8</sup> Section II of this note will discuss the history of organic food regulations within the United States and how they have developed into what we know them to be today. In light of the development of these regulations, this note will suggest that the present organic food regulations and those specifically pertaining to natural pesticides are not sufficient in achieving the goals put forth by the organic food movement due to consumer confusion. Section III of this note will address the issues of organic labeling and the consequences that result: consumer confusion.

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<sup>5</sup> Kenneth Chang, *Stanford Scientists Cast Doubt on Advantages of Organic Meat and Produce*, N.Y. TIMES (Sept. 3, 2012), <http://www.nytimes.com/2012/09/04/science/earth/study-questions-advantages-of-organic-meat-and-produce.html?ref=health>).

<sup>6</sup> *Id.*; see also Barbara L. Atwell, *Obesity, Public Health and the Food Supply*, 4 IND. HEALTH L. REV. 3, 15 (2007).

<sup>7</sup> Chang, *supra* note 5.

<sup>8</sup> See e.g., Michelle T. Friedland; *You Call That Organic?--The USDA's Misleading Food Regulations*, 13 N.Y.U. ENVTL. L.J. 379 (2005); Kate L. Harrison, *Organic Plus: Regulating Beyond the Current Organic Standards*, 25 PACE ENVTL. L. REV. 211, 213 (2008); Sheila Gholkar, *Moving Beyond the Industrial Organic Food Movement: Rethinking Organic Food Regulations*, 2 ARIZ. J. ENVTL. L. & POL'Y 1 (2012).

Consumer confusion is the inability for the consumer to understand what it is exactly that they are buying. For the organic food industry this confusion can mean many things.

Consumers mistake nonorganic foods for organic, they are unaware of the level of organic that the product they are purchasing maintains, they are misinformed as to what is actually in their food due to the lack of regulation regarding labeling, and many other misconceptions that go unnoticed on a daily basis.<sup>9</sup> As the regulations for organic food have developed, those for natural pesticides have failed to keep up.<sup>10</sup> Accordingly, through the development of new farming techniques and processes, although natural pesticides may be listed as permissible, some could prove to do more harm than what was initially thought.

Despite rigorous testing schemes that are in place, the effects of certain substances on not only our bodies, but also on the environment, may take many years to present itself and we are thus left to take the risk. All things considered, this becomes extremely detrimental to the industry because it goes against the driving force of the regulations: to create a uniform standard on which consumers can rely through a single labeling system.<sup>11</sup> There are many factors contributing to the industry's inability to uphold the basic purposes of the Organic Food Production Act<sup>12</sup> and until this problem can be corrected, the consumer will continue to remain partially in the dark when it comes to what is behind the organic label.<sup>13</sup> In order for this

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<sup>9</sup> See generally Beth Hoffman, *People Don't Understand What 'Organic' Means, But They Want It Anyway*, FORBES (July 17, 2013), <http://www.forbes.com/sites/bethhoffman/2013/07/17/what-is-organic-anyway/>; Beth Hoffman, *'Organic' One of the Most Confusing Labels, Report Says*, FORBES (July 17, 2013), <http://www.forbes.com/sites/bethhoffman/2013/07/17/organic-causes-confusion/>; Lisa Marshall, *Organic Continues Double Digit Gains* (May 31, 2013), <http://newhope360.com/nfm-market-overview/organic-continues-double-digit-gains>.

<sup>10</sup> See Gregory N. Mandek, *Gaps, Inexperience, Inconsistencies, and Overlaps: Crisis in the Regulation of Genetically Modified Plants and Animals*, 45 WM. & MARY L. REV. 2167, 2251 (2004).

<sup>11</sup> See Harrison *supra* note 8.

<sup>12</sup> See Aubrey Parlet, *Organic Foods Production: What Consumers Might Not Know About the Use of Synthetic Substances*, 21 LOY. CONSUMER L. REV. 392, 405 (2009).

<sup>13</sup> See generally *id.*

industry to continue growing at such a rate that we have seen so far, we must find a way to eliminate the consequences of consumer confusion.

More specifically, these organic food regulations aim to prohibit the use of synthetic materials when growing or processing organic foods.<sup>14</sup> While many synthetic substances are prohibited by the FDA, some are permitted, and even fewer are permitted in organic food production.<sup>15</sup> Section IV will discuss these substances, their permission and prohibition in organic foods, and the regulations that are currently in place. In order to provide the public with food meeting our self-imposed safety and quality standards, farmers must implement the use of pesticides at different parts of their growing process.<sup>16</sup>

However, to use such substances in order to benefit the consumer in conjunction with their high risk to that consumer's safety seems to be in direct contradiction to one of the main purposes of the organic food movement, which is to limit the consumer's exposure to such harmful substances.<sup>17</sup> This disconnect has resulted in a different necessary evil in the form of natural pesticides. These natural pesticides may include some synthetic substances that have been deemed non-harmful and thus, are included as exceptions to the general rule prohibiting anything synthetic in organic food production.<sup>18</sup> Although the natural pesticides are always subject to removal from that exception list pending information warranting their removal, their

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<sup>14</sup> *Id.*

<sup>15</sup> See 21 C.F.R. § 182 (2015).

<sup>16</sup> See *Why We Use Pesticides*, U.S. ENVTL PROTECTION AGENCY, <http://www2.epa.gov/safepestcontrol/why-we-use-pesticides>. (last visited Dec. 30, 2016).

<sup>17</sup> Friedland, *supra* note 8.

<sup>18</sup> Miles McEvoy, *Organic 101: Allowed and Prohibited Substances*, UNITED STATES DEP'T OF AGRICULTURE (Jan. 25, 2012), <http://blogs.usda.gov/2012/01/25/organic-101-allowed-and-prohibited-substances>.

effects on the consumer are much more difficult to eliminate. Just like all other aspects of the organic food industry, these exceptions are subject to regulation.<sup>19</sup>

In their Action Plan for the future of Organic Production in the European Union of 2014, the European Commission suggests an education overhaul for their citizens regarding their organic logo and what that logo stands for.<sup>20</sup> Section V of this note will explore both the new proposed policies of the European Union, and those current regulations that remain unchanged. It can be seen that people correlate natural with safe, despite the actual validity of such an association. The organic food industry capitalizes on this perceived relationship and aims to validate it in the most transparent way possible. Since this market is consumer driven, it is thus obligated to keep up with the needs and demands of that driving force.

## II. History of Regulations

The organic food industry has been on a continuous ascending journey throughout our country's history, most notably within the last 20 years.<sup>21</sup> This growth is shown through an increase in conventional food markets in which organic products are being sold, overtaking the previous number one market for organic foods — that being natural food stores.<sup>22</sup> As organic food moves into larger, more mainstream stores, there is more exposure to consumers who otherwise would not encounter these products. Another large portion of the organic food industry includes the direct market, which can include farmers' markets or farmer to consumer

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<sup>19</sup> *Id.*; see also, *Benefits of Pesticide Use*, NAT'L CENTER FOR FOOD AND AGRIC. POLICY, <http://www.ncfap.org/pesticideuse.html> (2008).

<sup>20</sup> *Action Plan for the Future of Organic Production in the European Union* EUROPEAN COMM'N, Brussels, 24.3.2014, 6 (2014).

<sup>21</sup> Carolyn Dimitri & Catherine Green, *Recent Growth Patterns in the U.S. Organic Foods Market*, ECON. RESEARCH SERVICE/USDA AIB-777 1, [http://www.ers.usda.gov/media/255736/aib777c\\_1\\_.pdf](http://www.ers.usda.gov/media/255736/aib777c_1_.pdf).

<sup>22</sup> *Id.*

connections. The appeal of buying local is identical to the appeal of buying organic; consumers associate these terms with safety and are thus willing to pay more for them.<sup>23</sup> Significantly, these direct markets are not immune to the organic food standards.<sup>24</sup> The federal organic food regulations are aimed at covering every piece of food that any farmer, handler, processor, or vendor intends to claim is organic so that the consumer has a baseline level of knowledge as to what they are purchasing.<sup>25</sup>

Regulations were first federally implemented in 1990 with the Organic Foods Production Act (“OFPA”).<sup>26</sup> As a whole, the organic market is focused on the quality of the end product. Consequently, organic food regulations target the production or processing methods.<sup>27</sup> This is because the end product can only be controlled by regulating not only what goes into the production of it, but what is withheld from its production and the process by which it is created. Accordingly, the regulations are generally found to be prohibitory in nature. In the years leading up to the implementation of the OFPA, the individual states had to manifest their own regulations to combat the rapidly developing problems with an equally rapidly developing industry.<sup>28</sup>

The need for regulation within the industry stemmed from the development of fraud among sellers who were misrepresenting the products they were selling. People were paying more for food they thought was of higher quality, when in fact it was conventionally produced food. This fraud led to a lack of confidence and awareness by the consumer regarding what they

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<sup>23</sup> Hannah Goldberg, *People Still Don't Know the Difference Between "Organic" and "Local"*, TIME (July 11, 2014), <http://time.com/2970505/organic-misconception-local/>.

<sup>24</sup> *Do I Need to Be Certified Organic?*, U.S. DEP'T OF AGRIC., <http://www.ams.usda.gov/services/organic-certification/need-be-certified> (last visited Dec. 30, 2016).

<sup>25</sup> *See id.*; *See Dimitri & Green, supra* note 21.

<sup>26</sup> *See* 7 U.S.C. §§ 6501-6523 (2006).

<sup>27</sup> Friedland, *supra* note 8, at 388.

<sup>28</sup> Kenneth C. Amaditz, *The Organic Foods Production Act of 1990 and its Impending Regulations: A Big Zero for Organic Food?*, 52 FOOD & DRUG L.J. 537, 538 (1997).

were purchasing. As a consequence of the lack of legislation, the resulting “patchwork” of state regulations left the industry just as inconsistent and the consumers just as confused as they were before.<sup>29</sup> Consequently, the government responded by passing the Organic Foods Production Act. Despite the belief by many analysts that the organic food industry would not continue to grow due to this initial failure, the consumers demonstrated that they in fact wanted organic foods and the only way to encourage the market would be to create uniform standards.<sup>30</sup> If consumers are able to trust that the food they are purchasing is what it claims to be, they will be willing to spend more money.

Other than to create uniform national standards of organic foods, the OFPA was enacted to eliminate consumer confusion based on what the organic label meant not only in the consumer’s state, but for those from other states as well.<sup>31</sup> However, the OFPA fails to absolutely define what it is to be “organic.”<sup>32</sup> Instead, we must look to the prohibitions and permissions within the Act to determine what will fit under this organic umbrella. In order to develop some sort of preliminary standard and as a more concrete decision, the United States Department of Agriculture (“USDA”) was charged by the OFPA with creating a definition in a future regulation.<sup>33</sup>

The Act creates a national organic plan requirement, which demands that each handler or producer seeking organic certification proposes a scheme fitting specific requirements, which is to be reviewed by a certifying agent and any established state organic certification program.<sup>34</sup>

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 539.

<sup>31</sup> 7 U.S.C. § 6501 (2012).

<sup>32</sup> *Amaditz, supra* note 28 at 540; *See* 7 U.S. C. § 6502 (2012) (failing to define the word “organic” and thus causing us to rely on the combination of the other parts of the statute to determine what is in fact organic).

<sup>33</sup> *See* Jessica Ellsworth, *The History of Organic Food Regulation* (Winter Term 2001) (unpublished Food and Drug Law Harvard Law) at 7, <https://dash.harvard.edu/bitstream/handle/1/8889458/Ellsworth.pdf?sequence=1>.

<sup>34</sup> 7 U.S.C. § 6513 (2012); *Amaditz supra* note 28 at 540.

Once this plan is approved, the applicant must comply with the requirements of the Act in order to maintain his certification to use the organic label. If the farmer fails to meet any aspect of the organic food requirement, he loses her permission to declare her food organic and is subject to penalties for continuing to use such labels. Once compliant with the standards of the act, the organic farmer is now prohibited from using synthetic chemicals during any part of the production or handling process, unless those synthetic chemicals are expressly exempt from the prohibition.<sup>35</sup> Along with this prohibition includes other stringent requirements on the production and handling of the foods in order to maintain the integrity of the organic label.<sup>36</sup>

In an attempt to assist the USDA in implementing these standards and developing specific regulations to be followed, the OFPA calls for the creation of an advisory board to be referred to as the National Organic Standards Board (“:NOSB”).<sup>37</sup> The board, consisting of different experts within the field, would provide recommendations to the USDA regarding what substances and processes should be acceptable for use within organic operations.<sup>38</sup> Because the food industry is so important to the health and economy of our nation, it became necessary to enlist the expertise of the specialists within the industry. The NOSB plays an integral role in shaping the organic food industry as we know it.

After its first recommendation in 1994, the NOSB developed a high number of proposals concerning all aspects of the organic food regulations the OFPA sought to create.<sup>39</sup> Shortly after the NOSB’s first proposal, the first attempt of proposed regulation by the USDA was

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<sup>35</sup> Amaditz *supra* note 28 at 540; 7 U.S.C. § 6517(c) (2012)(stating that the National List will contain all approved and prohibited substances to be considered in the organic food standards).

<sup>36</sup> §6501, *supra* note 31.

<sup>37</sup> 7 U.S.C. § 6518 (2012).

<sup>38</sup> See 7 U.S.C. § 6518 (b) (2012)(listing the composition of the board as such: four organic farmers; two organic handlers; one organic vendor; three environmentalists; three consumer interest group advocates; one scientist with expertise in toxicology, ecology or biochemistry; and one certifying agent (to be defined by §6515 of U.S. Code 7))

<sup>39</sup> See *NOSB Recommendations*, U.S. DEP’T OF AGRIC., <http://www.ams.usda.gov/rules-regulations/organic/nosb/recommendations> (last visited Dec. 30, 2016).

immediately met with rejection by the public due to its failure to align with current organic practices at the time.<sup>40</sup> It was clear to the over 200,000 commenters who spoke out during the public comment period that the USDA had completely ignored many of the NOSB proposals.<sup>41</sup> In creating the NOSB, the USDA purported to be relying on the expertise of the members of the NOSB. However, the USDA failed to place its trust on the NOSB. As a result, the USDA withdrew its proposal. Three years later in 2000, a revised proposal was issued which was met with another wave of condemnation. Eventually, after substantial changes were made, the Final Rule was issued by the USDA on December 21, 2000.<sup>42</sup>

When the rule was passed, it was never intended by Congress or the USDA to link an organic label with safety, nutrition or quality; it was merely a marketing tool to aid the consumers in making choices about their food.<sup>43</sup> For this reason, the consistency of both the label and those producers who used it was extremely important. The new rule, as implemented, is extremely lengthy consisting of seven subparts which populate more than 100 pages within the federal register. The subpart to be discussed further here is subpart D which contain the “Labels, Labeling, and Market Information.”<sup>44</sup>

### **III. The Organic Label**

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<sup>40</sup> Ellsworth, *supra* note 33 (providing for example, the rule allowed synthetic pesticides to kill bacteria found on organic food and allowed for cattle that consumed up to 20 percent of non-organic food to maintain the certified organic label).

<sup>41</sup> See Kristen S. Beaudoin, *On Tonight's Menu: Toasted Cornbread With Firefly Genes? Adapting Food Labeling Law to Consumer Protection Needs in the Biotech Century*, 83 MARQ. L. REV. 237, 268 - 269 (1999).

<sup>42</sup> 7 C.F.R. § 205 (2015).

<sup>43</sup> See S. Rep. No. 357, *reprinted in* 1990 U.S.C.C.A.N. at 4946-4947 (stating that the legislation is merely to indicate the regulations used in the production and handling of organic foods, and is not intended to make a scientific judgment of those foods).

<sup>44</sup> §205, *supra* note 42 subpart (d).

There are many different levels of organic labeling that can be attributed to a food depending on its composition. This regulation splits the labeling possibilities into four different categories: 100 percent organic which is only containing 100 percent organically produced ingredients; organic, containing at least 95 percent organically produced ingredients; made with organic (specified ingredients or food group(s)), containing at least 70 percent organically produced ingredients; and foods containing less than 70% organically produced ingredients can list the organic ingredients as organic as long as they conform to the federal standards as outlined in this regulation.<sup>45</sup> The information regarding these categories are listed in the United States Code but are not publically displayed on a federal level in an effort to raise consumer awareness within the United States.

While there are numerous self declared, “first party” labels attempting to gain traction within their specified markets, the USDA label is a uniform standard which can inform the consumer of exactly what they are purchasing making it a much more reliable and useful source.<sup>46</sup> Both the government and the individual states have regulations in place to control for the possibility of misstatements by those first party labels. Nevertheless, the damage is done when the consumer is exposed to these unverifiable labels.<sup>47</sup> Neither the OFPA nor the National Organic Program (“NOP”) prohibits the states from implementing their own regulations regarding organic foods and their labels; it simply sets a minimum by which the states must oblige.<sup>48</sup>

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<sup>45</sup> *Id.*

<sup>46</sup> See Jason Czarnezki, Andrew Homan & Meghan Jeans, *Creating Order Amidst Food Eco-Label Chaos*, 25 DUKE ENVTL. L. & POL’Y F. 281, 283 (2015) (discussing the creation of first party labels as those created by the business selling the product coinciding with their own self imposed, unverifiable standards).

<sup>47</sup> *Id.* at 284.

<sup>48</sup> Ellsworth *supra* note 33 at 9 (“The state standard must be as strict or stricter than the federal standard.”).

There is also the potential for producers to attain a “natural” label on the food they produce if they fail to qualify for the organic label, or choose not to pursue the organic certification.<sup>49</sup> The USDA is the first and only federal agency to recognize and regulate a label for naturally produced meat and poultry.<sup>50</sup> There is currently no regulation on a “natural” label for foods outside of those two categories. To attain a “natural” label, the product must be free from artificial ingredients and may only be minimally processed.<sup>51</sup> Although this label attempts to increase consumer knowledge regarding the product they are purchasing, it serves instead to perpetuate confusion. While a product may qualify for the organic label, it may not qualify for the natural label due to its processing procedures, and vice versa, a natural product may not attain an organic label due to the producer’s use of organically prohibited products during the processing or handling stages.<sup>52</sup> By allowing for these two standards to come together on store shelves, consumers are subsequently led to believe that they are synonymous which is not the case.

The unintended consequence of the creation of standards for a “natural” label along with the existence of the organic label, is the farmer or vendor who is capitalizing on the consumer’s confusion from this subsidiary level of regulation on all products that are not meat and poultry.<sup>53</sup> By using the natural label instead of organic, producers can save money and time by not complying with the organic standards, but can benefit from those consumers who assume they

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<sup>49</sup> Office of Policy, Program and Employee Development, “Natural Claims” in *Food Standards and Labeling Policy Book*, U.S. DEP’T OF AGRIC. 116 (August 2005).

<sup>50</sup> Charles P. Mitchell, *State Regulation and Federal Pre-emption of Food Labeling*, 45 FOOD DRUG COSM. L.J. 123, 124 (1990) (discussing FDA’s refusal to acknowledge a separate label for foods produced within the “natural” requirements).

<sup>51</sup> Office of Policy, Program and Employee Development, *supra* note 49.

<sup>52</sup> Kyle W. Lathrop, *Pre-Emptying Apples With Oranges: Federal Regulation of Organic Food Labeling*, 16 J. CORP. L. 885, 916 (1991).

<sup>53</sup> Office of Policy, Program and Employee Development *supra* note 49, only applying these standards to meat and poultry.

should mean more or less the same thing. The lack of “natural” labeling regulations on all other products leaves the consumers unprotected and uninformed of the standards. The use of largely printed statements of “All Natural,” “No Processed Ingredients” and many more that mean essentially the same things – unregulated and most definitely not organic – are the exact reason for the consumer’s inability to successfully distinguish between what is actually organic and what is not.

The average consumer who is buying organic foods may be doing so for reasons that are completely unsubstantiated by the USDA organic label.<sup>54</sup> Yet, some of the reasons they provide prove to be a well-informed attempt to make better choices regarding the food they and their families are consuming.<sup>55</sup> Despite their motives, consumers are still confused as this green market continues to grow. Some believe “natural” to indicate a more stringently regulated segment of the food industry, with organic just being a convoluted and meaningless label enabling the vendor to charge more, which is in fact the opposite of the reality.<sup>56</sup> As more and more companies look to exploit this confusion, the standards surrounding the organic labeling process will become increasingly irrelevant and unnecessary. Consumers will no longer value the USDA organic seal, and thus, producers and handlers will look to shed any and all costs associated with getting the organic certification.<sup>57</sup> This will greatly hinder the growth of the industry by reverting us back to the state of affairs before organic regulations came into existence.

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<sup>54</sup> Renée Shaw Hughner et al., *Who Are Organic Food Consumers? A Compilation and Review of Why People Purchase Organic Food*, 6 J. CONSUMER BEHAV. at 101 (2007).

<sup>55</sup> See Chang, *supra* note 5; See Ellsworth, *supra* note 33.

<sup>56</sup> Monica Eng, *Organic vs. Natural A Source of Confusion in Food Labeling* CHICAGO TRIBUNE (July 10, 2009), [http://articles.chicagotribune.com/2009-07-10/business/chi-natural-foods-10-jul10\\_1\\_organic-food-cornucopia-institute-mark-kastel](http://articles.chicagotribune.com/2009-07-10/business/chi-natural-foods-10-jul10_1_organic-food-cornucopia-institute-mark-kastel) (“They think ‘natural’ is regulated by the government but that organic isn’t, and of course, it’s just the opposite.”).

<sup>57</sup> *Id.*

In addition to the USDA verified organic label and the unregulated “All Natural” label the Non-GMO Project verified seal is gaining popularity on our store shelves.<sup>58</sup> The Project was created to give consumers access to clearly-labeled products which do not contain ingredients that have genetically modified organisms.<sup>59</sup> The verification process behind the seal only evaluates the use of GMOs present within a product and speaks to no other qualities regarding its handling or processing.<sup>60</sup> While GMOs are not permissible under organic standards, the Non-GMO verified label may include products that fall very far on the other end of the organic spectrum.<sup>61</sup> The Non-GMO label, while presenting a verification seal that looks as though it is equivalent to that of the organic label, is very narrowly tailored to the absence of GMOs. Many vendors have begun displaying both the USDA organic label and the Non-GMO label because of confusion regarding which seal covers what.<sup>62</sup> This control for consumer confusion is ineffective in that it is simply a quick fix for a much bigger problem, and it could ultimately undermine the organic label in the long run.<sup>63</sup>

There are vast differences among the organic label and the Non-GMO label that the average consumer is most likely unaware of. The verified Non-GMO label does not control for pesticide usage, handling procedures, or transportation conditions: all of which are covered under

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<sup>58</sup> Hank Schultz, *Survey Reveals Consumers Want to Avoid Pesticides, But Are Unsure How Label Certifications Help Them Do That*, FOOD NAVIGATOR-USA (Oct. 29, 2013), <http://www.foodnavigator-usa.com/Regulation/Survey-reveals-consumers-want-to-avoid-pesticides-but-are-unsure-how-label-certifications-help-them-do-that>.

<sup>59</sup> See, NON-GMO PROJECT, *The “Non-GMO Project Verified” Seal* (last visited Dec. 30, 2016), <http://www.nongmoproject.org/learn-more/understanding-our-seal>.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* (referencing only testing for GMOs and having no other requirements for verification than meeting the Action Threshold); See also, Ken Roseboro, *A Tale of Two Labels: Organic and Non-GMO*, ORGANIC CONNECTIONS (last visited Dec. 30, 2016), <http://organicconnectmag.com/project/a-tale-of-two-labels-organic-and-non-gmo/> (“According to Megan Westgate, Non-GMO Project executive director, more than half of the Project’s 9,000 verified products are organic.” Leaving still a large number of products not in conformance with organic standards).

<sup>62</sup> See Schultz, *supra* note 58.

<sup>63</sup> See Roseboro, *supra* note 61.

the USDA organic label.<sup>64</sup> As the result of such a severe disparity in what is regulated for under each respective label, the products which are only Non-GMO verified will be less expensive than those donning the organic label.<sup>65</sup> Much like “All Natural” labels, there is no federal regulation requiring a vendor to inform the consumer about the presence or absence of GMO’s in their product.<sup>66</sup> Proposed legislation, which has been referred to by the public as the DARK Act (“Denying Americans the Right-to-Know”), would remove the individual states’ rights to create GMO labeling standards, eliminate the FDA’s ability to create a uniform labeling system for GMOs and allow “natural” foods to contain GMO ingredients.<sup>67</sup> In contrast, the privately run non-profit which created the Non-GMO verified project uses the same standards as the European Union in labeling GMOs.<sup>68</sup> Consumer confusion as a result of these labeling battles has far-reaching consequences.

#### **IV. Natural Pesticides in the U.S.**

Natural pesticides and herbicides are very important to an organic farmer as a means for sustainability. While it is the ultimate goal to provide synthetic-free food to organic buyers, it is sometimes a necessity for producers to turn to pesticides in order to maintain their crops. Pesticides, by definition, are any substances intended to eliminate any pests or regulate the growth and production of any crop.<sup>69</sup> By their nature, pesticides are toxic and thus pose

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<sup>64</sup> See Non-GMO Project *supra* note 59.; See Mandek *supra* note 10.

<sup>65</sup> Roseboro *supra* note 61.

<sup>66</sup> Just Label It!, *The DARK Act* (last visited Dec. 30, 2016) <http://www.justlabelit.org/dark-act/>. (The states have begun to create legislation individually as a response, so far only being Vermont, with Connecticut and Maine following close behind with preliminary laws).

<sup>67</sup> *Id.*

<sup>68</sup> See Non-GMO Project, *supra* note 59.

<sup>69</sup> ANN GOLDWEBER, & MIRIAM E. VILLANI, NEW YORK PRACTICE SERIES – ENVIRL. LAW AND REGULATION IN NEW YORK 375 (William R. Ginsberg & Philip Weiberg, 2nd ed. 2015); 7 U.S.C. § 136(u).

potentially extensive threats to those who ingest them.<sup>70</sup> They are used to protect the food from harmful outside forces or promote successful and rapid growth. The use of such substances originally made it possible for farmers to keep up with the rising demand of certain foods.<sup>71</sup> This necessary evil is essential to the food industry as a whole to protect the consumer, as well as from harmful pests which could damage crops on such a large scale that could potentially lead to food shortages. Pesticides make large-scale production possible and economically feasible in order to keep food costs lower and production numbers higher.

Due to the integral role these pesticides play, regulation for this area is a challenging balance.<sup>72</sup> Concerns for legislation of pesticides were outlined in a 1992 United States General Accounting Office Report.<sup>73</sup> Some of these concerns place limitations on the ability of the legislature to regulate pesticides. These include: the difficulty in keeping old standards in line with scientific developments; the physical difficulty in completely removing certain pesticides from the products and where they are grown, including the farming area and groundwater; the inability of technology to keep up with the growing need for pesticides and the poor testing that results; the inability to regulate the workers' interactions with pesticides completely; the difficulty in monitoring the after effects of pesticides; and the illegal sale of such pesticides around the world that may be reintroduced back in to the United States.<sup>74</sup>

In order to understand the importance of their regulation, we must first understand the process by which a natural pesticide makes its way to the consumer's plate. Due to the fact that

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<sup>70</sup> *Id.*

<sup>71</sup> Md. Wasim Aktar, Dwaipayan Sengupta, & Ashim Chowdhury, *Impact of Pesticides Use in Agriculture: Their Benefits and Hazards*, 2 INTERDISCP. TOXICOL. 1 (Mar., 2009).

<sup>72</sup> *Id.*

<sup>73</sup> Peter F. Guerrero, Associate Director, Environmental Protection Issues, Resources, Community and Economic Development Decision, United States General Accounting Office Testimony: Pesticides, 30 Years Since Silent Spring – Many Long-standing Concerns Remain (Jul. 23, 1992).

<sup>74</sup> *Id.*

the organic status hinges on production methods and procedures, organic farmers and conventional farmers do things extremely different to tend their farms. Nevertheless, they do have one thing in common: insects. Whether the threat of the insect is from pathogens it potentially carries or its consumption and corruption of crops meant for human use, the end result is the same: the crops must be protected.<sup>75</sup>

People assume that in buying organic, they are buying pesticide-free, but that has been proven not to be the case.<sup>76</sup> In order for a natural pesticide to be used in organic farming, a key factor that is considered is whether the makeup of that pesticide occurs naturally without any artificial intervention.<sup>77</sup> As a part of the Organic Food Production Act, the USDA maintains a list of substances outlining those which can be used in the organic farming process and those which cannot.<sup>78</sup> This National List, which is established by the Secretary<sup>79</sup> is formed based on the proposed list or amendments to the National List which is primarily developed by the National Organic Standards Board.<sup>80</sup> Despite his ability to establish, the Secretary does not have the authority to provide any exemptions on the National List other than those present on the Proposed National List or Proposed Amendments to the National List.<sup>81</sup> The list must go through the common rigors of administrative regulation and is thus subject to publication and a notice and comment period.<sup>82</sup> The list outlines the criteria which will be used to evaluate

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<sup>75</sup> P.E. Kaufman and R.S. Mann, *Natural Product Pesticides: Their Development, Delivery and Use Against Insect Vectors*, MINI-REVIEWS IN ORGANIC CHEMISTRY, 185 (2012).

<sup>76</sup> Maureen Langlois, *Organic Pesticides: Not An Oxymoron*, NPR (June 17, 2011), <http://www.npr.org/sections/health-shots/2011/06/18/137249264/organic-pesticides-not-an-oxymoron>; See Schultz *supra* note 72.

<sup>77</sup> Langlois *supra* note 76.

<sup>78</sup> §205, *supra* note 42.

<sup>79</sup> 7 U.S.C. §6502 (19) (defining the term “Secretary” to mean the Secretary of Agriculture).

<sup>80</sup> 7 U.S.C. § 6517 (d)(1).

<sup>81</sup> *Id.* at (d)(2).

<sup>82</sup> 7 U.S.C. §6517.

whether or not the substance will be allowed or prohibited.<sup>83</sup> Synthetic substances to be considered for the list have a different set of standards by which they are evaluated.<sup>84</sup>

The criteria starts with the requirement that the substance is unable to be produced from a natural source and there are no organic substitutes that can be used as an alternative.<sup>85</sup> Synthetic substances are the unfavorable choice when deciding to use natural pesticides and for this reason they are closely evaluated to as much of an extent as science will presently allow. It is next required that the substances may not have an adverse effect, whether during their application or upon their breakdown, on the environment and the foods on which they are applied.<sup>86</sup> This requirement includes the constraint that they are produced in compliance with organic standards.<sup>87</sup> This standard is consistent with the idea that the organic label should stand for what is underneath it. Among the other criteria, one of the most important is that the substance is a necessity in the handling of organically produced agricultural products.<sup>88</sup> If the substance doesn't prove to be an essential part of the process of any organic food, it will not be permitted on the list.

Notably, this list does not allow all naturally produced substances to be used in organic farming. In evaluating the natural, non-synthetic substances to be used, their permission is assumed unless otherwise prohibited. Their prohibition will only be permissible if the Secretary of Agriculture, the Secretary of Health and Human Services and the Administrator of the Environmental Protection Agency determine that the use of such substances would be harmful to

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<sup>83</sup> §205, *supra* note 42. at §205.6 (referencing the criteria to be used as specified in “the Act” (7 U.S.C. 6517 and 6518)).

<sup>84</sup> *Id.* at (b) “In addition to the criteria set forth in the Act, any synthetic substance used as a processing aid or adjuvant will be evaluated against the following criteria...”

<sup>85</sup> §205.6 *supra* note 83 at (b)(1).

<sup>86</sup> §205.6 *supra* note 83 at (b)(2).

<sup>87</sup> *Id.*

<sup>88</sup> §205.6 *supra* note 83 at (b)(6).

human health or the environment and are inconsistent with organic farming and handling.<sup>89</sup> The National List is also subject to preemption by Federal regulatory action.<sup>90</sup>

While pesticides are known to be harmful, certified organic pesticides aim to mitigate the risk of such substances. By allowing certain natural pesticides to be used on products that carry the organic label, producers and consumers are consenting to a certain level of harm, even if that harm remains too small to meet the criteria needed to result in a prohibition from the National List.<sup>91</sup> The danger comes from the doses in which the substances are used, which is not among the evaluation criteria.<sup>92</sup> Although this harm is much less than that of conventionally produced food, it is still a level of harm nonetheless. The scientific technology has not yet caught up to the vastly growing need for a sustainable food industry and thus, natural pesticides that are claimed as safe exceptions to be permitted in organic foods are slipping through the cracks.

In a scientific study published in 2010, it was brought to light that the assumption that a pesticide is of natural origin makes it better for the consumer is not always such.<sup>93</sup> The consumers and legislatures cannot make assumptions based on generalizations of the chemical origins of natural pesticides.<sup>94</sup> While this study was limited to pesticide risk used in soybeans, it is representative of a larger problem. Science is moving at lightning speed and the regulations need to find a way to keep up. By improperly regulating natural pesticides, we are putting the consumers at risk. This approval of harmful substances undercuts the transparency of the organic food label by hiding harmful substances without putting the consumer on notice. We

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<sup>89</sup> §6517 *supra* note 82 at (c)(2).

<sup>90</sup> §6517 *supra* note 82 at (d)(3).

<sup>91</sup> See §6517 *supra* note 82; See generally, JEFF GILLMAN, THE TRUTH ABOUT ORGANIC GARDENING, 2008

<sup>92</sup> Langlois *supra* note 76.

<sup>93</sup> Christine A. Bahlai, Rebecca H. Hallett, Cara M. McCreary, Arthur W. Schaafsma & Yingen Xue, *Choosing Organic Pesticides over Synthetic Pesticides May Not Effectively Mitigate Environmental Risk in Soybeans* 5 PLOS ONE 6 (June 22, 2010).

<sup>94</sup> *Id.*

associate natural with safe and thus, are ignorantly content with permitting the pesticides.<sup>95</sup> The regulations concerning these pesticides need to catch up in order to make that fictitious belief of safety a reality. If they fail to do so, organic will no longer be able to maintain its title.

## V. European Union Organic Food Regulation

Traditionally, the United States has been a regulatory leader in the international realm.<sup>96</sup> At the same time, the organic food industry is growing at such a rapid pace that our regulations have to play catch up with the technology. Markedly, The EU's labeling regulations are very similar to those of the United States in that they have a stringent set of standards that must be followed by producers in order for them to use the organic logo. In another similarity to the United State's organic food industry, they are subject to the consequences of an extremely large amount of producers aiming to make the most profit, which is seen in organic food.<sup>97</sup> Consumers want not only the most nutritious food they can access, but also the best bang for their buck. This demand is likely to lead to shortcuts to be taken by producers and thus, an unreliable organic label.

Since 1991, the European Union has been battling the same issue.<sup>98</sup> Beginning with plant products, the European Council adopted regulations which covered both farming and labeling.<sup>99</sup> Later moving to animal products, the regulation extended to what was fed to the animals, the care they were given and how they were handled throughout the production process.<sup>100</sup> The

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<sup>95</sup> *About Organic Produce*, <https://www.ocf.berkeley.edu/~lhom/organictext.html> (last visited Dec. 30, 2016).

<sup>96</sup> Jennifer G. Hill, *What We Can Learn From Other Statutory Schemes: Regulatory Show and Tell: Lessons from International Statutory Regimes*, 33 DEL. J. CORP. L. 819 (2008).

<sup>97</sup> *See generally*, NEIL SORENSEN, HELGA WILLER & MINOU YUSSEFI-MENZLER, *THE WORLD OF ORGANIC AGRICULTURE: STATISTICS AND EMERGING TRENDS 2008* (Eds. 2008).

<sup>98</sup> EUROPEAN COMMISSION, *Organic Farming Policy: The Historical Background*, [http://ec.europa.eu/agriculture/organic/eu-policy\\_en](http://ec.europa.eu/agriculture/organic/eu-policy_en). (last visited Dec. 30, 2016).

<sup>99</sup> *Id.*; EUROPEAN UNION, Council Regulation (EEC), *Organically Grown Agricultural Products and Foodstuffs*, No. 2092/91 (Jun 24, 1991).

<sup>100</sup> *Id.*

regulations, now being extensive and complex due to changing times and numerous amendments, are the minimum standards by which all European Union countries must abide by in order to maintain uniformity throughout the whole European Union. This purpose is identical to that of the United States, though we see a disconnect between the two countries current regulations.

Despite these similarities, the regulations of the European Union prove to be much more stringent than those in the United States. Much like the United States, the European Union requires that all products that carry the organic logo must comply with organic standards. The regulations cover production, processing, control and labeling of food.<sup>101</sup> In addition to those standards, every operator within the organic food industry is subject to a strict system of checks upon each stage of the chain.<sup>102</sup> This control regime acts as a policing system in order to maintain the integrity of the organic industry. This transparency is important with so many organic products being imported into the Union and with such a high ease of mobility among the separate countries.

Labeling laws within the European Union are also much more stringent than those in the United States. The European Union regulations require that organic product labels display the name of the operator who last handled the item and the identifying marker of the certification authority who checked and approved the product.<sup>103</sup> This was important in applying a sense of credibility and accountability from producers to conform to the regulations. All of these regulations aimed to maintain a strict set of guidelines by which any person within the organic

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<sup>101</sup> EUROPEAN COMMISSION, *Organic Certification*, [http://ec.europa.eu/agriculture/organic/organic-farming/what-is-organic-farming/organic-certification/index\\_en.htm](http://ec.europa.eu/agriculture/organic/organic-farming/what-is-organic-farming/organic-certification/index_en.htm) (last visited Dec. 30, 2016).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*; EUROPEAN UNION, Council Regulation (EC), *On Organic Production and Labelling of Organic Products and Repealing Regulation (EEC) No. 2092/91*, No.834/2007, Title IV, Art. 24, 1 (a) (Jun 28, 2007).

food industry had to abide by in order to achieve the status of organic which, within an industry growing at an exponential rate, was and still is a coveted status to hold.

In 2007, the European Council of Agricultural Ministers set forth a new Council Regulation in order to redefine the organic industry regulations, and to keep up with the developing technology and desires of the consumers.<sup>104</sup> These new regulations placed an emphasis on promoting sustainability within the industry as well as focusing a large amount of the regulation to protect the consumer. The regulations also aimed to strengthen the industry as a whole by focusing on protecting both the environment used in the farming process, as well as the animals produced for consumption.<sup>105</sup> However, the European Union, like the United States, recognizes that although the practice is unfavorable, the use of synthetic materials within the industry may at some times be necessary. The European Union requires that there be no suitable alternatives to the synthetic material and requires that they be authorized for use by the Commission and the European Union countries before use.<sup>106</sup>

In 2013, Thünen Institute of Farm Economics released a study report on the Evaluation of the European Union Legislation on Organic Farming.<sup>107</sup> This report, which was funded by the European Commission, was created to evaluate the regulations on the industry through different countries participating, including Germany, the United Kingdom, Switzerland and France.<sup>108</sup> Throughout the analysis which covered things such as: the adequacy of the scope of the regulations; the adequacy of the production and processing rules; the adequacy of the overall

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<sup>104</sup> EUROPEAN COMMISSION, *EU Law On Organic Production: An Overview*, [http://ec.europa.eu/agriculture/organic/eu-policy/eu-legislation/brief-overview/index\\_en.htm](http://ec.europa.eu/agriculture/organic/eu-policy/eu-legislation/brief-overview/index_en.htm) (last visited Jan 9, 2016).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> THUNEN INSTITUTE OF FARM ECONOMICS, *EVALUATION OF THE EU LEGISLATION ON ORGANIC FARMING* (Jörn Sanders ed. 2013) [http://ec.europa.eu/agriculture/evaluation/market-and-income-reports/2013/organic-farming/fulltext\\_en.pdf](http://ec.europa.eu/agriculture/evaluation/market-and-income-reports/2013/organic-farming/fulltext_en.pdf).

<sup>108</sup> *Id.*

control system; consumer perceptions of organic farming; and the degree of simplification of the current legislative measures compared to the legal framework applicable before 2009.<sup>109</sup> As a result of the evaluation, the Commission found that the legislation surrounding organic farming in the European Union were generally sound for allowing a sustainable development of organic production.<sup>110</sup>

Some suggestions posed by the report included solutions that would later come to fruition in the European Union's proposed organic action plan. The evaluators explained, "In many cases the rules are adequate but there is a lack of a harmonized interpretation and enforcement in Member States."<sup>111</sup> In response to this problem, it is suggested that the regulations required there to be more guidance and clarification provided to those would be affected by such laws.<sup>112</sup> In order to do this effectively, the evaluators suggest that "[c]ollecting and making available more information to support the Commission and Member State authorities in streamlining the rules and monitoring their implementation (e.g. through the collection of market data) could improve this situation."<sup>113</sup>

What this note will suggest should be the most closely mirrored aspect of the European Union proposed policy is the evaluators next suggestion for improvement. There are multiple ways in which the European Union would be able to achieve the goal of increasing the impact of such a regulatory system, and as evidenced by their adopted action plan, they chose to remedy this issue by "providing more information and capacity building to relevant actors."<sup>114</sup> In effect, this means that all those who would be affected by, and all those who would have a role in the

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<sup>109</sup> Thünen Institute *supra* note 107 at i.

<sup>110</sup> Thunen Institute *supra* note 107 at xv.

<sup>111</sup> *Id.*

<sup>112</sup> Thunen Institute *supra* note 110 at xvi.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

processes of the organic food industry, should be the object of the information campaigns. The focus of these campaigns, as suggested by the evaluators, would be to raise awareness regarding the common concept of the organic industry, and to raise awareness and inform consumers of the European Union organic logo and all that stands behind the logo.<sup>115</sup>

In their approved 2014 Action Plan for the future of Organic Production in the European Union, the European Union aims to launch a new policy which will transform the interactions within the organic food industry between not only consumer and vendor, but also potential consumer and educator.<sup>116</sup> The European Union organic market has quadrupled over the last 10 years and with such growth, comes the need for updated regulations.<sup>117</sup> Updated regulations will lead to an enhanced ability to respond to problems arising and will allow for faster growth if the industry continues to move in the direction that it currently moves. For that purpose, the European Union seeks to take the best parts of the old organic food system and tweak the remaining problem areas in order to ensure success for the industry.<sup>118</sup> “The overall challenge faced by the organic sector is to ensure a steady growth of supply and demand, while maintaining consumers’ trust. It is essential to guarantee the credibility of the scheme and the added value in a long term perspective.”<sup>119</sup> Developing the regulations to fit the needs of technology is the prospective ideology that will stimulate the growth of the industry in an extremely positive way.

One of the major challenges of this new plan is the desire of the European Union to not only respond to the already existing demand for organic products but also to fuel its growth

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<sup>115</sup> *Id.*

<sup>116</sup> EUROPEAN COMMISSION, *European Action Plan*, [http://ec.europa.eu/agriculture/organic/eu-policy/european-action-plan/index\\_en.htm](http://ec.europa.eu/agriculture/organic/eu-policy/european-action-plan/index_en.htm) (last visited Jan 9, 2016).

<sup>117</sup> EUROPEAN COMMISSION, *Policy Development*, [http://ec.europa.eu/agriculture/organic/eu-policy/policy-development/index\\_en.htm](http://ec.europa.eu/agriculture/organic/eu-policy/policy-development/index_en.htm) (last visited Jan 9, 2016).

<sup>118</sup> *Id.*

<sup>119</sup> *See* European Commission Action Plan *supra* note 20.

without compromising consumer confidence.<sup>120</sup> It is likely that with a growing demand, producers and operators will be more prone to turning to illegal and unfavorable practices within the industry in order to keep up. This probability will also affect consumer confidence within the European Union and must be addressed by these new regulations.<sup>121</sup> Aside from these concerns, the European Union Action plan will focus on three priority domains: to increase competitiveness of European Union organic producers; to consolidate and increase consumer confidence in the organic foods that are either produced by the European Union or permissibly imported to the European Union; and to reinforce the external dimension of the European Union organic production scheme.<sup>122</sup>

The key common factor to these priorities is the increased range of information made available to all actors within the organic food industry. If the European Union can establish a more diverse range of information networks and make them a beneficial resource for both consumers and producers, then there is a much better chance that the organic food industry can establish and sustain its transparent quality. Through its Action Plan, the European Union recognizes that directing this information at children through elementary school initiatives is an extremely important factor in raising awareness of the organic food industry.<sup>123</sup> Like in the United States, the uniformity of the meaning behind the organic label is the backbone of this thriving market. Due to this necessity, in its Action Plan, the European Union has established a dual level check system in order to ensure the maintenance of consumer confidence within the system. Not only will it conduct periodic surveys on consumers' awareness of the European

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<sup>120</sup> See European Commission Action Plan *supra* note 20 at 3.

<sup>121</sup> See European Commission Action Plan *supra* note 20 at 4.

<sup>122</sup> *Id.*

<sup>123</sup> See *supra* note 20 at 7.

Union organic logo, but it will also survey consumers' awareness, confidence and understanding of the farming scheme behind the organic food industry.<sup>124</sup>

While the European Union Action Plan will create stricter standards and higher levels of information being made available to the consumers, this does not come without its detriments. As a consequence of these newly implemented programs, there are high levels of financial support needed by both the Commission and the Member States who are subject to these regulations.<sup>125</sup> If that support fails to be given through grants to the Member States, or some other process by which money is allocated, the burden will fall on the farmers through raised prices and fees in maintaining their organic status.<sup>126</sup> Notably, the Commission is not clear where these funds will come from and as such, the farmers are left at risk. The Commission also fails to indicate where the material for the educational programs will be derived. Without a uniform system to put this information out in an effective way, there will be no use for it to eliminate consumer confusion.

Another aspect of the European Union's organic industry is their regulations of GMO labeling.<sup>127</sup> The Commission requires that applicants can apply for GMO authorizations by submitting a report which contains both experimental data and a risk assessment.<sup>128</sup> In essence, the European Union is placing strict regulations on both the introduction of GMOs into the food industry, and their continued presence throughout.<sup>129</sup> "The approach chosen in the European

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<sup>124</sup> *Id.*

<sup>125</sup> IFOAM EU Group, *Organic Regulation Review* (last visited Dec. 30, 2016), <http://www.ifoam-eu.org/en/organic-regulations/organic-regulation-review>.

<sup>126</sup> *Id.*

<sup>127</sup> Health and Food Safety, *Genetically Modified Organisms*, EUROPEAN COMMISSION (Oct. 16, 2015), [http://ec.europa.eu/food/plant/gmo/index\\_en.htm](http://ec.europa.eu/food/plant/gmo/index_en.htm).

<sup>128</sup> Health and Food Safety, *GMO Authorisation*, EUROPEAN COMMISSION (Oct. 16, 2015), [http://ec.europa.eu/food/plant/gmo/authorisation/index\\_en.htm](http://ec.europa.eu/food/plant/gmo/authorisation/index_en.htm).

<sup>129</sup> Brussels European Council, *Fact Sheet: Questions and Answers on EU's policies on GMOs* (Apr. 22, 2015), [http://europa.eu/rapid/press-release\\_MEMO-15-4778\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-4778_en.htm).

Union as regards GMOs is a precautionary approach imposing a pre-market authorization for any GMO to be placed on the market and a post-market environmental monitoring for any authorized GMO.”<sup>130</sup> The risk assessment to be used is extremely stringent in that it involves both the European Food Safety Authority and the scientific bodies of the Member States to determine whether the product is safe for both animal and human health and the environment.<sup>131</sup> If a GMO is subsequently approved for use in food or feed, the product must be labeled as containing such unless the presence is below .9 percent of the food/feed.<sup>132</sup>

Unlike the United States, the European Union does not forbid the use of a GMO-free label on their foods.<sup>133</sup> However, with this permission to label GMO-free comes the requirement that vendors conform to the general rules on food labeling, placing an emphasis on avoiding labels which would provide consumers with misleading information.<sup>134</sup> It is clear through the regulations implemented by the European Union regarding their organic food standards that consumer confusion is an extremely important issue in which they aim to address at every level of the industry. In regard to their GMO policies, in allowing vendors to label foods as GMO-free is opening their consumers up to the strong possibility of experiencing misleading labels.<sup>135</sup>

Above all, at the heart of their policy is the desire of the Member States to have a standard which is balanced between flexible and stringent.<sup>136</sup> While they have maintained their national standard for risk management in which the Member States have a say, they have

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<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* See also, NON-GMO PROJECT, *The “Non-GMO Project Verified” Seal* (last visited Dec. 30, 2016), <http://www.nongmoproject.org/learn-more/understanding-our-seal>.

<sup>134</sup> Fact Sheet *supra* note 129.

<sup>135</sup> See GMO Authorisation *supra* note 128.

<sup>136</sup> Press Release, European Commission, More Freedom for Member States to Decide on the GMOs Use for Food and Feed (Apr. 22, 2015) [http://europa.eu/rapid/press-release\\_IP-15-4777\\_en.htm](http://europa.eu/rapid/press-release_IP-15-4777_en.htm).

changed the process occurring after authorization is approved or denied.<sup>137</sup> If the GMO is approved for use in food or feed, the Member States then have the choice to allow or prohibit the product.<sup>138</sup> This grant of sovereignty to the individual states is a complete contradiction of the currently proposed legislation for GMOs in the United States.<sup>139</sup> While this appeases the individual states right to make individual decisions based on their respective concerns, it will still perpetuate the issue of consumer confusion in altering the national standards: what is allowed in one state, will not be allowed in another and it is up to the consumers to make themselves aware.<sup>140</sup>

In spite of the Action Plan's failure to address natural pesticides, the European Union has a current stance that is similar to that of the United States.<sup>141</sup> The Commission acknowledges the necessity of pesticides in order to keep crops healthy and maintaining sustainability.<sup>142</sup> The European Union requires that all substances be authorized before they can be used on the market, much like GMOs.<sup>143</sup> In authorizing pesticides, the Commission first evaluates the active substances within the pesticides and either approve or deny its use.<sup>144</sup> Subsequently, if approved, the Member States can then evaluate and authorize the products; this two-tier system aiming to ensure the safety of their consumers and promoting the concerns of the individual states.<sup>145</sup> This system maintained by the European Union, in both GMOs and natural pesticides, is an attempt to

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<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> See DARK Act *supra* note 66.

<sup>140</sup> *Id.*

<sup>141</sup> Briefing, European Parliament, Organic Food: Helping EU Consumers Make an Informed Choice (May 2015), [http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/557009/EPRS\\_BRI\(2015\)557009\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/557009/EPRS_BRI(2015)557009_EN.pdf).

<sup>142</sup> *Id.* at 8.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*; See EU Commission Regulation No 889/2008 Annex II.

maintain national standards while also giving the independent states the freedom to decide for themselves on how they would like to shape their organic food industries to fit their needs.

The 18<sup>th</sup> Action of the European Union's Action Plan is also an extremely important proposal.<sup>146</sup> In order to further solidify the meaning and protection of their organic logo, the European Union seeks to address this issue in relation to third countries. By registering the logo as a collective trademark or entering into bilateral agreements, the European Union can ensure consumer confidence in their logo both in their Member States and out.<sup>147</sup> By having a trademarked logo, the European Union can ensure its standards are being met without having other countries use the logo with no regulations behind it as support.

## V. The Solution

It is clear that there are issues within the organic food industry that need to be addressed in order for consumers to gain an acceptable amount of confidence in the organic food industry. However, this note will only suggest solutions to address the specific issues addressed above. The United States has seen many attempts to create educational programs regarding childhood obesity and the importance of nutrition starting at the elementary school levels.<sup>148</sup> Even so, none of those programs have attempted to target the organic food industry as a main topic of discussion. The United States should adopt the proposal to create educational programs of both the organic food industry and its label to keep kids informed of what they are eating.

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<sup>146</sup> See European Commission Action Plan *supra* note 20.

<sup>147</sup> *Id.*

<sup>148</sup> See *e.g.*, Let's Move!, America's Move to Raise a Healthier Generation of Kids (last visited Dec. 30, 2016), <http://www.letsmove.gov/>; Division of Nutrition, Physical Activity, and Obesity, CDC, Childhood Obesity Research Demonstration Project (CORD) (Nov. 2, 2015), <http://www.cdc.gov/nccdphp/dnpao/division-information/programs/researchproject.html>; USDA, ChooseMyPlate (last visited Dec. 30, 2016) <http://www.choosemyplate.gov/>.

Let's Move!, the program instituted by Michelle Obama in 2010 was created to reconstruct school lunches in order to battle childhood obesity.<sup>149</sup> While the numerous successes of the campaign are outlined on its website, there is no mention of the organic food industry. It is important to incorporate this information into campaigns of this type because of how efficient it would be to do so. Simply familiarizing children with the organic food label and its standards while also informing them of nutrition standards would be a leap in the right direction. More exposure is what the European Union sought in implementing their new organic food policy and it would be wise for the United States to do the same.<sup>150</sup>

The United States has no policy regarding surveys to test the levels of consumer confusion within our country. The European Union has proposed periodic surveys in order to maintain a level of integrity within the industry and this is a practice which would greatly benefit the United States.<sup>151</sup> Consumer confusion is a serious problem that can cost the industry a vast amount of money.<sup>152</sup> When consumers are unaware of what they are buying underneath the guise of a USDA certified organic label, they are more likely to make compromises for less expensive products.<sup>153</sup> For those health conscious consumers encountering four types of the same product all donning different labels, USDA Organic, Non-GMO, All Natural and no label at all, understanding the health benefits of the organic label would make that choice no longer a choice.

In adopting a two-tiered system, as the European Union has, in regard to natural pesticides and GMOs, the United States would be taking a much safer step towards eliminating

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<sup>149</sup> *Id.* at Let's Move!

<sup>150</sup> *See* Thunen Institute *supra* note 110.

<sup>151</sup> *Id.*

<sup>152</sup> Roseboro *supra* note 61.

<sup>153</sup> *Id.*

consumer confusion. By involving the individual states in the choice to regulate certain pesticides and certain labeling provisions of GMOS, there would be a higher level of information sought out by those who would be involved in the decision making process. By utilizing state officials and teams with specialties in different areas, there will be more of a chance to uphold the highest standard of safety when it comes to these still very new areas of science.

## **VII. Conclusion**

The United States has made leaps and bounds in organic food regulations since mass food production has developed.<sup>154</sup> While there is more to improve on, through the implementation of standards to prevent against consumer confusion and to protect against unnecessary harmful substances, the regulations in place are sufficient to maintain a manageable industry. If children are made aware of the fact that there is a choice, giving them the information necessary to make that choice will in turn create adults who know exactly what they are buying. If consumers can feel as though they can trust the labels on their food, they will be more likely to pay the higher price and continue to move the industry in an upward climb.

An introduction of a system of ongoing checks of all operators within the industry will ensure the dependability and consistency of the label. Additionally, implementing a national awareness program will not only unify the individual states in supporting one organic standard, but it will directly affect the current major issue of consumer confusion.<sup>155</sup> The European Union's action plan goes further to suggest the need for educational programs for young consumers and children in order to both incite their interest in the benefits of utilizing the organic

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<sup>154</sup> See *History of Organic Farming in the United States*, SUSTAINABLE AGRICULTURE RESEARCH AND EDUCATION (last visited Dec. 30, 2016), <http://www.sare.org/Learning-Center/Bulletins/Transitioning-to-Organic-Production/Text-Version/History-of-Organic-Farming-in-the-United-States>.

<sup>155</sup> See, SUSAN F HENSSONOW, LAMBERT M SURHONE, & MARIAM T TENNOE, NATIONAL ORGANIC STANDARDS BOARD (2011).

market, but also stop consumer confusion from ever developing in the first place.<sup>156</sup> An integral aspect of these programs is the continued survey and monitoring of the consumers' awareness of not only the logo, but also their "confidence in and understanding of the European Union organic farming scheme."<sup>157</sup>

The American standards and daily practices do little to encourage or help the consumer in retaining a basic understanding of the American organic farming scheme. If our food labels are untrustworthy, the consumer could be buying food that is completely void of the necessary requirements but still carries the logo and thus earns the price of an organically produced food. The regulations controlling these schemes have numerous layers that can be overwhelming to the average consumer.

The buyer sees the organic label and assumes it ensures that the food was produced compliant with certain standards.<sup>158</sup> An educational program targeted not only at consumers looking to better understand our organic structure, but also targeted at children will be extremely effective in decreasing consumer confusion due to the simple element of exposure.<sup>159</sup> Children in the United States have little to no access to organic food education other than what is done within the home, if there is any done at all. Informing them early can be the first step at fighting consumer confusion. It is through these progressive programs and action plans which could help the United States to overcome this consumer confusion epidemic.

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<sup>156</sup> *Id.* at 10.

<sup>157</sup> *Id.*

<sup>158</sup> *See generally*, PETER LAUFER, *ORGANIC: A JOURNALISTS QUEST TO DISCOVER* (Meredith Dias ed. 2014).

<sup>159</sup> The information should come at a time where they are becoming both financially and health consciously aware (financially in the respect that they can/will have an effect on the economy and health consciously in the respect that they know what's going or not going in their bodies).