

7 Transportation, Delivery & Storage

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CHAPTER QUICK TIP

Limit Your Obligation to Prevent Contamination

Contract language stating you will take “all measures” to prevent contamination could require you to take extremely expensive measures. Instead, you can limit your obligation to prevent contamination by substituting language stating you will take all “commercially reasonable” anti-contamination measures, or that you will use “best efforts” to prevent contamination.

TRANSPORTATION

Who is responsible for transportation?

It is a good idea to ensure that the contract clearly defines how the organic product will be transported to the buyer, as transportation can be both complex and costly.

You may wish to include contract language covering the following issues:

Who is Responsible for Arranging Transportation?

Either the farmer or the buyer could be responsible for arranging transportation. If you make the arrangements, you will have more control over who is hired and the specific transportation services requested. On the other hand, making transportation arrangements will require you to expend time and resources that you would not have to expend if the buyer had the responsibility.

Whether it is more favorable for the farmer or the buyer to arrange transportation will also depend on who is paying for transport, which is discussed on the next page.

- *Be careful with transport companies that may not understand the needs of organic farmers*



If you are arranging transportation for your own products, be sure that transportation company personnel are fully informed about the contract obligations involved and exactly how and when the delivery must take place to prevent violation of the contract. It's a good idea to discuss the specifics with transport company office employees, as well as on-the-ground transport company employees (such as drivers).

In a best-case scenario, you will also enter into a separate contract with the transportation company. If the company agrees to ensure that your organic commodity is transported on time, safely, and without contamination, the company will likely be liable to you for any damage caused during transit. Be aware, though, that some trucking companies have standard insurance policies

covering damage to the product during transport that may not reflect the organic premium. You may wish to check with the transport company regarding its insurance.

Please see pages 7–12 through 7–16 of this chapter for a more thorough discussion of contamination prevention during transit.

- *Significant changes proposed for transport of bulk, unpackaged organic products*



In July 2011, the National Organic Program (NOP) published a draft guidance concerning the handling, including transport, of bulk, unpackaged organic products. The proposed policy would require handlers of unsealed organic products to be certified organic or be specifically named in the farmer's or buyer's organic plan and be subject to inspection. If the requirement is not satisfied, the proposed policy would result in loss of organic status for the commodity. The policy, if adopted, is likely to make arranging for transport of bulk, unpackaged organic products more complicated and probably more expensive. However, it could also help better protect organic integrity from farm to table.¹

A public comment period on the draft guidance was open until April 3, 2012. At the time this guide was printed, it was not known when or whether NOP will adopt these proposed handling rules as a program requirement.

Who Pays for Transportation?

For some organic commodities, like organic milk, the cost of transportation was historically the buyer's responsibility. In recent years, however, some buyers have begun charging farmers significant "hauling fees." Whether you are sharing the burden of transportation costs or are bearing the costs on your own, be sure to factor that cost into your expected profit calculation.

**Note for Organic Dairy Farmers**

Milk hauling fees have traditionally been flat fees (either per year or per month). However, some organic milk buyers have changed their contracts to include hauling charges based on the farm's distance from the milk processing plant. Consequently, organic dairy farmers should pay close attention to the details of any milk hauling charges in current contracts.

As a general matter, one party to the contract might be responsible for both arranging and paying for transportation—or the duties could be split between the two parties. If the duties are split, one party will likely pay all of the transportation expenses up front and then be reimbursed by the other for all or part of the expenses. If you have a reimbursement arrangement with a buyer, it is a good idea to set a deadline for reimbursement payments. You may also wish to set out whether there are any restrictions on reimbursement. For example, is there a limit on the amount of reimbursement for transport regardless of actual cost? Will reimbursement apply to partial loads? If the shipment does not fill the truck, rail car, or other vessel, and the transport company charges for the entire vessel, which party has to pay for the unused space?

Can the Transportation Payment Structure Change During the Contract?

Some organic contracts state that although the buyer might initially cover transportation costs, the buyer retains the right to begin charging for transportation (with or without notice). At present, this issue is most common in organic dairy contracts. Transportation costs can be significant, and this kind of provision allows buyers to shift significant expense to farmers with little or no notice. Therefore, it is best to avoid this kind of provision. However, if it cannot be avoided, a compromise could be to try to negotiate reasonable notice and/or a limit on farmer-covered transportation costs. At the very least, however, farmers who sign contracts that allow for increased transportation costs during the contract should try to factor a reasonable increase in transportation costs into their cost-benefit calculation before signing the contract.

Is a Specific Type of Transportation Required?

Does the contract require that a particular type of transportation be used (truck, rail, air, etc.) or a particular freight service? Or, does the contract require certain transport characteristics, such as refrigerated shipping

(perhaps at a certain temperature with a temperature recorder) or the maintenance of certain moisture levels?

If you are arranging and/or paying for transportation, it may be to your benefit if the contract allows flexibility in the type and characteristics of transportation used—while still maintaining quality.

Are there any packaging requirements?

Organic contracts are often quite specific when it comes to packaging the organic commodities for shipment. However, if the contract does not contain packaging requirements, consider whether adding specific requirements might be helpful in preventing future buyer complaints. It is more difficult for the buyer to complain about issues related to packaging (such as damage or contamination during transit) if you have agreed upon packaging requirements at the outset. Still, it may be to your benefit to retain flexibility in packaging options. You could strike a balance by identifying a range of acceptable packaging options in the contract.

If the Contract Does Discuss Packaging, You May See Contract Language Related to the Following:

- *Type of packaging*

The contract may call for a certain type of material or container, such as: bags (plastic, paper, mesh), bins (metal, plastic, wood), boxes (cardboard, wood, plastic), etc. Additionally, the contract may require packaging capable of maintaining the organic products at a certain temperature.

- *Size of packaging*

The contract may require specific packaging dimensions. This requirement will likely be designed to ease delivery and/or organization within the buyer's facility (for example, a 42-inch by 48-inch plastic pallet, or a one-ton storage bin) or sales (for example, 50-pound plastic bags may be the standard for selling an item in the wholesale market).



Example: Packaging Requirement

Required Packaging. All products must be shipped in new 25-lb clear 2-mil re-closable plastic bags.

- *Quality of packaging*

The contract may also include requirements relating to packaging quality. The requirements may be vague, requiring materials that are, for example, “clean and in satisfactory condition.” Or, quality requirements may be more specific, requiring plastic bags of a certain thickness or standardized pallets from a particular supplier. The contract might require brand-new packaging or might allow used packaging in good condition.

Consider whether you could benefit from more clarity in the contract regarding packaging quality or whether vague specifications give you useful flexibility.

- *Labeling*



Many organic contracts require farmers to label their commodities with the words “Certified Organic.” If you do label your commodities as organic, note that, if you are shipping or storing raw or processed agricultural product in non-retail containers labeled as containing organic ingredients, NOP regulations require those non-retail containers to be labeled with the production lot number of the organic product.²

Production Lot Numbers

Production lot numbers are unique codes associated with individual operations. As such, they often play a critical role in the identification of an organic product as it moves through the organic food system. Some buyers may be interested in tracking organic farm products by farm, barn, field, parcel—or even by bed. Production lot number systems can allow this level of tracking. Moreover, even if the contract does not require production lot numbers, NOP regulations require them for non-retail containers labeled as containing organic ingredients.

An example production lot number might include the farmer name, the type of crop, storage unit or field number, and the production date. For example, the lot number for Farmer Jane Smith's organic soybeans harvested on September 28, 2012 and stored in bin #5 might look like: 092812OS5Smith. To be effective, production lot numbers must be used consistently once established.

Creating and maintaining a labeling system that links products to units of production can be time-consuming and potentially somewhat costly, so be sure to factor any labeling costs into your contract cost-benefit analysis.



Labeling requirements in organic contracts other than the production lot number vary widely, and could include information like your farm's name, type of organic commodity, weight, lot number, test results, GMO-free status, or other identifiers.

The NOP regulations expressly allow non-retail containers used only to ship raw or processed organic products that are labeled as containing organic ingredients to display:



- Name and contact information of organic certifier (ACA)
- “Organic” designation
- Handling instructions to maintain organic integrity
- NOP seal
- Organic certifier (ACA) seal³

The production lot number, if applicable, must be displayed.⁴

The NOP regulations do not prohibit non-retail shipping or storage containers from displaying information in addition to those items listed above.⁵



Example: Labeling Requirement Provision

Labeling: Producer shall clearly label the outside of each bin with the Producer's assigned control number; year of harvest; variety name; weight; and the words "Certified Organic." The words "Certified Organic" shall also appear on the Bill of Lading and any other accompanying documentation.

If the contract requires that you invest in special packaging or satisfy elaborate labeling requirements beyond NOP regulations and other requirements imposed by federal labeling laws, consider whether you can afford the expense. If not, consider negotiating an alternative packaging solution.

Farmers should be aware that federal laws other than the NOP regulations may impose additional food labeling restrictions and requirements that are beyond the scope of this guide. The National Agricultural Law Center website contains a section dedicated to food labeling law that may be helpful and is available at:

<http://www.nationalaglawcenter.org/readingrooms/foodlabeling>.⁶

Will the buyer provide packaging?

Once a farmer knows what type or types of packaging are required under the contract, the next consideration is where to obtain packaging. Sometimes buyers will provide the packaging materials or require farmers to purchase packaging materials from the buyer. If a farmer is making numerous deliveries throughout the course of the year (such as organic milk or eggs), the buyer might offer a packaging materials exchange. In this type of arrangement, the farmer delivers the packaged commodities and picks up empty packaging in exchange for the packaging containing

the delivered commodity. If the buyer does not provide packaging, the farmer will have to find a packaging supplier.

Although it might be more convenient if the buyer provides packaging (or selects packaging for you to purchase), you might have the following concerns:

How Much Will the Packaging Cost?

If the buyer selects the exact packaging materials the farmer must purchase, the farmer loses the opportunity to shop around or find a better deal on packaging. The farmer may also end up paying a premium to the buyer. Consider more flexible contract language, such as “the seller may purchase packaging from the buyer,” which gives you the opportunity to purchase packaging materials from the buyer if it is convenient and advantageous, but allows you the freedom to look for a better deal.

Example: Seller Purchase of Packaging from Buyer

Seller may purchase the following items from Buyer, as they are available: plastic or hardwood pallets; other packaging material and supplies; labels; temperature gauges; and other packing supplies. These items must be paid for within 30 days.



Will the Packaging Materials Be Thoroughly Cleaned and in Good Condition?



The assurance that any packaging provided by the buyer will be clean and in good condition is particularly important for organic commodities, and should be set out in the contract. The NOP regulations prohibit the use of packaging materials and storage containers that contain synthetic fungicides, preservatives, or fumigants. Additionally, the regulations prohibit the use or reuse of any bag or container that has been in contact with any substance that would compromise the organic integrity of any organically produced product placed in those containers, unless such reusable bag or container has been thoroughly cleaned and poses no risk of contact between the organically produced product or ingredient and the prohibited substance.⁷ Therefore, if buyer-

provided packaging or storage materials are not appropriately cleaned, you may be in violation of the organic rules.

Also, does the contract protect you if buyer-provided packaging contaminates your products and the contaminated shipment cannot be marketed as organic? Must the buyer still pay for the contaminated products at the contract rate, do you take a loss on that shipment, or is there another result?

If the buyer-provided or buyer-mandated packaging is not in satisfactory condition (such as, splintered wooden pallets, rusty bins), does the contract protect you? Consider including contract language stating that the buyer will provide packaging materials in satisfactory condition and will replace any unsatisfactory materials promptly and free of charge. Alternatively, the contract could state that you have the right to purchase alternative packaging and be reimbursed for its cost if the packaging provided by the buyer is not in satisfactory condition.

Will the Materials Be Provided in a Timely Fashion?

Timely availability of packaging materials is especially important for perishable organic commodities. If you are required to wait for buyer-provided packaging, the delay could cause spoilage. You may wish to negotiate language stating that, if a delay occurs in packaging being provided (including the packaging being dirty or otherwise unusable), the buyer will protect you from any consequences of the delay. This could include the buyer's waiving quality standards for the shipment or compensating you for replacement packaging and/or the cost of products that spoiled due to the delay.

What kind of documentation is required as part of the organic shipping process?



Organic contracts often require documentation of organic status. Make sure you are prepared to provide required records at the appropriate time: when the contract is signed, prior to shipping, with the shipment, or after shipment. Also, check to see whether you must pay a fee to obtain any necessary documents and how much time it generally takes to obtain required documentation. For example, you may have to wait and/or pay a fee for documents that must be obtained from your organic certifier, such as an organic transaction certificate or a TM-11 form (both discussed below).

Although the Contract May Require Additional Documentation, Some Commonly Required Documents Include:

- *Audit trail documents*
 - Sales invoices or other delivery papers representing a complete record of the transaction
 - Inventory and shipping logs
 - Product sales records
 - Records of contracted custom application or harvest
 - Scale tickets or weight slips
 - Clean transport affidavits (discussed in the next section)

- *Bills of lading*

A bill of lading is the official document prepared by the transport company accepting the goods for shipment. It details information such as the item, quantity, lot number, value, vessel details, date, port, seller, buyer, terms of delivery, etc. The contract might require that the bill of lading state that the products are certified organic or that the product was loaded at a certain temperature.

- *Copy of farm's organic certificate*

This type of certificate simply documents the trade of certified organic products. Organic certificates are issued by your farm's organic certifier. While the original certificate is covered by the certification fee, you may have to pay for additional copies or transaction certificates. The certificates can be used for both domestic and international sales.

- *GMO-free documentation*

Please see Chapter 8 for a thorough discussion of GMO-related issues, including documentation.

- *Testing certifications*

The contract might require your organic farm products to be tested prior to shipment and might further require you to provide documentation of the test results. One common example is a USDA Phytosanitary Certificate, which certifies that fresh fruit and vegetables are healthy and pest-free. This certificate is generally issued by the U.S. Animal Plant Health Inspection Service (APHIS) or another federal or state government agency.

- *International documents*

International sales of organic commodities require particular documentation. The type of document required will depend on the country of export and the type of commodity. Some commonly required international certifications include the following:

- USDA Export Certificate (TM-11) for Japan and Taiwan
 - The United States has export arrangements with Japan and Taiwan stating that USDA-certified organic products exported to these countries must be accompanied by export certificate form TM-11 that verifies that the product complies with the terms of the export arrangements.⁸ Only organic certifiers can issue TM-11 export certificates. Thus, farmers whose contracts require this certificate will have to coordinate with their certifier and may have to pay a fee.
- Attestation for Export to Canada
 - As of 2009, the United States has an organic equivalence arrangement with Canada, meaning that organic operations certified to NOP standards (or to Canada Organic Product Regulation (COPR) standards) may be labeled and sold as organic in both the United States and Canada.
 - The following statement must accompany products produced under the US-Canada Organic Equivalence Arrangement: “Certified in compliance with the terms of the US-Canada Organic Equivalence Arrangement.” This statement must appear on documentation traveling with the shipment. The statement may be included on the organic certificate, a transaction certificate, bill of lading, or purchase order.⁹
 - For products packaged for retail sale, labels or stickers must state the name of the U.S. or Canadian certifying agent and may use the USDA Organic seal or the Canada Organic Biologique logos. Wholesale products only require lot numbers.
- European Union Certificate of Inspection
 - As of June 1, 2012, certified organic products from the United States can be represented as organic in the European Union (EU). U.S. organic products exported to the EU must be accompanied by an EU organic import

certificate completed by an NOP-accredited organic certifier. Organic certifiers must provide the signed certificates of inspection (also called EU import certificates) to the farmer so that the certificate may travel to the EU with the organic product.¹⁰

- Tariff classifications
 - In 2011, U.S. tariff classifications were established for organic products to ease tracking of imported and exported organic products throughout the world. These so-called “Schedule B codes” are required when submitting export shipment data or documentation.

It is important to know what documentation is required so you can be sure to provide the appropriate documents necessary to prove and maintain organic certification. You may wish to negotiate for your buyer to cover the cost of any documentation or to handle the process of obtaining documentation. It may also be helpful to know what consequences might follow from any failure to provide correct documentation in a timely fashion. Will the buyer reject your delivery? Will the buyer delay acceptance of your delivery until the appropriate records arrive? On the other hand, some contract obligations related to documentation requirements might be formalities your buyer is willing to waive during contract negotiations (although others are legally required and non-waivable).

To download blank forms related to shipping of organic products, including many of those listed above, visit www.attra.org, and click on “Help Tools & Blank Forms.” Another helpful online resource is the Iowa Organic Certification Program website, <http://www.iowaagriculture.gov/AgDiversification/organicCertification.asp>.

How does the contract address contamination prevention during transport?



Transportation of organic products currently represents a hole in the NOP regulations. Farms must be certified organic, and processors must be certified organic—but trucks, trains, and other forms of transportation currently cannot be certified organic. Although this may change if the proposed bulk handling policy discussed earlier in this chapter is adopted, for now farmers and buyers are left to create their own system to prevent transportation-related contamination. Even so, many organic

contracts do not sufficiently address the special considerations for transporting organic products.

Consider whether the contract satisfactorily addresses the following issues:

- *Who is responsible for preventing transport-related contamination?*

Is it the farmer's responsibility, the buyer's responsibility, or the transport company's responsibility to prevent contamination during transport?

If the buyer takes responsibility for preventing transport-related contamination, make sure the organic contract expressly states that the farmer has no liability for contamination during transit, that the buyer will cover all losses caused by contamination, and that the farmer will suffer no losses as a result of failure by the buyer or the transport company to prevent contamination.

If the farmer is arranging for transport with a transport company that agrees to take responsibility for transport-related contamination, the farmer's separate contract with the transport company should contain the assurances mentioned above (that is, the farmer has no liability for contamination during transit, the transport company will cover all losses caused by contamination, and the farmer will suffer no losses as a result of failure to prevent contamination).

- *Who pays for contamination prevention?*

The contract should specifically state who will pay for contamination prevention measures (either directly or through a contract with a transport company). Payment schemes could take any number of forms—the buyer could pay, the farmer could pay, the farmer and buyer could split the cost by specific prevention measures, the cost could be shared in certain percentages, etc. Be sure to factor these costs into your profit estimates.

- *How will contamination prevention be accomplished?*

You may wish to spell out exactly what measures will be taken to prevent contamination and preserve organic integrity. This could be done in your contract with the buyer. Alternatively, if you are responsible for transportation and have contracted with a transportation company, it's a good idea to include these requirements in your contract with the transportation provider.

For example, the transport contract could state that your organic commodity will be transported by a bulk semi-trailer, and that the trailer and any equipment used in transport will be power-washed and air-blown. The contract could further state that the trailer will be thoroughly inspected by transport company personnel for foreign odors, residues, pests, non-organic farm products, materials prohibited under the NOP regulations, and any other substances that may compromise organic integrity. Finally, the contract could state that your commodity will not be transported with non-organic commodities or even with other farms' organic commodities—although this could increase costs if this creates a partial load.

There are many potential methods of cleaning—including dry flushing, washing, brushing, wire-brushing, sweeping, vacuuming, and sterilizing. The method required by the contract should be appropriate to both the material that needs to be removed (how it adheres) and the type of item being cleaned (whether surfaces are smooth or rough, or whether there are corners and/or crevices). Items to be cleaned could include transport vehicles (farm wagons, common carriers, tankers, trucks, etc.), shipping containers, packaging, transport equipment (augers, shovels, tarps, etc.), or storage facilities.

The contract could also detail how shipping containers and/or vehicles should be properly sealed.

- *Does the contract require “clean transport” documentation?*



Many organic contracts require “clean transport affidavits” as one technique to protect organic integrity. Clean transport affidavits are documents used to verify the maintenance of a product's organic integrity during transport and can be useful even if the contract does not require them.¹¹ A typical affidavit will generally state the farmer's name, the date the transport unit was loaded, the type of transport, who arranged the transport, the nature of the previous load hauled in the unit (especially if it was not organic), any cleaning and/or inspection measures taken, and a statement that the transport unit was inspected and cleaned thoroughly using the method indicated. The person operating the transport vehicle will be asked to sign and date an affidavit provided either by the farmer or the transport company.

Of course, a clean transport affidavit is only as trustworthy as the person who signed it. If feasible, many farmers will conduct their own inspection of transport units prior to accepting a clean transport affidavit.

- *Try to limit your obligation to prevent contamination to factors within your control.*

Contract language that states a farmer shall take “all measures” to prevent contamination potentially requires the farmer to take extremely expensive measures that are not cost-effective. You do not want to open yourself up to a claim that you did not take every possible contamination prevention measure (regardless of cost or effectiveness). Instead, you want to limit your contamination prevention responsibilities to reasonable measures and events within your control.

If you do not wish the contract to detail particular required measures for contamination prevention, you could maintain flexibility and still limit your obligation somewhat by using language stating that you will take all “reasonable” measures or “commercially reasonable” measures, or that you will use “best efforts” to prevent contamination.



Overly Broad Example: Farmer Responsibility for Preventing Contamination

Seller shall take all measures to prevent contamination of the grain with any other variety or contaminants during transport, handling, growing, harvesting, and storage of the grain.

Who bears the risk of loss if the organic commodity is contaminated or lost in transit prior to delivery?

Unless the contract provides otherwise, the risk of loss generally stays with the owner of the commodity at the moment it was lost or contaminated. During transit, however, it is often not obvious who owns the commodity. One way to tell if a change in ownership has occurred is if the “title” to the commodity has changed hands—often called “passage of title” or “title transfer.”

To determine who will bear the risk of loss or contamination, first look to see what the contract says about risk of loss or title transfer. The language of the contract is especially important here because title to goods can pass from the seller to the buyer in many ways and at various points along the sales chain, as determined by state law and any conditions explicitly

agreed by the parties.¹² If the contract is silent, consider whether you wish to rely on state law (discussed below) or negotiate clear rules on risk of loss and title transfer.

Risky Example: Seller Retains Ownership Through Processing

Until delivery and acceptance by Buyer at Buyer's facility, all risk of loss, damage or deterioration shall be borne by Producer, and Producer assumes all responsibility and liability incident to the planting, growing, harvesting, storage, and delivery of the crop. Transfer of title from Producer to Buyer does not occur until the crop has been entirely processed and/or cleaned.



If the contract does not explicitly address title transfer, state law likely provides “fallback” rules. Each state has its own rules, but if your state has adopted Article 2 of the Uniform Commercial Code (U.C.C.), as most have, the following rules are most likely to apply:

- If the contract requires delivery at a specific destination (but does not require or authorize you to ship by carrier), title passes from the farmer to the buyer upon physical delivery of the organic product at the specified destination.
- If the contract requires or authorizes the farmer to send the goods to the buyer, but does not require the farmer to deliver them to a specific destination, title passes to the buyer at the time of shipment.
- If the contract requires or authorizes the farmer to ship organic products by carrier, but does not require the farmer to deliver the products to a particular destination, the risk of loss passes to the buyer when the goods are delivered to the carrier. Note this only applies when there has been no breach by the organic farmer.¹³
- If the buyer rejects the goods (rightfully or wrongfully), even after delivery, title automatically returns back to the farmer.¹⁴

DELIVERY

Is “delivery” defined in the contract?

One issue related to the risk of loss discussed in the prior section can be determining the exact point in time when the product is considered “delivered” or “accepted.” Is the product “delivered” when the truck arrives at the buyer’s facility? When it is unloaded? When it is physically taken inside the facility? These seemingly minor details can take on great importance if a dispute arises, because delivery and acceptance are often crucial to the determination of whether risk of loss has passed from the farmer to the buyer. To avoid confusion on this issue, consider defining “delivery” and/or “acceptance” in the contract.



Example: Definition of “Delivery”

For purposes of clarity, with respect to any delivered commodity, “delivery” shall be deemed to occur upon the unloading of bins at Buyer’s facility dock.

What are the delivery requirements?

Consider These Questions When Examining the Delivery Provisions of an Organic Contract:

- *Where is the delivery location?*

Will the organic commodity be delivered to the buyer’s facilities or somewhere else? If the shipping destination involves added costs, you may wish to negotiate a different destination or a cost-sharing plan.

- *Is there a set delivery date? Are you required to notify the buyer if delivery will be late?*
- *Is the delivery deadline tied to a shipping date or a delivery-at-location date?*

As a general rule, it is safer to tie the delivery deadline to the ship date rather than the actual delivery date. While you have some control over the date you ship out your organic farm products, you have much less control over what happens after the products have been entrusted to a delivery person or a transport company. If the buyer will not agree to a ship-date deadline, you may want to negotiate for a delivery window instead of a hard and fast delivery date.

Example: Ship-Date Deadline

All organic kidney bean deliveries must be shipped by November 15, 2012.



- *Is the delivery destination certified organic?*



Organic products will lose their organic status if they are handled by a non-certified facility. This may seem obvious, but farmers have sometimes been directed to deliver organic products to non-organic facilities. The contract should state that the delivery destination will be a certified organic facility. That way, if the farmer is directed to a non-organic operation, he/she can refuse delivery and maintain organic integrity and certification.

Farmers who are directed to deliver certified organic products to a non-certified facility should be extremely cautious. At the very least, the farmer should contact the buyer prior to delivery to discuss arranging delivery to a certified facility.

Farmers and buyers could agree in writing (either in the contract or as a contract addendum) that loss of organic certification due to delivery to a non-certified facility will not be a basis for rejection of the organic product or a reduction in the farmer's price. However, this is not a recommended practice, as loss of organic certification is permanent and would prevent product rejected on any other basis from being re-sold as organic.

- *What happens if the delivery is late?*

The contract should make clear what will happen if the shipment (for ship-date deadlines) or delivery (for delivery-date deadlines) is late. Will fees or discounts be applied? Will the shipment be rejected? Is there any leeway or grace period? Will the farmer be required to reimburse the buyer for any costs incurred as a result of the delayed shipment or delivery?

To prevent losses based on late shipment or delivery, think about the delays that could reasonably occur in your production cycle and try to build an appropriate cushion into the contract deadline. You may also wish to build in different levels of penalties for late shipment or delivery, based on the length of the delay.

In general, if you must agree to penalties for lateness, it is safer to agree to penalties in a set amount rather than open-ended penalties. For example, if you agree to reimburse the buyer for all costs it incurs as a result of the delay, you have no control over the amount that could be claimed. Instead, to limit your risk, consider negotiating flat fee penalties or penalties based on the number of days the shipment or delivery is past the deadline.

Be cautious about signing a contract that requires you to agree that any late shipment or delivery harms the buyer. In some situations, late shipment or delivery may not affect the buyer at all. Nevertheless, if you have agreed to a contract provision stating in advance that late shipment or delivery harms the buyer, the buyer could sue you for whatever amount of money she believes would compensate her for the “harm,” and you would likely be prevented from arguing that there was no harm.

- *When can products be shipped?*

The contract should make clear when the product can be shipped. Can you ship products immediately after harvest (or production, or slaughter), or must you wait until the buyer calls for delivery (that is, is delivery at the buyer’s discretion)? If delivery is at the buyer’s discretion, do you have appropriate storage options available if you are required to wait after harvest or production to deliver? What happens if the buyer calls for delivery and your commodity is not yet ready?

Example: Buyer Calls for Delivery Times and Amounts

Delivery Schedule: Buyer shall call for delivery at times and in amounts convenient for Buyer. Deliveries shall be, in general, completed by February 2012.



Does the buyer set out certain days and hours during which it will accept delivery? Is it possible to arrange delivery outside of normal receiving times? Will you be required to pay a fee for delivery outside the normal receiving times?

Example: Cost to Deliver Outside Buyer's Normal Receiving Time

Seller will deliver at agreed upon date during established receiving hours listed on Schedule C. Seller may not deliver outside of receiving hours without receiving advance Buyer permission and paying a \$100 fee.



STORAGE (& POST-DELIVERY)

How does the contract address storage?

Often, farmers must store their products for at least a short period of time prior to shipment. If you sell organic commodities that can be stored for an extended period of time, storage issues can become more complicated. Remember that proper storage, especially long-term storage, requires investments of time and money. Make sure to include the cost of storage in your anticipated profit calculation for any contract.

Questions to Ask Regarding Storage

- *Does the contract make storage a likely necessity?*

As discussed above, some buyers include contract language that allows them to “call for delivery” at times and in amounts that are most convenient for them. If the delivery schedule is at the discretion of the buyer, you should make sure you have adequate and appropriate storage for your entire production (including heating or cooling as necessary) in case the buyer decides to wait a significant period of time to call for delivery. To prevent having to store commodities for an extended period of time, consider negotiating a date or time period by which the buyer must accept delivery. You may also wish to require advance payment of all or part of the contract price or a payment to cover cost of storage if the buyer fails to call for delivery by a certain date.

Example: Advance Payment If Buyer Is Unable to Accept Delivery

If Buyer is unable to receive shipments for any reason, Grower will provide delivery when Buyer becomes able to receive deliveries. Notwithstanding the foregoing, Buyer and Grower will agree on an advance payment if Buyer fails to accept delivery before March 15, 2013. Grower will provide adequate storage that will maintain quality of product until delivery.



- *Who pays for storage?*

Organic contracts frequently include language requiring buyers to pay farmers for storage at a certain rate (either for the entire storage period or after a certain date), or to pay a premium for stored product (such as a storage credit based on the volume of product stored).

Example: Buyer Pays for Storage Costs

Seller shall bear the cost of any required storage charges through the end of the calendar year; after that point, Buyer shall pay a storage credit per bushel in an amount to be mutually agreed upon by the parties.



- *Who owns the product during storage?*

It is important for the contract to make clear who owns the product during storage. Ownership could become important if the stored organic commodity suffers degradation, infestation, rot, contamination, or other damage. To protect yourself during a long storage period, you could try to negotiate contract language stating that the risk of loss of the stored product passes to the buyer after a certain date.

After delivery (and inspection), how soon must the buyer accept or reject deliveries?

Often, organic contracts do not address how soon a buyer must decide to accept or reject a delivery. This is likely because buyers are the primary drafters of organic contracts, and buyers may not wish to bind themselves to a set time frame. The deadline for payment can act as a stand-in for an acceptance/rejection deadline, because typically a buyer will not pay if it does not intend to accept delivery. However, if the buyer's inspection or payment timeline is long, you may wish to negotiate for an acceptance/rejection deadline that would allow you time to find another buyer in case of rejection.



What happens if the buyer damages or contaminates the organic products during delivery, subsequent handling, and/or processing?

You may wish to negotiate for contract language protecting you in case of general mishandling of your product by the buyer. If the buyer rejects your delivery after causing damage or contamination during unloading, processing, or other buyer handling, it will likely be very difficult for you to find another buyer for that product. Alternatively, the buyer could contaminate or otherwise damage your shipment and still accept the delivery—but then try to penalize you for failing to meet quality standards. If possible, it is wise to use the contract to identify a point past which the buyer is liable for any damage or contamination. For example, the contract could state that liability for contamination passes to the buyer upon delivery or just prior to processing.

Shifting liability for damage to the buyer is especially important if the contract states that ownership does not pass to the buyer until after inspection or processing. Many buyers' operations are not solely organic. Thus, buyers may have non-organic products on site, or they may have recently used processing or manufacturing equipment for non-organic products. Thus, it is possible that the buyer could damage or contaminate your shipment as it awaits inspection, during transport within the buyer's facility, or during processing or cleaning.

Additionally, any delay between delivery and inspection could make it difficult to tell whether the organic commodity was damaged before or after delivery. For example, if the buyer waits until after processing to test your shipment for the presence of GMOs, it could be impossible to tell whether the shipment arrived contaminated or was contaminated during processing.

Again, even if the contract states that you own the product until after inspection or processing, you can still include contract language stating that the buyer is liable for any damage or contamination that occurs after delivery. If you are especially concerned about this issue, you could combine this language with testing or inspection upon delivery. For instance, the buyer could agree to test or inspect immediately upon receipt—or you could contract with your transportation company to perform testing or inspection upon delivery and document the results. This kind of arrangement could provide evidence that damage was, in fact, caused by the buyer—not during transport or on the farm.

Of course, perishable products—including produce, milk, and eggs—must be sampled and tested almost immediately. Storage commodities, like grain and dry beans, can theoretically be tested at any time (but preferably at least prior to processing). Regardless, the risks of

contamination and commingling increase with time and multiply each time an organic product is handled.



What happens if the organic farm product contaminates the buyer's other organic commodities?

Buyers generally purchase organic commodities from multiple farms, and may (intentionally or unintentionally) mix the different farms' products together at the buyer's facility. Thus, if your delivered products are infested or contaminated, it is possible that your products could damage other organic products the buyer has purchased.

For example, if the buyer is reselling organic commodities internationally, it is possible that GMO-contaminated corn could push the GMO levels beyond the low thresholds for GMO content in places like the EU and Japan. Insect infestations could also damage the buyer's other commodities.

Example: Seller Must Reimburse Buyer for Contamination of Other Commodities

Rights: Seller shall fully reimburse Buyer for any damages related to contamination caused by Producer's organic commodity.



Given that it is difficult to ensure with 100 percent certainty that your products will not contaminate the buyer's other organic products, you may wish to negotiate contract language stating what will happen in case of cross-contamination. You could agree to reimburse the buyer's full damages related to the contamination, but this cost could be unpredictably large. Alternatively, you could agree to reimburse the buyer's damages up to a certain dollar amount. You could also negotiate contract language stating that you have no liability for contamination after your product has been accepted and inspected by the buyer.

CHAPTER 7 — ENDNOTES

- ¹ U.S. Department of Agriculture National Organic Program, *Draft Guidance: Handling Bulk, Unpackaged Organic Products*, NOP 5031 (2011), available at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5096871>.
- ² See 7 C.F.R § 205.307(b) (2012). See also Iowa Department of Agriculture & Land Stewardship, *Iowa Organic Certification Program: Developing a Producer Lot Number*, available at <http://www.iowaagriculture.gov/AgDiversification/Organic/LotNumbering.doc>.
- ³ 7 C.F.R § 205.307(a) (2012).
- ⁴ 7 C.F.R § 205.307(b) (2012).
- ⁵ See 7 C.F.R § 205.307 (2012).
- ⁶ See also U.S. Department of Agriculture Food Safety and Inspection Service, *A Guide to Federal Food Labeling Requirements for Meat and Poultry Products* (August 2007), available at http://www.fsis.usda.gov/PDF/Labeling_Requirements_Guide.pdf (meat and poultry labeling); see also National Agricultural Law Center, *Legal and Business Guide for Specialty Crop Producers*, at Chapter 8 (February 2011), available at http://www.nationalaglawcenter.org/assets/articles/center_specialty.pdf (specialty crop labeling); see also U.S. Department of Agriculture Agricultural Marketing Service, *Labeling Packaged Products Under the National Organic Standards* (July 27, 2009), available at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5078591&acct=nopgeninfo> (organic labeling).
- ⁷ See 7 C.F.R. § 205.272 (2012).
- ⁸ See U.S. Department of Agriculture Agricultural Marketing Service, *Instructions for Completion of an Export Certificate (TM-11)*, available at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3017717>.
- ⁹ See U.S. Department of Agriculture National Organic Program, Miles V. McEvoy, Deputy Administrator, Policy Memo 10-3 at 2 (November 4, 2010).
- ¹⁰ For more information about EU documentation and the EU-U.S. equivalency agreement, see U.S. Department of Agriculture National Organic Program, *Accessing the European Union Organic Market* (May 25, 2012), available at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5097062> and *U.S.-European Union Organic Equivalence Arrangement Questions and Answers*, available at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5097061>.
- ¹¹ For a sample clean transport affidavit, see National Sustainable Agriculture Information Service (ATTRA), *Forms, Documents and Sample Letters for Organic Producers* (2005), available at <https://attra.ncat.org/attra-pub/viewhtml.php?id=170ATTRA>.
- ¹² See U.C.C. § 2-401(1) (1977).
- ¹³ See U.C.C. § 2-509 (1977).

¹⁴ See U.C.C. § 2-401(2), (4) (1977); see also, U.C.C. § 2-509 (1977) (risk of loss rules on delivery by carrier or by bailee); see also U.C.C. § 2-510 (1977); see also, generally, U.C.C. Art. 2, Part 5 (1977) (Performance).