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California Leafy Green Products Handler Marketing Agreement

My name is Scott Horsfall, and I am the Chief Executive Officer of the California Leafy Green Products Handler Marketing Agreement. The LGMA is a mechanism for verifying, through mandatory government audits, that handlers are following accepted food safety practices in the production and harvest of lettuce, spinach and other leafy green products. We are an instrumentality of the State of California, and operate with oversight from the California Department of Food and Agriculture.

Although the leafy greens industry has always prioritized food safety, in the aftermath of the 2006 outbreak, farmers, shippers and processors recognized that more effort was needed to protect public health. The question was how to do it. Several potential solutions were discussed, including regulatory and legislative options both at the state and federal levels. These discussions were broad and included parties from both inside and outside the industry. As these discussions progressed, it was clear that the leafy greens industry was determined to address the issue in a responsible manner and to do it in a way that would rebuild confidence among consumers, buyers, and regulators.

In the end, the decision was made to create the California Leafy Greens Handler Marketing Agreement (now usually referred to as the LGMA). The marketing agreement gave the farmers, shippers and processors of leafy greens a vehicle to protect public health that could be in place in time for the next year's growing season. This marketing agreement also provided the industry with the flexibility to quickly change and amend the program based upon sound science and new breakthroughs in food safety research. This flexibility is one of the key benefits of the LGMA structure.

The LGMA is focused on preventing the introduction of pathogens in leafy greens fields and farms. And we applaud the Obama Administration and the President's Food Safety Working Group's focus on prevention in their approach to improving food safety systems in the United States. We were happy to hear Vice President Biden and Health and Human Services Secretary Sibelius describe prevention as job number one at their food safety press conference on July 7th.

I would like to submit Part 970 for the record and take this opportunity to walk through several sections, picking up where Mr. Giclas left off:

EXPENSES AND ASSESSMENTS

§ 970.55 Expenses.

The Committee is authorized to incur such expenses as the Secretary finds are reasonable and likely to be incurred by it during each crop year for the maintenance and functioning of the Committee, including the payment of audit and inspection fees, and for such other purposes as the Secretary may, pursuant to the provisions of this part, determine to be appropriate. Such expenses shall be paid from assessments received pursuant to § 970.56 and other funds available to the Committee.

§ 970.56 Assessments.

(a) Each first handler shall pay to the Committee such handler's pro rata share of the Committee's expenses authorized by the Secretary for each crop year. The payment of assessments for the maintenance and functioning of the Committee, as described in § 970.55, Expenses, may be required under this part throughout

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the period it is in effect irrespective of whether particular provisions thereof are suspended or become inoperative.

(b) Based upon recommendation of the Committee, or other available data, the Secretary shall fix a base rate of assessment for all leafy green vegetables or products that first handlers shall pay during each crop year. The Committee may also recommend and the Secretary may approve supplemental assessments, but no combination of assessment and supplemental assessments may exceed the cap established in § 970.56(d).

(c) Any signatories who are not first handlers shall pay inspection service fees based on time and travel as approved by the Committee.

(d) Based on the recommendation of the Committee or other available data, the Secretary may change or modify the base rate classification defined in this section. The assessment shall be set at the lowest rate practical to carry out the objectives of the agreement. At no time shall the assessment rate exceed \$0.05 per 24 pound carton or equivalent.

(e) Any assessment not paid by a handler within a period of time prescribed by the Committee may be subject to an interest or late payment charge, or both. The period of time, rate of interest and late payment charge shall be as recommended by the Committee and approved by the Secretary. Subsequent to such approval, all assessments not paid within the prescribed period of time shall be subject to an interest or late payment charge or both.

(f) In order to provide funds for the administration of this part, the Committee may accept but not require, advance payments of assessments, which shall be credited toward assessments levied against such handler during the crop year. The Committee may also borrow money for such purposes when assessment and reserve funds are not sufficient to cover them.

The assessment levels described reflect the existing standards in California. It should be noted that the initial California assessment level was \$.02 per 24-count carton equivalents, and was lowered to \$.015 per carton equivalent after the second year. Efficiencies in implementing the program led to the reduction in assessments.

The proponents are confident, based on experiences in California and Arizona, that the actual costs of the proposed National Leafy Greens Marketing Agreement will be far less than the \$.05 per carton equivalent cap.

§ 970.57 Accounting.

(a) If, at the end of a crop year, the assessments collected are in excess of expenses incurred, the Committee, with the approval of the Secretary, may carry over such excess into subsequent crop years as an operating monetary reserve, except that funds already in such reserve shall not exceed approximately two (2) fiscal periods' budgeted expenses, or such lower limits as the Committee, with the approval of the Secretary, may establish. Funds in such reserve shall be available for use by the Committee for expenses authorized pursuant to § 970.55 and to cover necessary expenses of liquidation in the event of termination of this part. If any such excess is not retained in a reserve, each handler entitled to a proportionate refund shall be credited with such refund against the operations of the following crop year, or be paid such refund.

(b) Upon termination of this part, any refunds not required to defray the necessary expenses of liquidation shall be used, to the extent practicable, to fulfill any obligations under § 970.75, Research and promotion.

970.58 Contributions.

The committee may accept voluntary contributions but these shall only be used to pay expenses incurred pursuant to § 970.75, Research and promotion. Furthermore, such contributions shall be free from any encumbrances by the donor and the committee shall retain complete control of their use.

The proponents believe that assessments will be sufficient to fund the proposed national Leafy Greens marketing Agreement, including all administration and other costs. However, should industry members or other entities want to contribute voluntarily to the research and promotion efforts of the organization, this section makes such contributions possible.

DUTIES AND RESPONSIBILITIES OF SIGNATORIES

§ 970.65 Signatory parties.

No signatory to this agreement shall handle leafy green vegetables for human consumption unless such are verified as meeting the provisions of this part. This verification shall take the form of an official audit conducted by the inspection service.

§ 970.66 Verification audits.

(a) GAP audits.

(1) Signatory handlers shall ensure that any leafy green vegetables handled by their operation have been subject to GAP validation and verification audits. Such audits shall verify that such product was produced under auditable conditions that meet production and harvest requirements as outlined in the GAPs (§ 970.9) and as further defined in any applicable audit metrics provided for under § 970.67.

(2) No signatory handlers subject to the provisions of this agreement shall receive leafy green vegetables produced in foreign countries that have not been subject to GAP validation and verification audits by USDA licensed inspectors. Such audits shall verify that such product was produced under auditable conditions that meet production and harvest requirements as outlined in the GAPs (§ 970.9) and as further defined in any applicable audit metrics provided for under § 970.67.

(b) GHP or GMP audits.

(1) All signatory handlers shall be subject to audit verifications. Such audits shall verify that such signatories operate under auditable conditions that meet requirements outlined in the GHPs or GMPs, (§ 970.9 and § 970.10) and as further defined in any applicable audit metrics provided for under § 970.67.

(2) No signatory handlers subject to the provisions of this agreement shall receive leafy green vegetables from handlers in foreign countries that have not been subject to GHP, GMP validation and verification audits by Inspection Service or the FDA. Such audits shall verify that such product was produced under auditable conditions that meet production and harvest requirements as outlined in the GAPs (§ 970.9) and as further defined in any applicable audit metrics provided for under § 970.67.

(c) All audits shall be conducted by the Inspection Service, and certified as to meeting the regulations of this part.

(d) Audits shall be conducted on a regular schedule that ensures every handler is audited during their corresponding production season. In addition, random unannounced audits of handlers and associated producers will also be performed during the production season in each zone.

This section outlines the audit requirements of the proposed National Leafy Greens Marketing Agreement. The proponents believe that such audits should be carried out by Government bodies – specifically, the United States Department of Agriculture for GAP audits, and USDA or the United States Food and Drug Administration for GMP audits.

The Committee will work with USDA to determine audit schedules, but the intention is for all signatory members and the growers the handle product from will be audited on a regular basis.

§ 970.67 Audit metrics.

Audit metrics shall be recommended by the Committee to USDA for approval after consultation with the Technical Review Board.

(a)

GAP audit metrics. GAP audit metrics shall include verification related but not limited to: water quality, soil amendments, machine harvest, hand harvest (including direct contact with soil during harvest), transfer of human pathogens by field workers, field sanitation, equipment-facilitated cross contamination, flooding, water usage to prevent dehydration, and production location concerns, including climatic conditions and environment, and encroachment by animals of significant risk and urban settings, or any other factors defined under §970.9, or as recommended by the Committee and approved by the Secretary.

(b)

GHP or GMP audit metrics. Such audit metrics shall include verification of process controls related but not limited to:

Post-harvest handling process: cooling, water, reuse of field containers, bulk-bin modified atmosphere process, condition and sanitation of transportation vehicles, and employee hygiene.

Handling and manufacturing process: wash water, wash system capacity, bulk-bin modified atmosphere process, condition and sanitation of transportation vehicles, and employee hygiene, labeling of Raw Agricultural Commodity (RAC) versus ready-to-eat (RTE) products, and finished product packaging.

Distribution handling process: condition and sanitation of transportation vehicles, condition and sanitation of distribution/cooler facilities, and temperature measurement of product.

Any other factors defined under § 970.9 and § 970.10, or as recommended by the Committee and approved by the Secretary.

(c) Critical limits for process controls for each of the quality factors identified in the audit metrics shall be prescribed by USDA in consultation with FDA and any other federal or state regulatory body administering regulations impacted by the provisions of this agreement; shall incorporate Committee recommendations with regard to industry production, harvest and handling technologies; shall be based on sound scientific practices; and shall be approved by the Secretary.

(d) Audit metrics may be developed and recommended to accommodate differences in production and handling environments of different regions and different leafy green vegetable products.

(e)The committee may, at any time, recommend changes to the audit metrics after consultation with the Technical Review Board for approval by the Secretary.

(e) The Committee shall recommend, to the Secretary, for approval, a schedule for review of audit metrics such that audit metrics are reviewed a minimum of once every three years to ensure that they continually reflect the best industry practices, scientific information and industry knowledge.

All of the audits specified in the preceding section will be based on specific, verifiable and science-based metrics developed by the Technical Review Board and approved by the Committee and the Secretary. While the specifics of any audit metrics will be determined once the Committee has been formed, this section specifies that said metrics be science-based, be in compliance with FDA guidance and/or regulations, be verifiable via audit and be updated regularly as new science becomes available.

§ 970.68 Traceability.

(a) The traceability of leafy green products subject to the terms of this agreement shall be established at all stages of production, processing, and distribution.

(b) Signatory handlers shall have the ability to track their products from their supplier(s) to their customer(s). To this end, signatory handlers shall have in place systems and procedures which allow for this information to be made available for verification by the Inspection Service.

(c) Documents necessary for verification shall be maintained for two years.

§ 970.69 Official certification mark.

(a) USDA will obtain and grant to the Committee the use of a U.S. registered certification mark that will be the agreement's official mark (mark). This mark will be licensed to signatories who comply with the terms of this agreement. Signatories shall use the mark in accordance with this section and shall use the mark consistent with the mark registration.

(b) The Committee may license signatories to affix the official certification mark to bills of lading or manifests, subject to the verification, suspension, revocation requirements, or any other such uses recommended by the Committee and approved by the Secretary to carry out the purposes of this Agreement. A signatory's compliance with the regulations under this Agreement is a condition precedent and subsequent to the signatory's entitlement to use the mark.

The certification mark to be created and granted as the official mark of the National Leafy Greens Marketing Agreement will be licensed to signatories to use on their paperwork such as bills of lading. By using the certification mark in this manner, signatories will communicate to their customers that the company is in compliance that the company is in compliance with the NLGMA's requirements.

§ 970.70 Administrative review.

Any signatory denied the use of the official certification mark may request an administrative review if it is believed that a material fact of the original verification audit was misinterpreted. Administrative reviews would be conducted in accordance with the USDA audit verification procedures for any audit program in effect under this agreement. Any financially interested person may request an administrative review if it is believed that the original audit verification is in error. The person requesting the review would pay the cost of the review. The review results shall be issued to the person making the request.

§ 970.71 Modification or suspension of regulations.

(a) In the event that the Committee, at any time, finds that the provisions contained under this part should be modified or suspended, it shall by vote of a concurring majority of its members, so recommend to the Secretary.

(b) Whenever the Secretary finds from the recommendations and information submitted by the Committee or from other available information, that the provisions of this part should be modified, suspended, or terminated in order to effectuate the declared policy of the Act, the Secretary shall modify or suspend such provisions. If the Secretary finds that a regulation obstructs or does not tend to effectuate the declared policy of the Act, the Secretary shall suspend or terminate such regulation.

(c) The Committee, with the approval of the Secretary, may issue rules and regulations implementing this part.

§ 970.72 Exemptions.

The Committee, with the approval of the Secretary, may establish such rules, regulations, and safeguards that exempt from any or all requirements pursuant to this part such quantities of leafy green vegetables or products as do not interfere with the objectives of this part, and shall require such reports, certifications, or other conditions as are necessary to ensure that such leafy green vegetables are handled or used only as authorized.

Since membership in the proposed National Leafy Greens Marketing Agreement is voluntary, the proponents do not believe there is a current need to specify any exemptions. However, in order to provide the secretary and the committee flexibility in the future, language allowing for exemptions has been included.

RESEARCH AND PROMOTION

§ 970.75 Research and promotion.

The Committee, with the approval of the Secretary, may establish or provide for the establishment of marketing research, and development projects, and/or promotional activities, including paid advertising, designed to assist, improve, or promote the efficient adoption, implementation, and marketplace acceptance of the agreement and of leafy green vegetables or products handled by signatory members. The expenses of such projects shall be budgeted and paid from funds collected pursuant to § 970.56.

The proponents do not believe that NLGMA resources should be used to fund a consumer advertising campaign designed to “sell” food safety. However, the proponents do believe that funds should be used to promote acceptance of the NLGMA, its audit program and its food safety standards to buyers and others in the produce industry, and to communicate the meaning of the NLGMA certification mark. It is the hope of the proponents that the creation of the NLGMA will smooth the way towards acceptance of a common standard for food safety practices in the leafy greens industry, and outreach and promotion to the intended target audience (that is, buyers) will be critical to gaining that level of acceptance.

It is also the intention of the proponents to allow for market research projects, in order to better understand and communicate with key audiences, such as buyers.

REPORTS AND RECORDS

§ 970.80 Reports and recordkeeping.

(a) Each handler shall report acquisitions of all leafy green vegetables or products and such other reports or information as may be necessary to enable the Committee to carry out the provisions of this part.

(b) Each handler shall maintain records of all receipts and acquisitions of leafy green vegetables or products, and all documentation relating to the verification audit reports. Such records shall be maintained for at least two years after the crop year of their applicability. Such recordkeeping shall be sufficient to document and substantiate the handler compliance with this part.

(c) The Committee shall maintain copies of audit reports.

§ 970.81 Confidential information.

All reports and records furnished or submitted by handlers to the Committee which include data or proprietary information constituting a trade secret, or disclosing a trade position, financial condition, or business operations of the particular handlers or their customers, shall be received by, and at all times kept in the custody and control of, one or more employees of the Committee, who shall disclose such data and information to no person except the Secretary. However, such data or information may be disclosed only with the approval of the Secretary, to the Committee, when reasonably necessary to enable the Committee to carry out its functions under this part.

§ 970.82 Verification of reports.

For the purpose of checking and verifying reports filed by signatories, authorized agents or employees of the Committee, and the Secretary shall have access to any premises of any signatory at any time during reasonable business hours to verify compliance with the requirements of the agreement. For the purpose of checking and verifying GAP compliance, authorized agents or employees of the Committee and the Secretary shall have access to audit verification records.

§ 970.83 Compliance.

Compliance with the provisions of this agreement will be overseen by the Committee and any staff hired or appointed to undertake this responsibility. In conjunction with USDA, the Committee shall establish a policy for signatory handlers for non-conformities identified through verification audits:

(a) A signatory shall be subject to withdrawal of audit services, shall lose the privilege of the use of the official certification mark, and may be subject to misbranding or trademark violations, if the signatory:

(1) Produces or acquires leafy green vegetables or products without an inspection service verification audit, pursuant to § 970.9 and § 970.10.

(2) Fails to obtain audit verification on the production, handling or manufacturing of leafy green vegetable or products, pursuant to § 970.66, and ships such vegetables or products for human consumption;

(3) Ships or places into the current of commerce leafy green vegetables or products that fail to meet requirements under this agreement, pursuant to § 970.66 and § 970.67, for human consumption;

(4) Commingles leafy green vegetables that fail to meet the requirements of this agreement with leafy green vegetables verified to meet the requirements of the agreement and ships the commingled lot for human consumption;

(5) Fails to maintain and provide access to records, pursuant to § 970.80; or

(6) Otherwise violates any provision of this part.

(b) Any lot or portion thereof leafy green vegetables which is deemed an immediate threat to public health by Inspection Service staff during the course of a verification audit shall be reported by USDA to FDA

(c) Failure to comply with the provisions of this agreement may also result in additional remedies or penalties, such as injunctive relief, as authorized under the Act.

Compliance with the requirements of the National Leafy Greens Marketing Agreement results in certification as a member in good standing, and gains a company the right to use the certification mark and to communicate

with customers about their status in the program. By the same token, failure to comply must come with consequences, and this section spells out the details of the compliance program of the NLGMA. Failure to meet the requirements of the NLGMA, and failure to comply with the approved metrics can lead to decertification and loss of the right to use the certification mark.

MISCELLANEOUS

§ 970.85 Effective time.

The provisions of this part, as well as any amendments, shall apply to 2010-2011 and subsequent crop year leafy green vegetables and shall continue in force and effect until modified, suspended, or terminated.

§ 970.86 Rights of the Secretary.

Members and alternates of the Committee, subcommittees, advisory boards, and any agents, employees, or representatives thereof, shall be subject to removal or suspension by the Secretary at any time. Each and every decision, determination, and other act of the Committee shall be subject to the continuing right of the disapproval by the Secretary at any time. Upon such disapproval, the disapproved action of the Committee shall be deemed null and void.

§ 970.87 Personal liability.

No member or alternate member of the Committee, and no employee or agent of the Committee, shall be held personally responsible, either individually or jointly with others, in any way whatsoever, to any person for errors in judgment, mistakes, or other acts, either of commission or omission, as such member, alternate, employee, or agent, except for acts of dishonesty, willful misconduct, or gross negligence.

§ 970.88 Separability.

If any provision of this part is declared invalid or the applicability thereof to any person, circumstance, or thing is held invalid, the validity of the remainder of this part or the applicability thereof to any other person, circumstance, or thing shall not be affected thereby.

§ 970.89 Derogation.

Nothing contained in this part is, or shall be construed to be, in derogation or in modification of the rights of the Secretary or of the United States (a) to exercise any powers granted by the Act or otherwise, or (b) in accordance with such powers, to act in the premises whenever such action is deemed advisable.

§ 970.90 Duration of immunities.

The benefits, privileges, and immunities conferred upon any person by virtue of this part shall cease upon its termination, except with respect to acts done under and during the existence of this part.

§970.91 Agents.

The Secretary may, by designation in writing, name any officer or employee of the United States, or name any agency or division in the USDA, to act as the Secretary's agent or representative in connection with any of the provisions of this part.

§ 970.92 Suspension or termination.

(a) The Secretary may at any time terminate the provisions of this part.

(b) The Secretary shall terminate or suspend the operations of any or all of the provisions of this part whenever it is found that such provisions do not tend to effectuate the declared policy of the Act.

(c) The provisions of this part shall, in any event, terminate whenever the provisions of the Act authorizing them cease.

§ 970.93 Proceedings upon termination.

Upon the termination of this part, the members of the Committee then functioning shall continue as joint trustees, for the purpose of liquidating the affairs of the Committee. Action by such trustees shall require the concurrence of a majority of said trustees. Such trustees shall continue in such capacity until discharged by the Secretary, and shall account for all receipts and disbursements and deliver all property on hand, together with all books and records of the Committee and the joint trustees, to such persons as the Secretary may direct; and shall upon the request of the Secretary, execute such assignments or other instruments necessary or appropriate to vest in such person full title and right to all the funds, properties, and claims vested in the Committee or the joint trustees, pursuant to this part. Any person to whom funds, property, or claims have been transferred or delivered by the Committee or the joint trustees, pursuant to this section, shall be subject to the same obligations imposed upon the members of said Committee and upon said joint trustees.

§ 970.94 Effect of termination or amendment.

Unless otherwise expressly provided by the Secretary, the termination of this part or any regulation issued pursuant thereto, or the issuance of any amendment to either thereof, shall not:

(a) Affect or waive any right, duty, obligation, or liability which shall have arisen or which may thereafter arise, in connection with any provisions of this part or any regulation issued thereunder;

(b) Release or extinguish any violation of this part or any regulation issued; or

(c) Affect or impair any rights or remedies of the Secretary, or of any other persons, with respect to such violation.

§ 970.95 Amendments.

Amendments to this part may be proposed from time to time by the Committee, or by any interested person affected by its provisions, including the Secretary.

§ 970.96 Counterparts.

This agreement may be executed in multiple counterparts and, when one counterpart is signed by the Secretary, all such counterparts shall constitute, when taken together, one and the same instrument as if all signatures were contained in one original.

§ 970.97 Additional parties.

After the effective date of the agreement, any non-signatory handler may become a party hereto if a counterpart is executed by him or her and delivered to the Secretary. This agreement shall take effect as to such new contracting party at the time such counterpart is delivered to the Secretary. The obligations, benefits, privileges, and immunities conferred by this agreement shall then be effective as to such new contracting party.

§ 970.98 Withdrawal.

Release from this agreement may be obtained, provided that a signatory handler is not in violation of the provisions of this agreement and has fulfilled all of his or her obligations, including payment of any assessments or charges levied pursuant to this agreement, under any of the following conditions:

- (a) A signatory handler may file with the Committee a written request for withdrawal at the close of a crop year, effective for the succeeding crop year.
- (b) Immediate withdrawal may be effectuated when a signatory handler ceases to be a handler of leafy green vegetables or products and gives notice thereof to the Committee in writing.