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United States Food Law Update: Pasteurized Almonds and Country of Origin Labeling

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UNITED STATES FOOD LAW UPDATE: PASTEURIZED ALMONDS AND COUNTRY OF ORIGIN LABELING

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The last six months of 2008 found the nation occupied with a heated presidential election campaign and the transition to a new party's control of the executive branch. The outgoing president, as is often the case in the waning months of an administration's time in office, attempted to finalize several policy initiatives. This version of the *Food Law Update* will discuss two major developments with significant long-term impact on the law of food: the implementation of mandatory country of origin labeling (COOL) for most unprocessed agricultural commodities; and the increasing use of the United States Department of Agriculture's (USDA) Agricultural Marketing Service to regulate food safety via marketing orders/agreements. Specifically, this update will discuss new rules mandating treatment of raw almonds to reduce the risk of Salmonella bacteria. As an update, this article does not attempt to exhaustively analyze the implications of these developments, but merely to identify and briefly discuss the issues as a departure point for further analysis.

As in previous editions of this update, necessity dictates that not every change is included; rather, this update is limited to significant changes within the broader context of food production, distribution, and retail. The intent behind this series of updates is to provide a starting point for scholars, practitioners, food scientists, and policymakers determined to understand the shaping of food law in modern society. Tracing the development of food law through

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these updates also builds an important historical context for the overall development of the discipline.

I. MANDATORY COUNTRY OF ORIGIN LABELING (COOL)

Most items imported for sale in the United States require some type of label to indicate the product's country of origin.[1] Over the years, one prominent exception to these ubiquitous stickers on the back of products has been agricultural products in their "natural" (unprocessed) state.[2] Food products imported in consumer-ready packages, however, must bear a country of origin declaration on each package in accordance with the Tariff Act of 1930.[3] As of September 30, 2008, many unprocessed food products must now comply with country of origin labeling rules. The implementation of this labeling program, however, was not without significant controversy and vigorous debate regarding the merits of this rule continues.

Some farm groups advocate the imposition of mandatory COOL as a means to increase domestic consumer demand, and thus prices, for US farmers and ranchers.[4] Many of these producers may be smaller in scale, producing entirely for the domestic market, or face cost pressure from imported commodities. Supporters also contend that U.S. consumers, if offered a choice, would select foods of domestic origin to support "local" farmers and achieve a higher perceived degree of food safety.[5] Finally, consumer advocates sup-

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1. Tariff Act of 1930, 19 U.S.C. § 1304 (2006).

2. *See* 19 C.F.R. § 134.33 (2008) (exempting from country of origin labeling under the Tariff Act "Natural products, such as vegetables, fruits, nuts, berries, and live or dead animals, fish and birds; all the foregoing which are in their natural state or not advanced in any manner further than is necessary for their safe transportation.").

3. Tariff Act of 1930, 19 U.S.C. § 1304(a) (2006); *see also* Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts, Interim Final Rule with Request of Comments, 73 Fed. Reg. 45,106, 45,112 (Aug. 1, 2008).

4. Geoffrey S. Becker, *Country-of-Origin Labeling for Foods*, CRS Report for Congress, RS22955, Jan. 15, 2009.

5. Wendy J. Umberger, *Will Consumers Pay a Premium for Country-of-Origin Labeled Meat?*, CHOICES, 4th Quarter, 2004, at 15, *available at* http://www.choicesmagazine.org/2004-4/cool/2004-4-04.htm. USDA, however, does not consider the COOL program a food safety or traceability program, but rather a consumer information program. Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts, Final Rule, 74 Fed. Reg. 2658, 2679 (Jan. 15, 2009).

port a mandatory COOL program, framing their argument as a "right to know" issue.[6]

Other agricultural groups have opposed COOL as a form of trade protectionism that may undermine concurrent efforts to reduce agriculture-based trade barriers in other countries or infringe existing World Trade Organization or North American Free Trade Agreement obligations.[7] Additional opposition has centered on the extensive compliance costs, estimated by the United States Department of Agriculture (USDA) as $2.6 billion for first-year implementation, broken down as an average of $370 for each commodity producer, $48,219 for each wholesaler or processor, and $254,685 per retailer.[8] Some scholars, however, estimated that an increase in aggregate demand for domestic products of as little as two or three percent would offset producer welfare losses due to the implementation costs of a mandatory COOL program.[9]

There may also be regional variations among commodity group support for mandatory COOL based upon the degree of integration with cross-border agricultural activities. For example, some animal producers in the northern part of the United States rely on imports from Canada of young animals, which the domestic producer will feed until slaughter in the United States. These individuals could lose market share as they would no longer have "U.S. Origin" claims and/or Canadian producers may raise the animal until slaughter rather than exporting to the United States.[10]

The Farm Security and Rural Investment Act of 2002 (2002 Farm Bill) settled this debate, temporarily, in favor of a mandatory COOL program.[11] Section 10816 of the Act established country of origin labeling at the retail level (final point of sale) for certain "covered commodit[ies]."[12] The Act defined a "covered commodity" as "(i) muscle cuts of beef, lamb, and pork; (ii) ground beef, ground

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6. Allison Linn, *At Long Last, Food Labeling Law Set to Take Effect* (Sept. 30, 2008), http://www.msnbc.msn.com/id/26890660 (last visited Apr. 11, 2009). *See also* 73 Fed. Reg. at 45,114 (noting that the majority of comments received on the proposed mandatory COOL rules were from consumers expressing support).

7. Becker, *supra* note 4, at 1, 7. *See also* 74 Fed. Reg. at 2678.

8. Becker, *supra* note 4, at 7.

9. Jayson L. Lusk & John D. Anderson, *Effects of Country-of-Origin Labeling on Meat Producers and Consumers*, 29 J. AGRIC. & RESOURCE ECON. 185, 202 (2004).

10. *Id.* Similar concerns with respect to trade with Mexico were raised in comments received in response to the interim final rule. *See* 74 Fed. Reg. 2669 (Jan. 15, 2009).

11. Pub. L. No. 107-171, § 10816 (2002).

12. *Id.*

lamb, and ground pork; (iii) farm raised fish; (iv) wild fish; (v) a perishable agricultural commodity [as defined by Section 1(b) of the Perishable Agricultural Commodities Act of 1930, 7 U.S.C. § 499a(b); and] (vi) peanuts."[13] The Act excluded from the labeling requirement covered commodities used as ingredients in a processed food item, as well as products prepared, served or sold at food service establishments (e.g., restaurants, taverns, cafeterias, etc.).[14] A beef, lamb or pork commodity could bear a "United States" label only if derived exclusively from an animal "born, raised and slaughtered in the United States."[15] The statute imposed similar requirements for fish (e.g., caught and processed in waters of the United States) and peanuts (e.g., exclusively produced in the United States).[16]

The Act ordered the USDA to issue voluntary guidelines for COOL by September 2002 and to promulgate regulations for mandatory COOL not later than September 30, 2004, with an effective date of the same.[17] In October 2002, USDA published its *Guidelines for the Interim Voluntary Country of Origin Labeling of Beef, Lamb, Pork, Fish, Perishable Agricultural Commodities, and Peanuts.*[18] One year later, in October 2003, the agency published its proposed rule for implementation of mandatory COOL.[19] Not surprisingly, the proposed transition to mandatory COOL scheduled for September 2004 engendered significant controversy within the food and agricultural community,[20] and Congress, in its 2004 Consolidated Appropriations Act, delayed mandatory COOL implementation for all covered commodities except wild and farm-raised fish and shellfish until September 30, 2006.[21] The 2006 Food and Agricultural Ap-

13. *Id.*

14. *Id.*

15. *Id.* A limited exception was made for beef from an animal born and raised in Alaska or Hawaii and then transported for a period not to exceed 60 days through Canada to the United States and subsequently slaughtered in the United States. *Id.*

16. Pub. L. No. 107-171, § 10816 (2002).

17. *Id.*

18. 67 Fed. Reg. 63,367 (Oct. 11, 2002).

19. 68 Fed. Reg. 61,944 (Oct. 30, 2003).

20. The agency extended the comment period for the proposed mandatory COOL regulations to accommodate a rigorous debate. *See* 68 Fed. Reg. 71,039 (extending comment period for 60 days).

21. Pub. L. No. 108-199, § 749 (2004) ("Section 285 of the Agricultural Marketing Act of 1946 (16 U.S.C.1638d et seq.) is amended by striking '2004' and inserting '2006, except for 'farm-raised fish' and 'wild fish' which shall be September 30,

propriations Act further delayed mandatory COOL (except wild and farm-raised fish and shellfish) until September 30, 2008.[22] The Food, Conservation and Energy Act of 2008 (2008 Farm Bill) reaffirmed the September 30, 2008 implementation date for mandatory COOL and added several previously omitted commodities to the program—chicken and goat meat, pecans, ginseng and macadamia nuts.[23]

Is addition to expanding the definition of covered commodities, the 2008 Farm Bill provided additional requirements for labeling products with "multiple countries of origin."[24] It is these "blending" rules for multiple countries of origin items that have engendered the most controversy in the transition to mandatory COOL. For example, products derived from an animal that was "not exclusively born, raised and slaughtered in the United States," may bear a label indicating it is a product of the United States, as well as the other country(ies) in which the animal was born . . . raised or slaughtered.[25] This is in contrast to the rule for products derived from animals imported into the United States for immediate slaughter. In the later case, the product may bear a label indicating both countries, but the retailer must first designate the product as from the country of export, followed by the United States.[26] With respect to ground meat products, the country of origin notification must list all countries of origin contained in the lot or "a list of all reasonably possible countries of origin . . . ."[27]

The 2008 interim final rule for mandatory COOL clarified the 2008 Farm Bill requirements for domestically produced perishable agricultural commodities, ginseng, peanuts, pecans and macadamia nuts. These items commingled in a package for retail sale with the same commodity from another country must have a mark indicating each country of origin.[28] The 2008 interim final rule for mandatory COOL also clarified the labeling requirements for an item *produced* in the United States, but further *processed* or handled in a foreign

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2004'."). The USDA published an interim final rule for fish and shellfish on October 4, 2004. 69 Fed. Reg. 59708.

22. Pub. L. No. 109-97, § 792 (2006) ("Section 285 of the Agricultural Marketing Act of 1946 (7 U.S.C. 1638d) is amended by striking '2006' and inserting '2008'.").

23. Pub. L. No. 110-234, § 11002 (2008).

24. *Id.* (to be codified at 7 U.S.C. § 1638a).

25. Id. (to be codified at 7 U.S.C. § 1638a(a)(2)(B)).

26. *Id.* (to be codified at 7 U.S.C. § 1638a(a)(2)(C)). *See also* 73 Fed. Reg. 45,114 (discussing interim final rule for labeling multiple counties of origin muscle cuts of meat).

27. Pub. L. No. 110-234, § 11002 (to be codified at 7 U.S.C. § 1638a(a)(2)(E)).

28. *Id.* (to be codified at 7 U.S.C. § 1638(a)(4)); 73 Fed. Reg. at 45111.

country.[29] The interim final rule noted that so long as "the identity of the product is maintained along with records to substantiate the origin claims," the product may bear a United States origin designation.[30] For example, "peanuts grown in the United States and processed in another country such that a substantial transformation does not occur" remains eligible for a United States country of origin mark.[31]

On January 15, 2009, five days before the inauguration, USDA issued its final rule for mandatory COOL.[32] The rule, effective March 16, 2009, made substantial changes to the interim rule in operation since September 30, 2008. As noted above, the interim final rule specifically allowed United States origin products to be further processed or handled in a foreign country without losing its qualification for a United States label.[33] In response to comments, the USDA deleted this express provision allowing for United States origin labels on products re-imported into the United States. Although no longer subject to COOL rules, the agency acknowledged, however, that other federal regulations (e.g., Customs and Border Patrol) may authorize "Product of the U.S." on some of these products.[34]

Labeling treatment of beef products underwent the most extensive alterations between the interim and final rules. The statute simply lists "ground beef" as a "covered commodity."[35] The interim rule interpreted "ground beef" to include three separate products with Food Safety and Inspection Service (FSIS) standards of identity: ground beef,[36] hamburger,[37] and beef patties.[38] Several commenters objected to USDA's inclusion of hamburger and beef patties when the statute only listed ground beef.[39] If Congress intended to include hamburger and beef patties, these individuals argued, it would have included those items in the statute. The agency acknowledged the discrepancy with the statute, but reasoned that most customers do not distinguish between ground beef and hamburger and would

29. 73 Fed. Reg. 45,117.
30. *Id.*
31. *Id.*
32. 74 Fed. Reg. 2658 (Jan. 15, 2009).
33. 73 Fed. Reg. at 45117.
34. 74 Fed. Reg. at 2668.
35. 7 U.S.C. § 1638(2)(A)(ii).
36. 9 C.F.R. § 319.15(a) (2009).
37. 9 C.F.R. § 319.15(b) (2009).
38. 9 C.F.R. § 319.15(c) (2009).
39. 74 Fed. Reg. 2665 (Jan. 15, 2009).

not understand why beef marketed as ground beef would have a label in the meat case while the adjacent hamburger would not, especially because the standards of identity for the two products are virtually identical with the exception of added fat in hamburger.[40] On the other hand, the agency, in its final rule, agreed that mandatory COOL would not include beef patties because those products typically contain binders or extenders and, from the public's perception, is not interchangeable with beef that is ground or marketed as hamburger.[41] Accordingly, only products meeting the FSIS standard of identify for ground beef or hamburger are subject to mandatory COOL.[42]

The final rule also clarified issues related to labeling muscle cuts of meat derived from animals that were not born, raised and slaughtered exclusively in the United States (and not imported for immediate slaughter). Such mixed-origin products may bear a multiple origin designation—"Product of the U.S. and Country X."[43] Products of mixed or foreign (i.e., imported for immediate slaughter) origin that are commingled during a production run with products of exclusive U.S. origin, would have a similar mixed-origin label—"Product of the U.S. and Country X."[44] In each of these instances, the countries of origin may be in any order.[45] This final rule has raised the ire of many, as it allows otherwise "foreign" products to bear at least a mixed-origin U.S. label if only one step of the production process occurs in the United States. Critics accuse the Bush administration of promoting this interpretation as a way for meatpackers to avoid congressional intent and undermine the provisions advocated by domestic livestock producers and consumer advocates.[46]

Rather than further delay implementation of COOL while attempting to close this perceived loophole, Secretary Vilsack issued a letter to industry representatives requesting voluntary compliance

40. 74 Fed. Reg. 2666 (Jan. 15, 2009).
41. 74 Fed. Reg. 2666 (Jan. 15, 2009).
42. 74 Fed. Reg. 2705 (to be codified at 7 C.F.R. § 65.115 (defining "Ground Beef")).
43. 74 Fed. Reg. 2659 (Jan. 15, 2009).
44. 74 Fed. Reg. 2659 (Jan. 15, 2009).
45. 74 Fed. Reg. 2659 (Jan. 15, 2009).
46. Aliya Sternstein, *Agriculture Secretary Issues Stricter Labeling Guidelines for Meat Products*, CONGRESSIONAL QUARTERLY (Feb. 20, 2009), *available at* http://www.cqpolitics.com/wmspage.cfm?docID=news-000003057598.

with a revised labeling program for mixed-origin meat.[47] Specifically, the Secretary requested meatpackers to provide voluntary information regarding which "product step occurred in each country . . . ."[48] For example, an animal born in Country X and raised and slaughtered in the United States, under the current regulation, could state "Product of the U.S. and Country X."[49] Compliance with the voluntary program would require the meatpacker to state "Born in Country X and raised and slaughtered in the U.S."[50]

The generous exemption for processed foods also has engendered substantial criticism. The current version of mandatory COOL excepts covered commodities that have "been combined with at least one other covered commodity or other substantive food component . . . ."[51] For example, the addition of breading, sauce, or chocolate to a covered commodity creates a product that is considered "combined" and thus exempts the end product from COOL.[52] Likewise, a package of peas and a package of carrots would each require a label indicating origin, but a package of peas and carrots would be a combined product and qualify for the processed food exemption.

Also exempted as a processed food are those covered commodities that have "undergone specific processing resulting in a change in the character of the covered commodity."[53] Processing resulting in a change in character encompasses a long list including, but not limited to, frying, boiling, steaming, baking, curing and roasting.[54] In response to this broad exemption, Secretary Vilsack requested processors to voluntarily label products subjected to "curing, smoking, broiling, grilling or steaming."[55]

In addition to domestic concerns regarding a mandatory COOL program, Canada and Mexico, in December 2008, filed requests for formal World Trade Organization (WTO) consultations on COOL. Both filings assert that COOL results in a less favorable treatment of products of foreign origin and that the labeling rules reduce the

47. Letter from Secretary Vilsack to Industry Representative, Feb. 20, 2009, *available at* http://www.usda.gov/documents/0220_IndustryLetterCOOL.pdf.
48. *Id.*
49. *Id.*
50. *Id.*
51. 74 Fed. Reg. at 2705 (2009) (to be codified at 7 C.F.R. § 65.220 (2009)).
52. *Id.*; *see also* Letter from Secretary Vilsack, *supra* note 47.
53. 74 Fed. Reg. at 2705 (2009) (to be codified at 7 C.F.R. § 65.220 (2009)).
54. *Id.*
55. Letter from Secretary Vilsack, *supra* note 47.

value of their exported products.[56] Although the WTO filings presumably covered all products, it was "the Canadian beef and pork industries [that] . . . actively pushed their government to initiate a WTO challenge."[57] The Canadian Cattlemen's Association estimates annual losses of $500 million as a result of COOL.[58] Although as of this writing Canada has suspended its WTO challenge while analyzing the changes incorporated in the final rule (issued January 15, 2009), the issue is far from settled and was a discussion topic during President Obama's first visit to Canada in March 2009.[59]

In sum, the mandatory COOL program may not be perfect on many fronts, but after initial passage in the 2002 Farm Bill, followed by four years of implementation delays, this imperfect program certainly will be subject to continued scrutiny and regulatory adjustments in the future as it adapts to meet the needs of various political constituents and international trade regimes.

II. ALMOND "PASTEURIZATION"

In 2001, an unusual Salmonella strain not previously associated with non-animal products was traced to raw almonds sold in bulk bins.[60] Authorities further traced the almonds to three California orchards, which contained Salmonella bacteria.[61] The grower, huller/seller, and handler, in close coordination with the California Department of Health Services, implemented a program to treat the almonds prior to introduction into commercial channels.[62]

The Almond Board of California (Almond Board), the administrator of the California Almond Marketing Order,[63] embarked on an extensive research effort to understand the occurrence of Salmonella in almond orchards. The result was an industry education program for Good Agricultural Practices (GAPs), Good Manufacturing Practices (GMPs), and Sanitation Standard Operating Procedures,

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56. Becker, *supra* note 4, at 8.
57. *Id.*
58. *Id.*
59. Charles Abbott, *U.S. meat label idea may revive Canada trade spat*, Reuters (Feb. 18, 2009), *available at* http://www.reuters.com/article/domesticNews/idUSTRE51H6MT20090218.
60. Almonds Grown in California; Outgoing Quality Control Requirements, 72 Fed. Reg. 15,021, 15,022 (Mar. 30, 2007).
61. Fed. Reg. 15,021, 15,022 (Mar. 30, 2007).
62. Fed. Reg. 15,021, 15,022 (Mar. 30, 2007).
63. *See* 7 C.F.R. §§ 981.1-.481 (Almonds Grown in California).

(SSOPs).[64] Despite these efforts, a second Salmonella outbreak in raw almonds occurred in 2004, resulting in the handler's initial recall of 5 million pounds of product.[65] The handler subsequently expanded the recall to 15 million pounds, including product exported to eight countries.[66] The source of the outbreak "was traced to Paramount Farms, the world's largest supplier of pistachios and almonds, with 9000 total acres in nut crop production . . . ."[67]

"In the summer of 2004, the [Almond] Board unanimously approved a voluntary [industry] action plan [to treat] all almonds to reduce the potential for *Salmonella*."[68] The Almond Board, in February 2006, proposed to the USDA the creation of a mandatory treatment (pasteurization) plan as part of the federal Marketing Order for Almonds.[69] The objective of the pasteurization program is to achieve a minimum 4-log reduction in Salmonella bacteria prior to shipment, with no significant degradation of the sensory and quality characteristics.[70]

The Agricultural Marketing Agreement Act of 1937 (AMAA) authorizes the USDA to issue marketing orders to achieve "parity prices" and establish 'orderly marketing conditions' for agricultural commodities.[71] To achieve these goals, the AMAA authorizes several

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64. 72 Fed. Reg. 15,022 (Mar. 30, 2007).

65. 72 Fed. Reg. 15,022 (Mar. 30, 2007).

66. 72 Fed. Reg. 15,022 (Mar. 30, 2007). *See also* Press Release, FDA, FDA Issues Alert on Additional Recalled Stocks of Paramount Farms Raw Almonds (May 21, 2004), http://www.fda.gov/bbs/topics/news/2004/NEW01072.html (last visited Apr. 11, 2009)

67. *See* Cornucopia Inst., *Fact Sheet: Mandatory Sterilization of Raw Almonds*, at 1, http://www.cornucopia.org/alomond/Almond_Fact_Sheet.pdf (last visited Apr. 11, 2009)

68. 72 Fed. Reg. 15,022 (Mar. 30, 2007).

69. *See* Almond Board of California, *Almond Action Plan: Pasteurization Treatments* (Dec. 2008) *available at* http://www.almondboard.com/files/December%202008%20%20Pasteurization%20treatments.pdf (on file with the author).

70. *See* 72 Fed. Reg. at 15034 (to be codified at 7 C.F.R. § 981.442(b), Quality Control). *See also*, Almond Board of California, *Food Quality & Safety: Action Plan and Pasteurization, available at* http://www.almondboard.com/Programs/content.cfm?ItemNumber=890&snItemNumber=450 (on file with the author). A log reduction refers to the reduction in bacteria during a process. A 4-log reduction decreases bacteria by 10,000 fold. Milk and juice industries achieve a 5-log reduction (100,000 fold) while some canned food manufacturing requires up to 12-log reduction. *Id.* The Almond Board, in 2006, allocated $1 million in research to ensure that Salmonella reducing treatment did not result in a significant degradation of almond quality. 72 Fed. Reg. at 15,031.

71. *See* Daniel Bensing, *The Promulgation and Implementation of Federal Marketing Orders Regulating Fruit and Vegetable Crops Under the Agricultural Marketing Agreement*

regulatory actions, including, *inter alia*: restrictions on the quantity of a commodity entering the market, limits of the grade, size or quality of a commodity, regulation of pack and container size, and the creation of commodity market research, development and promotion programs.[72] It is the regulation of commodity quality upon which the almond pasteurization rule resides.[73]

As an active relic of President Roosevelt's New Deal effort to counterbalance the economic power of small, independent growers against large commodity handlers, the underlying premise of marketing orders is to place restrictions on the actions of "handlers" (e.g, packing houses and processing plants) for the principal benefit of growers.[74] The USDA received four comments in full opposition to the mandatory pasteurization rule—three from small handlers and one from an agricultural consultant.[75] The basis for their opposition was the contention that the rule would "put small handlers out of business" due to the expensive technological investment required for pasteurization and the high cost of contracting for pasteurization services.[76] The USDA calculated that approximately half of the 112 domestic almond "handlers" are small businesses and that the largest 24 percent of the handlers cumulatively process 82 percent of the California almond crop.[77] To the extent that small handlers would be forced out of the business, the industry would see further concentration, perhaps even exacerbated by the forecasted 50 percent harvest increase and resulting price depression within the next three to five years due to new acreage coming into production.[78] USDA's impact projections, however, did not account for the potential substitution of imported raw (untreated) almonds in product formulation. The pasteurization rules of the almond marketing order only apply to domestically produced almonds. Importers remain free to deliver untreated almonds of foreign origin to food processors and consumers.

Act of 1937, 5 SAN. JOAQUIN AGRIC. L. REV. 3, 5 (1995) (citing 7 U.S.C. § 602(2) and Block v. Community Nutrition Inst., 467 U.S. 340 (1984)).

72. *Id.* at 7 (citing 7 U.S.C. § 608c(6)).

73. 72 Fed. Reg. at 15,031.

74. Bensing, *supra* note 71, at 8. *See also*, *Bailey Farm Dairy Co. v. Anderson*, 157 F.2d 87, 90 (8th Cir. 1946) (noting that the purpose of the marketing order is to benefit the commodity producer). For a more detailed discussion of the AMAA, *see* 9 NEIL E. HARL, AGRICULTURAL LAW §§ 70.01-70.07 (1993 & Supp. 1994).

75. 72 Fed. Reg. 15,031-2.

76. 72 Fed. Reg. 15,032.

77. 72 Fed. Reg. 15,025-6.

78. 72 Fed. Reg. 15,025.

This raises a question posed on an increasingly frequent basis by some within the food production community—the appropriateness of using marketing orders administered by the USDA's Agricultural Marketing Service (AMS) to impose food safety requirements.[79] Few politicians with hopes of a continuing career in elected office will argue against stronger technology-based food safety measures, especially those promoted by the industry itself. And marketing orders, by virtue of their initiation and enforcement via industry organizations such as the Almond Board, have the *de facto* blessing of the regulated community.[80] What may be overlooked in this deferral to industry and its devotion to a technology-focused approach to food safety is the impact of these new regulatory initiatives on small-scale producers that usually are in competition with members of the industry boards with regulatory power.[81] Regarding the almond industry, it is the small "handlers" objecting to expensive technology requirements and the potential loss of profitable spe-

79. *See* Letter from United Fresh Produce Association to Michael V. Durando, Chief, Marketing Order Administration Branch (Dec. 3, 2007), *available at* http://www.unitedfresh.org/assets/files/Comments%20to%20AMS%2012-3-07.pdf (noting that the "AMS is not a food safety regulatory agency, has no authority to set standards for food safety, and cannot be considered an alternative to regulation by the legally empowered health regulatory agency the U.S. Food and Drug Administration" but acknowledging that "marketing tools can be helpful to industries in addressing common challenges") (on file with the author). Professors Padberg and Hall go a step further and question the continued necessity of marketing order regardless of subject matter, arguing that "today's producer is much more specialized and functions more like an industrial producer. . . . The market does less coordinating; the more mature marketing infrastructure does more. In many situations, these changes may lead to less need for marketing orders. This is especially true where a large sophisticated manufacturer is involved. Where a farm commodity goes directly to sale to consumers, marketing orders may be more important." Daniel I. Padberg & Charles Hall, *The Economic Rationale For Marketing Orders*, 5 SAN JOAQUIN AGRIC. L .REV. 73, 84 (1995).

80. *See* 7 C.F.R. § 981.38 (2008) (authorizing the board to (a) administer the regulations; (b) make rules and regulations to effectuate the marketing order; (c) receive and investigate complaints of violations; and (d) recommend amendments to the marketing order).

81. *See* Bensing, *supra* note 71, at 42 (questioning continued appropriateness of "giving industry leaders the authority to administer a program that regulates their competitors and themselves"). The actual representativeness of these industry elected boards warrants further research beyond the scope of this article. *See generally*, DANIEL COHEN, THE HISTORY, POLITICS & PERILS OF THE CURRENT FOOD SAFETY CRISIS 36-37 (2008), *available at* http://www.caff.org/CAFF.Policy.Guide.l.pdf (noting that often only the largest farms have representatives on industry boards and are able to vote based on production volumes).

cialty markets to imported almonds.[82] With respect to leafy greens (e.g., lettuce, spinach, etc.), another commodity subject to AMS food-safety related rulemaking, small-scale farmers, often producing for specialty or organic markets, have raised objections to proposed food safety rules incorporated within marketing agreements[83] that may have a disparate impact on scale.[84]

Embedded in this opposition is the contention that the food safety concerns (and the potential for more wide-spread damage) that necessitate expensive investment in technological solutions arise from production factors inherent only (or with greater frequency) in larger-scale operations. Accordingly, it is only these large operations that should bear the burden of mandatory investment in technological solutions.[85] Smaller-scale production activities, with a history of product safety, should have the flexibility to adopt scale-appropriate, preventative food safety programs rather than undertaking forced investment in high cost "best available technology."[86]

It is this tension between society's demand for defect-free food and the small-scale producers' ability to manage (and adjust to) changing environmental conditions that may present a potentially adverse impact on food safety that results in opposition to a technology-based, one-size-fits-all mandate imposed via the USDA's marketing order approach to food safety. This is not to say that market-

82. *See* Cornucopia Inst., *supra* note 67, at 3 (noting cost of equipment and transportation and that the projected cost of contract pasteurization services is for large volumes, making it up to five times more costly for small-scale producers, and even more costly for organic producers due to segregation issues).

83. *See* Handling Regulations for Leafy Greens Under the Agricultural Marketing Agreement Act of 1937, 72 Fed. Reg. 56,678 (issuing advance notice of proposed rulemaking in response to industry interest in establishing a marketing agreement addressing food safety for leafy greens).

84. *See e.g.*, Community Alliance with Family Farmers, *Policy: Leafy Green Marketing Agreement*, *available at* http://www.caff.org/policy/leafygreen.shtml (last visited Apr. 11, 2009) (listing several links to position papers opposing the marketing agreement's potential impact on small farms) (on file with the author). Examples of the disparate impact in proposed leafy green marketing agreements include testing requirements as these costs would comprise a large percent of the operations total budget, and setback requirements which would be spread over fewer acres of potential production. *See* Community Alliance with Family Farmers, *Comments to Joint Assembly and Senate Committees on Agriculture*, Feb. 27, 2007, at 5, *available at* http://www.caff.org/policy/CAFFCommentsonFoodSafety.pdf (on file with the author).

85. *See* Cohen, *supra* note 81, at 38-39.

86. *See* Cornucopia Inst., *supra* note 67, at 5 (advocating that the Almond Board should focus on the benefits of organic and sustainable farming in preventing bacterial outbreaks rather than "technological Band-Aids").

ing orders should be blind to food safety issues, but rather better tailored with respect to the process of policy formation to incorporate the various scales of production and distribution channels in our diverse agricultural system. As noted by United Fresh Produce Association, the industry:

> is also now facing significant challenges in the use of market power to compel compliance with a host of different food safety practices down the supply chain. Some of those practices may be wise and good steps that all producers should take; but, others may be less grounded in science or based more on the unique opinion of certain buyers upstream from growers. . . . USDA should carefully consider the wisdom of investing collective market power upstream in the supply chain to compel grower behavior . . . .[87]

USDA's increasingly frequent use of the AMAA to impose safety standards developed by handlers, without adequate consultation with the full scope of the grower community, has the danger of shifting even more market power away from growers and undermining the purpose of the AMAA—to place restrictions on handlers for the principle benefit of growers.[88]

III. CONCLUDING THOUGHTS

Country of origin labeling illustrates a complex intersection between consumer preferences for a labeling system, economic considerations of domestic farmers and ranchers, and our increasing globalized food supply chain that incessantly seeks out low-cost goods. Underlying these supply chain issues is consumer apprehension due to the lack of control over their food, especially in light of previous imported food safety incidents discussed in this series of updates. These concerns provided political support for final implementation of a COOL program promoted as one way to reestablish a sense of ownership over food choices and to provide domestic producers a potentially positive economic outcome. Threatened WTO/NAFTA challenges notwithstanding, COOL also fits nicely into the current economic downturn in which "buy American" clauses have political popularity. Accordingly, a mandatory COOL program, perhaps eventually linked to a national animal

87. Letter from United Fresh Produce Association, *supra* note 79, at 4.

88. *See supra* note 74 and accompanying text (discussing purpose of the AMAA). *See also* Bensing, *supra* note 71, at 42; Koretoff v. Vilsack, 2009 WL 585651 (D.D.C. Mar. 9, 2009) (dismissing almond growers, handlers, and grower-handlers challenge to the almond pasteurization rule as growers have no right to judicial review under the statute and handlers failed to exhaust their administrative remedies).

identification program, will be a permanent fixture in the nation's food law.

Food safety rules embedded within commodity marketing orders issued by the Agricultural Marketing Service and administered by industry boards, on the other hand, may have a more limited shelf-life. This is not because of their potential effectiveness, but gradual movement toward a consensus on the overhaul of the food safety system that would consolidate government oversight in a single (or at least fewer) agencies. Although it is difficult (and perhaps not prudent) to disaggregate food safety from marketing, the procedural difficulties with the AMAA may make it an opportune target for reform.