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USDA Requirements for Implementing Mandatory Country of Origin Labeling

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A Brief Legislative History

Simply put, mandatory country of origin labeling (COOL) requires specified food retailers to inform their customers of the country of origin of covered commodities. The Federal requirements for mandatory COOL stem from the 2002 Farm Bill, which amended the Agricultural Marketing Act of 1946 to add COOL provisions. Among other requirements, the 2002 Farm Bill directed USDA to issue guidelines for voluntary COOL by Sept. 30, 2002. During the time that they were available, no retailers adopted the voluntary guidelines to provide COOL information to their customers. Regulations to implement mandatory COOL were to be promulgated by Sept. 30, 2004, and the requirements were to apply to the retail sale of a covered commodity by that date.

The law subsequently has undergone a number of changes since it was first enacted. First, the 2002 Supplemental Appropriations Act amended the COOL provisions by further defining the country of origin for wild fish. The Consolidated Appropriations Act, 2004 then delayed the applicability of mandatory COOL until Sept. 30, 2006 for covered commodities except for farm-raised fish and wild fish, for which the effective date of Sept. 30, 2004 remained unchanged. The Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2006 further delayed the applicability of mandatory COOL until Sept. 30, 2008 for those covered commodities. Finally, the 2008 Farm Bill contained a number of provisions that amended the COOL provisions of the Act.

Because of the changing requirements of the law, the rule-making process for promulgating implementing regulations has followed a similarly arduous process. There are

rules in effect for the mandatory COOL program. An interim final rule for fish and shellfish was published in the *Federal Register* on Oct. 5, 2004. More recently, an interim final rule for the remaining covered commodities was published in the *Federal Register* on Aug. 1, 2008, with an effective date of Sept. 30, 2008. These two interim final rules provide full regulatory authority for the mandatory COOL program, having served as a mechanism for soliciting public comments for consideration in promulgating a final rule and remain in effect until Mar. 15, 2009. The final rule superseding the two interim final rules and encompassing all covered commodities was published in the *Federal Register* on Jan. 15, 2009, and will become effective Mar. 16, 2009, 60 days following publication.

The remainder of this article highlights selected provisions of the COOL requirements as delineated in the final rule. This article draws liberally from the final rule itself and guidance documents released by USDA.

Retailer

The COOL legislation adopts the definition of “retailer” as having the meaning given that term in the Perishable Agricultural Commodities Act of 1939 (PACA). Under PACA, a retailer is any person engaged in the business of selling any perishable agricultural commodity (i.e., fresh and frozen fruits and vegetables) at retail. Retailers are required to be licensed when the invoice cost of all purchases of perishable agricultural commodities exceeds \$230,000 during a calendar year. Therefore, retail establishments, such as butcher shops, which do not generally sell fruits and vegetables, do not meet the PACA definition of a retailer and therefore are not subject to this rule.

Food service establishments, such as restaurants, cafeterias, lunch rooms, food stands, saloons, taverns, bars, lounges, or other similar facilities engaged in the business of selling food to the public, are exempt from COOL requirements. Similar food service facilities include salad bars, delicatessens, meal preparation stations in which the retailer sets out ingredients for different meals and consumers assemble the ingredients into meals to take home, and other food enterprises located within retail establishments that provide ready-to-eat foods.

Covered Commodities

From the time of the initial legislation, covered commodities under mandatory COOL have been defined to include muscle cuts of beef (including veal), lamb, and pork; ground beef, ground lamb, and ground pork; farm-raised and wild fish and shellfish; perishable agricultural commodities; and peanuts. The 2008 Farm Bill added muscle cuts of chicken and goat; ground chicken and ground goat; and ginseng, pecans, and macadamia nuts to the list of covered commodities.

By law, the mandatory COOL requirements do not apply when a covered commodity is an “ingredient in a processed food item.” However, the law does not define these terms, and they consequently must be defined by regulation. The regulations define a “processed food item” as a retail item derived from a covered commodity that has undergone specific processing resulting in a change in the character of the covered commodity, or that has been combined with at least one other covered commodity or other substantive food component (e.g., chocolate, breading, tomato sauce). The addition of a component (such as water, salt, or sugar) that enhances or represents a further step in the preparation of the product for consumption, would not in itself result in a processed food item.

Specific processing that results in a change in the character of the covered commodity includes cooking (e.g., frying, broiling, grilling, boiling, steaming, baking, roasting), curing (e.g., salt curing, sugar curing, drying), smoking (cold or hot), and restructuring (e.g., emulsifying and extruding). Examples of items excluded from mandatory COOL include teriyaki flavored pork loin, meatloaf, roasted peanuts, breaded chicken tenders, fruit medley, mixed vegetables, and a salad mix that contains lettuce and carrots and/or salad dressing.

Bearing a “United States Country of Origin” Declaration

Since its inception in 2002, the COOL legislation has defined specific requirements for United States country of origin. In the case of perishable agricultural commodities, peanuts, pecans, ginseng, and macadamia nuts, the covered commodity must be produced (harvested) in the United States. Farm-raised fish and shellfish must be hatched, raised, harvested, and processed in the United States; and wild fish and shellfish must be harvested in the waters of the United States or by a U.S. flagged vessel and processed in the United States or aboard a U.S. flagged vessel.

In the case of beef, lamb, pork, chicken, and goat the law states that these commodities may bear a U.S. origin declaration only if they are derived exclusively from animals born, raised, and slaughtered in the United States (including animals born and raised in Alaska and Hawaii and transported for a period of time not more than 60 days through Canada to the United States and slaughtered in the United States). The 2008 Farm Bill added the provision that meat derived from animals present in the United States on or before July 15, 2008, and once present in the United States have remained continuously in the United States are also eligible to

bear a United States origin declaration.

The 2008 Farm Bill amendments permit designation of the state, region, or locality where such commodity was produced (these designations are also acceptable for commodities that have been imported). For example, state brands such as “New Jersey Fresh” and “California Grown” would adequately convey origin information as long as the criteria for such state marketing programs mirror the regulatory definition of U.S. origin (e.g., grown in the United States). Examples of regional and locality labeling include “Imperial Valley,” “Tuscany,” or “Orange County”; and all would be acceptable labeling for covered nuts, perishable agricultural commodities, and ginseng in the context of COOL compliance. On the other hand, more obscure regional labels that do not specify a discernable country of origin would not suffice; examples of more obscure designations include “Great Lakes,” “Eastern,” “Rocky Mountains,” and “Island Fresh.”

Country of Origin for Imported Products

An imported covered commodity for which origin has already been established as defined by this law (e.g., born, raised, slaughtered or grown) and for which no production steps have occurred in the United States shall retain its origin as declared to U.S. Customs and Border Protection at the time the product enters the United States, through retail sale. Covered commodities imported in consumer-ready packages are currently required to bear a country of origin declaration on each individual package under the Tariff Act of 1930 (Tariff Act), and the COOL regulations do not change these requirements.

One of the greatest sources of controversy regarding mandatory COOL concerns the definition of the country of origin for meats. While the COOL

provisions of the 2002 Farm Bill specified requirements for U.S. country of origin of meats—namely born, raised, and slaughtered in the United States—there was no clear direction on how to label meats not meeting the U.S. origin requirements. Of particular concern was how to label meats from animals imported from another country and then raised and slaughtered in the United States, as well as animals imported directly into the United States for slaughter. Also of concern was how to label meats potentially derived from livestock from more than one origin, such as ground beef.

The 2008 Farm Bill included additional provisions for labeling of meat, which have commonly been referred to as Categories A, B, C, and D (see Figure 1).

Regarding ground meat, the declaration of country of origin must include a list of all countries of origin contained therein or a list of all reasonably possible countries of origin contained therein. When a raw material from a specific origin is not in a processor's inventory for more than 60 days, the country shall no longer be included as a possible country of origin.

Figure 1.

Muscle cuts of meat derived from animals born, raised, and slaughtered in the United States that are commingled during a production day with those from animals raised and slaughtered in the United States and not derived from animals imported for immediate slaughter, origin may be designated as "Product of the U.S., Country X, and (as applicable) Country Y." Similarly, muscle cuts of meat derived from animals that are born in Country X or Country Y, raised and slaughtered in the United States, that are commingled during a production day with muscle cut covered commodities that are derived from animals that are imported into the United States for immediate slaughter may be designated as "Product of the United States, Country X, and (as applicable) Country Y." In either case, the countries of origin may be listed in any order.

Labeling Commingled Covered Commodities

To provide the industry with flexibility, the regulations do not contain specific requirements regarding the exact placement or size of the country of origin declaration. However, such declarations must be legible and placed in a conspicuous location, allowing consumers to read and understand the country(ies) of origin.

The law states that retailers may use a label, stamp, mark, placard, or other clear and visible sign on the covered commodity or on the package, display, holding unit, or bin containing the commodity at the final point of sale to consumers. In general, abbreviations are not acceptable unless approved for use under U.S. Customs and Border Protection rules, regulations, and policies.

Labeling Commingled Covered Commodities

In the regulations, a commingled covered commodity is defined as a single type of covered commodity (e.g., frozen peas), presented for retail sale in a consumer package, that has been prepared from raw material sources having different origins. Further, a commingled covered commodity does not include ground meat products, for which labeling requirements are defined separately. If the retail product contains two different types of covered commodities (e.g., peas and carrots), it is considered a processed food item and is not subject to mandatory COOL.

In the case of perishable agricultural commodities, fish and shellfish, peanuts, pecans, ginseng, and macadamia nuts, for imported covered commodities that have not subsequently been substantially transformed in the United States that are commingled with imported and/or United States origin commodities, the declaration shall indicate the countries of origin for all covered commodities in accor-

dance with U.S. Customs and Border Protection marking regulations. For example, a bag of frozen peas that were sourced from France and India is currently required under U.S. Customs and Border Protection regulations to be marked with that origin information on the package.

Markings

To provide the industry with flexibility, the regulations do not contain specific requirements regarding the exact placement or size of the country of origin declaration. However, such declarations must be legible and placed in a conspicuous location, allowing consumers to read and understand the country(ies) of origin.

The law states that retailers may use a label, stamp, mark, placard, or other clear and visible sign on the covered commodity or on the package, display, holding unit, or bin containing the commodity at the final point of sale to consumers. In general, abbreviations for state, regional, or locality label designations are acceptable as long as they use official United States Postal Service abbreviations or those approved for use under U.S. Customs and Border Protection rules, regulations, and policies.

Recordkeeping Requirements and Responsibilities

The law states that the Secretary may conduct an audit of any person that prepares, stores, handles, or distributes a covered commodity for retail sale to verify compliance. As such, records maintained in the normal course of business that verify origin declarations are necessary in order to provide retailers with credible information on which to base origin declarations.

Any person engaged in the business of supplying a covered commodity to a retailer, whether directly or indirectly (i.e., growers, distributors, handlers, packers, and processors, etc.), must make available informa-

tion to the subsequent purchaser about the country(ies) of origin of the covered commodity. This information may be provided either on the product itself, on the master shipping container, or in a document that accompanies the product through retail sale provided it identifies the product and its country(ies) of origin.

Any person engaged in the business of supplying a covered commodity to a retailer, whether directly or indirectly, must maintain records to establish and identify the immediate previous source (if applicable) and immediate subsequent recipient of a covered commodity for a period of one year from the date of the transaction.

In addition, the supplier of a covered commodity that is responsible for initiating a country of origin declaration, which in the case of beef, lamb, pork, chicken, and goat is the slaughter facility, must possess or have legal access to records that are necessary to substantiate that claim. In the case of beef, lamb, chicken, goat, and pork, a producer affidavit shall be considered acceptable evidence on which the slaughter facility may rely to initiate the origin claim, provided it is made by someone having first-hand knowledge of the origin of the animal(s) and identifies the animal(s) unique to the transaction.

Retailers also have record-keeping responsibilities. Records and other documentary evidence relied upon at the point of sale by the retailer to establish a covered commodity's country(ies) of origin must be maintained for as long as the product is on hand. Upon request, these records must be provided to any duly authorized representatives of USDA within five business days of the request and may be maintained in any location. For pre-labeled products (i.e., labeled by the manufacturer/first handler) the label itself is sufficient evidence on which the retailer may rely to establish the product's origin. In addi-

tion to indicating country of origin information, pre-labeled products must contain sufficient supplier information to allow USDA to trace back the product to the supplier initiating the claim. Records that identify the covered commodity, the supplier, and for products that are not pre-labeled, the country of origin information must be maintained for a period of one year from the date the origin declaration is made at retail.

Safe Harbor for Participants of National Animal Identification System

Slaughter facilities that slaughter animals that are part of a National Animal Identification System (NAIS) compliant system or other recognized official identification system (e.g., Canadian official system, Mexican official system) may also rely on the presence of an official ear tag and/ or the presence of any accompanying animal markings (i.e., "Can", "M"), as applicable, on which to base their origin claims. This would also include such animals officially identified as a group lot.

Visual Inspection

In the case of cattle, producer affidavits may be based on a visual inspection of the animal to verify its origin. If no markings are found that would indicate that the animal is of foreign origin (i.e., "CAN" or "M"), the animal may be considered to be of U.S. origin.

Enforcement

The law encourages USDA to enter into partnerships with states to the extent practicable to assist in the administration of this program. As such, USDA has entered into partnerships with states that have enforcement infrastructure to conduct retail compliance reviews.

Routine compliance reviews may be conducted at retail establishments and associated administrative offices,

and at supplier establishments subject to the COOL regulations. USDA will coordinate the scheduling and determine the procedures for compliance reviews. Only USDA will be able to initiate enforcement actions against a person found to be in violation of the law. USDA may also conduct investigations of complaints made by any person alleging violations of these regulations when it determines that reasonable grounds for such investigation exist.

The law contains enforcement provisions for both retailers and suppliers that include civil penalties of up to \$1,000 for each violation. For retailers and persons engaged in the business of supplying a covered commodity to a retailer (suppliers), the law states that if USDA determines that a retailer or supplier is in violation of the Act, USDA must notify the retailer or supplier of the determination and provide the retailer or supplier with a 30-day period during which the retailer or supplier may take necessary steps to comply. If upon completion of the 30-day period the Secretary determines the retailer or supplier has (1) not made a good faith effort to comply and (2) continues to willfully violate the Act, after providing notice and an opportunity for a hearing, the retailer or supplier may be fined not more than \$1,000 for each violation.

For More Information

Comprehensive information on USDA's COOL program, including rules, policies, guidance documents, and other information is available online: <http://www.ams.usda.gov/COOL>

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