Fighting for the U.S. Cattle Producer!
R-CALF USA

R-CALF United Stockgrowers of America
P.O. Box 30715
Billings, MT 59107
Fax: 406-252-3176
Phone: 406-252-2516
Website: www.r-calfusa.com
E-mail: r-calfusa@r-calfusa.com

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Country of Origin Labeling Program
Room 2607-S
Agricultural Marketing Service
U.S. Department of Agriculture
STOP 0254
1400 Independence Avenue, SW
Washington, DC 20250-0254

Desk Officer for Agriculture
Office of Information and Regulatory Affairs
Office of Management and Budget
New Executive Office Building,
725 17th Street, NW., Room 725
Washington, DC 20503

Via Facsimile and Electronic Portal: 202-354-4693

Re: Docket No. AMS-LS-07-0081, RIN 0581-AC26: Interim Final Rule: Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts

The Ranchers-Cattlemen Action Legal Fund, United Stockgrowers of America (R-CALF USA) appreciates this opportunity to submit its comments regarding the interim final rule (IFR) for mandatory country of origin labeling (COOL) for beef, pork, lamb, chicken, goat meat, perishable agricultural commodities, peanuts, pecans, ginseng, and macadamia nuts. These comments are submitted in response to the Department's request for public input published at 73 Fed. Reg. 45106 *et seq*. (Aug. 1, 2008). R-CALF USA is a nonprofit cattle-producer association that represents thousands of U.S. cattle producers in 47 states. R-CALF USA's mission is to represent the U.S. cattle industry in trade and marketing issues to ensure the continued profitability and viability of independent U.S. cattle producers. R-CALF USA's membership consists primarily of cow/calf operators, cattle backgrounders, and feedlot owners. Various main-street businesses are associate members of R-CALF USA.

INTRODUCTION

In 2002, Congress enacted the mandatory country-of-origin labeling (COOL) law for beef and other products to enable consumers to make informed choices about the food they buy and

eat.[1] Despite consumer, producer and congressional support for COOL, implementation of the labeling law for beef has been delayed until Sept. 30, 2008. The Food Conservation and Energy Act of 2008 (2008 Farm Bill) amended the law to, *inter alia*, provide more specificity as to how the law should be implemented. R-CALF USA believes that the U.S. Department of Agriculture (USDA) should adopt the recommendations made herein to ensure that COOL is implemented in a manner that maximizes, to the greatest extent possible, the scope of commodities covered by the COOL law and minimizes, to the greatest extent possible, the recordkeeping burden on industry participants responsible for delivering covered commodities to the consumer.

Below are R-CALF USA's specific comments and recommendations organized according to Part 65 – Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Perishable Agricultural Commodities, Macadamia Nuts, and Peanuts – as provided at 73 Fed. Reg. 45148 – 45151. R-CALF USA appreciates the numerous simplification steps USDA adopted subsequent to the draft COOL implementing regulations published in 2003, which contained numerous onerous recordkeeping and retention requirements for suppliers and retailers.[2] In addition, R-CALF USA appreciates USDA's express inclusion of hamburger and beef patties as among the ground beef products subject to the COOL law, the elimination of the onerous "chain of custody" requirement for retailers and the authorization to use state marketing programs to achieve compliance with COOL requirements. However, R-CALF USA has serious concerns regarding specific provisions in the IFR and will provide comment and recommendation only on the specific provisions that raise such serious concerns for the organization.

§ 65.220 NAIS-compliant system:

R-CALF USA disagrees with USDA's attempt to supplant its existing regulatory definition of the phrase that describes official animal identification systems, i.e., "Official identification device or method,"[3] with the new phrase "NAIS-compliant system," which new phrase is not authorized by either statute or regulation (and, hence, was subject neither to congressional review nor public notice and comment). The new definition found at § 65.220 actually delimits USDA-approved identification devices or methods, notwithstanding USDA's recent assurance that all official identification devices defined in the *Code of Federal Regulations* are "NAIS-compliant."[4] For example, the *Code of Federal Regulations* includes, and is expressly not limited to, "official tags, tattoos, and registered brands when accompanied by a certificate of inspection from a recognized brand inspection authority." 9 CFR § 93.400. In contrast, USDA's new definition is silent on the use of registered brands and tattoos.

In addition, USDA erroneously infers that existing USDA disease programs are compliant with NAIS when it is the opposite that is true, i.e., USDA's proposed NAIS system is compliant with USDA's existing official identification systems. This fact is demonstrated by

[1] 7 U.S.C. § 1638 *et seq*.
[2] *Mandatory Country of Origin Labeling of Beef, Lamb, Pork, Fish, Perishable Agricultural Commodities, and Peanuts; Proposed Rule*, 68 Fed. Reg. 61,944, Oct. 30, 2003 (hereinafter "2003 Draft Rule).
[3] *See,* e.g., 9 CFR § 93.400.
[4] *See A Business Plan to Advance Animal Disease Traceability,* U.S. Department of Agriculture, Animal and Plant Health Inspection Service, Version 1.0, September 2008, at ii.

USDA's own description of its NAIS proposal, which overreaches the requirements of existing official identification systems. For example, USDA explains that NAIS is comprised of three components: 1) premises registration; 2) animal identification; and, 3) animal tracing.[5] Current registered brand programs, however, which are expressly recognized as an existing official identification device or method,[6] *do not* require premises registration as is required by NAIS.

For the foregoing reasons, R-CALF USA recommends that USDA eliminate the definition for an "NAIS-compliant system" and include, instead, the existing regulatory definition of "Official identification device or method" so as not to mislead the public into believing that they must comply with the overreaching requirements of USDA's NAIS proposal, e.g., premises registration, in addition to maintaining current compliance with existing official identification systems. This change would be consistent with USDA's assurance that the NAIS "does not alter any regulation in the Code of Federal Regulations or any regulations that exist at the State level."[7]

§ 65.220 Processed food items:

R-CALF USA appreciates USDA's express recognition that the addition of a component (such as water, salt, or sugar) does not represent a processing step that changes the character of a covered commodity. We recommend that USDA also expressly state that the addition of water-based or other types of flavoring – such as the solution containing water, sodium phosphate, salt, and natural flavoring purportedly injected into meat muscle-cut commodities by some retailers – does not represent a processing step that changes the character or identity of a covered commodity.

R-CALF USA disagrees with USDA's premise that it should narrow the scope of commodities subject to the COOL law in the IFR, particularly since Congress just recently expanded the scope of overall commodities to be covered in the 2008 Farm Bill, i.e., Congress added several commodities that were not included in the 2002 Farm Bill. It is counterintuitive for USDA to argue that Congress intended to minimize the volume of a specific commodity subject to the COOL law while it simultaneously increases the variety of covered commodities. This counterintuitive outcome suggests that USDA's action to narrow the scope of specific commodities subject to the COOL law is contrary to congressional intent. R-CALF USA recommends that USDA expressly *exclude* cooking, curing, smoking, and restructuring from among the processes applied to covered commodities that exempt the covered commodity from the COOL law. Our basis for this recommendation is that any of those processes represent merely an additional step in the preparation of the commodity for consumption while preserving the distinguishing character (i.e., the identity) of the commodity itself. In other words, any specific muscle cut of beef, for example, retains its distinguishing feature as a muscle cut of beef after undergoing any one of these preparatory steps – a beef roast retains its identity as a beef roast even after it is cooked.

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[5] *See A Business Plan to Advance Animal Disease Traceability*, U.S. Department of Agriculture, Animal and Plant Health Inspection Service, Version 1.0, September 2008, at 1.
[6] *See,* e.g., 9 CFR § 93.400.
[7] *See A Business Plan to Advance Animal Disease Traceability,* U.S. Department of Agriculture, Animal and Plant Health Inspection Service, Version 1.0, September 2008, at i, fn 1.

§ 65.300 (d)(2) Country of origin notification: Covered commodities that undergo further processing in a foreign country:

The IFR effectively treats specific processing steps administered in a foreign country more favorably than it treats the same processing steps administered in the United States. It achieves this inconsistent outcome by allowing a covered commodity that meets the requirements for a United States country-of-origin label to retain its United States label even after the commodity is exported and subjected to *further processing* in a foreign country and then imported into the United States, provided the commodity retains its *identity* when it is imported into the United States (and accompanied by records). This relaxed treatment of further processing steps administered in a foreign country, as well as the relaxed standard the imported product must meet – it needs only to retain its identity upon importation – stands in sharp contrast to USDA's exclusion of a covered commodity from the COOL law if it undergoes processing in the United States that changes the *character* of the covered commodity.

R-CALF USA recommends that USDA delete entirely § 65.300 (d)(2) and include language that expressly prohibits the retention of a United States origin label for any commodity that undergoes additional processing or handling in a foreign country. Further, R-CALF USA recommends that USDA substitute the stringent standards it has applied in § 65.220 (i.e., excluding covered commodities from labeling requirements if they underwent processing that changed the *character* of the covered commodity) with the far more relaxed standard it intends to apply to foreign processed commodities (i.e., the commodity would be subject to the COOL law provided the processing did not change the *identity* of the covered commodity).

§ 65.300 (e) Country of origin notification: Labeling muscle cut covered commodities of multiple countries of origin that include the United States:

The IFR effectively undermines the agreement reached by industry stakeholders during Congress' development of its 2008 Farm Bill amendments concerning COOL. It was neither Congress' intent nor the intent of the stakeholders' agreement to allow a multiple country of origin label (e.g., "Product of the United States, Canada, and Mexico," "Product of the United States and Canada," or "Product of the United States and Mexico") on meat commodities that are derived from animals that were exclusively born, raised, and slaughtered in the United States. It was clearly Congress' intent and the intent of the agreement to prohibit the use of a label containing the United States and one or more additional countries on meat that is derived from an animal that is exclusively born, raised, and slaughtered in the United States.

The IFR, however, defies this prohibition by allowing meat from animals that were born, raised, *and/or* slaughtered in the United States to be labeled with a label that includes the United States and one or more countries. We suggest that USDA issue a technical correction to the IFR before Sept. 30, 2008, to delete the "and" in the "and/or" clause and insert the prohibition against the use of a multiple country-of-origin label on any meat derived from an animal that is exclusively born, raised, *and* slaughtered in the United States. Failure to make this crucial change would nullify the purpose of the COOL law by effectively authorizing what amounts to a North American label on all domestically produced beef, thus preventing consumers from

knowing from what country their purchased meat products originated. This would be a tremendous disservice to U.S. consumers, as well as to the thousands of U.S. cattle producers who have now fought for several years to ensure that consumers would have the ability to exercise an informed choice in their grocery store when purchasing food for themselves and their families.

A Sept. 22, 2008, news article published by the *National Journal* represented that the Secretary of Agriculture had informed the National Association of State Departments of Agriculture that USDA would not allow the North American label for U.S. beef. Specifically, the news article quoted the Secretary as saying that the use of a multiple label for U.S. beef ‘"was not the intent of the law, [and] not the intent of all of you when you started this many years ago,"’ and, ‘"We don't think that's the original intent of the law. We think we have found a way to deal with that. Oct. 1 we'll find out."’ R-CALF USA urges USDA to implement its plan to remedy this problem before the Sept. 30, 2008 effective date of COOL.

§ 65.300 (h) Country of origin notification: Labeling ground beef, ground pork, ground lamb, ground goat, and ground chicken:

R-CALF USA appreciates the requirement that a processor must remove from the ground meat origin label the name of any country from which no raw product is sourced after a specified time period (the time period in the IFR is more than 60 days). This requirement appears to address the problem associated with muscle cuts and discussed above in which persons could avoid the use of the stand-alone United States label by including on the label the United States and one or more foreign countries, even if no meat were sourced from a foreign country. However, R-CALF USA believes the 60-day time period is far too long. We recommend that the time period be changed to no longer than one week, which would reduce the period during which consumers would be misinformed as to the true origins of the ground meat product. Given the perishable nature of meat, which necessarily limits the duration of processing, one week should be a reasonable time period for processors to update their labels and determine from what country they will be sourcing their raw products.

§ 65.400 (d) Markings: Labeling bulk containers:

R-CALF USA is concerned that the language authorizing a list of “all possible origins” on a bulk container, such as a meat display case that may contain commodities from different origins, would inadvertently allow a retailer to hang a sign over the entire meat display case stating the entire meat case contains products from the United States and one or more countries, even if the display case contains only commodities from the United States. R-CALF USA recommends that USDA add language to require that if a meat display case contains commodities from more than one country, then the commodities must be physically separated according to their origins within the meat display case and a separate origin declaration must be associated with each section. This additional language is necessary to ensure that consumers can exercise an informed choice, even if commodities of differing origins were displayed in a single meat display case.

§ 65.500 (b) Recordkeeping requirements: Responsibility of Suppliers:

Support of USDA's Clarification Statement

R-CALF USA appreciates USDA's Aug. 7, 2008, *Livestock Producer Compliance with Interim Final Rule* that clarifies that subsequent producers/buyers that commingle animals from various sources are authorized to rely on previous producer affidavits as a basis for formulating their own affidavits for the origin of their new lots.

Support of Industry Stakeholder Recommendations

R-CALF USA supports the recommendations contained in the Sept. 4, 2008 letter signed by numerous industry stakeholders that provides standardized language for three forms of affidavits. This letter is attached hereto as Attachment A, and the three standardized forms of affidavits are described briefly below:

1. A continuous country of origin affidavit/declaration for use by any operation in the livestock chain of custody, but particularly for first-level producers.
2. An origin declaration for seller/buyer invoices and other documents such as health papers, brand inspection papers, check-in sheets, and virtually any other document related to livestock sales transactions. This language could be used in conjunction with continuous affidavits with reference to specific sales transactions or as a stand-alone affidavit for specific sales transactions.
3. A continuous country of origin affidavit/declaration for any transactions, including the sale of livestock to a packer. This affidavit/declaration contains a provision that the seller would maintain records for one-year from the date of livestock delivery for purposes of complying with a USDA audit.

R-CALF USA further supports the additional recommendation made by the industry stakeholders to authorize sellers of cattle to conduct a visual inspection of their livestock for the presence or absence of foreign marks of origin, and that such visual inspection constitutes firsthand knowledge of the origin of their livestock for use as a basis for verifying origin and to support an affidavit of origin. This method of verifying livestock origins will complement other acceptable origin verification records, will help to ensure the accuracy of origin claims, will help to ensure that all livestock will be eligible for an origin designation, and will help to ensure that USDA has the ability to conduct audits of persons making origin claims.

The use of visual inspections by cattle producers/sellers to initiate an origin claim on livestock is fully compliant with the national treatment obligations of the U.S. under World Trade Organization (WTO) rules and trade agreements such as NAFTA (North American Free Trade Agreement). Article III(4) of the WTO's General Agreement on Tariffs and Trade (GATT) provides that imports must be "accorded treatment no less favorable than that accorded to like products of national origin." All laws and regulations affecting a product's internal sale, purchase, or use are subject to this requirement. Importantly, national treatment obligations do not require that domestic livestock be permanently marked with a mark of origin even if imported livestock are required to be so marked. This is because WTO member countries are

authorized under Article IX of GATT to require marks of origin on goods imported from any other WTO member as a condition of entry into a WTO members' country, without regard to whether or not the WTO member requires similar marks of origin on its domestic products.

The U.S. currently requires all cattle entering the U.S. market from Canada and Mexico to be permanently marked with such devices as brands (e.g., "CAN," "M"), permanent metal ear tags (applicable to breeding stock from Mexico[8]), other ear tags, tattoos, or to arrive at packing plants in sealed conveyances, for health and safety reasons.[9] The origin of animals that arrive in sealed conveyances is discernable to the packer by the seal and accompanying documentation. The import markings on live cattle, or the absence thereof, would be readily discernable during a visual inspection by cattle producers/sellers of all of their livestock subject to sale. Under visual inspection, U.S. cattle producers/sellers would accord imported cattle the same treatment accorded to domestic cattle – each and every animal within the U.S. market, whether imported or domestic, would be subjected to visual inspection to ascertain the presence or absence of permanent marks of origin. The outcome of such visual inspection, again performed on both imported and domestic animals, would provide the basis for a producer affidavit attesting to the origin of the animals. This methodology is consistent with the authority that USDA has granted to the packers in the IFR to use the presence of official import markings as a basis for initiating an origin claim.

Recommendation to Eliminate Legal Access to Records Requirement

The 2003 draft COOL rule states that, in addition to providing origin information to retailers, meat packers must "possess or have legal access to records that substantiate" the origin claim.[10] The 2004 interim final rule for fish and shellfish eliminated the requirement that processors have "legal access" to other parties' substantiating origin documentation, and instead simply requires suppliers to possess such records.[11] The IFR however reinstates the requirement that meatpackers have "legal access" to other parties' substantiating origin documentation. We believe this requirement is unnecessary. The IFR prescribes that suppliers must provide "information to the buyer about the country (ies) of origin of the covered commodity" and that packers responsible for initiating an origin claim may expressly rely on a producer affidavit or on ear tags and/or markings applied pursuant to a recognized official identification system for purposes of initiating such a claim. Each of these prescriptions necessarily result in the packer possessing the "acceptable evidence" upon which the packers' origin claim is made. Because the IFR already requires packers to base their origin claim on such "acceptable evidence," there is no justification for also authorizing the packer to have "legal access" to other parties' substantiating origin documentation. Indeed, the COOL law authorizes only the Secretary of Agriculture to conduct an audit, not the packer.[12] Therefore, the only justifiable reason for having legal access to the records of cattle producers/sellers would be to conduct a verification audit, which only the Secretary of Agriculture is authorized to conduct. For the foregoing reasons, R-CALF USA recommends that USDA eliminate the requirement that suppliers responsible for initiating an

[8] *See* 9 C.F.R. § 93.427(d).
[9] *See* 9 C.F.R. §§ 93.420, 93.427(c)(1), 93.429, and 93.436(b)(3).
[10] *2003 Draft Rule* at 61,984 (§ 60.400(b)(1)).
[11] *2004 Fish Rule* at 59,745 (§ 60.400(b)(1)).
[12] 7 U.S.C. § 1638a(d).

origin claim have legal access to records necessary to substantiate that claim, and instead require that such suppliers possess such records.

Recommendation to Eliminate Reference to "NAIS Compliant Systems"

As discussed under § 65.220 above, the NAIS system overreaches requirements imposed under existing official identification systems as described, e.g., under USDA's official brucellosis identification system, which does not require a registered premises number and, hence, does not require a premises registration for compliance.[13] Indeed, a premises-based numbering system, as prescribed under the proposed NAIS system, is among four optional numbering systems that may be used to comply with the official brucellosis identification system.[14] While USDA infers that the more prescriptive NAIS system is itself an official identification system (the IFR states that "[p]ackers that slaughter animals that are part of a NAIS compliant system *or other recognized official identification system*," (Emphasis added.)) R-CALF USA can find no evidence that the NAIS is an official identification system sanctioned either by statute or regulation. Therefore, R-CALF USA believes it is improper to imply that the more prescriptive NAIS proposed system is an official identification system and because the proposed NAIS system further overreaches bon-a-fide official identification systems, any reference to the NAIS system should be eliminated from the IFR for COOL. In its place, R-CALF USA recommends that USDA include "existing official identification systems that require an official identification device or method."

CONCLUSION

R-CALF USA appreciates this opportunity to submit comments on USDA's IFR for COOL. While R-CALF USA appreciates USDA's steps to simplify and improve upon the 2003 Draft Rule, the foregoing comments identify several serious shortcomings regarding the IFR, including a provision that completely undermines the COOL law. R-CALF USA urges USDA to issue a notice of technical correction before Sept. 30, 2008, to bring the IFR into compliance with Congress' intent to prohibit the use of a multiple country of origin label, i.e., a label that includes the United States and one or more countries, for meat derived from animals exclusively born, raised, and slaughtered in the United States.

Sincerely,

R. M. Thornsberry DVM

R.M. Thornsberry, D.V.M.
President, R-CALF USA Board of Directors

Attachment A: September 4, 2008 Industry Letter and Attachments

[13] *See* 9 CFR § 71.1, *et seq.*; *see also* 9 CFR § 78.1, *et seq.*
[14] *See Ibid.*