UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

American Meat Institute, *et al.*	§	
	§	
	§	
Plaintiffs,	§	
	§	
v.	§	Civil Action No. 13-cv-1033 (KBJ)
	§	
United States Department of Agriculture, *et al.*	§	
	§	
Defendants.	§	

DECLARATION OF BILL BULLARD

I, Bill Bullard, declare as follows:

1. I am the chief executive officer of Ranchers Cattlemen Action Legal Fund, United Stockgrowers of America ("R-CALF USA") and have held this position since 2001.

2. In this capacity I am primarily responsible for carrying out the member-developed policies of the organization, which entails managing staff and day-to-day operations of the organization, lobbying on behalf of the organization, and coordinating activities between the organization and its state affiliates, all within the confines of the organization's financial resources that are derived exclusively from voluntary membership dues and contributions.

3. R-CALF USA is a national, nonprofit trade association incorporated in the state of Montana that exclusively represents the interests of independent cattle producers within the multi-segmented United States beef supply chain. With 4,625 voluntary dues-paying members in 42 states, R-CALF USA is the largest producer-only cattle trade association in the United States. R-CALF USA's members are involved in all stages of the cattle production process and they include seed-stock producers, cow/calf producers, stockers and backgrounders, as well as feedlot owners. R-CALF USA's voting members are members who own cattle. Some members run a

significant number of sheep and cattle while some other members run only sheep. R-CALF USA has cattle-owning members that also raise hogs.

4. In addition to its thousands of individual, dues-paying farmer and rancher members, R-CALF USA also has 19 dues-paying affiliated organizations that represent state and county livestock-producer associations from 10 states. Included among these numerous associations are such statewide associations as the Buckeye Quality Beef Association from Ohio, Independent Cattlemen of Nebraska, Independent Cattlemen of Wyoming, Colorado Independent CattleGrowers Association, and South Dakota Stockgrowers Association, that is joining R-CALF USA in its Motion to Intervene as a representative of R-CALF USA's many affiliates. Like other statewide affiliates, Colorado Independent CattleGrowers Association ("CICA") is a grassroots cattle-producer association. These dues-paying R-CALF USA affiliates have passed various resolutions stating that the implementation of mandatory COOL was necessary to defend and preserve the U.S. domestic cattle market. CICA as well as other affiliates believe beef produced exclusively from U.S. cattle and sold under a mixed label misinforms as well as deceives consumers. They believe that such mixed labels only benefit the packers and retailers and undermine the original intent of creating mandatory COOL for beef and other food products. They also believe that USDA's new rule more closely implements the original COOL legislative intent and will definitely benefit U.S. consumers in their purchasing decisions at the retail meat counter and will also help independent producers and feeders that need to differentiate their wholesome and safe beef product from their foreign competitors' products at the meat counter. If the final COOL rule published May 24, 2013 is vacated in whole or in part, these affiliates will be harmed because their ability to fulfill their member-developed policies will be impaired. This

likely will cause them difficulty in retaining members, recruiting new members, and generating contributions.

5. On numerous occasions since 2001, I have testified before Congress and federal agencies on behalf of R-CALF USA on domestic and international issues that affect the profitability of its farmer/rancher members. Following its first annual business meeting held in 2000, the cattle-owning members of R-CALF USA voted overwhelmingly for a policy that directs the organization to support COOL and to define the term "origin" as the country where the livestock from which the product was derived was born and raised.

6. This was R-CALF USA's core plan for protecting and preserving competition for U.S. cattle farmers and ranchers. R-CALF USA has long held that the differentiation of imported beef from domestic beef at the grocery store was quintessential to ensuring that competitive demand signals for U.S. live cattle are generated by consumers at the meat counter and transmitted upstream to U.S. cattle farmers and ranchers, without interferences from the packers. In other words, without COOL, the packers can unilaterally decide from which country to source the cattle they need to satisfy the consumers' appetite for beef. With COOL, however, it is the choices exercised by consumers that initiate demand signals for live cattle from the various countries. If consumers consistently choose beef produced exclusively from U.S. cattle, then packers will have to satisfy that increased demand by sourcing more of their cattle needs from U.S. born and raised cattle produced by U.S. cattle farmers and ranchers.

7. R-CALF USA strongly disagrees with the Plaintiffs attempt to downplay the global competition that occurs between U.S. cattle farmers and ranchers in the U.S. cattle industry, Canadian cattle producers in the Canadian cattle industry, and Mexican cattle producers in the Mexican cattle industry by erroneously characterizing the production of livestock and meat

within these three separate and distinct industries as a "North American meat industry" (*See* Pls.' Am. Compl. at 2). R-CALF USA views this as an attempt to capture the livestock supply chain away from independent cattle producers by eliminating a means for U.S. cattle farmers and ranchers to differentiate their product in the marketplace through the use of an accurate COOL label. R-CALF USA values global competition between the livestock producers in the United States, Canada and Mexico as well as the competition that occurs between the livestock industry (which R-CALF USA represents) and the beef packing industry (which Plaintiffs represent).

8. R-CALF USA members have a fundamental interest in preserving their reputation as honest, transparent and reliable producers of wholesome, safe meat. This cannot be achieved if, as a fundamental matter, consumers are kept in the dark regarding where the animal was born, raised, and slaughtered from which their beef was derived. This is particularly important in the cow/calf sector of the live cattle industry where cows may spend years, *i.e.*, up to 15 years or more, in a productive cattle herd before they are ultimately harvested for human consumption.

9. Since 2000, COOL has been R-CALF USA's "Flagship Issue" and members have since refined, expanded and strengthened their membership-developed COOL policies,.

10. Also since 2000, R-CALF USA has devoted perhaps more of its organizational resources toward the passage, implementation, reform and defense of COOL than it has expended on any other issue the organization has addressed. Literally years of staff time, hundreds of thousands of member-contributed dollars, and years of volunteer time have been devoted to the passage, implementation, reform, and defense of COOL.

11. R-CALF USA provided direct assistance to Senate leaders during the drafting and passage of the COOL law enacted in the 2002 Farm Bill.

12. In 2008, when Congress considered amendments to the COOL law, R-CALF USA worked to achieve greater specificity from Congress regarding how to differentiate meat from foreign sources.

13. Beginning in 2002 and continuing until May 24, 2013, R-CALF USA participated in each and every one of the numerous rulemaking public notices and comment periods for COOL to ensure that the regulation was implemented in a manner consistent with the interests of R-CALF USA members. Attached as Exhibit A are true and accurate comments that R-CALF USA has submitted to either or both the USDA and the U.S. Trade Representative ("USTR") in an effort to assist in the proper implementation of COOL for meat.

14. R-CALF USA has long contended that one of the attributes that consumers could act upon if they knew from which country or countries their meat originated was food safety. In our lawsuits filed against the USDA's attempt to, in our opinion, prematurely reopen the Canadian border following the discovery of numerous cases of Bovine Spongiform Encephalopathy ("BSE" or "mad cow disease") in the Canadian cattle herd, R-CALF USA repeatedly argued in its court pleadings that the border should not be reopened to Canadian cattle or beef until the United States implements COOL. We contended that with COOL consumers could decide to either accept what the USDA characterized as a low risk of contracting mad cow disease by purchasing beef from Canadian cattle, or they could choose to reduce any potential risk even further by choosing to avoid, altogether, beef from cattle that originated in Canada where mad cow disease was known to be circulating, or from any other country about which consumers may learn of disease outbreaks they would prefer to avoid. The U. S. District Court agreed with R-CALF USA and granted a preliminary injunction.

15. R-CALF USA members already have been harmed due to the untimely implementation of COOL. Following the December 23, 2003 detection of a cow imported from Canada that was infected with BSE, USDA urged a voluntary recall of the meat from the infected cow. The recall was soon expanded to include grocery stores in eight states. Reports indicate that some of the potentially contaminated meat had already been sold to consumers and at least one company attempted to offer refunds if consumers would return the meat. USDA had not implemented COOL at that time so the consumer backlash that should have been focused only on beef from Canadian cattle had no choice but to be focused on beef in general. Domestic cattle farmers and ranchers, therefore, were unnecessarily harmed when consumers who wanted to avoid potentially contaminated beef could only do so if they avoided all beef.

16. In anticipation of the eventual implementation of COOL that would genuinely allow consumers to distinguish between U.S.-origin beef and foreign-origin beef, which only now has been achieved under the May 24, 2013 final COOL rule, R-CALF USA devoted considerable resources over the past ten years toward marketing and advertising U.S.-origin beef by encouraging consumers to seek out USA beef in the marketplace. For example, R-CALF USA offers merchandise (for sale and as door prizes and gifts) such as farm and ranch signs, coffee mugs and travel mugs that state: "Demand USA Beef." R-CALF USA members advertise USA beef by placing signage at the entrance of their farms or ranches. R-CALF USA and its affiliates have for several years been distributing bumper stickers and other signage that states: "Not Just Any Beef: USA-Raised Beef. Ask for it." Also, R-CALF USA and Defendant-Intervenor South Dakota Stockgrowers Association has sponsored a traveling banner that traveled nationwide to rodeos throughout the year for several years that likewise stated, "Not Just Any Beef: USA-Raised Beef. Ask for it." If this court vacates all or part of the May 24, 2013 final COOL rule,

then all of R-CALF USA's considerable time and resources dedicated to marketing and advertising to encourage consumers to choose U.S.-origin beef will have been wasted.

17. R-CALF USA strenuously objected to USDA's sudden decision to allow meatpackers to mislabel beef from animals exclusively born, raised, and slaughtered in the United States with a mixed-origin label, *e.g.*, product of USA, Mexico and Canada, through commingling. It did not appear that commingling was allowed in the proposed rule and, therefore, R-CALF USA and all other members of the public were not afforded adequate notice or opportunity to comment. The first clear indication that USDA was authorizing commingling occurred in a September 26, 2008 Question and Answer document. *See* Country of Origin Labeling (COOL) Frequently Asked Questions, AMS, at 7-8 (Sept. 26, 2008) (attached as Exh. B-7-8), available at http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5071922. The next day, Sept. 27, 2008, R-CALF USA sent a letter objecting to USDA's commingling scheme and stated:

> The effect of your agency's action is to make a mockery of Congress' COOL amendment contained in the 2008 Farm Bill as well as your agency's IFR for COOL that instruct U.S. cattle producers to maintain records and to produce affidavits for the purpose of providing documentation as to the origins of cattle they sell. Your agency's action would render origin verification by U.S. cattle producers wholly unnecessary, useless, and a complete waste of time by authorizing meatpackers to circumvent or otherwise ignore such origin documentation and to label all meat products with a mixed label or North American label.
>
> It is unconscionable that your agency would purposely grant meatpackers a blueprint describing how they can circumvent Congress' intent to not allow a mixed origin or North American label on meat produced exclusively from animals born, raised, and slaughtered in the United States, particularly after your publicly reported acknowledgement that labeling exclusively U.S. meat with a mixed label or North American label '"was not the intent of the law [and] not the intent of all of you when you started this many years ago."'

R-CALF USA's supplemental comments on interim final COOL Rule (Sept. 27, 2008), at 3, (attached as Exhibit A-53), R-CALF USA formally requested that USDA immediately prohibit the use of a mixed-origin label on beef derived from animals exclusively of U.S. origin.

18. R-CALF USA's request was not honored by USDA and R-CALF USA later learned that the U.S. and Canadian ambassadors to the World Trade Organization ("WTO") had essentially entered a *quid pro quo* agreement whereby the United States would allow commingling in return for a promise by Canada to delay the filing of a complaint at the WTO. On July 22, 2009, R-CALF USA provided Secretary Tom Vilsack with evidence of the improper *quid pro quo* and stated:

> Based on this available evidence [copies of letters sent between the ambassadors] that specifically relates to the final COOL rule, we urge you to immediately reverse the inappropriate concessions accorded to Canada during the previous Administration and to promulgate a new final COOL rule that conforms to Congress' clear intent to accurately inform consumers as to the origins of food covered under COOL.

(Exh. A-76.)

19. R-CALF USA's request was again ignored by USDA and the USTR soon became embroiled in the disputes against COOL filed by Canada and Mexico at the WTO. Throughout the WTO dispute process, R-CALF USA sent information and suggestions to USDA and USTR to assist them in their defense of COOL. On Aug. 10, 2012, after the WTO Appellate Body had issued its adverse COOL ruling, the USTR conducted a stakeholders' conference call that I participated in. The USTR asked participants to provide suggestions as to how the USTR should proceed in light of the WTO's ruling. I provided suggestions to the USTR that included the suggestion to promulgate a new rule to prohibit the practice of commingling.

20. I closely monitored the unfolding of what became the largest recall of beef and beef products in Canadian history. On August 30, 2012, the USDA Food Safety and Inspection

Service (“FSIS”), the agency charged with ensuring the safety of imported beef, identified imported Canadian beef at the U.S.-Canadian border that was tainted with *E. coli* 0157:H7, which has been associated with kidney failure, blindness, and even death. Neither FSIS nor its Canadian counterpart, the Canadian Food Inspection Agency (“CFIA”) issued any recalls at the time. In fact, it was not until Sept. 20, 2012, after nearly three weeks had lapsed since the adulterated imports were identified, that the FSIS began issuing what became a series of Public Health Alerts lasting at least until Sept. 28, 2012. On Oct. 9, 2012, the day after the Public Health Agency of Canada announced 11 confirmed cases of illness in humans, R-CALF USA issued a news release to inform the public that the importation of tainted beef from Canada provided a clear example of how COOL labels can be used by U.S. citizens to ensure food safety by enabling them to avoid food from countries known to export tainted beef.

21. On September 1, 2012, R-CALF USA joined as a co-plaintiff in a lawsuit filed in the United States District Court for the District of Colorado against USDA, USTR and the WTO. The lawsuit was later amended and asked the court to, among other things, declare the WTO’s COOL ruling null and void and permanently enjoin USDA from allowing meat from animals exclusively born, raised, and slaughtered in the United States to be labeled with a mixed-country label because, we alleged, USDA’s commingling provisions were improperly adopted and contrary to the COOL statute.

22. Because R-CALF USA was generally pleased with the proposed COOL rule published at 78 Fed. Reg. 15645-653 on March 12, 2013, in particular the proposal to finally disallow commingling that allowed meat derived from animals exclusively born, raised, and slaughtered in the United States to be mislabeled with a mixed-origin label (*see* Exh. A-93,-98),

R-CALF USA and its co-plaintiffs on March 28, 2013, voluntarily dismissed their lawsuit before the U.S. District Court for the District of Colorado.

23. Because COOL has been such a prominent issue for R-CALF USA throughout its organizational existence, and because independent cattle producers understand that accurate COOL labeling is needed to enable them to remain competitive in their own domestic market that is becoming increasingly global, I believe that any weakening or delay of the May 24, 2013 final COOL rule will be perceived by independent producers as a failure on R-CALF USA's part to carry out its mission of ensuring the continued profitability and viability of independent U.S. cattle producers. As a result, I believe R-CALF USA will find it extremely difficult to continue receiving membership renewals, generating new members, and generating contributions. Further, if the May 24, 2013 final COOL rule is delayed, weakened or vacated, I believe that because product differentiation is a prerequisite to marketplace competition, and because disaggregated livestock producers have no means to persuade the highly concentrated packing industry (where today 4 of the largest packers control about 85% of the nation's fed cattle slaughter) to voluntarily label their meat products as to their origin (particularly when it is in the packers interest to not disclose such information to consumers), we would expect to see an acceleration of the exodus of U.S. cattle producers, a continued decline in the U.S. cattle herd, a continued decline in U.S. beef production, and an increased dependence on foreign beef. This already is the exact fate of the U.S. sheep industry that has been so overwhelmed by imports that the U.S. has begun importing more lamb and mutton than the beleaguered domestic sheep industry can produce to satisfy the U.S. consumers' ongoing appetite for lamb and mutton. The sheep industry is the cattle industry's canary in the coal mine and if U.S. livestock producers are not immediately able to clearly differentiate their product in the marketplace, there soon won't be

enough independent livestock producers (as opposed to contract producers, as in the much constricted U.S hog and poultry industries) to support a producer-only national organization like R-CALF USA.

Pursuant to the provisions of 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 23rd day of August, 2013.

Bill Bullard

Exhibit A

R-CALF USA

P.O. Box 30715
Billings, MT 59107
Phone: 406-252-2516
Fax: 406-252-3176
E-mail: r-calfusa@r-calfusa.com
Website: www.rcalf.com

February 21, 2003

Country of Origin Labeling Program
Agricultural Marketing Service
USDA Stop 0249
Room 2092-S
1400 Independence Avenue, S.W.
Washington, D.C. 20250-0249

Desk Officer
Office of Management and Budget
New Executive Office Building
725 17th Street, N.W.
Room 725
Washington, D.C. 20503

Clearance Officer
USDA-OCIO
Room 404-W
Jamie L. Whitten Building
Stop 7602
1400 Independence Avenue, S.W.
Washington, D.C. 20250-7602

Via E-Mail: cool@usda.gov and Facsimile: 202-720-3499

Re: Notice of Request for Emergency Approval of a New Information Collection

Dear Sir or Madam:

The Ranchers-Cattlemen Action Legal Fund – United Stockgrowers of America (R-CALF USA) is pleased to have the opportunity to submit comments in response to the Agricultural Marketing Service's (AMS) November 21, 2002, Federal Register notice announcing that the agency is requesting emergency approval from the Office of Management and Budget for the new information collection, "Interim Voluntary Country of Origin Labeling of Beef, Lamb, Pork, Fish, Perishable Agricultural Commodities, and Peanuts under the Agricultural Marketing Act of 1946."

R-CALF USA is a non-profit association that represents approximately 8000 U.S. cattle producers on issues concerning national and international trade and marketing.

R-CALF USA is dedicated to ensuring the continued profitability and viability of the U.S. cattle industry. R-CALF USA's membership consists primarily of cow-calf operators, cattle backgrounders, and independent feedlot owners. Its members are located in 42 states, and the organization has 36 local and state cattle association affiliates. Various main street businesses are associate members of R-CALF USA.

Background

In the Farm Security and Rural Investment Act of 2002, Congress amended the Agricultural Marketing Act of 1946 to require retailers to inform consumers of the country of origin of certain food products.[1] Congress required a two-part implementation procedure. First, Congress mandated the United States Department of Agriculture (USDA) to issue *Guidelines* for the voluntary implementation of country of origin labeling no later than September 30, 2002.[2] Second, Congress mandated USDA to promulgate regulations for mandatory labeling not later than September 30, 2004.[3] Voluntary Country of Origin Labeling Guidelines were issued by the USDA Agriculture Marketing Service (AMS) as published in the October 11, 2002, Federal Register.[4]

On November 21, 2002, AMS published the Notice of Request for Emergency Approval of a New Information Collection, which estimates industry compliance costs for the record-keeping requirements AMS contends are necessary to implement voluntary country of origin. In its instant notice, AMS specifically seeks comments on: (1) Whether the record-keeping is necessary for the proper operation of this voluntary program, including whether the information would have practical utility; (2) the accuracy of USDA's estimate of the burden of the record-keeping requirements, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the records to be maintained; and (4) ways to minimize the burden of the record-keeping on those who are to maintain and/or make the records available, including the use of appropriate automated, electronic, mechanical, or other technological record-keeping techniques or other forms of information technology.[5]

Because the AMS cost estimate notice is based on AMS's Voluntary Country of Origin Labeling Guidelines, R-CALF USA's comments will necessarily address both notices.

I. Are the Proposed Record-keeping Requirements Necessary for the Proper Operation of the Voluntary Program, and Would the Information have Practical Utility?

[1] Subtitle D-Country of Origin Labeling, Sec. 282(a)(1).
[2] *Id.* Sec. 284(a).
[3] *Id.* Sec. 284(b).
[4] Federal Register, Vol. 67, No. 198 (Friday, October 11, 2002).
[5] Federal Register, Vol. 67, No. 225 (Thursday, November 21, 2002).

A. Applicability of Proposed Record-keeping Requirements on Live Cattle Producers

1. USDA Has Overreached Its Statutory Authority

Not only are the record-keeping requirements unnecessary for the proper implementation of the voluntary program, but USDA has overreached its statutory authority by imposing such a requirement on cattle producers. The Country of Origin Labeling provisions of the Farm Security and Rural Investment Act of 2002 (Act) compel retailers of a covered commodity to provide country of origin information to consumers.[6] Further, it compels persons engaged in the business of supplying a covered commodity to a retailer to provide information to the retailer indicating the country of origin of the covered commodity.[7] Finally, it expressly prohibits USDA from using a mandatory identification system to verify country of origin of a covered commodity[8]

The Act does not direct USDA to establish an audit verification system, but USDA is given discretionary authority to require any person that prepares, stores, handles, or distributes a covered commodity for retail sale to maintain a verifiable record-keeping audit trail.[9] Congress was explicit with respect to which activities within the food supply chain could be subject to an audit verification system. Congress explicitly listed the following activities as subject to an audit verification system if the USDA chooses to establish such a system at all: ". . . any person that prepares, stores, handles, or distributes a covered commodity for retail. . ."[10] However, if the USDA chooses to establish a verifiable record-keeping system, USDA is expressly prohibited from using a mandatory identification system for purposes of verifying the country of origin of a covered commodity.[11]

The Act separately defines beef as meat produced from cattle (including veal).[12] With respect to beef, the Act only includes muscle cuts of beef and ground beef as covered commodities.[13] Thus, the Act clearly does not include cattle as a covered commodity. Because cattle are not a covered commodity as defined by the Act, and because Congress excluded either "cattle producers," or "cattle or animals used to produce beef" or even "producers" or "growers" from the list of persons subject to any discretionary audit verification system, USDA has no statutory authority to impose a record keeping system for cattle.

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[6] Subtitle D-Country of Origin Labeling, Sec. 282 (a)(1)
[7] *Id.* Sec. 282(e).
[8] *Id.* Sec. 282(f)(1).
[9] *Id.* Sec. 282(d).
[10] *Id.* Sec. 282(d).
[11] *Id.* Sec. 282(f)(1).
[12] *Id.* Sec. 281(1).
[13] *Id. Sec.*281(2)(A)(i) and (ii).

Congress's explicit exception of "cattle" is reinforced by Congress's prohibition on using a mandatory identification system to verify the country of origin of a covered commodity.[14] Although Congress does not specifically define a "mandatory identification system," it is nonsensical to conclude that the AMS requirement that producers and growers ". . . maintain auditable records documenting the origin of covered commodities,"[15] and further by rejecting self-certification as a means of documenting said origin[16] is not, in fact, the very mandatory identification system expressly prohibited by Congress.

2. Congress Has Narrowly Defined USDA's Role

Congress limited USDA's authority to that of first establishing guidelines and then of promulgating rules for the express purpose of ensuring that persons who supply a covered commodity to a retailer can provide accurate information to the retailer indicating the country of origin of the covered commodity.[17] Congress narrowly defined the persons who supply covered commodities to retailers as those who prepare, store, handle, or distribute covered commodities.[18] And, Congress subjects only these specific persons to an audit verification system if the USDA chooses to establish such a system.[19]

Congress does not include cattle producers, growers or live cattle importers as among those persons subject to the USDA's discretionary authority to establish a record-keeping requirement and reinforces this exception by expressly prohibiting any form of mandatory identification system.

Moreover, Congress established the criteria wherein covered commodities would be eligible for a label denoting a United States country of origin. In the case of beef, a United States country of origin may only be used if the beef is "exclusively from an animal that is exclusively born, raised, and slaughtered in the United States (including from an animal exclusively born and raised in Alaska or Hawaii and transported for a period not to exceed 60 days through Canada to the United States and slaughtered in the United States)."[20]

Thus, for those who prepare, store, handle, and distribute covered commodities, USDA may require an auditable record keeping system. For all others, USDA may not require such record-keeping.

USDA's charge, then, is to establish guidelines that will enable the conveyance of country of origin information associated with the live animals that will subsequently be

[14] *Id.* Sec. 282(f)(1).
[15] Federal Register, Vol. 67, No.198 (Friday, October 11, 2002) at 63374.
[16] *Id.*
[17] *Id.* Sec. 282(e).
[18] *Id.* Sec. 282(d)
[19] *Id.*
[20] *Id.* Sec. 282(a)(2)(A).

delivered to those who will transform the live animals into covered commodities. This is not a daunting task.

Although comments regarding proper rules with which to achieve the objective of accurately conveying country of origin information for live animals to the persons who will transform the live animals into covered commodities is more applicable to the comments USDA is soliciting on its *Voluntary Guidelines* and due by April 9, 2003, R-CALF USA believes it would be irresponsible not to address such implementation rules after asserting that the present guidelines are contrary to statute. Therefore, R-CALF USA offers the following options with which to achieve this important objective:

B. IDENTIFYING LIVE ANIMALS THAT WILL BE SUBSEQUENTLY TRANSFORMED INTO A COVERED COMODITIY

1. Background

According to a recent report by the Congressional Research Service to Congress, "Federal law requires most imports, including many food items, to bear labels informing the 'ultimate purchaser' of their country of origin."[21] The report goes on to explain that "Under Section 304 of the Tariff Act of 1930 as amended (19 U.S.C. 1304), every imported item must be "conspicuously and indelibly" marked in English to indicate to the "ultimate purchaser" its country of origin."[22] Excluded from this requirement are items that are incapable of being marked or where the cost would be "economically prohibitive."[23] The report states that the Secretary of the Treasury is empowered to exempt certain classes of imports under Section 1304(a)(3)(J).[24] Among the items exempted by the Secretary is livestock.[25] Finally, the report stated with regard to treatment of imported beef products, "[O]nce these non-retail items entered the country, they have been considered (under the federal meat inspection law, see 21 U.S.C. 620(a)) to be domestic products."[26]

Another report completed by the USDA Food Safety and Inspection Service (FSIS) addresses the issue of labeling requirements for imported meat.[27] This report states that, "Pursuant to the Federal Meat Inspection Act (FMIA), imported meat and meat food products that are accepted for import are to be deemed and treated as "domestic" products subject to the FMIA and its implementing regulations."[28] Moreover, the report states, "All meat products imported into the United States are required to bear the country of origin on the labeling of the container in which the products are shipped,

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[21] CRS Report for Congress, Country-of-Origin Labeling for Foods, 97-508 ENR, January 28, 2003, at 1.
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.* at CRS-2.
[26] *Id.* at CRS-2.
[27] Food Safety and Inspection Service-USDA, Mandatory Country of Origin Labeling of Imported Fresh Muscle Cuts of Beef and Lamb, January 2000, at 1.
[28] *Id.*

as well as the establishment number assigned by the foreign meat inspection system and certified to USDA."[29]

The FSIS report further states that, "Article IX, Marks of Origin, of the General Agreement on Tariffs and Trade (GATT) (1994) allows imported products to be labeled with their specific country of origin at the time of import so long as the marking requirement does not seriously damage the imported products, materially reduce their value, or unreasonably increase their costs."[30] The report goes on to state that, "Whenever administratively practicable WTO member countries should permit required marks of origin to be affixed at the time of importation."[31]

2. Implications of Existing Requirements

It is, therefore, quite clear that the United States can and does require labeling of imported beef products without requiring comparable domestic products to be similarly labeled. This despite the requirement that imported meat accepted for import is to be treated as "domestic product." Obviously, requiring a country of origin label on imported products as a prerequisite to importation is a common practice and the fact that domestic products are not similarly labeled does not violate the requirement that imported products are to be treated as "domestic product." Therefore, R-CALF USA asserts that the United States has the authority to require all imported live animals to be marked in a manner that identifies their country of origin, without imposing a similar requirement on domestic livestock.

The United States has the authority to require country of origin markings on livestock as a prerequisite to importation into the United States. By requiring such markings, persons who will subsequently transform the livestock into a covered commodity will know with certainty the country of origin of the livestock. USDA can, therefore, promulgate rules to require the retention of such marking and, further, establish that the lack or omission of said markings is proof that livestock are both born and raised in the United States. Upon the transformation of the livestock into a covered commodity, all persons who subsequently prepare, store, handle and distribute the resulting covered commodity to retailers would be subject to the USDA's audit verification system.

3. Options for Affixing Country of Origin Markings on Livestock

a. Physical Markings

USDA can require any one or more of the livestock industry's common marking methods for marking imported livestock with their country of origin. Such common marking methods include:

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[29] *Id.*
[30] *Id.* at 3.
[31] *Id.*

1. A metal ear tag as is commonly used to identify domestic livestock vaccinated for Brucellosis.
2. A blue metal ear tag as is presently used to identify imported Mexican feeder cattle, including slaughter cattle.
3. A USDA ear tag or a Canadian Food Inspection Agency approved ear tag as is presently required for United States cattle imported to Canada under the Restricted Feeder Program.[32]
4. A brand as is commonly used on cattle imported from Mexico (it is R-CALF USA's understanding that cattle imported from Mexico are branded with an "M" on their hip and a blue metal identifier ear tag used for purposes of managing Tuberculosis or other forms of animal disease).
5. Either a hot or freeze brand denoting a letter or numeric code that denotes a specific country, e.g., "M" for Mexico, "C" for Canada, "A" for Australia.
6. An ear tattoo denoting a letter or numeric code associated with a specific country.

As criteria for determining the correct markings for live animals accepted for importation into the United States, the USDA may want to adopt the conditions the USDA-Animal Plant Health and Inspection Service (APHIS) has proposed to impose on Uruguayan beef. As recently as February 10, 2003, APHIS proposed that Uruguayan beef be certified by an authorized veterinarian that the meat is from bovines that have been born, raised, and slaughtered in Uruguay.[33] APHIS imposed a similar condition on Argentina in 2000.[34] If USDA were to adopt the condition that imported livestock must be identified with all the countries in which the livestock resided prior to importation, the information could prove beneficial for purposes of better protecting the United States cattle-herd health.

According to the latest U.S. commercial cattle slaughter data available from the Economic Research Service's Red Meat Yearbook, the United States slaughtered just over 36 million head of cattle in 1999.[35] During that year, the United States imported approximately 1.9 million head of live cattle from Canada and Mexico.[36] Thus, only about 5 percent of all live cattle slaughtered in 1999 would have been ineligible for the United States label and, necessarily, eligible for either a Mexico or Canada label. From a standpoint of efficiency, cost-effectiveness, and practicality, USDA should focus its rulemaking efforts on accurately marking the minority of cattle ineligible for the United

[32] Canadian Food Inspection Agency-Health of Animals-Restricted Feeder Cattle from the United States, Client Services Information Sheet No. 14, Obtained from the Internet on May 29, 2002, at http://www.inspection.gc.ca/english/anima/heasan/import/bovine.shtml.
[33] Federal Register, Vol. 68, No. 27, Monday, February 10, 2002, at 6675.
[34] Federal Register, Vol. 65, at 82894.
[35] Economic Research Service-USDA, Red Meat Yearbook (94006), Commercial Livestock Slaughter, obtained from the Internet at http://www.ers.usda.gov/data/sdp/view.asp?f=livestock/94006/, on February 16, 2003.
[36] Economic Research Service-USDA, Livestock, Dairy and Poultry Situation and Outlook, LDP-M-73, July 26, 2000, obtained from the Internet on February 16, 2003, at http://jan.mannlib.cornell.edu/reports/erssor/livestock/ldp-mbb/2000/ldp-m73.pdf.

States label and requiring another country's label. Such a system would remove any burden upon United States cattle producers who do not handle imported products.

Under this system, there would be no need for any new record-keeping system by either domestic producers or importers of live cattle. In the event of lost markings, USDA could additionally require that the original import documentation be presented to determine the proper origin of live cattle, much in the same manner as R-CALF USA previously suggested in its August 9, 2002, comments to AMS.[37]

It is noteworthy that even cattle associations that opposed the Act agree, at least conceptually, with the proposal contained herein. In its August 7, 2002, comments to USDA regarding the issuance of guidelines for voluntary country of origin labeling, the National Cattlemen's Beef Association (NCBA) stated:

> *NCBA contends that the least complicated and least costly system is for the identification already required on imported cattle and calves to remain with those animals until point of slaughter, at which time they will be marked to indicate that beef from these cattle does not qualify for the born, raised and processed in the USA label. . . For the purpose of identifying U.S. cattle—since Mexico and Canada are currently the only sources for imported cattle, and since Mexican and Canadian cattle are already required to be identified when they enter the U.S.—is for U.S. cattle to be defined as cattle not labeled, branded, tagged or identified as originating from Mexico or Canada. By virtue of not being identified as Mexican or Canadian cattle, all other cattle essentially become U.S. cattle by default. This system will minimize the cost of identification and process verification for U.S. producers and will ensure consumers that this beef is exclusively from cattle that are exclusively born, raised and processed in the U.S.*[38]

The Kansas Livestock Association (KLA) also agreed as indicated by their comments on the issuance of guidelines for voluntary country of origin labeling. The KLA stated:

> *KLA proposed that the least costly system of identification would be to utilize the already required identification of imported cattle. This identification would remain with those animals until slaughter, at which time they would be marked to indicate that the beef from these cattle would not be eligible for the "born, raised and processed in the U.S. label.*

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[37] Comments of R-CALF United Stockgrowers of America on the Issuance of Guidelines for Voluntary Country of Origin Labeling, August 9, 2002, available on the Internet at http://rcalf.com/COOL/voluntary_cool_guideline_comments.htm.

[38] National Cattlemen's Beef Association, Country-of-Origin Labeling Guidelines Comments, August 7, 2002.

> *By default, those cattle not identified as imported cattle would be considered of U.S. origin.*[39]

The Texas Cattle Feeders Association (TCFA) also agreed as indicated by their comments on the issuance of guidelines for voluntary country of origin labeling. The TCFA stated:

> *TCFA contends that the least complicated and least costly system is for identification already required on imported cattle and calves to remain with those animals until point of slaughter, at which time they will be marked to indicate that beef from these cattle does not qualify for the born, raised and processed in the USA label. Beef from these cattle could be identified as coming from the country from which the cattle originated, or USDA should develop some alternative type of domestic content or multiple labeling system.*[40]

In addition to R-CALF USA, another national association that supported the Act and that represents the U.S. live cattle industry, the Livestock Marketing Association, stated in its comments:

> *. . . Consideration should however be given to having livestock producers and feeders certify as to the origins of the animals they sell for finishing or slaughter if those animals are born, raised or slaughtered outside the United States. . . Also, the current system of animal health and meat import certificates should provide an excellent means of identifying and segregating animals and meat originating from other countries. . .*[41]

The United States cattle industry appears to be in full agreement with the recommendation that the USDA should establish rules that require only the identification of imported live animals and that further establishes that the lack of foreign markings or import documentation shall be proof of domestic origin.

4. Summary

In summary, the proposed record-keeping requirements imposed on live cattle producers and live cattle importers are unnecessary. In addition, the imposition of such a record-keeping system is not authorized by the Act as live cattle producers and live cattle importers do not produce a commodity covered by the Act. Congress certainly did not intend for USDA to saddle producers with such an unnecessary record-keeping burden when the objective of first identifying and then segregating imported livestock from wholly domestic livestock can be readily accomplished under existing authorities.

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[39] Kansas Livestock Association, Voluntary Country of Origin Labeling Guidelines, August 8, 2002.
[40] Texas Cattle Feeders Association, Country of Origin Labeling, August 9, 2002.
[41] Livestock Marketing Association, Country-of-Origin Labeling, August 8, 2002.

C. Applicability of Proposed Record-keeping Requirements on Persons Who Prepare, Store, Handle, or Distribute Covered Commodities

As herein discussed, Congress afforded the USDA with the discretionary authority to establish a verifiable record-keeping audit trail for any person that prepares, stores, handles, or distributes a covered commodity for retail that will permit the Secretary to verify compliance with the Act.[42] Congress expressly listed five models that USDA could use in designing such a system to certify country of origin labeling.[43] USDA should review the record-keeping requirements of these specific programs, as well as other preexisting programs that currently address the segregation of covered commodities such as the programs allowing for labels associated with "Hormone Free and/or Antibiotic Free Beef," "All Natural Beef," "Certified Angus Beef," or "Certified Hereford Beef."

The authority to establish a verifiable record keeping trail begins at the point that the covered commodities are produced. For meat, this point begins at the processor level of the food production chain. Therefore, USDA should determine the present segregation systems employed by processors that participate in the abovementioned programs and design a system that complements rather than replicates such preexisting segregation systems. R-CALF USA does not understand why USDA would elect to ignore some of the very segregation systems it presently administers by concluding that an entirely new system would be required to implement country of origin labeling. The verification procedure for labeling covered commodities according to their country of origin should be analogous to changes commonly made in U.S. tax forms when Congress decides that additional information is required—new fields are routinely added to preexisting forms to accommodate the new information requirements.

To the extent that USDA assumed that all persons who handle covered commodities do not presently transfer invoices or otherwise keep records that could be easily modified to accommodate a new line or field denoting country of origin, or that USDA will require an entirely new record-keeping system despite the fact that certain records and documents are already maintained by industry participants who handle covered commodities, the USDA record-keeping requirements are unnecessarily duplicative. R-CALF USA foresees no benefits for requiring an entirely new layer of records for those who prepare, store, handle, or distribute a covered commodity and, therefore, submit that such a requirement lacks utility.

II. The Accuracy of USDA's Estimate of the Burden of the Record-Keeping Requirements, Including the Validity of the Methodology and Assumptions Used

[42] Subtitle D-Country of Origin Labeling, Sec. 282 (d).
[43] *Id.* Sec. 282 (f) (2) (A-E).

USDA's estimate is based on unsupportable assumptions, making it unworkable as a starting point for determining any additional costs that may be associated with country of origin labeling. A list of USDA's unsupportable assumptions includes:

1. USDA made no effort to determine the number of U.S. producers who either produce or handle covered commodities. As herein stated, cattle producers do not handle a covered commodity unless they are involved in a retained ownership-type program. Therefore, the number of producers who do handle the specific commodities covered by the Act should have been ascertained prior to making any calculations regarding producer-related costs. R-CALF USA does not know the true number of producers who actually produce the covered commodities listed in the Act, but it is certain the number is much lower than the total number of U.S. producers, of all crops and livestock, used by USDA.[44]
2. USDA ignores the highly concentrated and vertically integrated structure of the United States food processing, food importing, and food retailing industries, as well as the integrated structure of the nation's hog production and pork processing industries. USDA wrongly assumed there is no relationship between importers of covered commodities, processors of covered commodities, and retailers of covered commodities. However, it is common knowledge that many of the major importers are also processors. Instead, USDA assumed each segment of the food industry is independent of the next, thus necessitating independent records.[45]
3. USDA ignored the documentation that presently accompanies food products from one segment of the food processing chain to the next, e.g., the transfer of invoices, the use of bar codes on boxed beef, and other documentation that currently aides USDA in effecting recalls of food products.
4. USDA did not consider a "least-cost" method of verifying the origin of covered commodities. Instead, it used a "green-field" approach commonly used to develop a worst case scenario. However, USDA provided only a "point" estimate rather than a more appropriate "range" estimate, thereby giving the impression that the estimate is without any uncertainty and is, instead, substantially definitive.
5. The USDA ignored the fact that producers of many of the covered commodities are already required to maintain records for purposes of verifying chemical and pesticide use as well as to verify environmental compliance. No recognition is given for the existing record keeping systems that could be easily modified to accommodate a new line or field for denoting origin.
6. USDA did not rely on any existing studies to determine the hours necessary to complete the proposed records.
7. As stated previously, USDA ignored the preexisting programs, including those expressly included in the Act, and wrongly assumed there are no tracking or

[44] Federal Register, Vol. 67, No. 225, USDA estimated that all 2 million commercial farms, ranches, and fisherman in the United States would implement a system of voluntary labeling even after acknowledging that ". . . a number of these farms, ranches, and fisherman may not produce products that are covered by these guidelines. . ." at 70205.
[45] *Id.* at 70206.

record-keeping systems in place within the food processing and retailing industry that could be used to accommodate a new line or field denoting country of origin.

Based on the foregoing and major deficiencies, the USDA cost estimate cannot be relied upon even as a starting point for determining any additional costs that may be associated with the labeling of covered commodities. Therefore, USDA should withdraw its estimate and endeavor to establish a more meaningful estimate reflective of current industry practices and consistent with the Act. Consistent with the Act, and as herein discussed, the costs to U.S. cattle producers and live cattle importers associated with delivering live animals, replete with an accurate means of identifying the origin of those animals, to persons who will transform the cattle into covered commodities will be zero.

Further, given the recent announcement that no person has yet voluntarily agreed to follow the October 11, 2002, *Voluntary Guidelines* to effect a country of origin label on covered commodities, there is a high probability that there will be no cost associated with the *Voluntary Guidelines*. This conclusion is consistent with R-CALF USA's initial comments to AMS on August 9, 2002, in which R-CALF USA stated:

> *The USDA has had a voluntary geographic labeling program since at least the early 70s, though the program was not widely used. The reason for this appears to be that unless all segments of the beef industry jointly participate to effect a geographic label, any one of the distinct industry segments can disqualify a product's eligibility by simply declining to participate in the program. In other words, labeling under the program would only occur if the live cattle producer voluntarily substantiated that the animal's origin was a specific geographic region; the processor voluntarily agreed to segregate the product to maintain the integrity of the geographic substantiation throughout the processing phase; and the retailer voluntarily agreed to affix the appropriate geographic label on the product. The new voluntary labeling program will require this degree of inter-industry cooperation in order to be successful.*
>
> *To accomplish this heightened level of cooperation, USDA must provide an incentive to encourage each of the three industry segments to participate in the voluntary program. Lacking a more creative solution to impart such needed incentives within the present industry structure, and given the fact that country of origin labeling is scheduled to become mandatory in two years, R-CALF USA recommends that USDA adopt interim rules with which to implement mandatory labeling from the outset. However, pending the September 30, 2004, implementation date for mandatory labeling, the retailer's decision regarding whether to retain the country of origin label upon final sale of the product would be left voluntary. In support of this recommendation, it should be noted that the*

> *mandate for labeling is a mandate on the retailer of the covered commodity, but the retailer is necessarily dependent upon the product's origin identification and segregation by the two principle upstream suppliers – packers and producers.*[46]

The current non-participation under the new *Voluntary Guidelines* reveals the inherent problem with a voluntary labeling program, i.e., retailers and packers, are able to place arbitrary conditions upon producers under the guise of protecting themselves from liability in the event that a covered commodity is mislabeled. Several packers have circulated letters to producers in an attempt to impose such arbitrary conditions and this is clearly creating unnecessary and unwelcome confusion and fear among U.S. cattle producers.[47] It will be incumbent upon USDA, whether for a voluntary or mandatory program, to establish federal rules that mandate origin related verification standards that all segments of the food industry must accept for purposes of verifying origin.

III. Ways to Enhance the Quality, Validity, and Clarity of the Records to be Maintained

R-CALF USA encourages USDA to first determine the nature and scope of current records, documentation, and labeling already used by persons who prepare, store, handle or distribute covered commodities to retailers, and used by retailers. Once this information is collected, USDA should determine the least-costly, least-intrusive means of adding a field, line, box, or other area on such existing records to accommodate the listing of origin for covered commodities. In the unlikely event that no such records, documentation, or labels are available among or between the various persons who handle covered commodities, USDA should adopt the least-cost, least-intrusive system presently employed within the various verification models listed in the Act, or those mentioned in Section II above.

IV. Ways to Minimize the Burden of the Record-Keeping on Those Who are to Maintain and/or Make the Records Available, Including the Use of Appropriate Automated, Electronic, Mechanical, or Other Technological Record-Keeping Techniques or Other Forms of Information Technology

R-CALF USA believes it has sufficiently addressed this issue in Sections I through III above. R-CALF USA urges USDA to endeavor to use existing information systems wherever possible to include the origin of covered commodities as this will

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[46] Comments of R-CALF United Stockgrowers of America on the Issuance of Guidelines for Voluntary Country of Origin Labeling, August 9, 2002, available on the Internet at http://rcalf.com/COOL/voluntary_cool_guideline_comments.htm.

[47] Swift & Company, Letter to Producers, February 3, 2003; San Angelo Packing Company, Inc., Letter to Customers, February 6, 2003; Swift & Company and EA Miller, Inc., Blue Ribbon Beef, Letter to producers, February 6, 2003; IBP Feedback, Helpful Facts for Cattle and Hog Producer, undated; KC Olson, University of Missouri, State Beef Nutrition and Management Specialist, Letter to Specialists, February 13, 2003.

minimize the burden on persons who prepare, store, handle, or distribute covered commodities to retailers and on retailers.

Conclusion

R-CALF USA appreciates the opportunity to comment on this important matter and pledges its willingness to work with USDA to effect workable country of origin labeling rules that will maximize benefits to both producers and consumers while minimizing any associated burden upon the food processing and retailing industries. R-CALF USA would look forward to a request to provide addition information or assistance. R-CALF USA can be reached at 406-252-2516.

Sincerely,

Leo R. McDonnell, Jr.
President, R-CALF USA

R-CALF USA

P.O. Box 30715
Billings, MT 59107
Phone: 406-252-2516
Fax: 406-252-3176
E-mail: r-calfusa@r-calfusa.com
Website: www.rcalf.com

April 9, 2003

Country of Origin Labeling Program
Agricultural Marketing Service
USDA Stop 0249
Room 2092-S
1400 Independence Avenue, S.W.
Washington, D.C. 20250-0249

Via E-Mail: cool@usda.gov and Facsimile: 202-720-3499

Re: Notice of Establishment of Guidelines for the Interim Voluntary Country of Origin Labeling of Beef, Lamb, Pork, Fish, Perishable Agricultural Commodities, and Peanuts Under the Authority of the Agricultural Marketing Act of 1946

Dear Sir or Madam:

The Ranchers-Cattlemen Action Legal Fund – United Stockgrowers of America (R-CALF USA) is pleased to have the opportunity to submit comments in response to the Agricultural Marketing Service's (Agency's) October 11, 2002, Federal Register notice requesting public comments regarding the Agency's voluntary guidelines for country of origin labeling.

R-CALF USA is a non-profit association that represents approximately 8400 U.S. cattle producers on issues concerning national and international trade and marketing. R-CALF USA is dedicated to ensuring the continued profitability and viability of the U.S. cattle industry. R-CALF USA's membership consists primarily of cow-calf operators, cattle backgrounders, and independent feedlot owners. Its members are located in 43 states, and the organization has 36 local and state cattle association affiliates. Various main street businesses are associate members of R-CALF USA.

The Montana Cattlemen's Association, Missouri Stockgrower's Association, Houston County Minnesota Cattlemen's Association, and the Southeast Wyoming Cattle Feeders Association specifically join R-CALF USA in these comments.

Background

In the Farm Security and Rural Investment Act of 2002, Congress amended the Agricultural Marketing Act of 1946 to require retailers to inform consumers of the

country of origin of certain food products.[1] Congress required a two-part implementation procedure. First, Congress mandated the United States Department of Agriculture (USDA) to issue *Guidelines* for the voluntary implementation of country of origin labeling no later than September 30, 2002.[2] Second, Congress mandated USDA to promulgate regulations for mandatory labeling not later than September 30, 2004.[3]

The following comments pertain to the *Guidelines* for the voluntary implementation of country of origin labeling issued by the Agency, with the understanding that the *Guidelines* may form a basis for the mandatory program. R-CALF USA's comments are presented in the same order and under the same headings as contained in the Guidelines.

VOLUNTARY COUNTRY OF ORIGIN GUIDELINES

Definitions

Ground Beef

Current guidelines appear to allow ground beef to be excluded from labeling if water, salt, or other flavoring, seasoning, or extenders are added in the grinding process. This significantly reduces the products that should be covered by the Act and it provides an unjust means of circumventing the intent of the Act. The Agency should ensure that ground beef remains covered by the Act even if water, cereal, soy or other derivatives, other extenders, salt, sweetening agents, flavoring, spices or other seasoning is added. The addition of any one or more of these additives, enhancers, or extenders does not change the fact that the resulting product is ground beef.

Material Change

Current guidelines appear to greatly expand the scope of products Congress excluded from the Act. Congress said an otherwise covered commodity would be excluded from coverage only "if the item is an ingredient in a processed food item."[4] We believe this means that if a covered commodity is further processed, i.e., cooked, cured, restructured, or flavored, it will remain covered by the Act unless the covered commodity is also commingled, mixed, or incorporated with other commodities to create a distinct food item such as pizza, ravioli, soup, or TV dinners, for example. A roast remains a muscle cut of beef even if it is cooked, salted, or flavored. Therefore, a cooked, salted or flavored roast should remain covered by the Act. The Agency appropriately recognized this fact with respect to peanuts, allowing the coverage of peanuts that are shelled, roasted, salted, or flavored.[5] We believe the Agency's definition of material change should be abandoned.

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[1] Farm Security and Rural Investment Act of 2002, Subtitle D-Country of Origin Labeling, Sec. 282(a)(1).
[2] *Id.* Sec. 284(a).
[3] *Id.* Sec. 284(b).
[4] *Id.* Sec. 281(B).
[5] Federal Register, Vol. 67, No. 198, at 63369.

Processed Food Item

R-CALF USA believes the Agency's definition of a processed food item will significantly reduce the number of food items Congress intended to be covered by the Act. R-CALF USA disagrees with the Agency's stated rational for adopting this definition. Specifically, R-CALF USA believes the Agency was mistaken when it stated that a strict interpretation of the Act vis-à-vis the National Organic Program's definition of processing would exclude a covered commodity because "slaughtering, cutting, and chilling were examples of 'processing.'"[6] The Act clearly states that the term covered commodity does not include an item "If the item is an ingredient in a processed food item."[7] The fact that an item is a processed food item does not exclude the item from coverage of the Act. In the case of covered beef commodities, for example, the precursor commodity (cattle) must first be slaughtered (processed) before the covered commodities materialize. Congress said only if the item is an ingredient in a processed food item is the item excluded.

R-CALF USA suggests the Agency abandon its definitions for "ingredient," "material change," and "processed food item." Instead, the Agency should define the phrase "processed food item ingredient," as only if an otherwise covered commodity is also a "processed food item ingredient" is it excluded from the Act.

R-CALF USA suggests the following definition: "Processed food item ingredient" means a covered commodity that is commingled, mixed, or incorporated with one or more covered or non-covered commodities to create a food item distinct from any of its separate ingredients. For example, ground beef commingled with other perishable commodities and incorporated with flour (dough) to create a separate food item like pizza, ravioli, or soup would be considered a "processed food item ingredient" and exempt from the Act. A covered commodity that is cooked, cured, roasted, restructured, salted, flavored, seasoned, breaded, or otherwise enhanced does not meet the definition of a "processed food item ingredient."

Because the additions described above could be viewed as further processing of covered commodities, the Agency may wish to consider a label such as "Product of Country X that was cooked, cured, restructured, or flavored in the United States."

Consumer Notification

C. Exclusions

The guidelines state that "[a] meal kit that includes ground beef and other ingredients" would be excluded from the Act. We believe such a meal kit should be excluded only if the other ingredients are also other commodities and the meal kit is a distinct food item. Simply adding

[6] *Id.* at 63368.
[7] Farm Security and Rural Investment Act of 2002, Subtitle D-Country of Origin Labeling, Sec. 281(B).

water, salt, bread crumbs, or flavoring should not constitute "other ingredients," and if no other ingredients are also commodities, the food item should remain covered.

E. Labeling Covered Commodities of United States Country of Origin

The guidelines allow for a carcass derived from animals born, raised, and slaughtered in the United States to be shipped to a foreign country for further processing, i.e., to be cut into steaks, and then re-imported into the United States bearing a "Product of the United States Origin." We believe this is inconsistent with the Agency's definition of "slaughter" wherein the term "'slaughtered" is interchangeable with the term "processed."[8] We agree that the terms "slaughtered" and "processed" are interchangeable. But we believe that the cutting of steaks from a carcass in a foreign country constitutes a further slaughter/process of the carcass and the resulting steaks would not meet the criteria reserved exclusively for only products born, raised, and slaughtered/processed in the United States.

Again, the Agency may wish to consider a label such as "Product of the United States and further processed in Country X." U.S. producers are eager to begin promoting an exclusive United States product and the exclusiveness of the United States product should not be misrepresented with a liberalized label.

F. Labeling Imported Products

The guidelines allow beef and beef derived from animals born and raised in a foreign country to achieve eligibility for its respective country's label merely by exiting that country and entering the United States. Therefore, beef derived from a live animal imported from Canada is automatically eligible for a "Product of Canada" label simply by virtue of crossing the United States border from Canada—no additional paperwork is needed. We believe the Agency should adopt an equally simple standard for determining eligibility for the "Product of the United States" label for beef derived from animals born and raised in the United States. Clearly, any live animal that does not enter the United States through one of her borders can be nothing other than an animal born and raised in the United States. There simply is no way for an animal residing in the United States to be anything but born and raised in the United States if it has not crossed the United States border.

G. Labeling Covered Commodities From Multiple Countries That Include the United States

The guidelines appear to mandate that meat products derived from animals born and/or raised in a foreign country and slaughtered in the United States must bear a label that includes the "United States" in the label. We believe this mandate exceeds the authority of the Agency. The Act only requires a label denoting the country of origin. We agree with the Agency in its effort to allow multi-country labels denoting which country or countries harbored an animal before it is slaughtered in the United States when such countries can be verified. However, we do not believe the agency should mandate that the United States be included in the label. An importer

[8] Federal Register, Vol. 67, No. 198, at 63373.

may prefer to include only the country of origin specified at time of import. We believe the use of the "United States" in a label for beef with multi-origins should be voluntary.

H. Blended Products

For the reasons stated above, we do not believe that labels for blended products must denote the various countries the animal from which the constituent products were derived were born and raised. It should be sufficient that the product includes the foreign label from the country importing the animal into the United States.

For reasons also stated above, we do not believe that the mere cooking, curing, salting, or flavoring of a covered commodity changes the identity of a covered commodity and, therefore, object to the Agency's proposal to exclude covered commodities used in blended products if processing has "altered the commodity's character."

Record Keeping

Paragraph B

We believe the Agency has overreached its authority by including cattle producers, backgrounders, and feeders under its jurisdiction. Congress explicitly listed each entity that is subject to the Act. The specific entities are ". . . any person that prepares, stores, handles, or distributes a covered commodity for retail sale. . ."[9] Cattle producers, backgrounders and feeders are not among the entities covered by the Act. Further, cattle producers do not prepare, store, handle, or distribute a covered commodity for retail sale which, with respect to beef, only includes muscle cuts of beef and ground beef.[10] Cattle are not a covered commodity and, therefore, the Agency has no authority to require cattle producers to "maintain auditable records documenting the origin of covered commodities."

Further, because cattle producers are not covered entities, both because Congress did not include them as such and because they do not prepare, store, handle, or distribute covered commodities, the Agency cannot deny cattle producers the use of self-certification as a means to communicate origin to persons who subsequently transform live cattle into a covered commodity.

Paragraph C

The Agency appears to be abrogating its congressionally assigned, discretionary duty to require a verifiable record-keeping trail and to verify compliance by empowering retailers to ". . . ensure that a verifiable audit trail is maintained through contracts and other means." Congress granted only the Secretary of Agriculture the authority to require ". . . that any person that prepares, stores, handles, or distributes a covered commodity for retail sale maintain a verifiable audit trail that will permit the Secretary to verify compliance with this subtitle (including the regulations

[9] Farm Security and Rural Investment Act of 2002, Subtitle D-Country of Origin Labeling, Sec. 282(d).
[10] *Id. Sec.*281(2)(A)(i) and (ii).

promulgated under section 284(b))"[Emphasis added.].[11] We do not believe Congress intended to the Secretary of Agriculture to delegate this authority. Therefore, the Secretary of Agriculture must reserve its exclusive authority to require a verifiable audit trail, along with its exclusive authority to conduct any audits of such a trail.

Moreover, the standard of willfulness for determining violations of the Act make any surveillance or audits between and among retailers and persons who prepare, store, handle, or distribute covered commodities unnecessary.[12] Retailers could not be held liable for a misrepresentation of a packer or distributor, for example. Under a willful violation standard, only if a retailer willfully mislabeled a covered commodity would the retailer be subject to the Agency's enforcement actions. Therefore, there is no reason for retailers to be afforded anything other than a representation of origin verification from its immediate upstream supplier.

Paragraph D

For the reasons stated in C above, retailers should not be granted the authority to audit or otherwise review the business records of their immediate or indirect upstream suppliers. Therefore, the Agency should remove any reference indicating that retailers have any authority or responsibility to access any country of origin records of its suppliers. Retailers should be entitled to only a representation of origin verification from its most immediate upstream supplier.

Paragraph E

For the reasons previously stated under Paragraphs B, C, and D above, the Agency appears to have far exceeded its authority by requiring records that "clearly identify the location of the growers and production facilities." Nowhere in the Act does Congress require any product identification other than that of the country of origin of a covered commodity. Moreover, Congress did not include producers, backgrounders, or feeders as regulated classes under the Act. Therefore, the Agency must adopt a completely different methodology for ensuring that the origin of live cattle is properly communicated to the first entity regulated by the Act. In the case of beef, the first regulated entity would be at the point of slaughter where the packer transforms live cattle into muscle cuts of beef or ground beef.

R-CALF USA recommends that the Agency consider the following methodology when developing its mandatory country of origin labeling rules:

1. The Agency should identify the critical control points where initial compliance must occur and where violations are most likely to originate.

    a. R-CALF USA believes there are only two critical control points relative to the live cattle industry.

[11] *Id.* Sec. 282 (d).
[12] Id. Sec.283(c).

i. Live cattle entering the United States from a foreign country are the only animals capable of producing beef that must be labeled with other than the USA label. Therefore, the first critical control point is the border of the United States.

ii. Only live cattle that have entered the United States from a foreign country must be specifically identified at the point of slaughter as only the beef derived from these animals must be labeled with other than the USA label. Therefore, the second critical control point is the point of slaughter.

2. With respect to live cattle, the Agency must focus its limited, regulatory resources at these two critical control points as there are no other control points within the live cattle supply chain where violations can be initiated.

   a. No U.S. farm, ranch, or feedlot can cause an animal in its possession to be eligible for any label other than the USA label unless it has passed through the first critical control point described above.

3. To identify the cattle capable of producing beef eligible for other than the USA label, the Agency should establish in rules that:

   a. All cattle imported in the United States shall be permanently marked with its country of origin with a brand, tattoo, or permanent ear tag. This requirement could not be construed as a mandatory identification system as all animals so marked would remain indistinguishable from all other animal imported from the respective foreign country from which they originated.

      i. R-CALF USA believes such a requirement is authorized under Article IX, Marks of Origin, of the General Agreement on Tariffs and Trade (GATT) (1994) that allows imported products to be labeled with their specific country of origin at the time of import so long as the marking requirement does not seriously damage the imported products, materially reduce their value, or unreasonably increase their costs.[13]

      ii. R-CALF USA also believes such a requirement is authorized Under Section 304 of the Tariff Act of 1930 as amended (19 U.S.C. 1304).

4. The Agency should establish in rules that all cattle be designated as born and raised in the United States at the point of slaughter if:

   a. The cattle bear no foreign markings such as the brand, tattoo, or permanent ear tag.

[13] See Food Safety and Inspection Service-USDA, Mandatory Country of Origin Labeling of Imported Fresh Muscle Cuts of Beef and Lamb, January 2000, at 3.

5. The Agency should establish in rules that meat derived from animals marked with foreign markings shall be labeled with the country identified by the foreign markings or, in the case of multiple origins, the countries in which the animal has resided as represented by the seller of the cattle to the packer.

6. The Agency should establish in rules that packers shall rely solely on the foreign markings, or lack thereof, for establishing the origin of live cattle. However, if the immediate supplier of live cattle marked with a foreign marking voluntarily provides documentation that the foreign-marked cattle were born in the foreign country for which it is marked and raised in the United States, the packer must accept this multi-country designation and ensure that all muscle cuts of beef and ground beef derived from the animal be labeled accordingly. The maintenance and conveyance of such records to the packer, however, should be voluntary.

7. The Agency should establish in rules that it has the exclusive authority to conduct investigations and audit compliance and that packers and retailers shall impose no conditions, either through contract, agreement, or other means upon U.S. cattle producers for purposes of verifying country of origin.

8. The Agency should establish in rules that the permanent foreign marking requirement shall be the exclusive determinant of origin unless, at the discretion of the seller, a verifiable record trail denoting in which countries the animal has spent its various production phases, replete with affidavits attesting to each phase, is transferred to each buyer. Buyers shall have an affirmative duty to transfer such records until reaching the point of slaughter. The packer shall have the right to rely exclusively on such records/affidavits, as well as an affirmative duty to ensure the labeling of the resulting meat contains the origin information specified therein.

9. The Agency should establish in rules that because it is not practical or possible to determine the origin of animals presently residing in the United States, all animals not marked with a foreign marking are deemed to be born, raised, and slaughtered in the United States. Thus, the enforcement of the Act shall begin on the effective date of the Act. This will effectively constitute a grand fathering of any animals presently within the United States and of foreign origin. Animals that bear a foreign marking, such as cattle from Mexico with an "M" branded on the hip, and cattle with Canadian ear tags would be exempt from the grand fathering. R-CALF USA believes this grand fathering is prudent and necessary in order to equitably and fairly clear the livestock presently within the production system.

Conclusion

R-CALF USA respectfully recommends that the Agency convene a group of federal and state regulatory officials, consumer representatives, and representatives from each of the industries affected by the Act (recognizing that several industry groups have differing viewpoints and both

views should be included) to assist the Agency in formulating its proposed regulations for mandatory country of origin labeling. R-CALF USA offers its assistance in this regard.

Thank you for the opportunity to provide these comments. We are committed to working with you to ensure that mandatory country of origin labeling is implemented in a manner that maximizes benefits to producers and consumers while minimizing any burdens on any segment of the food supply chain.

Sincerely,

Leo R. McDonnell, Jr.
President, R-CALF USA

Co-Signers:

Dennis McDonald
Vice President
Montana Cattlemen's Association

R.M. Thornsberry, D.V.M.
President
Missouri Stockgrower's Association

Randy Stevenson
President
Southeast Wyoming Cattle Feeders Association

Bob Scanlan
President
Houston County Minnesota Cattlemen's Association

R-CALF USA

P.O. Box 30715
Billings, MT 59107
Phone: 406-252-2516
Fax: 406-252-3176
E-mail: r-calfusa@r-calfusa.com
Website: www.rcalf.com

February 27, 2004

Country of Origin Labeling Program
Agricultural Marketing Service
USDA Stop 0249
Room 2092-S
1400 Independence Avenue, S.W.
Washington, D.C. 20250-0249

Via E-Mail: cool@usda.gov and Facsimile: 202-720-3499

Re: Docket No. LS-03-04, Proposed Rule: Mandatory Country of Origin Labeling of Beef, Lamb, Pork, Fish, Perishable Agricultural Commodities, and Peanuts

Dear Sir or Madam:

The Ranchers-Cattlemen Action Legal Fund – United Stockgrowers of America (R-CALF USA) is pleased to have the opportunity to submit comments in response to the Agricultural Marketing Service's (Agency's) October 30, 2003, Federal Register notice requesting public comments regarding the Agency's proposed rule for country of origin labeling.

R-CALF USA is a non-profit association representing over 52,000 members, 8400 of which are voluntary, dues-paying R-CALF USA members and over 43,000 are members of R-CALF USA's 58 affiliated cattle associations. R-CALF USA represents U.S. cattle producers on issues concerning national and international trade and marketing and is dedicated to ensuring the continued profitability and viability of the U.S. cattle industry. R-CALF USA's membership consists primarily of cow-calf operators, cattle backgrounders, and independent feedlot owners along with local, state and regional cattle associations which represent same. Various main street businesses are associate members of R-CALF USA.

INTRODUCTION

R-CALF USA sponsored two Country of Origin Labeling (COOL) Summits in November 2003 and December 2003, respectively. All United States cattle associations, including all national, regional, state and county associations were invited to participate. The purpose of the first Summit was to review the proposed COOL rule and to identify options available to the U.S. cattle industry to more accurately and efficiently transfer country of origin information from the live cattle sector to the beef processing sector than was proposed by the AMS. The purpose of

the second COOL summit, COOL Summit II, was to further develop the live cattle industry's preferred alternative for a simplified, low-cost method of accurately verifying the origins of live cattle at the point of slaughter, in full conformity to the COOL law.

Twenty-eight representatives from 15 U.S. cattle associations participated in the first COOL Summit and 18 representatives from 14 U.S. cattle associations participated in the COOL Summit II.

R-CALF USA will divide its comments into two separate parts: Part I will describe the raw work product of COOL Summits I and II. In Part II, R-CALF USA will refine and augment the raw work product of the COOL Summits and will propose specific language to incorporate the COOL Summit recommendations into the final COOL rule.

PART I: Work Product of COOL Summit Participants

Participants of COOL Summit I identified the following problems with USDA's proposed rules:

1. The rules do not place any limits on the type of information packers may require from producers.
2. The rules do not address how to identify pre-existing cattle.
3. The rules are too complicated.
4. The rules do not specify the responsibilities of cattle producers.
5. The rules are too complicated regarding the identification of cattle of mixed origin.
6. The rules improperly delegate USDA authority to the packers.
7. Enforcement with respect to producers is not clear.

Participants of COOL Summit II generated the following suggestions for improving the proposed rules:

A. Miscellaneous Provisions of COOL Rules

1. **Ground Beef:** Participants expressed concern over the proposal to exempt ground beef from labeling if the ground beef contained more than 30 percent fat or if it contained water. This exemption would appear to reduce the amount of ground beef sold at retail that would be labeled.

2. **Slaughtered:** Participants agreed that the word "harvested" should be used in lieu of "slaughtered" for retail beef labels.

3. **Labeling Beef When the Product Has Entered the United States During the Production Process:** Participants expressed concern over USDA's proposal to go beyond the mandate of the COOL law by requiring that the country involved in each production step be included in the retail label. For example: a retail label such as "Born in Canada, Raised and Slaughtered in the U.S." would be required when cattle spend production steps in multiple countries. Participants viewed this

as the most complicated and most costly labeling system among the three systems discussed:

i. The least complicated and least costly system would be one that reserved the USA label only for products born, raised, and slaughtered in the U.S.; and for beef that was imported during any production step, the beef would be labeled with the foreign country from which it was imported. For example: beef from cattle born in the U.S., raised in Canada, and slaughtered in the U.S. would be labeled "Product of Canada."

ii. The second least complicated and least costly labeling system would be one that simply listed the countries, in alphabetical order, on the retail label in which the animal spent a portion of its life cycle. For example: beef from cattle born in the U.S., raised in Canada, and slaughtered in the U.S. would be labeled "Product of Canada and the United States."

Participants offered that USDA should mandate the least complicated and least costly labeling system described in paragraph 3. (a.) above and allow the processing and retailing segments the option of voluntarily adopting the more complicated system.

4. **Blended Products:** Participants suggested that USDA afford the packing and retailing industries greater flexibility in labeling blended products. For example: ground beef derived from cattle from several countries should be labeled as "This product may include beef from any of the following countries: (countries listed in alphabetical order)."

B. Addressing the Critical Flaws in the Proposed COOL Rules

1. Participants generally agreed that the most prominent flaw contained in the proposed COOL rule is that USDA has authorized packers to "possess and have legal access to producer records" without, in any way, limiting the type of records, information, demands or requirements that packers may impose on producers.

2. Participants further agreed that the final rules should not grant packers any authority over producers. Participants surmised that USDA granted this authority to the packers because Congress did not grant USDA authority over cattle producers or cattle. In response to this challenge, participants developed the following solution:

i. USDA should prescribe that packers shall rely solely upon producer affidavits for initiating country of origin labeling designations.

ii. USDA should prescribe the information that must be contained in a producer affidavit. That information should be limited to the following:

iii. The producer's testament as to the origin or origins of the animal.

iv. An agreement by the producer to provide records to the packer upon a specific request by USDA for the production of such records.

v. USDA should list the specific records that it will use in determining the validity of an origin claim in the final rule. USDA should itemize the same records it has previously provided the industry. For example: health records, brand inspections, production estimates, feed bills, and the other records listed on USDA's website.

vi. USDA should clarify that only USDA has the authority to verify, audit, and administer the labeling program.

Participants believe the foregoing changes to the proposed COOL rules will solve the critical flaw in the rules while effectively addressing the fact that Congress did not grant USDA jurisdiction over cattle producers.

C. Devising a Better Method of Determining Origins of Live Cattle

Participants reviewed the three new options developed during the first COOL Summit held on November 18, 2003, and determined that the hybrid model incorporating both an import marking system and an affidavit-type system was the most workable. This system addresses USDA's principle objection to a presumption of domestic origin system. USDA has stated that the presumption of domestic origin system does not allow USDA to retrace an animal back through its chain of custody. The following hybrid model incorporates both a presumptive-type system as a secondary, real-time check on the accuracy of the accompanying paper trail that is the primary source of origin information. This model significantly reduces, if not completely eliminates, the potential for error associated with USDA's current model of using an affidavit-type system backed up with producer records.

The Import Marking and Origin Disclosure Model

1. Packers and USDA shall use existing import markings to verify the accuracy of accompanying transfer documents at the point of slaughter.

2. To further enhance the effectiveness of import markings on livestock from all present and future importing countries, the cattle industry should pursue the removal of livestock from the J-List (the list of exceptions to the general rule that all imported products be identified with a mark of origin)

3. A new line or field should be included on all livestock transfer documents enabling each seller to disclose the origins of livestock at every transfer of ownership. Such documents shall include:

a. Shippers Agreements
b. Health Certificates
c. Brand Inspections
d. Bills of Sale
e. Affidavits (needed only if producers retain ownership of livestock all the way through the beef manufacturing process)

Under this model, the packer shall use the origin designation on the applicable transfer document listed above to determine the origin designation of each animal slaughtered. Additionally, the packer shall inspect the livestock for any foreign markings at the time of slaughter to ensure that the origin designation on the transfer document is verified by either a foreign marking or lack of foreign marking. For audit and compliance purposes, USDA is afforded a paper trail with which to retrace the entire chain of custody back to the original seller of the animal using the above mentioned transfer documents. From the producer's perspective, this model eliminates the expense and burden associated with the accumulation of new documentation (a problem associated with a strict affidavit system).

D. Proposal for Ascertaining Origins of Preexisting Cattle

Another flaw in the COOL rules is that USDA did not address the issue of how to identify the origins of older cattle and cattle that have entered the United States prior to the effective date of the COOL law. This oversight could result in a devaluation of older cattle, primarily breeding stock, whose origin cannot be affirmatively proven by their present owner. Participants developed the following solution to this challenge:

1. During the 60 day period preceding the effective date of the COOL law, all cattle residing in the United States shall be designated as born and raised in the United States (this is consistent with current USDA-APHIS policy in which all imported cattle in the United States for over 60 days are considered domestic), except:

    a. All foreign cattle bearing a foreign marking or ear tag. (this would include all Mexican cattle in the United States and, because the border with Canada has been closed since May 2003, there should be few, if any, young cattle from Canada in the United States).

    b. All cattle identified by APHIS as originating in a foreign country. APHIS would be directed to notify all producers in writing of any cattle in their possession that APHIS has identified as originating in a foreign country.

Participants agreed that this proposal would provide an adequate window to address the issue of preexisting cattle in full compliance with the COOL law as the law would be supplemented with a rule that establishes an evidentiary burden for determining origins of live cattle that would otherwise be unidentifiable. This rule-based designation of origin would be a one-time event and would effectively prevent the unnecessary devaluation of U.S. breeding stock.

PART II: R-CALF USA'S SPECIFIC RECOMMENDATIONS

A. R-CALF USA agrees that the problems identified by the COOL Summit I participants described above in PART I, items 1-7 are the most egregious problems associated with the proposed rule and must be addressed in order to properly implement COOL.

B. R-CALF USA supports the COOL Summit recommendations described in PART I, A, 1-4 above and incorporates the concepts here in the form of proposed language for USDA's final rule:

1. Substitute the "Ground Beef" definition found at § 60.110 Ground Beef with the following language:

§ 60.110 Ground Beef.

Ground Beef has the meaning given the term in 9 CFR 319.15(a), except that it includes chopped fresh and/or frozen beef with or without the addition of beef fat, regardless of the proportion of beef fat and regardless of whether it contains added water, phosphates, binders, or extenders.

2. Add a new definition at § 60.113 for "Harvested" and omit the definition of "Slaughtered" at § 60.128. Include the following language under the new § 60.113:

§ 60.113 Harvested.

Harvested means the point in which a livestock animal is prepared into meat product for human consumption and is interchangeable with the word "slaughtered."

3. Labeling Beef When the Product Has Entered the United States during the Production Process.

Consistent with the recommendations of the COOL Summit participants, R-CALF USA proposes the following changes to the proposed rules:

Substitute the language contained in § 60.200 (g) with the following:

(g) Labeling Covered Commodities When the Product Has Entered the United States During the Production Process.

1. Beef, Lamb, Pork:

(i) If an animal does not meet the criteria established in (e) above for a covered commodity, it shall retain the origin of the country from which it was imported as determined by CBP at the time the animal entered the United States, and the resulting meat products derived from that animal shall be labeled at retail as originating from the CBP designated country, except:

(1) A supplier responsible for originating a country of origin declaration may declare that the origin of the resulting meat

products included production step(s) occurring in the United States and production step(s) occurring in a country or countries other than the United States if the animal's identity was maintained along with producer certifications to substantiate the origin claims. If a supplier provides such information to the retailer, the product shall be labeled at retail listing the production steps performed in the various countries.

4. Blended Products.

Consistent with the recommendations of the COOL Summit participants, R-CALF USA proposes the following change to the proposed rule:

Substitute the language found at § 60.200 (h) with the following language:

§ 60.200 (h) *Blended Products.* For commingled or blended retail food items comprised of the same covered commodity (e.g., bagged lettuce, ground beef, shrimp) that are prepared from raw material sourced having different origins, the label shall list alphabetically the countries of origin (as set forth in these regulations) for all raw materials that may be contained in the retail food item, e.g. "This product may include beef from any of the following countries: (all countries sourced by the processor may be listed alphabetically)."

C. While R-CALF USA agrees that the recommendations described in PART I, B, 1-2 above is a significant improvement over the proposed rule, it remains functionally deficient in that sole reliance upon a producer self-certification system is susceptible to error if animals of different origins are commingled. R-CALF USA's specific recommendation is contained in D. below and is reflective of the COOL Summits recommendation found in PART I, C, 1-3 above.

D. R-CALF USA fully supports the COOL Summit participant's recommendations for an improved method for determining the origins of live animals and incorporates the concept here, with minor revisions, in the form of proposed language for USDA's final rule:

Substitute Language for § 60.400 Recordkeeping Requirements, (b) Responsibilities of Suppliers:

(1) Any person engaged in the business of supplying a covered commodity to a retailer, whether directly or indirectly, must make available information to the buyer about the country of origin and, if applicable, designation of wild or farm-raised, of the covered commodity. 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, and pork is the meat packing facility, and, if applicable, designation of wild or farm-raised, shall base such country of origin declaration on the following:

a. For any livestock imported for immediate slaughter a determination of country of origin shall be made by reference to importation documents accompanying said livestock;

b. For livestock not imported for immediate slaughter, by reference to the presence, or absence of country of origin markings on livestock about to be slaughtered. Country of origin markings will be deemed present under any of the following circumstances:
   i. APHIS markings mandated pursuant to 7 U.S.C. §§ 8301-8315;
   ii. The presence of foreign country mandatory animal identification markings (ex. tags, microchips, etc.);
   iii. Any other U.S. mandated country of origin marking present on the animal.

c. If a country of origin marking is not present, then the supplier responsible for initiating a country of origin declaration may require verification documentation to accompany cattle, hogs, and sheep, and, if applicable, fish at the point of slaughter.

d. Verification documentation, if required by the supplier responsible for initiating a country of origin declaration, shall be limited to a producer certificate in which the livestock producer certifies as to the origin (the country of birth and country where animal was raised), or origins of the animal and includes the livestock producer's name and mailing address. The supplier shall require only that producer certificates be based on the livestock producer's personal knowledge of the origin(s) of the animal as well as the livestock producer's indirect knowledge of the origin(s) of the animal. The supplier shall not require any new documents from producers if the information described herein and in (e) below can be included in existing livestock transfer documents including but not limited to: Shippers Agreements, Health Certificates, Brand Inspections, and Bills of Sale.

e. If verification documentation described in (d) above is requested by the supplier responsible for initiating a country of origin declaration, the supplier may further require that when a livestock producer sells an animal, that livestock producer shall provide a producer certification to the person to whom the animal is sold. The supplier may also require that persons who purchase foreign livestock request that the foreign livestock producer provide them with a copy of the import permit, as required under APHIS' authority pursuant to 7 U.S.C. §§ 8301-8315, that accompany each animal upon entry into the United States in lieu of a livestock producer certification. The supplier who receives the livestock producer's certification shall keep this information for a period not to exceed three (3) years.

f. The subsection 1, paragraph (c.) through (e.) verification procedures shall no longer be necessary if the United States has implemented a requirement that all imported livestock be marked with a mark of origin. If such a marking requirement is imposed, then a determination of country of origin shall be made solely by reference to importation documents accompanying any livestock imported for immediate slaughter, or by reference to the presence of country of origin markings on livestock about to be slaughtered. If a country of origin marking is not present then the animal shall be deemed of U.S. origin.

g. Suppliers responsible for initiating a country of origin declaration shall require no additional information to accompany cattle, hogs, and sheep at the point of slaughter other than what is specifically provided in (a.) through (e.) above for purposes of complying with this subpart.

h. Suppliers responsible for initiating a country of origin declaration and who rely upon the information obtained pursuant to (a.) through (e.) above shall be deemed in compliance with this subpart.

D. R-CALF USA supports the COOL Summit participants' recommendations for determining the origins of preexisting cattle as described in PART I, D. above and incorporates the concept here in the form of proposed language for USDA's final rule:

Add a new definition at Section 60.104 to include:

§ 60.104 Born.

Born means in the case of:

(a) Beef, pork, and lamb: the country in which cattle, hogs, and sheep were birthed on or after September 30, 2004.

(b) All cattle, hogs, and sheep birthed prior to September 30, 2004, and residing within the United States on September 30, 2004, shall be deemed to be born in the United States, except:

a. Foreign cattle identified with APHIS markings mandated pursuant to 7 U.S.C. §§ 8301-8315;

b. Foreign cattle identified with foreign country mandatory animal identification markings (ex. tags, microchips, etc.);

c. Foreign cattle identified through a cooperative effort by owners of cattle, hogs, and sheep, their respective state animal health officials, and USDA who shall jointly research import records and foreign animal health certificates and endeavor to identify all foreign animals presently residing in the United States during the period from September 30, 2004 through November 30, 2004.

i. Not later than December 31, 2004, all potential owners of imported cattle, hogs, and sheep identified during the period ending November 30, 2004, shall be notified in writing by their respective state animal health officials that records indicate that foreign animals may be on the owners premises and that these animals are ineligible for a "Born" in the United States declaration and, consequently, shall be designated as "Born" in the appropriate foreign country.

ii. After December 31, 2004, all cattle, hogs, and sheep not identified as originating from a foreign country shall be deemed to be birthed in the United States.

CONCLUSION

R-CALF USA appreciates the opportunity to provide these comments. We are committed to working with you to ensure that mandatory country of origin labeling is implemented in a manner that maximizes benefits to producers and consumers while minimizing any burdens on any segment of the food supply chain.

Sincerely,

Leo R. McDonnell, Jr.
President, R-CALF USA

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

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

August 20, 2007

Country-of-Origin Labeling Program
Room 2607-S
Agricultural Marketing Service (AMS)
United States Department of Agriculture
1400 Independence Avenue, SW
Washington, DC 20250-0254

Re: R-CALF USA Comments Regarding *Mandatory Country-of-Origin Labeling for Beef, Lamb, Pork, Perishable Agricultural Commodities, and Peanuts*

The Ranchers-Cattlemen Action Legal Fund – United Stockgrowers of America (R-CALF USA) appreciates this opportunity to submit its views regarding Department's proposed rule for mandatory country-of-origin labeling (COOL) for beef, lamb, pork, perishable agricultural commodities, and peanuts. This submission responds to the Department's request for comments published in the Federal Register on June 20, 2007 at 72 Fed. Reg. 33917. R-CALF USA represents thousands of U.S. cattle producers on domestic and international trade and marketing issues. R-CALF USA, a national, non-profit organization, is dedicated to ensuring the continued profitability and viability of the U.S. cattle industry. R-CALF USA's membership consists primarily of cow-calf operators, cattle backgrounders, and feedlot owners. Its members are located in 47 states, and the organization has over 60 local and state association affiliates, from both cattle and farm organizations. Various main street businesses are associate members of R-CALF USA.

In its request for comments, the Department seeks relevant information on whether the definitions and requirements contained in the interim final rule for COOL for fish and shellfish can be applied to a mandatory COOL program for beef and other products. R-CALF USA welcomes the Department's consideration of this approach, as R-CALF USA believes that there are many ways in which the interim final COOL rule for fish and shellfish improves upon the proposed COOL rule for beef and other products. In many instances, the simplified and streamlined requirements in the fish rule can be applied directly to the COOL program for beef, reducing implementation costs for producers while ensuring that the law is fully complied with and consumers have accurate information regarding the origin of the meat products they purchase.

I. INTRODUCTION

In 2002, Congress enacted mandatory country-of-origin labeling (COOL) for beef and other products to enable consumers to make informed choices about the food they buy and eat.[1] The law only allows beef to bear a "U.S." origin label if the meat is wholly from animals born, raised, and slaughtered exclusively in the U.S.[2] Despite consumer, producer, and congressional support for COOL, implementation of the labeling law for beef has been delayed until 2008. Recently, the U.S. House of Representatives included language in the 2007 Farm Bill reaffirming the September 30, 2008 deadline for COOL implementation and clarifying portions of the law. While the draft COOL implementing regulations published by USDA in 2003 contained numerous onerous record-keeping and retention requirements for suppliers and retailers,[3] an interim final rule for labeling of fish and seafood was released by the Department in 2004 which simplified many of these requirements and provided a much more workable model for country of origin labeling.[4] The farm bill recently passed by Congress builds on many of the innovations in the fish rule to mandate a more workable COOL program for beef and other products.[5]

Cattle producers believe that the benefits of implementing COOL will far outweigh any costs, and believe that many costs can be greatly minimized by streamlining regulatory requirements while maintaining full compliance with the law. A series of simple revisions to the draft rule of 2003, based in part on improvements made in the interim final fish rule in 2004, would greatly facilitate implementation and lower costs along each step of the production chain. These changes would help address any legitimate concerns about the costs of the labeling program, while preserving the full benefits of mandatory COOL for producers and consumers. The comments below propose a number of changes to the proposed COOL rule for beef that draw on the improvements in the interim final fish rule. These proposals can be implemented under the law as currently written, and are also fully complaint with the recent COOL language passed by the House of Representatives.

II. PROPOSED CHANGES TO DRAFT COOL RULE FOR BEEF

A) Simplify Labeling of Beef from Animals not Exclusively Born, Raised and Slaughtered in the U.S.

The COOL law requires consumers to be informed of a product's country-of-origin, and it states that beef may not be designated U.S. origin unless it is "exclusively of an animal that is exclusively born, raised, and slaughtered in the U.S."[6] The law does not currently specify how meat from an animal born or raised outside the U.S., but

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[1] 7 U.S.C. § 1638 *et seq.*
[2] 7 U.S.C. § 1638a(a)(2)(A).
[3] *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*").
[4] *Mandatory Country of Origin Labeling of Fish and Shellfish; Interim Final Rule*, 69 Fed. Reg. 59,708, Oct. 5, 2004 (hereinafter "*2004 Fish Rule*").
[5] H.R. 2419, § 11104 as amended by manager's amendment.
[6] 7 U.S.C. § 1638a(a)(2)(A).

slaughtered or further processed within the U.S., should be labeled, other than to prohibit labeling such meat as U.S. origin. The 2003 draft rule would have required labels on such products that enter the U.S. during the production process to include not only "import of [country X]," but also specific identification of "the production step(s) occurring in the U.S."[7] This requirement would add costs for processors of foreign-born or fed cattle, who would need to not only identify which animals were not fully U.S.-origin, but also to identify which animals entered the U.S. along different stages of the production process.

This aspect of the proposed rule should be changed to simplify labeling of such products while continuing to prohibit labeling of such meat products as U.S.-origin, as required by the COOL law. In particular, the rule should no longer require that additional specific information on every production step that has occurred in the U.S. be included on the product's label. For example, the 2004 interim final fish rule allows fish from another country that has been partially processed in the U.S. to be labeled, "From [country X], processed in the U.S."[8] A similar approach was adopted in the farm bill that recently passed the House of Representatives. A similar label could be allowed on beef, without requiring further itemization of which exact production steps (feeding, slaughtering, etc.) occurred in the U.S. or abroad. Suppliers who wish to include such specific information would be free to do so, but not required to do so under the regulations.

B) Simplify Labeling of Blended Products

The law requires that consumers be informed of the country of origin, and only allows a U.S. label to be affixed to meat "exclusively" of U.S. animals. But the law does not provide guidance on how to label blended products incorporating meat of different origins. The draft 2003 rule would have required such products to be labeled with an alphabetical list of each country of origin for all of the raw materials included in the product.[9] This requirement to definitively name each ingredient's country of origin would require detailed tracking of meat sources along the processing line, posing logistical difficulties for processors. While it is important to ensure that such blended products are not improperly designated as "U.S." product, in violation of the COOL law, itemization of each country of origin in blended products is not required and would impose high costs with few consumer benefits.

Instead, implementing regulations for COOL for beef should allow blended products to be labeled with a list of the countries of origin that may be contained in the final product. This allows processors to list the countries of origin of all of the materials entering the production line on labels for all of the blended products emerging from the production line, without having to verify that each product actually contains product from each of the listed countries. This is the approach that was taken in the 2004 fish rule, which provides that the label on blended products shall "indicate the countries of origin

[7] *2003 Draft Rule* at 61,983 (§ 60.200(g)(1)).
[8] *2004 Fish Rule* at 59,745 (§ 60.200(g)(2)).
[9] *2003 Draft Rule* at 61,983 (§ 60.200(h)).

contained therein or that may be contained therein."[10] This is also the approach adopted by the House of Representatives in the COOL amendments contained in the 2007 farm bill. This method will give consumers a reasonable indication of likely origin, while reducing implementation costs.[11]

C) Allow Retailers to Rely on Pre-Labeled Products

The COOL law allows the Secretary to require that retailers maintain a verifiable recordkeeping audit trail that enables the Secretary to verify compliance, and a willful violation could result in fines.[12] The law also requires suppliers to provide retailers with country of origin information for products supplied to them.[13] The draft 2003 rule required retailers to maintain the documents they relied upon to establish origin (such as shipping receipts) for 7 days from sale, and to maintain records identifying retail supplier, unique product ID, and origin information for each product for 2 years.[14] Thus, retailers would be required to maintain records verifying origin for each product, and retailers would need to keep track of when each product was sold in order to maintain the required records for the appropriate time thereafter. Suppliers would also need to pass along documents indicating origin for each product, imposing potentially large administrative costs.

A more workable approach would be to allow a pre-labeled product's origin label alone to serve as sufficient documentation of origin. Retailers should only be required to maintain such documentation as long as the product is on the shelf. The 2004 fish rule specifies that, for pre-labeled products, "the label itself is sufficient evidence on which the retailer may rely to establish the product's origin."[15] Additional documentation identifying the supplier for each product must be maintained by retailers for a year, but such records need only indicate origin if it is not indicated on the pre-labeled product itself. In addition, the rule specifies that suppliers can provide origin information to retailers "on the product itself," and need not pass along separate documents substantiating origin.[16]

D) Allow Packers to Use Import Markings to Determine Origin

The COOL law requires suppliers to provide retailers with country of origin information for products they supply. The 2003 draft COOL rule stated that, in addition to providing origin information to retailers, meat packers must "possess or have legal access to records that substantiate" the origin claim.[17] In addition, importers of record were required to ensure that their own records "substantiate" origin claims.[18] Meat

[10] *2004 Fish Rule* at 59,745 (§ 60.200(h)).
[11] *2004 Fish Rule* at 59,715.
[12] 7 U.S.C. §§ 1638a(d) and 1638b(c).
[13] 7 U.S.C. § 1638a(e).
[14] *2003 Draft Rule* at 61,984 (§ 60.400(c)).
[15] *2004 Fish Rule* at 59,746 (§ 60.400(c)(1)).
[16] *See also 2004 Fish Rule* at 59,716 – 59,717 for an explanation and justification of the new system.
[17] *2003 Draft Rule* at 61,984 (§ 60.400(b)(1)).
[18] *Id.* at § 60.400(b)(4).

packers appear to have interpreted this proposed rule to require them to have access to extensive documentation from cattle producers that legally establishes the origin of the animals supplied. Alternatively, some opponents of COOL have argued that the only way to substantiate origin adequately for COOL purposes is to await full implementation of a mandatory national animal identification system, though the COOL law prohibits reliance on such a system to verify COOL origin claims.[19]

It will be much easier for packers to establish animal origin if they are allowed to use import markings to differentiate cattle of foreign origin from cattle of U.S. origin. Cattle from Mexico that are not imported for immediate slaughter must be branded with a distinct, permanent, and legible "M" or "Mx" mark and bear a numbered, blue ear tag issued by the Mexican Ministry of Agriculture.[20] Similarly, under rules promulgated in 2005, Canadian cattle imported for feeding before slaughter must be "permanently and humanely identified" with a "distinct and legible mark" branded on to the animal.[21] The mark designated by USDA for Canadian cattle is "CAN." Cattle brought in from Mexico and Canada for immediate slaughter within two weeks are not branded, but must be: 1) accompanied by an official health certificate that includes, among other things, information on the animal's country of birth and identification of the country of export; and 2) shipped in sealed containers to the slaughter establishment.[22] These rules also apply to animals born in the U.S. that are taken to Canada or Mexico for feeding and then re-enter the U.S.

This allows packers to easily identify cattle that do not qualify for a "U.S." label under COOL. Any animal that ever was in Canada in Mexico – whether it was born in one of those countries and brought in to the U.S. as breeder cattle, born and raised in one of those countries and brought to the U.S. only for direct slaughter, or born in the U.S. but transported briefly to one of those countries for feeding before returning to the U.S. – will bear a Mexico or Canada marking or arrive to the slaughterhouse in a marked, sealed conveyance. This is because every animal that crosses the border into the U.S. from Canada or Mexico is marked – thus, every single animal that does not qualify for a "U.S." origin label under the COOL law (either because it was not born and/or raised exclusively in the U.S.) will bear a clear and permanent mark that packers can rely on for origin purposes. Conversely, any animal that arrives at the slaughterhouse without a Canada or Mexico marking, and not in a sealed conveyance, has never been in Canada or Mexico and can be presumed to be of U.S. origin.

Any final rule for COOL for beef should enable packers to use cattle import markings to establish the foreign origin of cattle, and the absence of such markings to establish that cattle are of wholly domestic origin. It should also allow the use of other readily-available and reliable information sources, pending a universal marking requirement for imported cattle, to enable packers to substantiate origin claims without imposing undue implementation costs on cattle producers. The rule should specify that

[19] *See* 7 U.S.C. § 1638a(f)(1).
[20] 9 C.F.R. § 93.427(c)(1) and (d).
[21] 9 C.F.R. §93.436(b)(3).
[22] 9 C.F.R. §§ 93.420, 93.429.

suppliers may base origin determinations on importation documents, on separate tracking of animals arriving in sealed conveyances under 9 C.F.R. § 93.420 or § 93.429, or on animal import markings or tags required under 9 C.F.R. §§ 93.427(c)(1), (d), and 93.436(b)(3). Any animal that does not arrive in a sealed conveyance and does not bear such an import marking shall be deemed to be of U.S. origin by the supplier and be eligible for a "U.S." label under COOL.

In addition, the requirement that packers have "legal access" to other parties' substantiating origin documentation should be eliminated, as it was in the 2004 fish rule, which instead simply requires suppliers to possess such records.[23] Finally, importer records should not have to themselves substantiate origin if accurate origin information is already accessible in Customs import documents. The 2004 fish rule recognizes this by only requiring importers to ensure that their records "accurately reflect" the country of origin established in Customs import documents rather than requiring that the records independently substantiate origin.[24] Separate substantiating documentation is not required given that existing import records already contain the required information.[25] These changes are also reflected in the farm bill that recently passed the U.S. House of Representatives, which only requires that suppliers be able to verify origin on the basis of documents kept in the ordinary course of business.

E) Eliminate Requirement to Document the Chain of Custody

The COOL law allows the Secretary to require that retailers maintain a verifiable recordkeeping audit trail that enables the Secretary to verify compliance, and a willful violation could result in fines.[26] The 2003 draft COOL rule required suppliers and retailers to maintain documents that not only identify the immediate previous source of the product and the subsequent recipient, but also to maintain documents demonstrating the entire chain of custody for the product.[27] This requirement would add an extra record-keeping and information-gathering burden for suppliers and retailers, who would be required to pass the chain of custody information up along the supply chain with each transaction.

Implementing regulations for COOL for beef should eliminate the requirement for suppliers and retailers to document the chain of custody for each product, and rely instead on the requirement for suppliers and retailers to maintain records of the immediate previous source and the subsequent recipient of the product. This information should be sufficient for the Department to track products back through the supply chain to the original producer if necessary, and it is information that suppliers and retailers should already document in the regular course of business. Eliminating the chain of custody documentation requirement would not weaken the reliability of origin information, since all parties are still required to possess records substantiating origin claims and the

[23] *2004 Fish Rule* at 59,745 (§ 60.400(b)(1)).
[24] *Id.* at § 60.400(b)(4).
[25] *See 2004 Fish Rule* at 59,716 for a discussion of the reasons for the change.
[26] 7 U.S.C. § 1638a(d).
[27] *2003 Draft Rule* at 61,984 (§ 60.400(a)(1)).

original producers of each product would still be identifiable through retailers' and suppliers' records on previous sources of their products. The Department recognized this fact in writing the interim final rule for fish in 2004, which deletes the chain of custody documentation requirement.[28] In a Notice to the Trade issued in March of 2005, USDA reiterated that routine business documents should be sufficient to document the chain of custody in almost all cases.[29]

F) Eliminate Supplier's Duty to Demonstrate Separate Tracking

The draft 2003 COOL rule required suppliers who handle similar products from more than one country to "document that the origin of the product was separately tracked, while in their control, during any production and packaging process, to demonstrate that the identity of a product was maintained."[30] This requirement to document separate tracking created another layer of documentation beyond the requirement to substantiate origin, imposing another record-keeping burden on suppliers. The rule would have required separate documents demonstrating the steps in the production process, in addition to the basic duty to establish origin for each product supplied.

Implementing regulations for COOL for beef should delete the separate tracking documentation requirement. In the 2004 fish rule, the Department recognized that this requirement to demonstrate separate tracking was "duplicative and unnecessary" given the existing requirement to provide origin information to subsequent recipients of each product.[31] In addition, given that blended products can be labeled with the countries of origin that "may" be contained in the product under the interim final fish rule, separate tracking should no longer be needed at all stages of the production process for such products. The same should be true for a simplified COOL rule for beef. Suppliers handling product of various origins should be free to establish and maintain whatever tracking system works best in their operations, and as long as this system enables them to accurately identify the origin of their products sold to retailers, as required by the law, their system should be sufficient.

G) Reduce the Record Retention Requirement to One Year

The 2003 draft COOL rule required suppliers and retailers to maintain documents identifying the immediate previous source and subsequent recipient for each product for two years.[32] The record retention requirement adds an extra burden for suppliers and retailers to maintain files for two years after the date of a transaction. Revised implementing regulations should reduce the period of time for which suppliers and retailers must retain their records from two years to one year, as was done in the 2004

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[28] *2004 Fish Rule* at 59,716.
[29] *Notice to the Trade: Mandatory Country of Origin Labeling for Fish and Shellfish*, USDA Agricultural Marketing Service, March 2005.
[30] *2003 Draft Rule* at 61,984 (§ 60.400(b)(5)).
[31] *2004 Fish Rule* at 59,717.
[32] *2003 Draft Rule* at 61,984 (§ 60.400(b)(3) and (c)(2)).

fish rule.[33] The Department noted this timeframe is consistent with other record retention periods (such as under the Bioterrorism Act) and provides "ample time" for the Department to conduct verification activities.[34] A similar change should be made for beef.

H) Specify that Supplier Affidavits and Third-Party Verification Audits Are Not Required

The law allows the Secretary to impose fines on a retailer who has "willfully violated" the COOL law.[35] The 2003 draft COOL rule provides that intermediary suppliers and retailers shall not be held liable for mislabeled products if the violation results from the conduct of another and the intermediary supplier or retailer "could not have been reasonably expected to have had knowledge of the violation."[36] The 2003 rule also discussed the possibility of adding an affidavit requirement to the rule to give retailers added security that suppliers made a legally binding statement regarding origin.[37] Subsequently, packers have claimed that they would need such affidavits from cattle producers regarding origin to avoid liability, and would demand the right to verify producers' records through third-party audits. These provisions would add substantial expense to the administration of the COOL rule, and effectively push the costs of compliance up the supply chain to cattle producers in order to shield packers and retailers from liability.

Revised implementing regulations for COOL for beef should specify that affidavits and third-party verification are not required. As long as downstream retailers or packers could not have reasonably been expected to know of the inaccuracy of the origin claim, they cannot be held liable for the violation of another party. In writing the interim final 2004 fish rule, the agency concluded that requiring affidavits was not practicable or necessary, noting public comments indicating that such a requirement would be "expensive, onerous, and unnecessary."[38] The explanation of the final fish rule also specifies that a downstream supplier or retailer need not require third-party verification or third-party audits of an upstream supplier's origin information in order to avoid liability.

In writing the final rule for beef, the agency could further clarify the liability standard and the lack of need for affidavits and audits. For example, the final rule should specify that the fact that a downstream supplier or retailer did not require such affidavits or audits from its upstream suppliers may not be used as evidence to establish that the downstream supplier or retailer was not "reasonable" in its reliance on upstream supplier's origin claims. Furthermore, if suppliers are allowed to rely on import marking

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[33] *2004 Fish Rule* at 59,745 – 59,746 (§ 60.400(b)(3) and (c)(2)).
[34] *Id.* at 59,716.
[35] 7 U.S.C. § 1638b(c).
[36] *2003 Draft Rule* at 61,984 – 61,985 (§ 60.400(b)(2) and (c)(3)).
[37] *Id.* at 61,951.
[38] *2004 Fish Rule* at 59,717.

for origin purposes as proposed in Section II.D, above, there should be no need for such expensive and burdensome affidavits or audits.

III. CONCLUSION

R-CALF USA welcomes the Department's willingness to re-examine the proposed COOL rule for beef and other products in light of the innovations contained in the 2004 interim COOL rule for fish and shellfish. The fish rule significantly streamlined and rationalized regulatory requirements to ensure that implementation of COOL would be less burdensome on producers while still upholding the COOL law and providing consumers with accurate information regarding origin. R-CALF USA urges the department to issue a new proposed rule for COOL for beef that builds upon the progress in the fish rule as outlined above. These changes to the COOL rules for beef will fully implement the original COOL law, and will also comply with new legislative language passed by Congress regarding COOL if that language were to become law. Most importantly, R-CALF USA believes that the department should take advantage of the opportunity to issue revised rules for COOL for beef to instruct suppliers that they may rely on import markings already present on imported cattle to establish origin. This solution does not require the creation or funding of any new programs by the government or the private sector – instead, the solution relies on a working import marking system that is already in place to facilitate the implementation of COOL and reduce compliance costs for producers and suppliers. This solution will ensure that consumers have the origin information that Congress intended, while greatly reducing costs for the cattle and beef industry to implement COOL.

Finally, R-CALF USA requests that a new draft rule on COOL for beef be issued without delay, so that further comments may be solicited and a final rule issued in a timely manner. This will ensure that COOL is implemented on September 30, 2008 with rules in place for the industry, as intended by Congress.

Thank you for the opportunity to submit our views on this important subject.

Sincerely,

R. M. Thornsberry DVM

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

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

September 25, 2008

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

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[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.*

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

September 27, 2008

The Honorable Ed Schafer
Secretary of Agriculture
U.S. Department of Agriculture
1400 Independence Ave., S.W.
Washington, D.C. 20250

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: R-CALF USA's Supplemental Comments on the Interim Final Rule: Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts

Dear Secretary Schafer:

Subsequent to R-CALF USA's September 25, 2008 submission of its formal comments in the above captioned docket, commonly referred to as the interim final rule for mandatory country-of-origin labeling (IFR for COOL), the U.S. Department of Agriculture posted on its website a revised *Country of Origin Labeling (COOL), Frequently Asked Questions, COOL Implementation: Legislative History and Status of Rulemaking*, dated September 26, 2008, under the general heading "New Guidance Documents" (COOL Q&A). R-CALF USA's comments concerning two specific revisions made in USDA's COOL Q&A are expressed below:

The two specific revisions contained in the COOL Q&A that are the subject of R-CALF USA's comments are the following two questions and answers:

> **Q.** ***Can a packer or intermediary supplier that processes whole muscle meat products derived from both mixed origin animals (e.g., Product of U.S., Canada and Mexico) and U.S. origin animals commingle and label these products with a mixed origin label?***
>
> **A. If meat covered commodities derived from U.S. and mixed origin animals are commingled during a production day, the resulting product may carry the mixed origin claim (e.g., Product of U.S., Canada, and Mexico). Thus, it is not permissible to label meat derived from livestock of U.S. origin with a mixed origin label if solely U.S. origin meat was produced during the production day.**
>
> Q. ***Can a retailer, like a meat packer, label meat products derived from livestock born, raised, and slaughtered in the United States (i.e., Product of USA) as having a mixed origin (e.g., Product of the United States, Canada, and Mexico)?***
>
> **A. Similar to packers and intermediary suppliers, retailers are permitted to market U.S. produced meat products under a mixed origin label** ***(e.g., Product of U.S., Canada and Mexico)*** **if they are commingled with meat of mixed origin. That is, if a retailer further processes meat at the store and the resulting package includes meat of both U.S. origin and mixed origin (e.g., Product of U.S., Canada and Mexico), the origin declaration can read Product of U.S., Canada and Mexico.**

Presumably, the above revisions (revisions) were made pursuant to concerns that the IFR for COOL disregarded Congress' intent to ensure that meat derived from animals exclusively born, raised, and slaughtered in the United States would be labeled as a product of the United States, and no other country. R-CALF USA is concerned that the revisions will serve, instead, to grant meatpackers a license to label meat that is exclusively of U.S. origin with a label denoting, e.g., "Product of the United States, Canada, and Mexico" (mixed label or North American label), in direct contravention of Congress' intent.

USDA's revisions accord meatpackers the authority to mislabel U.S.-origin beef by authorizing a mixed or North American label for meat produced each production day by the meatpacker, provided that at least one animal of foreign origin is commingled with United States-origin cattle each production day as well. The meatpackers' ability to achieve this *de minimis* precondition will not be difficult due to the large, daily influx of foreign cattle imports.

From January 1, 2008 through approximately September 20, 2008, the United States imported 1,079,308 live Canadian cattle[1] and 667,232 live Mexican cattle,[2] representing a total of 1,746,540 live cattle imports so far this year. Based on the approximately 227 processing days during this same period (i.e., Jan.1-Sept. 20), there were approximately 7,694 imported cattle available during each processing day in 2008. Thus, there are more than enough imported cattle to allow every major meatpacker to commingle one or more imported cattle with U.S. cattle each processing day, thus enabling them to meet your agency's *de minimis* precondition and to undermine Congress' intent.

The effect of your agency's action is to make a mockery of Congress' COOL amendment contained in the 2008 Farm Bill as well as your agency's IFR for COOL that instruct U.S. cattle producers to maintain records and to produce affidavits for the purpose of providing documentation as to the origins of cattle they sell. Your agency's action would render origin verification by U.S. cattle producers wholly unnecessary, useless, and a complete waste of time by authorizing meatpackers to circumvent or otherwise ignore such origin documentation and to label all meat products with a mixed label or North American label.

It is unconscionable that your agency would purposely grant meatpackers a blueprint describing how they can circumvent Congress' intent to not allow a mixed origin or North American label on meat produced exclusively from animals born, raised, and slaughtered in the United States, particularly after your publicly reported acknowledgement that labeling exclusively U.S. meat with a mixed label or North American label '"was not the intent of the law [and] not the intent of all of you when you started this many years ago."'[3]

R-CALF USA respectfully, but strongly, implores you to immediately issue a technical correction to the IFR for COOL to expressly prohibit the use of a mixed or North American label on meat products derived from animals that are exclusively born, raised, and slaughtered in the United States. Failure to do so would undermine the intent of the COOL law, undermine the intent of Congress, and it would make a mockery of USDA's own rule that instructs U.S. cattle producers to maintain records as to the origins of their livestock.

If R-CALF USA can be of any assistance in this important matter, please do not hesitate to contact us at 408-252-2516.

Sincerely,

R. M. Thornsberry DVM

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

---

[1] *Canadian Live Cattle Imports by State of Entry, Data for Week Ending 9/20/08*, U.S. Department of Agriculture Market News, attached hereto as Exhibit 1.
[2] *Mexico to U.S. Imports*, U.S. Department of Agriculture Market News, attached hereto as Exhibit 2.
[3] *USDA to Clarify Country-of-Origin Labeling For U.S. Meat*, Jerry Hagstrom, CongressDailyPM/NationalJournal, September 22, 2008, attached hereto as Exhibit 3.

EXHIBIT 1

WA_LS635
Washington, DC Wed, Sep 24, 2008 USDA Market News

Canadian Live Animal Imports by State of Entry
Data for week ending 09/20/08

Cattle State	Feeder Strs/Hfrs AA	Sltr Cows AB	Sltr Bulls AC	Sltr Males AD	Breeding Females AE	Breeding Females AF	Other AG	Total
Idaho	0	7213	0	174	0	0	0	7387
Maine	0	0	0	0	0	0	0	0
Michigan	0	1142	183	0	0	0	0	1325
Montana	0	0	0	0	0	0	0	0
North Dakota	7258	1085	1493	837	0	0	11	10684
New York	124	2076	195	5	0	0	1	2401
Vermont	0	0	0	0	0	0	0	0
Washington	1878	195	664	334	0	1	8	3080
Total	9260	11711	2535	1350	0	1	20	24877
Cattle totals may include interstate shipments from Hawaii.								
YTD 2008	454798	479543	105785	32092	562	2598	3930	1079308
YTD 2007	306706	572065	0	0	0	0	0	878771

Hogs State	Feeder AH	Sltr B/G AI	Sltr S/B AJ	Breeding Males AK	Breeding Females AL	Other AM	Total
Idaho	0	2397	420	0	0	0	2817
Maine	0	0	0	0	0	0	0
Michigan	16580	9809	4759	0	160	0	31308
Montana	0	0	0	0	0	0	0
North Dakota	98751	14372	4298	22	1668	0	119111
New York	0	989	297	0	0	0	1286
Vermont	0	0	0	0	0	0	0
Washington	601	0	0	0	0	0	601
Total	115932	27567	9774	22	1828	0	155123
YTD 2008	5133177	1386836	456368	5697	31416	6899	7020393
YTD 2007	4640252	1718216	483607	6629	80293	5908	6934905

Sheep State	Feeder AN	Sltr Lambs AO	Sltr Ewes AP	Breeding Males AQ	Breeding Females AR	Other AS	Total
Idaho	0	0	0	0	0	0	0
Maine	0	0	0	0	0	0	0
Michigan	0	0	0	0	0	0	0
Montana	0	0	0	0	0	0	0
North Dakota	0	0	0	0	0	0	0
New York	0	0	0	0	0	0	0
Vermont	0	0	0	0	0	0	0
Washington	0	0	0	0	0	0	0
Total	0	0	0	0	0	0	0

EXHIBIT 1 CONTINUED

Dairy Cattle	Breeding Males AT	Breeding Other Females AU	AV	Total
Idaho	0	0	0	0
Maine	0	0	0	0
Michigan	0	206	0	206
Montana	0	0	0	0
North Dakota	0	0	0	0
New York	0	31	0	31
Vermont	0	0	0	0
Washington	0	37	0	37
Total	0	274	0	274

Goats State	Angora AW	Spanish AX	Breeding Males AY	Breeding Other Females AZ	BA	Total
Idaho	0	0	0	0	0	0
Maine	0	0	0	0	0	0
Michigan	0	0	0	0	0	0
Montana	0	0	0	0	0	0
North Dakota	0	0	0	0	0	0
New York	0	0	0	0	0	0
Vermont	0	0	0	0	0	0
Washington	0	0	0	0	0	0
Total	0	0	0	0	0	0

Horses State	Feeder BB	Sltr BC	Breeding Males BD	Breeding Females BE	Geldings BF	Other BG	Total
Idaho	0	0	1	1	0	0	2
Maine	0	0	0	0	0	0	0
Michigan	0	0	0	2	0	50	52
Montana	0	0	0	0	0	0	0
North Dakota	0	0	0	0	36	79	115
New York	0	0	0	1	21	54	76
Vermont	0	0	0	0	0	0	0
Washington	0	0	0	0	1	22	23
Total	0	0	1	4	58	205	268

Note: Data are based on currently available information and are subject to future revision.

Source: USDA, APHIS
Washington, DC 202-720-7316 Email: wash.lgmn@usda.gov
www.ams.usda.gov/mnreports/wa_ls635.txt

EXHIBIT 2

AL_LS625
Las Cruces, NM Tue, Sep 23, 2008 USDA Market News
Mexico to U.S. Imports

Species	Current Week 9/20/2008	Previous Week 9/13/2008	Current Year-to-date	Previous Year-to-date
Slaughter	0	0	0	0
Feeders	2,474	5,672	409,656	667,232
Total	2,474	5,672	409,656	667,232

Source: USDA Market News Service, Las Cruces, NM
John Langenegger, OIC (505) 527-6861 FAX (505) 527-6868
www.ams.usda.gov/mnreports/AL_LS625.txt
0848m lg

EXHIBIT 3

USDA To Clarify Country-Of-Origin Labeling For U.S. Meat

Monday, Sept. 22, 2008
by Jerry Hagstrom
CongressDailyPM / NationalJournal

The Agriculture Department will require packers to label beef from cattle born, raised and slaughtered in the United States as U.S. beef rather than follow a packers' plan that would label all beef coming from the United States, Canada and Mexico as North American, according to Agriculture Secretary Schafer. This ruling is significant because most of the 2008 farm bill goes into effect Oct. 1, including a provision requiring country-of-origin labeling for red meat. The provision includes categories for U.S. meat, foreign meat and meat of mixed origin that labeling advocates and packers had agreed on.

Some packers have said recently that they intend to label all beef coming from the United States, Canada and Mexico as of North American origin -- prompting some concerns from some farm and ranch leaders and lawmakers. But Schafer told the National Association of State Departments of Agriculture in Bismarck, N.D., Friday that USDA would not allow the North American label for U.S. beef. Such mixed labeling "was not the intent of the law, [and] not the intent of all of you when you started this many years ago," Schafer told the group, as quoted in the Grand Forks Herald. Schafer acknowledged the rule does contain a provision allowing the North American label so that packers who do not have enough U.S. cattle for a full day's processing can finish with cattle from another country. Citing that language, some packers had said they were going to label all the beef as mixed. "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," Schafer said. Schafer noted that as governor of North Dakota he had signed the nation's first meat country-of-origin labeling law. A USDA spokesman today confirmed Schafer's statements.

North Dakota Agriculture Commissioner Roger Johnson, the outgoing president of NASDA, said he was surprised and impressed by Schafer's defense of the U.S. label. The packers' initiative "was something that ... seemed to have been OK'd within USDA in some fashion. That is not at all the message that [Schafer] sent to us," said Johnson. "He was saying he supports the country of origin labeling law. He wants to be clear that if it is all U.S. born, raised, slaughtered, [the meat] should have a U.S. label on it."

National Farmers Union President Tom Buis, who met with Schafer Thursday, said Schafer had been much less enthusiastic about U.S. labeling in that meeting than his remarks indicated on Friday. "The devil is in the details," said Buis. "[USDA's] original rule allowed this and I hope they can change it. But [if] they can't, we stand ready to introduce legislation to make the packers live up to the intent of the law." Buis also said USDA should not try to finalize the rule until a six-month trial period is complete. Meanwhile, Senate Agriculture Chairman Tom Harkin said in an e-mail Friday that USDA seemed to be "taking liberty with their interpretation" of country-of-origin labeling, which he said goes against the spirit of the law and the negotiated settlement between producer and packing industry representatives. "After all the debate on this issue, producers and consumers deserve a common sense rule that allows U.S. product to be labeled as intended," said Harkin.

nationaljournal.com

March 13, 2009

Office of the United States Trade Representative
Office of the General Counsel
600 17th Street NW
Washington, DC 20508

Re: Docket No. USTR-2009-0004

Transmitted electronically via regulations.gov

Dear Sir or Madam:

The undersigned consumer, family farm, agricultural, manufacturing and labor organizations respectively submit the following comments to Docket No. USTR-2009-0004, "WTO Dispute Settlement Proceeding Regarding United States—Certain Country of Origin Requirements." It is imperative that USTR vigorously defend these country of origin rules at the WTO.

The United States can prevail in this WTO dispute and preserve the country of origin labeling requirements. The merits of the case are strong and USTR can present a compelling case before a WTO tribunal. The U.S. Department of Agriculture has determined that the final country of origin rules do not violate the United States' international trade obligations under WTO rules, and we concur.[1] This WTO case is the first opportunity for the Obama Administration to demonstrate the President's pledge to "aggressively defend our rights" before WTO dispute panels.[2]

Most of these organizations have advocated for the enactment and implementation of country of origin labeling of food for more than a decade before these requirements were mandated in the 2002 and 2008 Farm Bills. Consumers have demanded the right to know where their food has been grown and harvested. The implementation of these regulations represents a significant step in disclosing essential information so consumers can make informed choices about the foods covered under the law.

Before a single label was applied to one steak or apple, these rules were challenged at the World Trade Organization as a barrier to trade. These labeling requirements are basic consumer protection measures that enjoy overwhelming popular support. USTR must not allow the WTO to overrule democratically enacted, consumer right-to-know labeling disclosure rules.

[1] 74 Fed. Reg. 2679.
[2] Executive Office of the President of the United States. 2009 Trade Policy Agenda. March 2, 2009 at 3.

The WTO COOL challenge by two of the United States' closest trading partners undermines key trade policy objectives of the Obama Administration. Defending these rules reaffirms President Barack Obama's long-standing commitment to COOL. A strong defense of COOL at the WTO also furthers the administration's commitment to the legitimacy of multilateral trade agreements. A WTO decision that overturned U.S. country of origin labeling program could exacerbate the public's skepticism of global commercial agreements.

It should be noted that although plaintiffs prevail in the majority of WTO cases, the WTO did uphold France's asbestos ban. In that case, a ruling overturning an obviously sensible public health policy could have damaged the credibility of the WTO dispute system. The merits of the asbestos case provided sufficient grounds for the WTO to rule in favor of the asbestos ban to prevent a public outcry from undermining the legitimacy of the organization.

While the organizations signed onto this comment all believe that the country of origin labeling requirements can and should be strengthened, the provisions of the final rule are not inconsistent with the United States' WTO obligations. Canada and Mexico contend that the COOL measure violates the national treatment provision of the WTO; the WTO Technical Barriers to Trade Agreement (TBT), or, in the alternative, the WTO Sanitary and Phytosanitary Agreement (SPS); the Agreement on Rules of Origin and the provisions covering nullification and impairment.[3]

Generally, country of origin labeling requirements that are facially neutral and apply the same requirements to all countries equally without discriminatory intent or impact should not be found to violate WTO rules. Further, the implemented rules cover unprocessed food products that are outside the scope of international standards referenced by the complainants.

The complainants maintain that even if country of origin labels do not violate the WTO TBT obligations, the final rule does not meet the WTO requirements for a food safety standard under the SPS agreement. However, country of origin labels do further a legitimate objective by providing consumers with information that may be used to protect their own health and by providing food safety regulators with information to be used as a first step in investigations of foodborne disease. Protection of consumer health and protection from deceptive practices are legitimate objectives consistent with the WTO TBT and the WTO SPS Agreement.

The complainants argue further that country of origin labels nullify and impair their anticipated benefits under the WTO. Therefore, Mexico and Canada will seek to present evidence of economic damage to their exporters, even if they are unable to prove to WTO dispute panelists that the U.S. rule violates the TBT or SPS agreements. Since the marketplace needs informed consumers in order to fulfill the legitimate objective of the prevention of deceptive practices, these informed consumers cannot be a barrier to trade.

This comment elucidates the merits of the case to defend country of origin labeling at the WTO. The initial complaints were lodged against the interim final rule issued in August 2008. Thus, the promulgation of final rules in January 2009 and the subsequent clarifying recommendations by

[3] WTO Dispute Settlement Body. Request for Consultations by Canada. United States—Certain Country of Origin Labeling (COOL) Requirements. WT/DS384/1. December 4, 2008; WTO Dispute Settlement Body. Request for Consultations by Mexico. WT/DS386/1. December 22, 2008.

the U.S. Secretary of Agriculture in February 2009 would require new requests for consultations at the WTO and the restarting of the WTO Dispute Settlement process. However, in the interim, USTR must continue to pursue the defense of country of origin labeling at the WTO. This temporary respite is unlikely to be the end of this dispute.

The Mexican government had stated that it planned to pursue its WTO complaint after the final rules were issued. Mexico is now awaiting the implementation of the final rules to re-file a new WTO complaint.[4] Although Canada decided to suspend its challenge once the final rules were issued, Canada's Agriculture Minister commented that although Canada was unlikely to immediately revive its WTO complaint, Canada could "move forward with [a WTO complaint] as soon as we see some negative responses."[5]

The Importance of Country of Origin Labeling to the Public

Country of origin labeling has broad and growing U.S. consumer support. This labeling provides vital information consumers need and want to make informed choices about where their food is from and offers farmers an opportunity to distinguish their products in an increasingly international marketplace. For years, consumer support for country of origin labeling has been consistently high, with numerous polls finding that well over 80 percent of the public wants country of origin labeling on their food.[6] A 2008 Consumers Union survey found overwhelming consumer support for COOL – 95 percent of people expressed support for always having country of origin labels.[7]

President Obama supported these goals in the Senate and reaffirmed these goals in the White House's agenda. In 2007, then-Senator Obama signed a dear colleague letter to include "common-sense" COOL rules in the Farm Bill language to facilitate "long-awaited and successful implementation of mandatory COOL."[8] The president's agenda includes fully implementing country of origin labeling "so that American producers can distinguish their products from imported ones."[9] U.S. Secretary of Agriculture Tom Vilsack reaffirmed the importance of country of origin labeling to give "consumers the information they need to make informed decisions while also allowing producers to differentiate their products."[10]

Country of Origin Labels Do Not Present a National Treatment Barrier

The WTO permits rules and regulations that treat imported and domestic goods equally. Country of origin rules can be applied in a facially neutral manner—all goods can be required to bear a

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[4] Barrera, Adriana. "Mexico says to keep fighting U.S. meat-label rule." *Reuters*, January 29, 2009; "Mexico to proceed against COOL at WTO." *Inside US Trade*. February 6, 2009.
[5] Egan, Louise. "Canada holds fire on new U.S. meat labeling rules." *Reuters*, February 25, 2009.
[6] Food & Water Watch. Press release. "New poll shows overwhelming consumer support for country of origin labeling." March 25, 2007.
[7] Consumer Reports National Research Center, "Food-Labeling Poll 2008." November 11, 2008 at 13.
[8] Senator Tim Johnson et al. letter to Senator Tom Harkin, Chairman of the Senate Committee on Agriculture, Nutrition & Forestry. September 25, 2007.
[9] *See* www.whitehouse.gov/agenda/rural/.
[10] Healy, Amber. "Vilsack jumps out of gate, names interim FSIS chief, sets COOL aside." *Food Chemical News*. February 2, 2009.

label clearly designating their country of origin. The final U.S. COOL requirements meet this basic test. The country of origin rules do not apply different label requirements on foreign imports than on domestically produced goods – both will be required to bear a label designating the source of the food.

Country of origin labels are neither uncommon nor new. The Government Accountability Office found that 48 U.S. trading partner nations require country of origin labeling for meat, produce, seafood and peanuts.[11] Canada adopted comprehensive country of origin voluntary guidelines that cover almost all food including processed foods like prepackaged soups in 2008. In order to use a "Product of Canada" label, manufacturers must use no more than 2 percent imported ingredients in their product.[12] In the United States, the U.S. Tariff Act of 1930 requires the country of manufacture (but not the origin of the food ingredients) to be disclosed on many products, including some retail-ready manufactured food products.[13] None of these long-standing requirements have ever been challenged as barriers to trade.

Importantly, the final COOL rule does not designate imported goods as "foreign" or "imported," it merely designates the source of the food in a clear, distinct manner that consumers can comprehend. It is not inconceivable that American consumers would prefer to purchase Canadian or Mexican food products instead of foods that were raised or harvested further away than these neighboring countries.

During the rulemaking process, the United States rejected a standard that would affirmatively label imported products but apply a presumptively domestic non-label standard for livestock or crops raised within U.S. borders.[14] A presumptive domestic standard would be considerably less facially neutral, because imported products would effectively bear a "foreign" brand or label. At least four countries that are trading partners with the United States require country of origin labels for imported products, but do not require that domestically produced products bear a country of origin label.[15]

Claimants Contend Disadvantage Under New COOL Rules

Canada and Mexico maintain that their exports are disadvantaged under COOL because American meatpacking firms will be less inclined to purchase their livestock for slaughter, that their exported livestock will receive lower prices than they would without country of origin labeling and that the cost to retailers will deter the purchase of imported meat products. This claim rests largely on the country of origin labeling requirements for meat and poultry products,

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[11] U.S. General Accounting Office. "Country-of-Origin Labeling: Opportunities for USDA and Industry to Implement Challenging Aspects of the New Law." GAO-03-780. August 2003 at 23-24.
[12] Kennedy, Lauren. "Farmers feel new labeling guidelines do not meet safety regulations for consumers." *Victoria (Can.) Star*. January 21, 2009.
[13] 74 Fed. Reg. 2661; Becker, Geoffrey S. Congressional Research Service.. "Country-of-Origin Labeling for Foods." 97-508ENR. June 3, 2005 at 1.
[14] USDA, Agricultural Marketing Service. 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 for comments. Docket No. AMS-LS-07-0081. July 2008 at 112.
[15] U.S. General Accounting Office. "Country-of-Origin Labeling: Opportunities for USDA and Industry to Implement Challenging Aspects of the New Law." GAO-03-780. August 2003 at 24.

especially those derived from imported livestock in comparison to livestock that was born, raised and slaughtered entirely within U.S. borders.

The final country of origin labeling requirements delineate four classes of labels for domestic and imported muscle cuts of meat. Products derived entirely from livestock born, raised and slaughtered in the United States can bear a "Product of the United States" label (known as category A). Imported meat products must bear a label designating the country of origin of the import (known as category D). The dispute centers on the two labels categories for imported livestock slaughtered in the United States and the extent to which these labels can be used for livestock of multiple countries of origin (both imported and domestic livestock).

Muscle cuts of meat from imported livestock would bear one of two different labels depending on whether or not the livestock was imported for immediate slaughter. Livestock that was imported and raised in the United States (for example, farrow-weight hogs that were imported but raised to slaughter-weight in the United States) would bear a label stating "Product of the United States and Country X" (known as label B), but livestock imported for immediate slaughter would bear a label stating "Product of Country X and the United States" (known as label C).[16]

The final rule allows a blurring of the label A, label B and label C categories if animals of different origins are commingled during a single production day at a slaughterhouse. The rule allows the application of category B labels for commingled meat processed during a single production day from both domestic livestock and imported livestock that was imported and raised in the United States but was not imported immediately prior to slaughter.[17] Additionally, the final rule effectively allows animals imported for immediate slaughter to bear a category B label if they are commingled with livestock that was imported but raised in the United States.[18]

For ground beef, the final country of origin labeling requirements allow meatpacking plants to list all the "reasonably possible countries of origin" that can include the origin of any animal in the manufacturer's inventory for the previous 60 days.[19]

Meatpackers have planned to utilize the category A labels for domestic livestock, but will maintain mixed country of origin labeling for some production. Tyson Foods planned to shift to category A labels for many lines of its premium lines of beef in early 2009 and all beef and pork products by mid-year.[20] Cargill began transitioning to category A "Product of USA" as well as category B mixed country of origin labels in separate production lines in early 2009.[21] JBS-Swift committed to providing "Product of USA" labels on applicable livestock and meat products.[22]

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[16] 74 Fed. Reg. 2661.
[17] 74 Fed. Reg. 2661.
[18] 74 Fed. Reg. 2662.
[19] 74 Fed. Reg. 2662.
[20] Clapp, Stephen. "Tyson says it will use USA label for COOL purposes." *Food Chemical News.* October 20, 2008.
[21] Clapp, Stephen. "Cargill joins Tyson in adopting USA COOL labels." *Food Chemical News.* October 27, 2008.
[22] Clapp, Stephen. "JBS-Swift joins competitors in embracing USA COOL labels." *Food Chemical News.* November 3, 2008.

The final labeling rules for both muscle cuts and ground beef provide significant flexibility that obviates the national treatment claims made by the complainants. This allows meatpackers to continue slaughtering imported livestock and commingle the animals with domestic livestock – either for muscle cuts or ground beef – and bear a label that includes the United States as one of the countries of origin. Consumer and farm advocates consider these loopholes in the rules overly weak – but as written, the final rule does not present a national treatment violation for imports.

Country of Origin Labeling Rules Do Not Violate WTO Technical Barriers to Trade Agreement Obligations

The claimants maintain that the country of origin labeling requirements violate the WTO TBT Agreement's rules because the U.S. measure does not use appropriate international standards regarding determination and labeling of the country of origin. The WTO TBT Agreement requires countries to utilize "relevant international standards" unless these standards would be an "ineffective or inappropriate means for the fulfillment of the legitimate objectives."[23] Most countries apply some form of country of origin labeling requirement and there is little conformity between the applications of these standards. The Codex Alimentarius standards established under the United Nations permit country of origin labeling for prepackaged foods "if its omission would mislead or deceive the consumer."[24]

Currently, almost all meat sold in American grocery stores – whether domestically or foreign raised or processed – is labeled as USDA-inspected or USDA-graded. The USDA inspection and grading label appearing on imported meat or meat processed from imported livestock can mislead consumers into believing they are purchasing domestically produced meat.[25] USDA noted in its interim final rule that one benefit of country of origin label identification is to remove informational distortions that existed without the labeling.[26] Country of origin labels provide the most effective and legitimate remedy to avoid such consumer deception.

Indeed, Canada claims that the Codex Alimentarius standards for labeling prepackaged foods should be the presumptive standard for country of origin labeling.[27] The final U.S. country of origin labeling requirements are in close alignment with these standards. The Codex standard requires that if a food "undergoes processing" in the importing country (i.e. the United States) that "changes its nature," the country where the processing occurs should be considered its country of origin.[28]

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[23] WTO Technical Barriers to Trade Agreement. Article 2.4.
[24] Codex Alimentarius. General Standard for the Labelling of Prepackaged Foods. Country of origin. Para. 4.5.1. Codex Stan. 1-1985 amended 2008.
[25] Hagstrom, Jerry. "Trade: conflicts over labeling likely to intensify in short term." *Congress Daily AM*. February 2, 2009.
[26] USDA, Agricultural Marketing Service. 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 for comments. Docket No. AMS-LS-07-0081. July 2008 at 117.
[27] Engan, Luke. "Canada sees possible WTO problems with new U.S. food label law." *Inside US Trade*. October 3, 2008.
[28] Codex Alimentarius. General Standard for the Labelling of Prepackaged Foods. Country of origin. Para. 4.5.2. Codex Stan. 1-1985 amended 2008.

The final country of origin labeling rules explicitly exclude processed food products from mandatory labeling requirements. The country of origin labeling interim final rule recognized that "substantial transformation" is the underlying basis for determining the country of origin under the WTO Agreement on Rules of Origin as well as the Codex' standard for prepackaged food.[29] The final rule for country of origin labels are not mandated for foods that undergo "specific processing resulting in a change in the character of the covered commodity."[30] For example, although country of origin rules cover ground beef, they do not apply to meatballs, meatloaf, or similar items made from ground beef containing binders and/or seasonings.[31] This language is substantively equivalent to the Codex standard for prepackaged foods referenced by the complainants.

Mexico further contends that the final country of origin labeling requirements are not justified as necessary to fulfill a legitimate objective and thus is an illegitimate requirement for imported goods.[32] However, the TBT agreement explicitly lists as a legitimate objective protection of consumer health and protection from deceptive practices.[33] Country of origin labels provide consumers with information that may be used to protect their own health and provide food safety regulators with information to trace foodborne disease.

Canada has also contended that country of origin labels provide little benefit to consumers.[34] The consumer benefits of country of origin labels are basic disclosure to consumers who overwhelmingly desire access to this important information and the ability of consumers to avoid potentially risky imported food products.

Although it is not possible to clearly quantify the economic benefit of country of origin labeling to consumers, the high level of consumer support for labeling suggests that the qualitative and intangible benefits are important to nearly all consumers. The increased disclosure on the label removes unnecessary confusion that currently exists in the marketplace and furthers a legitimate goal under internationally accepted country of origin labeling standards. Even the referenced standard by the claimants permit country of origin labeling for prepackaged foods "if its omission would mislead or deceive the consumer."[35]

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[29] USDA, Agricultural Marketing Service. 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 for comments. Docket No. AMS-LS-07-0081. July 2008 at 55-56.
[30] 74 Fed. Reg. 2660.
[31] USDA, Agricultural Marketing Service. 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 for comments. Docket No. AMS-LS-07-0081. July 2008 at 57.
[32] 74 Fed. Reg. 7498.
[33] WTO Technical Barriers to Trade Agreement. Art. 2.2.
[34] Brevetti, Rossella. "Mexico joins Canada in consultations with WTO on U.S. food labeling rule." *Daily Report for Executives*. December 22, 2008.
[35] Codex Alimentarius. General Standard for the Labeling of Prepackaged Foods. Country of origin. Para. 4.5.1. Codex Stan. 1-1985 amended 2008.

Country of Origin Labels Do Not Violate WTO Sanitary and Phytosanitary Agreement Obligations

Canada and Mexico also claim that country of origin labels violate the United States' obligations under the WTO Agreement on Sanitary and Phytosanitary Measures. This claim was included in case their claim on TBT is unsuccessful. This recognizes that TBT provisions "do not apply to sanitary or phytosanitary measures."[36]

The United States identified the objective for the proposed country of origin rules as "protection of consumers and human health" in its notification to the WTO's Committee on Technical Barriers to Trade in June 2007.[37] Measures that protect human health and life are covered by the SPS Agreement and are among the legitimate objectives under that agreement.[38]

The rising number of foodborne illness outbreaks associated with imported foods and increasing number of food recalls of contaminated or adulterated imported food justifies a basic measure that can help consumers know the source of their food. While the SPS agreement only allows measures to the "extent necessary" to protect human life or health,[39] the country of origin labeling rules are amongst the least trade restrictive measures that could further these objectives. Because country of origin labels are applied to products from all countries, including the United States, equally, the rules do not discriminate against any WTO members.[40]

Country of origin labels would provide consumers with important information generally and especially in the case of a foodborne illness outbreak related to imported foods when such information is necessary to protect their health.

Consumers are already turning to existing country of origin labeling as a tool to avoid the risks of foodborne contaminants and adulteration on imported food.[41] Country of origin labels can provide a first line of consumer defense during foodborne illness outbreaks. For example, if country of origin labeling had been in effect last year, consumers could have chosen to buy American tomatoes during the waning weeks of the 2008 salmonella-tainted produce outbreak that was ultimately associated with farms and a packinghouse in Mexico.[42]

Further, since much of the beef and pork sold in the United States comes from imported livestock processed in U.S.-based meatpacking plants, it has been impossible for consumers and regulators to associated meat-based foodborne illnesses with either imported or domestic meat. Canada has reported about a dozen cases of mad-cow disease (bovine spongiform encephalopathy) over the past several years that have led consumers to doubt Canada's capacity

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[36] WTO TBT. Art. 1.5.
[37] WTO Committee on Technical Barriers to Trade. United States Notification on Mandatory Country of Origin Labeling of Beef, Lamb, Pork, Perishable Agricultural Commodities, and Peanuts. G/TBT/N/USA/281, June 26, 2007.
[38] WTO Agreement on Sanitary and Phytosanitary Measures Art. 2.1.
[39] WTO SPS Agreement Art. 2.2.
[40] WTO SPS Agreement Art. 2.3.
[41] Jones, Chris, "Food safety worries makes consumers label-savvy." *Food Navigator*. March 28, 2008.
[42] Klipa, Jessica. "New labeling rules could help in future food advisories." *Bradenton (Florida) Herald*. June 25, 2008.

to prevent BSE. In the summer of 2008, USDA inspectors found systemic food safety problems at 11 Mexican meat and poultry plants that led the USDA to hold imported meat from these plants until laboratory tests could verify the safety of the products.[43] If meat products from these problematic exporters entered into the United States, COOL would allow U.S. consumers to choose whether or not to buy products from a country that apparently does not have the capacity to enforce meat and poultry hygiene rules.

Imported fresh fruits and vegetables that are covered under country of origin labeling are significantly more likely to contain foodborne pathogens and pesticides than domestically grown produce, according to U.S. government data, Imported fruit is four times more likely to have illegal levels of pesticides and imported vegetables are twice as likely to have illegal levels of pesticide residues as domestic fruits and vegetables.[44] Imported produce is more than three times more likely to contain the illness-causing bacteria *Salmonella* and *Shigella* than domestic produce.[45] The U.S. Food and Drug Administration has indicated that about half of the foodborne illness outbreaks in the United States are attributable to imported foods.[46]

More than half of Americans do not believe there are enough border inspectors to ensure the safety of imported food, according to a July 2008 Associated Press/Ipsos poll.[47] A 2008 Hart/Public Opinion Strategies poll found that 61 percent of Americans think that the government is doing too little to ensure that imported fresh fruit and vegetable products are free of contamination.[48]

The WTO SPS Agreement allows measures that "are not more trade restrictive than required to achieve the appropriate level of protection."[49] Labeling regimes are among the least trade restrictive measures to increase safety oversight of imported foods. Country of origin labels are an appropriate level of protection to provide consumers and regulators more information about the source of food and are consistent with the United States' WTO SPS obligations.

Country of Origin Rules Do Not Violate WTO Agreement on Rules of Origin

Finally, the claimants contend that the country of origin rules violate U.S. WTO commitments under the Agreement on Rules of Origin. The facially neutral application of country of origin labels as directed in the final rule is in conformity with this WTO agreement. The country of origin labels are not an "instrument to pursue trade objectives."[50] The use of the labels are not restrictive and are not more stringent than necessary.[51] The rules will be applied consistently and

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[43] "U.S., Mexico at odds over extent, remedy of beef safety problems in Mexican plants." *Inside US Trade*. August 25, 2008.
[44] FDA, Center for Food Safety and Applied Nutrition, "Pesticide Monitoring Program 2004-2006: Results and Discussion FY 2006," August 1, 2008.
[45] Beru, Nega and Peter A. Salsbury, "FDA's Produce Safety Activities," *Food Safety Magazine*, February/March 2002.
[46] FDA Office of Regulatory Affairs. "FY 2007 ORA Field Workplan," October 1, 2006, p. 03-20.
[47] Ipsos Public Affairs, AP/Ipsos, "Food Safety Study," Project #81-5681-91, July 10-14, 2008.
[48] Hart Research Associates/Public Opinion Strategies, Study #8657b, Pew Food Safety Survey, July 2008 at 4.
[49] WTO SPS Agreement Art. 5.5-5.6.
[50] WTO Agreement on Rules of Origin Art. 2(b).
[51] WTO Agreement on Rules of Origin Art. 2(b-c).

are based on a positive standard, not a presumptively domestic rule as noted earlier.[52] The country of origin rules were established entirely in conformity with the WTO Rules of Origin.

Conclusion

This WTO case is a kitchen table issue that will affect every American. USTR should provide total transparency and public input into this important WTO case. The President's Trade Policy Agenda properly identified the need for trade policy to "become more transparent" and the urgent need to "expand public participation."[53] USTR should affirmatively and promptly release the complainants' WTO filings to the public. If the case proceeds from a request for consultations to the formation of a WTO dispute panel, all U.S. government communications and non-governmental evidence presented in the dispute should be posted on the USTR web site. USTR should also urge the WTO to accept any *amicus curiae* briefs submitted in this dispute and/or submit any stakeholder brief as an attachment to the U.S. filing in this case.

USTR must successfully defend country of origin labeling against any and all WTO challenges to protect American consumers, fulfill the Obama Administration's agenda, and solidify its goal of strengthening the long-term legitimacy of the global trading system.

Signed:

Coalition for Prosperous America
Consumer Federation of America
Food & Water Watch
Institute for Agriculture & Trade Policy
Iowa Citizens for Community Improvement
Missouri Rural Crisis Center
National Family Farm Coalition
National Farmers Union
Organization for Competitive Markets
Public Citizen
Ranchers-Cattlemen Action Legal Fund USA (R-CALF USA)
Rural Advancement Foundation International – USA (RAFI-USA)
Western Organization of Resource Councils

[52] WTO Agreement on Rules of Origin Art. 2(e-f).
[53] Executive Office of the President of the United States. 2009 Trade Policy Agenda. March 2, 2009 at 3.

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

July 1, 2009

Docket No. WTO/DS384 and WTO/DS386 (Docket No. USTR-2009-0004)
United States Trade Representative
600 17th Street, NW.
Washington, DC 20508

Sent Via Federal eRulemaking Portal

Re: R-CALF USA Comments in Docket No. USTR-2009-0004: Notice; Request for Comments in the Matter of the WTO Dispute Settlement Proceeding Regarding United States – Certain Country of Origin Labeling Requirements

Dear United States Trade Representative:

R-CALF USA (Ranchers-Cattlemen Action Legal Fund, United Stockgrowers of America) is a national, nonprofit organization dedicated to ensuring the continued profitability and viability of the U.S. cattle industry. R-CALF USA represents thousands of U.S. cattle producers on trade and marketing issues. Our members are located across the U.S. and are primarily cow/calf operators, cattle backgrounders, and/or feedlot owners, and there are numerous affiliated organizations and various main-street businesses that are associate members. R-CALF USA appreciates this opportunity to comment on Docket No. USTR-2009-0004, found at 74 Fed. Reg., 24059-24061 ("USTR Notice").

I. INTRODUCTION

R-CALF USA believes it is fundamentally contrary to our U.S. Constitution for the United States Trade Representative ("USTR") to agree that foreign governments – specifically Canada and Mexico – have any standing whatsoever to bring a complaint against our constitutionally passed mandatory country-of-labeling ("COOL") law.

Our domestic COOL law imposes no duty or restrictions on any foreign government; it does not impose any limits on the volume or type of commodities that a foreign country may export to the United States; foreign countries are not obligated, in any way, to export to the United States any of the commodities that would be subject to our COOL law – hence, a foreign country's decision to market their products in the U.S. market and under the rules of the U.S. market is purely voluntary; and, COOL jurisdiction is exclusively limited to United States retailers, as defined exclusively by U.S. law, and subjects all covered commodities marketed by U.S. retailers to identical information requirements, regardless of where the commodities originate. Thus, our domestic COOL law does not affect international trade agreements and it is fundamentally

inappropriate for the World Trade Organization ("WTO") to even entertain a foreign country's complaint against our domestic COOL law. Further, and for the foregoing reasons, the USTR should not consent to WTO jurisdiction over our domestic COOL law.

Assuming, but only hypothetically, that United States officials had inadvertently surrendered the right of its sovereign U.S. citizens to govern themselves – as guaranteed by our U.S. Constitution – to the WTO, the complaints by Canada and Mexico against our domestic COOL law would still be baseless and wholly without legitimacy. **The following comments, therefore, are offered assuming a worst case, hypothetical scenario – that United States officials have surrendered the sovereign right of U.S. citizens to govern themselves to an international tribunal, the WTO:**

II. THE COMPLAINTS BY CANADA AND MEXICO AGAINST THE U.S. COOL LAW ARE BASELESS

The U.S. Department of Agriculture ("USDA"), after a prolonged and comprehensive rulemaking process that began in 2002[1], has determined that the final COOL rule is consistent with U.S. international trade obligations.[2] R-CALF USA agrees with USDA's determination and finds that Canada's and Mexico's complaints are baseless. Unfortunately, the complaints filed by Canada and Mexico fail to provide any factual allegations against the COOL law, are vague, and lack sufficient specificity to refute.[3] As such, the very process of this WTO dispute places U.S. citizens in the unenviable position of having to expend valuable resources to prove a negative – to prove that the COOL law does not violate the numerous international standards identified by Canada and Mexico without even the benefit of knowing how Canada or Mexico believe those standards have been breached. Because the burden of initiating a complaint is so minimal, this WTO dispute procedure appears to invite frivolous complaints from countries such as Canada and Mexico as it grants them an overly simplified forum to retaliate against U.S. citizens' exercise of their constitutional rights.

A. Contrary to the Complaints of Canada and Mexico, the U.S. COOL Law is Consistent with GATT 1994, Article III.4.

Article III: 4 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") addresses the national treatment of imported products and suggests that such imported products be accorded treatment no less favorable than that accorded to like products of national origin. The U.S. COOL law requires labeling of all covered commodities regardless of their specific origin, thereby imposing identical requirements on both U.S.-origin products and foreign-origin products. The only factor that determines what country or countries are included on the actual COOL label of a given covered commodity is a factual determination – the actual origin or origins of the covered commodity. There can be no bias or disparate treatment under this inherently just approach. In fact, it can be argued that the U.S. COOL law imposes stricter requirements on domestic meat products to be designated with a United States country of origin.

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[1] *See* 67 Fed. Reg. 63367-63375 (USDA initiated its rulemaking for mandatory COOL on Oct. 11, 2002).
[2] *See* 74 Fed. Reg. 2679, col. 1.
[3] *See* Request for Consultations by Canada, Addendum, 11 May 2009; *see also* Request for Consultations by Mexico, Addendum, 11 May 2009.

Only meat exclusively from an animal that is exclusively born, raised, and slaughtered in the United States may bear a label designating only the United States as the product's country of origin.[4] However, the COOL law's requirement for imported meat, i.e., meat from either Canada or Mexico, does not require such a rigorous origin standard in order to achieve a single-country designation for their respective countries. Meat imported from either Canada and Mexico enjoy a lesser standard under the COOL law as such meat retains its single-country origin based on the origin declared to U.S. Customs and Border Protection at the time the product entered the United States.[5] Thus, the COOL law actually provides meat imported from Canada and Mexico *more* favorable treatment than it provides to domestic meat, but this disparity could be corrected by Canada and Mexico by following U.S. Agriculture Secretary Vilsack's Feb. 20, 2009, request that all meat be labeled to designate where each of the production steps occurred, i.e., where the animal from which the meat was derived was born, raised, and slaughtered.[6] Because products from Canada and Mexico are accorded treatment no less favorable to national products, Canada's and Mexico's complaint must be rejected.

B. Contrary to the Complaints of Canada and Mexico, the U.S. COOL Law is Consistent with GATT 1994, Article IX: 2.

Article IX: 2 of the GATT 1994 addresses marks of origin and suggests that the difficulty or inconvenience of applying such marks of origin be reduced to a minimum; and it also emphasizes the necessity of protecting consumers against fraudulent or misleading indications. Any argument regarding alleged difficulty or inconvenience in affixing labels required by the COOL law to covered commodities is immediately contradicted by the various labels – including voluntary country of origin labels, brand labels, product description and weight labels, and nutrition labels – which are already applied to such commodities by either or both commodity suppliers, including meatpackers, and commodity retailers. It is frivolous for Canada and Mexico to claim that adding additional ink to a label to denote the products origin is unreasonably difficult or inconvenient. Moreover, the U.S. COOL law is intended to protect consumers against misleading indications that have resulted for years due to USDA's practice of affixing quality grade information, e.g., prime, choice, and select quality grade stamps, on meat derived from animals that originate in foreign countries, and of affixing the USDA's official inspection sticker, e.g., "U.S. INSPECTED AND PASSED BY DEPARTMENT OF AGRICULTURE." For many years these practices resulted in consumers being mislead to believe that all meat bearing such labels must be of U.S. origin. In the agency's interim final COOL rule, USDA referenced the removal of information distortions associated with not knowing the origin of products as a consumer-oriented benefit of the COOL law identified by several analysts.[7] R-CALF USA believes the COOL law's clarification of origin for a product that also bears the USDA grade stamp and inspection sticker is an even greater benefit. Canada's and Mexico's claim that the COOL law violates GATT 1994, Article IX: 2, is meritless.

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[4] See 74 Fed. Reg. 2706, col. 1 (note exception for animals imported from Alaska and Hawaii via Canada).
[5] *See* 74 Fed. Reg. 2706, col. 2.
[6] *See* Letter to Industry Participants, U.S. Secretary of Agriculture Tom Vilsack, February 20, 2009.
[7] *See* 73 Fed. Reg. 45128, col. 1.

C. Contrary to the Complaints of Canada and Mexico, the U.S. COOL Law is Consistent with GATT 1994, Article IX: 4.

Article IX: 4 of the GATT 1994 further addresses marks of origin and suggests that marks of origin should be applied in a manner that does not damage the product, materially reduce its value, or unreasonably increase costs. As discussed in Section B above, any claim by Canada and Mexico that COOL requirements would damage their products would be frivolous. As would any claim be that alleged COOL would reduce their products' value. While the attributes a consumer may ascribe to a particular country's food production and food safety regime may well affect a consumer's perceived value for a given product, any difference in the product's value would be the result of the consumer's knowledge about the specific country, not the result of a label that disclosed the product's origin. Finally, the issue of cost has been carefully and thoroughly weighed by USDA during its lengthy and comprehensive rulemaking process for COOL and neither Canada nor Mexico would be subject to any costs that would not also be borne by the U.S. in the administration of COOL. Because the COOL law is consistent with GATT 1994, Article IX: 4, Canada's and Mexico's claim must be rejected.

D. Contrary to the Complaints of Canada and Mexico, the U.S. COOL Law is Consistent with GATT 1994, Article X: 3.

Article X: 3 of the GATT 1994 address the publication and administration of trade regulations that would impact custom matters and potentially affect the sale or distribution of imports or exports, and suggests that such information be promptly communicated to governments and traders. As stated previously, the COOL law imposes no requirements on countries that export products to the United States. Section A, above, explains that imported products retain the same origin designation that is already declared, under preexisting law, to U.S. Customs and Border Protection at the time the product enters the United States. In addition, neither the COOL law nor the COOL rule require any certification requirements for imported livestock that do not already exist under preexisting law. And, both Canada and Mexico have had equal access to USDA rules and policy notices at the same time such information was available in the U.S. via the agency's website. There is no basis for Canada's and Mexico's claim that the COOL law is inconsistent with GATT 1994, Article X:3, and their claims must be rejected.

E. Contrary to the Complaints of Canada and Mexico, the U.S. COOL Law is Consistent with the Agreement on Technical Barriers to Trade, Article 2.

Article 2 of the Agreement on Technical Barriers to Trade ("TBT Agreement") essentially reiterates the provisions of the GATT 1994 Articles described in Sections A through D, above, and applies them in the context of technical regulations or standards that could raise potential trade barriers. The TBT Agreement expressly lists examples of technical regulations and standard deemed legitimate and they include, inter alia, national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. It is important to note that COOL does not constitute a technical regulation that would in any way restrict international trade. As previously stated, products exported from Canada and Mexico retain their origin designation pursuant to preexisting law. Thus, it is only while exported products are under U.S. jurisdiction, and only if the foreign

county's product is comingled, transformed, or, in the case of livestock, converted to meat in a U.S. slaughtering establishment, would the COOL law require the addition of another county's name on the origin label of a covered commodity exported by either Canada or Mexico and sold in a U.S. retail establishment.

As stated in Section B, above, the COOL law fulfills the TBT Agreement's objective of preventing ongoing and misleading indications on meat products, i.e., the USDA grade stamp and inspection stickers. In addition, the born, raised, and slaughtered standard required for meat bearing a U.S. designation has long been in use by USDA to ensure the safety of beef originating in foreign countries that were deemed susceptible to the introduction of foot and mouth disease ("FMD"). For example, the U.S. requires beef imported from Uruguay to be certified as originating from cattle that were born, raised, and slaughtered in Uruguay – the very same standard adopted by the COOL law for food products eligible to bear the USA label. The United States Code of Federal Regulations at 9 CFR state:

> **§ 94.22 Restrictions on importation of beef from Uruguay.**
>
> Notwithstanding any other provisions of this part, fresh (chilled or frozen) beef from Uruguay may be exported to the United States under the following conditions:
>
> (a) The meat is beef from bovines that have been born, raised, and slaughtered in Uruguay . . .
>
> (j) An authorized veterinary official of the Government of Uruguay certifies on the foreign meat inspection certificate that the above conditions have been met.

Thus, the transmittal of origin information, as required by the COOL law, is a practiced and proven means of ensuring food safety and food product integrity. Only with origin information can verification be made that the final food product underwent the food production practices of a particular country's food production regime. Such verification simply cannot be made through mere inspection of the final food product, either by official government inspectors or by consumers.

In addition, the COOL law provides consumers with a first line of defense in the event of food safety problems that have already occurred in foreign countries and that will likely reoccur in the future. For example, COOL could have benefited both food safety and the integrity of U.S.-produced beef following Canada's detection of bovine spongiform encephalopathy ("BSE") in May 2003. Consumers at that time could have used COOL to avoid Canadian beef products. However, COOL was not available and when the Canadian-origin cow slaughtered in Mabton, Washington, was diagnosed with BSE later that year, in late December 2003, consumers had no means of differentiating Canadian beef from U.S. beef and, therefore, no means of avoiding the beef from that cow that entered the U.S. food system before the disease was detected. A COOL label would have allowed consumers to avoid Canadian-labeled beef, rather than to avoid all

beef, while the Food Safety Inspection Service was conducting its recall of the 10,410 pounds of raw, undifferentiated beef thought to include meat derived from the infected cow.[8]

The recent melamine contamination problem further demonstrates that food production practices within a particular country impact food safety and food product integrity. Only by transmitting information as to origin can consumers distinguish food products based on the particular production regime to which the food product was subjected.

Further, past experience shows that reliance upon U.S. government inspections to ensure food safety is inadequate. For example, a report issued by the Office of Inspector General (OIG) in December 2005 revealed that Canadian plants were allowed to circumvent U.S. equivalency requirements for nearly two years:

> In July 2003, FSIS found that Canadian inspection officials were not enforcing pathogen reduction and HACCP system regulations. These same types of concerns were identified again in June 2005, almost 2 years later. However, as of September 2005, FSIS has not made a determination whether the identified concerns are serious enough to limit the import of Canadian products. As a result, FSIS has allowed the importation of almost 700 million pounds of meat and poultry from plants that did not receive daily inspection, a requirement for all U.S. meat and poultry plants. Additionally, FSIS allowed the import of over 261 million pounds of ready-to-eat meat and poultry that had not been subjected to finished product testing for *Listeria monocytogenes*, as is required of U.S. plants.[9]

Thus, there is a disparity between what the food safety inspection system is supposed to require of foreign plants that ship products to the U.S. and what is actually practiced. The result, according to the OIG report, is that "FSIS did not institute compensating controls to ensure that public health was not compromised while deficiencies were present."[10] Clearly, COOL affords consumers with the ability to achieve an additional level of food safety protection against breaches in food safety inspection systems that operate in plants in foreign countries.

For the reasons stated above, the TBT Agreement is not applicable to the COOL law and even if it was, the COOL law fulfills critical objectives that include, *inter alia*, national security, the prevention of deceptive practices and misleading indications, the protection of human health and safety, and the protection of animal health. As a result, Canada's and Mexico's claims are baseless and must be rejected.

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[8] *See* Transcript of Tele-News Conference Briefing Updating Presumptive Positive BSE Case, Washington, D.C., December 24, 2003, available at http://www.usda.gov/wps/portal/!ut/p/_s.7_0_A/7_0_1OB/.cmd/ad/.ar/sa.retrievecontent/.c/6_2_1UH/.ce/7_2_5JM/.p/5_2_4TQ/.d/3/_th/J_2_9D/_s.7_0_A/7_0_1OB?PC_7_2_5JM_contentid=2003%2F12%2F0435.html&PC_7_2_5JM_parentnav=TRANSCRIPTS_SPEECHES&PC_7_2_5JM_navid=TRANSCRIPT#7_2_5JM

[9] Audit Report Food Safety and Inspection Service Assessment of the Equivalence of the Canadian Inspection System, U.S. Department of Agriculture, Office of Inspector General, Northeast Region, Report No. 24601-05-Hy, December 2005, at 4, hereafter referred to as "OIG Audit Report."

[10] OIG Audit Report at 4.

F. Contrary to the Complaints of Canada and Mexico, the U.S. COOL Law is Consistent with the Agreement on the Application of Sanitary and Phytosanitary Measures, Articles 2, 5, and 7.

Articles 2, 5, and 7 of the Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement") suggests that countries may implement legitimate sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health. Clearly, the examples provided in Section E, above, demonstrate that the U.S. COOL law is vital to the achievement of these national security-related objectives and is fully consistent with Articles 2, 5, and 7 of the SPS Agreement. Canada and Mexico have no basis to challenge the U.S. COOL law under the SPS Agreement.

G. Contrary to the Complaints of Canada and Mexico, the U.S. COOL Law is Consistent with the Agreement on Rules of Origin, Article 2.

Article 2 of the Agreement on Rules of Origin ("ARO") essentially suggests that rules of origin should not create restrictive, distorting, or disruptive effects on international trade, should not impose stricter standards on imports than are imposed on domestic products, and should be based on a positive standard. As stated in Section A, above, the U.S. COOL does not impose a new standard on products entering the United States. Further, and as previously discussed above, the COOL law does not discriminate against imported products and imposes labeling requirements on all covered commodities, regardless of their origins. And, as specifically discussed in Section E, above, the standards applied under the COOL law serve the positive purpose of ensuring the health and safety of human and animal health.

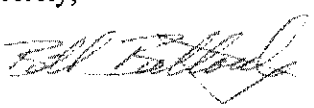
H. Contrary to the Complaints of Canada and Mexico, the U.S. COOL Law Does Not Nullify or Impair any Benefits They Claim Accrue to Them.

Attached hereto is the R-CALF USA presentation provided to the USTR on June 1, 2009, and that provides statistical data that show that Canada's and Mexico's claims that the U.S. COOL Law somehow nullifies or impairs benefits they believe are owed to them are baseless.

III. CONCLUSION

R-CALF USA appreciates the opportunity to submit these comments and it urges the USTR to take deliberate and decisive steps to quash Canada's and Mexico's attempts to interfere with the United States sovereign right to inform U.S. consumers, using the most accurate and truthful means possible, about the origins of the food they purchase for themselves and their families.

Sincerely,



Bill Bullard
CEO, R-CALF USA

Attachment

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

July 22, 2009

The Honorable Tom Vilsack
Secretary of Agriculture
U.S. Department of Agriculture
1400 Independence Ave., S.W.
Washington, D.C. 20250

Sent via facsimile and U.S. Mail: 202-720-6314

Re: Recently Disclosed Documents Show COOL Rule Was Compromised by Quid Pro Quo Exchange at WTO

Dear Secretary Vilsack:

R-CALF USA does not know whether you have been informed of how the final rule for mandatory country-of-origin labeling (COOL) came to contain provisions that effectively undermined the program's purpose and defied Congress' intent. We recently obtained copies of correspondence dated January 7, 2009 between Ambassador John Gero, Premanent Mission of Canada to the WTO, and Ambassador Peter Allgeier, Permanent Mission of the United States to the WTO, that sheds considerable light on this subject. Attached to this letter are the copies of the referenced correspondence.

These correspondences between U.S. and Canadian Ambassadors to the WTO indicate that the decision to retain and solidify in the U.S. Department of Agricultfinal COOL rule the most troublesome and misleading provisions of the U.S. Department of Agriculture's (USDA's) interim final COOL rule – the ability for packers and retailers to misinform consumers with multi-country labels instead of 'Product of USA' labels for those commodities produced exclusively in the United States - was made not to achieve the public interest, but rather, to avoid conflict with Canada.

These correspondences suggest that USDA's concessions were the result of a quid pro quo exchange whereby Canada's requests would be honored in return for Canada's promise not to pursue a WTO dispute for a period of eight months. Further, these correspondences indicate that USDA had granted *a foreign country* – Canada – the opportunity to dictate the final contents of the Final COOL Rule, while U.S. consumers and producers were afforded no such opportunity.

We do not know if this type of decision making was a common practice under the previous Administration. Nor do we know whether other rulemakings, such as those involving USDA's relaxation of safeguards against bovine spongiform encephalopathy (BSE), were likewise subjected to the granting of preferential treatment to foreign countries or other interests. However, we strongly believe that your Administration should review whether similar quid pro

quo arrangements controlled any other agency decisions, including rulemakings, and take decisive action to reverse any decisions that were so influenced.

Based on this available evidence that specifically relates to the final COOL rule, we urge you to immediately reverse the inappropriate concessions accorded to Canada during the previous Administration and to promulgate a new final COOL rule that conforms to Congress' clear intent to accurately inform consumers as to the origins of food covered under COOL.

Thank you for your consideration of this important matter and please let me know if we can provide any additional information.

Sincerely,

Bill Bullard
CEO, R-CALF USA

PERMANENT MISSION OF THE UNITED STATES TO THE WORLD TRADE ORGANIZATION
MISSION PERMANENTE DES ÉTATS-UNIS D'AMÉRIQUE
AUPRÈS DE L'ORGANISATION MONDIALE DU COMMERCE
11, ROUTE DE PRÉGNY
1292 CHAMBÉSY – GENEVA

January 7, 2009

H.E. Mr. John Gero
Ambassador
Permanent Mission of Canada to the WTO
Avenue de l'Ariana 5
1202 Geneva

Dear Mr. Ambassador,

I refer to Canada's request of December 1, 2008 for consultations with the United States of America ("United States") pursuant to Articles 1 and 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article XXII of the *General Agreement on Tariffs and Trade 1994*, Article 14 of the *Agreement on Technical Barriers to Trade*, Article 11 of the *Agreement on the Application of Sanitary and Phytosanitary Measures*, and Article 7 of the *Agreement on Rules of Origin*, which was circulated in document WT/DS384/1.

Pursuant to this request, the United States and Canada held constructive consultations in Washington, D.C. on December 16, 2008. During these consultations, Canada described its concerns about certain mandatory country of origin labeling provisions of the United States under the *Agricultural Marketing Act of 1946*, as amended by the *Food, Conservation, and Energy Act, 2008*, and as implemented by the U.S. Department of Agriculture Interim Final Rule on *Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts* ("Interim Final Rule"), published on August 1, 2008 (73 Fed. Reg. 45106).

The United States has informed Canada that it intends to issue a Final Rule on *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") in the near future. Such a Final Rule will replace the Interim Final Rule, implementing the *Agricultural Marketing Act of 1946*, as amended by the *Farm, Security, and Rural Investment Act of 2002* and the *Food, Conservation, and Energy Act, 2008*. Through the letter of December 1, 2008 from Canada's Minister of International Trade to the United States Trade Representative and the attachment to that letter, Canada informed the United States of its request to have the following elements[1] included in the Final Rule:

[1] These elements are explained more fully in the attachment to the December 1, 2008 letter from Canada's Minister of International Trade to the United States Trade Representative.

(a) maintaining the flexibility to use a Category B[2] label on covered commodities derived from Category A[3] animals when Category A animals and Category B animals are commingled during a single production day;

(b) expanding the flexibility to use a Category C[4] label on covered commodities derived from Category B animals, without any requirement that there must be commingling between B and C animals; and

(c) establishing the flexibility to use a Category B label on covered commodities derived from Category C animals when Category B animals and Category C animals are commingled during a single production day.

A copy of the attachment to the letter from Canada's Minister of International Trade to the United States Trade Representative is attached hereto.

The United States has carefully considered Canada's concerns and its request regarding the inclusion of the three elements in the Final Rule described above.

The United States requests Canada to confirm that if the three elements described above are included in the Final Rule, Canada will not request the establishment of a panel for a period of at least eight months from the date of publication of the Final Rule in the U.S. Federal Register in its dispute WT/DS384, *United States – Certain Country of Origin Labeling [COOL] Requirements*, or initiate or pursue any other WTO dispute settlement proceedings regarding the *Agricultural Marketing Act of 1946*, as amended by the *Farm, Security, and Rural Investment Act of 2002* and the *Food, Conservation, and Energy Act, 2008*, including as implemented by the Final Rule, during the eight month period from the date of publication of the Final Rule, provided that the Final Rule continues to contain the three elements described above during that period.[5]

The United States proposes that at the end of the eight month period from the date of publication of the Final Rule described above, the United States and Canada will consult regarding the *Agricultural Marketing Act of 1946*, as amended by the *Farm, Security, and Rural Investment Act of 2002* and the *Food, Conservation, and Energy Act, 2008*, including as implemented by the Final Rule.

The United States proposes that in these consultations, which could include a continuation of the consultations held on December 16, 2008, the United States and Canada would explore the possibility of a mutually agreed solution regarding: 1) dispute WT/DS384, *United States – Certain Country of Origin Labeling [COOL] Requirements*, and 2) the COOL provisions of the

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[2] Category B refers to § 282(2)(B) of the *Agricultural Marketing Act of 1946*, as amended by the *Food, Conservation, and Energy Act, 2008* § 11002.
[3] Category A refers to § 282(2)(A) of the *Agricultural Marketing Act of 1946*, as amended by the *Food, Conservation, and Energy Act, 2008* § 11002.
[4] Category C refers to § 282(2)(C) of the *Agricultural Marketing Act of 1946*, as amended by the *Food, Conservation, and Energy Act, 2008* § 11002.
[5] This is without prejudice to the proceedings in WT/DS357, United States – Subsidies and Other Domestic Support For Corn and Other Agricultural Products.

Agricultural Marketing Act of 1946, as amended by the *Farm, Security, and Rural Investment Act of 2002* and the *Food, Conservation, and Energy Act, 2008*, including as implemented by the Final Rule.

The proposals of the United States described in this letter are without prejudice to the rights and obligations of the United States and Canada under the *Marrakesh Agreement Establishing the World Trade Organization*.

Sincerely,

Peter F. Allgeier

Peter F. Allgeier
Ambassador

Permanent Mission of Canada
to the United Nations
and the World Trade Organization

Mission permanente du Canada
auprès des Nations Unies
et de l'Organisation mondiale du commerce

Avenue de l'Ariana
1202 Geneva, Switzerland
Tel: (41.22) 919-9214, Fax: 919-9254

January 7, 2009

H.E. Mr. Peter Allgeier
Ambassador
Permanent Mission of the United States
to the WTO
11, route de Pregny
1292 Genève

Dear Mr. Ambassador,

Thank you for your letter, dated January 7, 2009, which states as follows:

> "I refer to Canada's request of December 1, 2008 for consultations with the United States of America ("United States") pursuant to Articles 1 and 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article XXII of the *General Agreement on Tariffs and Trade 1994*, Article 14 of the *Agreement on Technical Barriers to Trade*, Article 11 of the *Agreement on the Application of Sanitary and Phytosanitary Measures*, and Article 7 of the *Agreement on Rules of Origin*, which was circulated in document WT/DS384/1.
>
> Pursuant to this request, the United States and Canada held constructive consultations in Washington, D.C. on December 16, 2008. During these consultations, Canada described its concerns about certain mandatory country of origin labeling provisions of the United States under the *Agricultural Marketing Act of 1946*, as amended by the *Food, Conservation, and Energy Act, 2008*, and as implemented by the U.S. Department of Agriculture Interim Final Rule on *Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts* ("Interim Final Rule"), published on August 1, 2008 (73 Fed. Reg. 45106).
>
> The United States has informed Canada that it intends to issue a Final Rule on *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") in the near future. Such a Final Rule will replace the Interim Final Rule, implementing the *Agricultural Marketing Act of 1946*, as amended by the *Farm, Security, and Rural Investment Act of 2002* and the *Food, Conservation, and Energy Act, 2008*. Through the letter of December 1, 2008 from Canada's Minister of International Trade to the United States Trade Representative and

Canada

the attachment to that letter, Canada informed the United States of its request to have the following elements[1] included in the Final Rule:

(a) maintaining the flexibility to use a Category B[2] label on covered commodities derived from Category A[3] animals when Category A animals and Category B animals are commingled during a single production day;

(b) expanding the flexibility to use a Category C[4] label on covered commodities derived from Category B animals, without any requirement that there must be commingling between B and C animals; and

(c) establishing the flexibility to use a Category B label on covered commodities derived from Category C animals when Category B animals and Category C animals are commingled during a single production day.

A copy of the attachment to the letter from Canada's Minister of International Trade to the United States Trade Representative is attached hereto.

The United States has carefully considered Canada's concerns and its request regarding the inclusion of the three elements in the Final Rule described above.

The United States requests Canada to confirm that if the three elements described above are included in the Final Rule, Canada will not request the establishment of a panel for a period of at least eight months from the date of publication of the Final Rule in the U.S. Federal Register in its dispute WT/DS384, *United States – Certain Country of Origin Labeling [COOL] Requirements*, or initiate or pursue any other WTO dispute settlement proceedings regarding the *Agricultural Marketing Act of 1946*, as amended by the *Farm, Security, and Rural Investment Act of 2002* and the *Food, Conservation, and Energy Act, 2008*, including as implemented by the Final Rule, during the eight month period from the date of publication of the Final Rule, provided that the Final Rule continues to contain the three elements described above during that period.[5]

The United States proposes that at the end of the eight month period from the date of publication of the Final Rule described above, the United States and Canada will consult

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[1] These elements are explained more fully in the attachment to the December 1, 2008 letter from Canada's Minister of International Trade to the United States Trade Representative.

[2] Category B refers to § 282(2)(B) of the *Agricultural Marketing Act of 1946*, as amended by the *Food, Conservation, and Energy Act, 2008* § 11002.

[3] Category A refers to § 282(2)(A) of the *Agricultural Marketing Act of 1946*, as amended by the *Food, Conservation, and Energy Act, 2008* § 11002.

[4] Category C refers to § 282(2)(C) of the *Agricultural Marketing Act of 1946*, as amended by the *Food, Conservation, and Energy Act, 2008* § 11002.

[5] This is without prejudice to the proceedings in WT/DS357, *United States – Subsidies and Other Domestic Support For Corn and Other Agricultural Products*.

regarding the *Agricultural Marketing Act of 1946*, as amended by the *Farm, Security, and Rural Investment Act of 2002* and the *Food, Conservation, and Energy Act, 2008*, including as implemented by the Final Rule.

The United States proposes that in these consultations, which could include a continuation of the consultations held on December 16, 2008, the United States and Canada would explore the possibility of a mutually agreed solution regarding: 1) dispute WT/DS384, *United States – Certain Country of Origin Labeling [COOL] Requirements*, and 2) the COOL provisions of the *Agricultural Marketing Act of 1946*, as amended by the *Farm, Security, and Rural Investment Act of 2002* and the *Food, Conservation, and Energy Act, 2008*, including as implemented by the Final Rule.

The proposals of the United States described in this letter are without prejudice to the rights and obligations of the United States and Canada under the *Marrakesh Agreement Establishing the World Trade Organization*."

I am pleased to confirm that if the three elements described in your letter are included in the Final Rule, Canada will not request the establishment of a panel for a period of at least eight months from the date of publication of the Final Rule in the U.S. Federal Register in its dispute WT/DS384, *United States – Certain Country of Origin Labeling [COOL] Requirements*, or initiate or pursue any other WTO dispute settlement proceedings regarding the *Agricultural Marketing Act of 1946*, as amended by the *Farm, Security, and Rural Investment Act of 2002* and the *Food, Conservation, and Energy Act, 2008*, including as implemented by the Final Rule, during the eight month period from the date of publication of the Final Rule, provided that the Final Rule continues to contain the three elements described in your letter during that period.*

I am also pleased to confirm Canada's acceptance of your proposal that at the end of the eight month period from the date of publication of the Final Rule described in your letter, the United States and Canada will consult regarding the *Agricultural Marketing Act of 1946*, as amended by the *Farm, Security, and Rural Investment Act of 2002* and the *Food, Conservation, and Energy Act, 2008*, including as implemented by the Final Rule. In these consultations, which could include a continuation of the consultations held on December 16, 2008, Canada and the United States would explore the possibility of a mutually agreed solution regarding: 1) dispute WT/DS384, *United States – Certain Country of Origin Labeling [COOL] Requirements*, and 2) the COOL provisions of the *Agricultural Marketing Act of 1946*, as amended by the *Farm, Security, and Rural Investment Act of 2002* and the *Food, Conservation, and Energy Act, 2008*, including as implemented by the Final Rule.

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* This is without prejudice to the proceedings in WT/DS357, *United States – Subsidies and Other Domestic Support For Corn and Other Agricultural Products*.

Canada's acceptance of your proposals is without prejudice to the rights and obligations of Canada and the United States under the *Marrakesh Agreement Establishing the World Trade Organization.*

Yours sincerely,

John Gero
Ambassador
Permanent Representative to the WTO

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

August 22, 2012

The Honorable Ron Kirk
United States Trade Representative
600 17th Street NW
Washington, DC 20208

The Honorable Tom Vilsack
United States Secretary of Agriculture
1400 Independence Ave., S.W.
Washington, D.C. 20250

Dear Ambassador Kirk and Secretary Vilsack:

R-CALF USA appreciated the opportunity to participate in the August 10, 2012 stakeholders' conference-call regarding the status of country-of-origin labeling (COOL) sponsored by the Office of the U.S. Trade Representative (USTR) and attended by officials from the U.S. Department of Agriculture (USDA).

As a follow-up to that call, R-CALF USA would like to offer its suggestions regarding how it believes USTR and USDA should proceed to ensure that U.S. cattle producers and U.S. consumers receive the maximum benefits from COOL in the wake of the adverse World Trade Organization (WTO) panel determination that found U.S. COOL to be inconsistent with the WTO's national treatment standard.

Based on our understanding of the information provided by USTR during the August 10 conference call, the principal objection raised by the WTO against U.S. COOL is that COOL does not make a legitimate regulatory distinction. According to the WTO, the methodology employed under COOL to verify the origins of cattle creates a disproportionate record-keeping burden on upstream cattle suppliers, in particular suppliers of Canadian and Mexican cattle, when compared to the relatively limited origin-information actually communicated to beef purchasers via the various COOL labels.

The following suggestions are intended to both reduce the record keeping requirements on all live cattle, including those imported from Canada and Mexico, and to make the origin information communicated to retail beef purchasers more accurate:

1. USDA Should Initiate a Rulemaking to Verify Origin Information for Live Cattle Using a Presumption of Domestic Origin Methodology

a. Labeling beef from cattle originating in the U.S., Canada and Mexico.

As a condition of entry into the United States, cattle from Canada and Mexico that are not imported for immediate slaughter are currently required to be permanently identified with an official foreign marking that denotes their respective, foreign country of origin.[1] There is no comparable requirement on domestic cattle. Therefore, cattle entering the United States from

[1] *See* 9 C.F.R. § 93.427(c), § 93.436(b)(2).

either Canada or Mexico are readily distinguishable as to their country of origin when they reach the slaughterhouse where their permanent, foreign markings can be visually inspected. Consequently, all cattle arriving at the slaughterhouse that do not bear a permanent, foreign marking can be nothing other than cattle exclusively born and raised in the United States. Thus, no record keeping is needed from any upstream supplier to distinguish domestic cattle from imported cattle, other than from the meatpacker that would remove foreign markings from the carcass after the live cattle are visually inspected and slaughtered.

Presuming all cattle presented for slaughter that are void of official foreign markings to be exclusively born and raised in the United States is an accurate means of verifying that the beef derived from those cattle is eligible for the USA label without the need for any accompanying documentation or recordkeeping. Similarly, relying on the mandatory foreign markings affixed to imported cattle from Canada and Mexico is an accurate and recordkeeping-free means to verify the origins of cattle from which the beef would be eligible for a label that contains the particular foreign country and the United States, *i.e.*, a mixed-origin label.

The origins of cattle imported for immediate slaughter are known by the packer by virtue of the official seal accompanying the transit vehicle.[2] Therefore, the beef from such cattle would be eligible for the appropriate mixed-country label, also without any additional record-keeping burden.

b. Labeling beef from cattle originating in countries other than the U.S., Canada and Mexico, along with hogs from any country

The presumption of domestic origin methodology discussed above, along with reliance on foreign markings to determine a live animal's eligibility for a particular COOL label after it is slaughtered, without any additional documentation or recordkeeping, can be readily employed for imported cattle from countries other than Canada and Mexico, as well as for imported hogs from any country that is not already subject to a mandatory marking requirement. The means to accomplish this could be achieved by simply removing livestock from the U.S. Department of Treasury's list of products that are currently exempt from the general U.S. requirement that all imported products bear origin markings as a pre-condition to entry into the United States.[3]

Upon removal of livestock from the list of the relatively few products that are currently exempt from the general U.S. requirement that all imported products be marked with a mark of origin, all imported livestock would bear a permanent foreign marking upon entry into the United States, just as imported cattle from Canada and Mexico are so marked. Therefore, the origins of all livestock, including hogs, presented for slaughter could be visually verified at the

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[2] *See* 9 C.F.R. §§ 93.420, 93.429, and 93.436(a).

[3] Unlike beef and most other imported products, cattle imported into the United States are exempt from the country-of-origin marking requirements of U.S. law due to cattle's inclusion on the so-called "J-List." The J-List was established in 1938 as an amendment to the Tariff Act of 1930. (*See* 19 U.S.C. §1304(a)(3)(J)). The U.S. Treasury Department designated items for inclusion on the J-List in 1938 and 1939, and cattle, along with all other livestock and unprocessed agricultural commodities, have been included in the J-List since its creation. (The current list of items included in the J-List is at 19 C.F.R. § 134.33).

slaughterhouse without the need for any additional documentation or recordkeeping. And, all livestock presented for slaughter that are void of any foreign markings would remain eligible for the USA label as they could be nothing other than born and raised in the United States.

2. **USDA Should Initiate a Rulemaking to Disallow a Mixed-Origin Label on Meat that Is Derived from Animals Exclusively Born, Raised, and Slaughtered in the United States.**

The 2008 Farm Bill clearly states that mixed-origin labels apply to products that are not exclusively born, raised, and slaughtered in the United States. The final COOL rule, however, undermines Congress' intent by including a loophole that allows packers to label muscle cuts of meat derived from animals that are exclusively born, raised, and slaughtered in the U.S. as a product of mixed origin if it is processed by a packer on the same day as foreign products. Not only does this loophole undermine Congress' intent, but also, it deceives consumers by misinforming them as to the true origins of their meat purchases. It also directly harms producers who market cattle that are born, raised, and slaughtered in the United States. This is because consumers are unable to accurately distinguish exclusively U.S. beef from beef of mixed origin, thus depriving domestic producers the opportunity to have their resulting beef products selected by consumers who may prefer an exclusively domestic beef product.

3. **USDA Should Initiate a Rulemaking to Disallow Countries to be Listed on a Ground Meat Label if Meat from Such Countries Is not Included in the Ground Beef Product.**

The final COOL rule allows packers and processors of ground beef to include the United States on a ground beef label provided at least some United States meat was used by the packer or processor within the previous 60 days. This provision allows packers and processors to misuse the good reputation of U.S. cattle producers to market exclusively foreign beef during 59 of each 60-day period. This provision facilitates the conveyance of fraudulent information to U.S. consumers. It also harms domestic cattle producers by misleading consumers that may choose products that contain at least some U.S. meat for the purpose of maintaining demand for U.S. livestock marketed by U.S. farmers and ranchers. The United States should not be listed on any product label if that product does not include meat from the United States.

4. **USDA Should Initiate a Rulemaking to Include Products that Undergo Minor Processing as Covered COOL Commodities.**

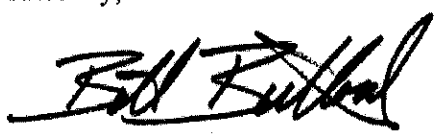
The final COOL rule improperly reduced the benefits of COOL for both consumers and producers by excluding otherwise covered commodities from COOL labeling requirements if those commodities underwent such minor processing as cooking, smoking, curing, breading or adding tomato sauce. The effect of this provision is to deprive consumers of the benefits of COOL on a wide range of food products that Congress certainly did not intend to be excluded from COOL requirements.

Conclusion

R-CALF USA firmly believes its first suggestion discussed above will eliminate the WTO's concern that COOL imposes a disproportionate burden on upstream suppliers when compared to the limited information actually conveyed to consumers. R-CALF USA further believes its remaining three suggestions will greatly increase the accuracy of information communicated to U.S. consumers via country-of-origin labels, thus maximizing the benefits of COOL for U.S. consumers and U.S. producers.

R-CALF USA would be pleased to discuss and/or further explain its suggestions to you. Please contact me at 406-670-8157 if such an opportunity would be helpful.

Sincerely,



Bill Bullard, CEO

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

April 9, 2013

Julie Henderson, Director
COOL Division, Livestock, Poultry, and Seed Program
Agricultural Marketing Service
U.S. Department of Agriculture (USDA)
STOP 0216
1400 Independence Avenue SW., Room 2620–S
Washington, DC 20250–0216.

Via Federal eRulemaking Portal: ***http://www.regulations.gov.***

Re: **R-CALF USA Submission of Petitions in Document No. AMS–LS–13–0004 (RIN 0581-AD29): 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**

Dear Director Henderson,

The Ranchers-Cattlemen Action Legal Fund, United Stockgrowers of America (R-CALF USA) appreciates this opportunity to submit petitions it has gathered that are directly relevant to and in support of the U.S. Department of Agriculture (USDA) Agricultural Marketing Service's (AMS') proposed rule: *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* (proposed rule), published at 78 Fed. Reg., 15645-653 (March 12, 2013).

R-CALF USA is the largest producer-only cattle trade association in the United States. It is a non-profit association that represents thousands of U.S. cattle farmers and ranchers in 45 states. R-CALF USA works to sustain the profitability and viability of the U.S. cattle industry, a vital component of U.S. agriculture. Its membership consists primarily of cow-calf operators, cattle backgrounders and feedlot owners. Various main street businesses are associate members of R-CALF USA.

During the interim period between the November 2012 World Trade Organization's (WTO's) adverse ruling against the United States' mandatory country of origin labeling (COOL) measure and before the publication of the proposed rule, R-CALF USA joined with the Made in

the USA Foundation to circulate petitions to demonstrate the resolve of U.S. citizens to preserve and defend the United States' sovereign right to pass and implement COOL so U.S. consumers can discern where their food originates.

Two separate petitions were circulated, both addressed to President Barack Obama, Secretary of Agriculture Tom Vilsack and U.S. Trade Representative Ron Kirk. The first petition was circulated via R-CALF USA's facebook page and subsequently circulated via the online service, "Causes," which is available at http://www.causes.com/actions/1688877-fight-for-country-of-origin-labeling. Attached hereto are the names of the 12,688 people that electronically signed this petition that states:

> We the undersigned citizens of the United States, hereby petition the U.S. government to enforce the Country of Origin Labeling Act (COOL) and to disregard "rulings" of the World Trade Organization finding that COOL is a technical barrier to trade.
>
> The U.S.' Country of Origin Labeling Act (COOL) was passed in Washington as part of the 2002 Farm Bill. Starting in 2008, COOL ordered U.S. retailers to notify their customers, by way of labeling, on the sources of many meats, fish, fruits, vegetables, and some nuts sold in their stores.
>
> In November of 2011, the World Trade Organization (WTO) declared that the law violated parts of the WTO's Agreement on Technical Barriers to Trade (TBT). Even though Washington appealed the ruling last March, the WTO Appellate Body upheld its decision, stating that COOL "has a detrimental impact on imported livestock."
>
> As citizens of the United States, we reject the WTO's authority to undermine our domestic laws. COOL does not discriminate against any country by requiring labeling. Rather, it gives consumers the right to decide whether to buy U.S. or imported meat. We ask that our government defend this consumer right and take a stand for our nation's sovereignty by disregarding the WTO's ruling on COOL.

The second petition was circulated in a hard copy format by R-CALF USA members from across the United States and by the Made in the USA Foundation. Attached hereto are the names of the 1,912 people in the United States the signed the petitions circulated by R-CALF USA:

> We the undersigned citizens of the United States, hereby petition the U.S. government to enforce the Country of Origin Labeling Act (COOL) and to disregard "rulings" of the World Trade Organization finding that COOL is a technical barrier to trade:

The 14,600 total people that signed one of the two petitions mentioned above specifically asked that the U.S. government enforce COOL and disregard the rulings of the WTO that found

COOL to be a technical barrier to trade. In addition, the 12,688 people who electronically signed the first petition additionally requested that the U.S. government defend the right of consumers to be informed of the origins of their food and defend our nation's sovereignty, both of which are to be accomplished by disregarding the WTO's adverse ruling on COOL.

R-CALF USA firmly believes that the proposed rule is a favorable and welcomed response to the specific requests made by the 14,600 people who signed the petitions mentioned above for the following reasons:

1. As a favorable response to the petitioners' request that the U.S. government enforce COOL, the proposed rule would provide more, and more specific information to consumers by requiring labels on muscle cuts of meat to state the country where each of the three production steps (*i.e.*, born, raised, and slaughtered) occurred. It also eliminates the loophole that has heretofore functioned to weaken COOL by disallowing the use of a multiple-country label on muscle cuts that are derived from animals exclusively born, raised and slaughtered in the United States.

2. As a favorable response to the petitioners' request that the U.S. government defend our nation's sovereignty (which was a specific request in the first petition signed by 12,688 people), the proposed rule effectively addresses the negative WTO ruling without ceding the United States' sovereign right to pass and enforce laws that require retailers to inform consumers about the origins of their food.

R-CALF USA appreciates this opportunity to submit the attached names of 14,600 people who signed petitions urging the USDA to enforce the U.S. COOL law, which is precisely what the USDA's proposed rule is expected to do.

Sincerely,

Bill Bullard, CEO

Attachment: Contains 14,600 signors on 2 COOL petitions

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

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

April 11, 2013

Julie Henderson, Director
COOL Division, Livestock, Poultry, and Seed Program
Agricultural Marketing Service
U.S. Department of Agriculture (USDA)
STOP 0216
1400 Independence Avenue SW., Room 2620–S
Washington, DC 20250–0216.

Via Federal eRulemaking Portal: ***http://www.regulations.gov***

Re: **R-CALF USA Comments in Document No. AMS–LS–13–0004 (RIN 0581-AD29): 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**

Dear Director Henderson,

The Ranchers-Cattlemen Action Legal Fund, United Stockgrowers of America (R-CALF USA) appreciates this opportunity to comment on the U.S. Department of Agriculture (USDA) Agricultural Marketing Service's (AMS') proposed rule: *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* (proposed COOL rule), published at 78 Fed. Reg., 15645-653 (March 12, 2013).

R-CALF USA is the largest producer-only cattle trade association in the United States. It is a non-profit association that represents thousands of U.S. cattle farmers and ranchers in 45 states. R-CALF USA works to sustain the profitability and viability of the U.S. cattle industry, a vital component of U.S. agriculture. Its membership consists primarily of cow-calf operators, cattle backgrounders and feedlot owners. Various main street businesses are associate members of R-CALF USA.

I. INTRODUCTION

The proposed COOL rule is necessary to begin rectifying the fundamentally flawed COOL regulations that went into effect on March 16, 2009. Those regulations were improperly and unlawfully adopted, are contrary to the intent of Congress, and impose recordkeeping

requirements on cattle producers that are not needed to accurately inform consumers as to the origins of beef.

A. Current COOL Regulations Were Improperly and Unlawfully Adopted

The public comment period for the Aug. 1, 2008 interim final COOL rule was Sept. 30, 2008. *See* 73 Fed. Reg., 45,106. Although U.S. citizens and all other interested parties were expressly barred from influencing USDA's final COOL rule after the Sept. 30, 2008 public comment period deadline (*see id.*)[1], the government of Canada, by and through John Gero, Canadian Ambassador to the WTO, did nevertheless, between December 1, 2008 and Jan. 7, 2009, improperly and unlawfully blackmail the United States into granting Canada certain concessions in the final COOL rule under threat of retaliatory action by Canada that was to take the form of an immediate request for a WTO dispute panel against U.S. COOL.[2]

The concessions made by USDA pursuant to its improper and unlawful negotiations with the government of Canada that had occurred after the close of the public comment period for the interim final COOL rule include the provisions contained at 7 CFR § 65.300(e)(2 and 4) that allow muscle cuts of meat derived exclusively from animals exclusively born, raised, and slaughtered in the United States to nevertheless be mislabeled as a product of mixed origin if the meat was produced during a meatpacker's production day when muscle cuts derived from imported animals were comingled by the meatpacker.[3]

In July 2009 R-CALF USA formally urged the Agriculture Secretary to initiate a rulemaking to reverse the inappropriate concessions that allowed the mislabeling of meat derived exclusively from animals exclusively born, raised, and slaughtered in the United States.[4] For reasons unknown to R-CALF USA, for longer than three years Secretary Vilsack refused R-CALF USA's request to initiate a rulemaking to redress the improper and unlawful concession made by USDA to the final COOL rule.

It is an absolute travesty that USDA knowingly allowed this mislabeling of USA beef to continue for longer than three years. That is why R-CALF USA, Made in the USA Foundation, Melonhead, LLC, Organization for Competitive Markets, Inc., South Dakota Stockgrowers

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[1] It is R-CALF USA's understanding that the Administrative Procedures Act (APA), Pub.L. 79-404, 60 Stat. 237, 5 U.S.C. et seq. prohibits any negotiation or discussion regarding the merits of a rulemaking between the USDA and any person or persons after the close of a rulemaking's public comment period and before the agency's publication of a final rule.

[2] *See* R-CALF USA letter to Agriculture Secretary Vilsack with attached communications between the U.S. and Canadian ambassadors to the WTO, July 22, 2009, (R-CALF USA wrote regarding the communications: "[T]hese correspondences indicate that USDA had granted a *foreign country* – Canada – the opportunity to dictate the final contents of the Final COOL Rule, while U.S. consumers and producers were afforded no such opportunity."), attached hereto as Exhibit 1.

[3] *See id.*, (Canada had specifically requested the use of a mixed-origin label when foreign animals are comingled during a single production day.).

[4] *See id.*, R-CALF USA wrote in July 2009: "[W]e urge you to immediately reverse the inappropriate concessions accorded to Canada during the previous Administration and to promulgate a new final COOL rule that conforms to Congress' clear intent to accurately inform consumers as to the origins of food covered under COOL."

Association, Independent Cattlemen of Wyoming, and Chad, Tyler and Stanley Scott, filed an amended complaint in the federal district court in Denver, Colorado, alleging, *inter alia*, that:

> The regulations of the U.S. Department of Agriculture that allow labeling meat as from "Canada, Mexico and the United States," when such meat is exclusively of United States origin, violates the Administrative Procedure Act because the defendants' actions under the program exceed statutory authority and limitations imposed by Congress by the Country of Origin Labeling Act and are not otherwise in accordance with law, and are taken without observance of procedures required by law.[5]

However, in direct response to, and as a demonstration of support for, the proposed COOL rule that finally rectifies USDA's improper and unlawful authorization granted to U.S. meatpackers so they could mislabel meat exclusively derived from animal exclusively born, raised, and slaughtered in the United States with a mixed-origin label, R-CALF USA and the other parties to the complaint voluntarily dismissed their complaint without prejudice against Secretary Vilsack and others on March 28, 2013.[6] If Secretary Vilsack finalizes the proposed COOL rule without substantive changes, many, if not all, of the concerns R-CALF USA and others expressed in the lawsuit will be addressed.

B. Current COOL Regulations Are Contrary to the Intent of Congress

In numerous joint letters sent by members of Congress, USDA was duly informed that its prior COOL rulemakings contained provisions that were contrary to Congress' intent and, hence, the COOL statute. On September 28, 2008, a bipartisan group of 32 U.S. Senators articulated Congress' intent regarding COOL in response to USDA's interim final COOL rule. The Senators wrote:

> Section 282 of the Agriculture Marketing Act of 1946 (7 U.S. C. 1638a) was intended to provide distinct labeling categories such as product of U.S. origin, product of mixed origin, product from animals imported for immediate slaughter, and product that is foreign product. It is the intent of Congress that meat product that is exclusively born, raised and slaughtered in the United States will have its own label, such as "Product of the U.S.," so that consumers could easily determine U.S. product apart from product that is from other countries. . . It is not the intent of Congress that all U.S. product or such product from large segments of the industry be combined with the multiple countries of origin category nor was it dictated by statute. . . Consumers and producers are expecting to see exclusively U.S. origin product labeled as such.[7]

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[5] Complaint for Declaratory and Injunctive Relief, *Made in the USA Foundation, et al. v. World Trade Organization et al.*, attached hereto as Exhibit 2.

[6] *See* Notice of Voluntary Dismissal Without Prejudice, *Made in the USA Foundation, et al. v. World Trade Organization et al.*, attached hereto as Exhibit 3.

[7] Letter from U.S. Senators to Agriculture Secretary Ed Schafer, Sept. 28, 2008, attached hereto as Exhibit 4.

This large group of Senators even quoted then Agriculture Secretary Ed Schafer to demonstrate that USDA was fully aware of Congress' intent regarding the labeling of exclusively USA beef. The Senators wrote:

> Recently, you [then Secretary Schafer] indicated that the Department [USDA] agrees with Congress that product exclusively born, raised and slaughtered in the United States should be labeled as "Product of U.S." On September 19, you were quoted while speaking to the National Association of State Departments of Agriculture in Bismarck, North Dakota that it 'was not the intent of the law, [and] not the intent of all of you [Congress and the public] when you started this many years ago' to allow U.S. product to be labeled jointly with other countries.[8]

However, as was discussed in Sect. I A above, despite Congress' effort to explicitly convey Congress' intent to USDA, and despite USDA's presumptive acknowledgement that it fully understood Congress' intent, USDA's final COOL rule issued Jan. 15, 2009 nevertheless defied Congress' intent, and hence the COOL statute, by authorizing meatpackers to label U.S. product jointly with other countries.

Soon after the Jan. 15, 2009 publication of the final COOL rule, a bipartisan group of 7 U.S. Senators wrote Secretary Tom Vilsack to highlight their concern that the final COOL rule contains loopholes that allow meatpackers to put a multiple country of origin label on products that are exclusively U.S. product and to request that Secretary Vilsack revise the rule.[9] The Senators wrote, "The USDA regulations defeat the primary purpose of COOL – providing clear, accurate and truthful information to American Consumers."[10]

On Feb. 20, 2009, Secretary Vilsack wrote a letter to the industry stating that he had legitimate concerns with certain components of the final COOL rule, including its treatment of product from multiple countries.[11] To address his concern, the Secretary asked industry representatives to, *inter alia*, "include information about what production step occurred in each country when multiple countries appear on the label."[12]

The Secretary's request for voluntary action by industry representatives presumable was for the purpose of correcting the final COOL rule's inexplicable authorization to mislabel U.S. product with a mixed-origin label, particularly since a voluntary label denoting in what country each production step occurred would effectively nullify the rule's authorization to affix a label containing only the names of multiple countries. In other words, if industry representatives were to have complied literally with the Secretary's request, even product produced during a production day when foreign product was comingled with USA product would bear labels denoting in which country the various production steps occurred for each product.

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[8] *Ibid.*
[9] Letter from U.S. Senators to Agriculture Secretary Tom Vilsack, Feb. 3, 2009, attached hereto as Exhibit 5.
[10] *Ibid.*
[11] Letter from Secretary Vilsack to Industry Representatives, Feb. 20, 2009, attached hereto as Exhibit 6.
[12] *Ibid.*

The Secretary stated he would evaluate the industry's performance in relation to his suggestions for voluntary action and, "Depending on this performance, I will carefully consider whether modifications to the rule will be necessary to achieve the intent of Congress."[13]

R-CALF USA is unaware of any evidence indicating that industry representatives initiated any of the voluntary actions suggested by Secretary Vilsack. Nevertheless, for longer than three years the Secretary took no action to remedy the fundamentally flawed final COOL rule that inexplicably defied Congress' intent.

The Secretary had summarily dismissed the concerns of Congress, R-CALF USA and others by taking no action to correct the fundamentally flawed final COOL rule until a panel of foreign nationals convened by a WTO tribunal forced his hand by ruling that U.S. COOL regulations discriminated against Canadian and Mexican livestock.

The proposed COOL rule is an exceedingly dilatory remedy that finally, albeit partially, begins to achieve Congress' intent by overturning USDA's inexplicable authorization to U.S. meatpackers to mislabel U.S. product with a mixed country of origin label. The proposed COOL rule accomplished this by requiring labels to specify in which country each of the products' three production steps occurred and by disallowing the meatpackers' ongoing practice of using a mixed-country label on exclusively U.S. product whenever a foreign product is comingled with domestic product during the meatpacker's production day.

C. Current COOL Regulations Impose Record Keeping Requirements on Cattle Producers that Are Not Needed to Accurately Inform Consumers as to the Origin of Beef

Throughout USDA's protracted and numerous rulemaking processes for COOL that first began in October 2002, R-CALF USA has suggested that USDA does not need to require live cattle producers to maintain *any* origin-related records or affidavits to accurately communicate origin information to consumers.[14] Instead, R-CALF USA posited that Congress did not authorize USDA to impose record-keeping requirements on producers and, instead, imposed a duty on meatpackers to initiate origin claims based on a presumption of domestic origin methodology whereby all cattle presented to a packer without any import markings would be declared a wholly U.S. animal and those with import markings would have necessarily been born in the country indicated by the respective import marking.[15]

In a 2003 research paper published by the University of Florida titled, *Country of Origin Labeling: A Legal and Economic Analysis*, legal and economic scholars agreed that the presumption of domestic origin methodology deployed at the point of slaughter was the preferred means of accurately determining the origins of live cattle as it "is most likely to comply with the

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[13] *Ibid.*
[14] *See, e.g.*, R-CALF USA comments to USDA, Feb. 21, 2003 (R-CALF USA explains in detail how cattle import markings or lack thereof is all that is necessary for meatpackers to initiate an accurate origin determination at the point of slaughter), attached hereto as Exhibit 7.
[15] *See id.*

law, lessens the burden on industry and government, and sufficiently deters potential label misrepresentation."[16] The scholars wrote:

> The Presumption of U.S. Origin Rule is a shorthand title for a regulatory reporting scheme in which all products are presumed to be of U.S. origin unless they carry a mark from another country. The corollary to this presumption is a duty to maintain the mark of origin that is currently required on most imported products as a condition of entry into this country. This scheme avoids the problem of lack of jurisdiction over U.S. producers, complies with international trade norms, and minimizes the regulatory burden caused by the program.
>
> First, the regulatory burden is significantly reduced by the Presumption of U.S. Origin Rule by eliminating a large number of affected entities. U.S. producers are a whole category of entities left untouched, except for the few that import young animals to grow for later sale. Many small processors, packers and other handlers would be *de facto* exempt because they do not engage in the trade of imported product (though statistics are not available to quantify this number).
>
> Second, the problem of lack of jurisdiction over U.S. producers is eliminated because this regime does not rely upon the producer as the trigger point to input the first information as to country of origin that follows the product to the consumer. Rather, the trigger point relied upon is the passage of covered commodity over the border, through customs. The USDA acknowledged in the Voluntary Guidelines that several current federal laws require most imports, including food items, to bear labels or other information designating the country of origin.
>
> Third, the Presumption of U.S. Origin Rule complies with international trade rules. The relevant rule arises from the membership of the United States in the World Trade Organization (WTO). Though some have argued that a Presumption of U.S. Origin Rule would violate the general proposition that a WTO member must afford the same treatment to foreign goods that it does to domestic product, Article IX of the General Agreement on Tariffs and Trade (GATT) allows member nations to require marks of origin on goods imported from any other WTO Member. (citations omitted)[17]

USDA has refused to release cattle producers from the unnecessary burden of maintaining origin records even though adopting the presumption of domestic origin methodology that relies exclusively on the meatpacker to initiate origin claims is the least burdensome, least costly and most efficient means of ascertaining the origins of live cattle, including identification of the country where each production step occurred. Instead, USDA's final COOL rule allows

[16] Country of Origin Labeling: A Legal and Economic Analysis, J. VanSickle, R. McEowen, N. Harl, R. Taylor, and J. Connor, International Agricultural Trade and Policy Center, University of Florida, PBTC 03-5, May 2003, at 6, attached hereto as Exhibit 8.
[17] *Id*, at 8.

producers to provide producer affidavits to meatpackers (and authorizes meatpackers to require such affidavits from producers) based on a presumption of domestic origin methodology.[18] Unfortunately, however, USDA appears to not recognize that requiring producers to generate affidavits based on a presumption of domestic origin creates an inessential redundancy that adds unnecessary costs and complexity to COOL implementation that could be avoided completely if the meatpackers were required to initiate origin claims as Congress had intended.

Evidence supports R-CALF USA's contention that USDA's purpose in unnecessarily requiring live cattle producers to provide origin-related records to meatpackers is to purposefully add costs and complexity to COOL regulations in an effort to generate opposition against the COOL statute. As an evidentiary example that USDA was motivated to derail COOL, the former Deputy Under Secretary for USDA's Marketing and Regulatory Programs, Dr. Charles "Chuck" Lambert, told Congress during the COOL rulemaking process:

> Mr. Chairman, as you may know, the Office of Management and Budget's Statement of Administration Policy on S.1731, the *Agriculture, Conservation, and Rural Enhancement Act of 2001*, found the provision requiring mandatory country of origin labeling highly objectionable. The Administration's position and the reasons for that position have not changed. We feel these new requirements will not have a positive effect overall and that the unintended consequences on producers and the distribution chain could be significant.[19]

With such a documented motive to derail COOL, it is manifest that USDA also has both the means and opportunity to generate opposition to derail COOL through its action of promulgating unnecessarily costly and complex rules that effectively undermine COOL by masking the true origins of meat derived exclusively from animals born, raised and slaughtered in the United States and through its inaction reflected by its failure to timely correct inessential redundancies and provisions that undermine the fundamental purpose of COOL.

Indeed, it is for that very reason, *i.e.*, USDA's failure to timely correct inessential redundancies and provisions that have long undermined the fundamental purpose of COOL, and for that reason alone, that USDA has even proposed its March 12, 2013 proposed COOL rule.[20] USDA's inaction had welcomed, if not facilitated, Canada's and Mexico's WTO COOL complaints that resulted in a WTO finding that the recordkeeping burden on upstream cattle producers was superfluous based on the very limited amount of information actually conveyed to consumers via

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[18] *See, e.g.*, 7 CFR § 60.500 (b)(1) "Producer affidavits shall also be considered acceptable records that suppliers may utilize to initiate origin claims, provided it is made by someone having first-hand knowledge of the origin of the covered commodity and identifies the covered commodity unique to the transaction. 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."

[19] Statement of Dr. Charles "Chuck" Lambert, Deputy Under Secretary for Marketing and Regulatory Programs, U.S. Department of Agriculture, before the House Committee on Agriculture, June 26, 2003, attached hereto as Exhibit 9.

[20] *See* 78 Fed. Reg., 15,645 (USDA states it initiated this rulemaking as a result of the WTO's action that gave the U.S. until May 23, 2013 to bring COOL into compliance with the WTO's ruling.).

origin labels.[21] Further, the WTO found that USDA's authorization to allow meatpackers to label exclusively U.S. product with a mixed-origin label when foreign product is commingled during the packers' production day resulted in the communication of inaccurate information to consumers.[22]

USDA's long-term recalcitrance to Congress', R-CALF USA's, and other group's requests to correct the obvious deficiencies in the COOL regulations have now resulted in those deficiencies being highlighted by foreign nationals seated by the WTO and who are now threatening the U.S. with sanctions.

II. PROPRIETY OF THE PROPOSED RULE

As stated above, R-CALF USA believes USDA is exceedingly dilatory in its offering of the proposed COOL rule and further believes the proposed COOL rule is absolutely necessary to finally correct at least some of the fundamental flaws and deficiencies manifest in current COOL regulations. However, R-CALF USA has specific suggestions for improving the proposed COOL rule and discussed below.

A. The Proposed COOL Rule Appropriately Disallows Mixed Labels for USA Meat

The most important provision in the proposed COOL rule is the elimination of the loophole that has allowed U.S. meatpackers to mislabel meat derived from animals that are exclusively born, raised and slaughtered in the United States with a mixed label if the meatpacker comingles foreign product with domestic product during a production day.

More specifically, R-CALF USA fully supports the provision in the proposed COOL rule that eliminates the allowance of any commingling of muscle cut covered commodities of different origins and encourages USDA to adopt this provision as quickly as possible and without change.

B. The Proposed COOL Rule Solves the Challenge of Disproportionate Upstream Recordkeeping Compared to Downstream Information Conveyance but Additional Remedies Are Warranted that Would Further Reduce Costs and Provide Alternatives

The proposed COOL rule effectively resolves the criticism leveled by the WTO tribunal that current COOL regulations require more detailed recordkeeping from upstream cattle producers

[21] *See* Appellate Body Report, United States – Certain Country of Origin Labelling (COOL) Requirements, WT/DS384/AB/R, WT/DS386/AB/R, adopted 23 July 2012, at ¶ 349 ("In sum, our examination of the COOL measure under Article 2.1 reveals that its recordkeeping and verification requirements impose a disproportionate burden on upstream producers and processors, because the level of information conveyed to consumers through the mandatory labelling requirements is far less detailed and accurate than the information required to be tracked and transmitted by these producers and processors."), attached hereto as Exhibit 10.

[22] *See id.*, at ¶ 343 ("Furthermore, due to the additional labeling flexibilities allowed for commingled meat, a retail label may indicate that meat is of mixed origin when in fact it is of exclusively US origin, or that it has three countries of origin when in fact it has only one or two." (citations omitted)).

than is ultimately transmitted to consumers through origin labels.[23] The proposed COOL rule accomplishes this not be reducing the recordkeeping requirements imposed on upstream producers, but rather, by requiring more information to be transmitted to consumers through origin labels. Specifically, the proposed COOL rule would require labels to specify the production steps of birth, raising, and slaughter of the animal from which the meat is derived that took place in each country listed on the origin designation.

While R-CALF USA supports this change, it believes additional revisions are warranted that would lower the overall cost of COOL compliance, eliminate inessential redundancy's, and reduce burdens on upstream cattle suppliers.

Specifically, R-CALF USA encourages USDA, when it finalizes the proposed COOL rule, to eliminate the present regulatory burden on U.S. cattle producers to provide producer affidavits to meatpackers that attest to the origins of live cattle. As was discussed in greater detail above in Section I. C., R-CALF USA encourages USDA to modify its regulation at 7 CFR § 60.500 (b)(1) that allows producers to make origin designations based on a presumption of domestic origin methodology by exclusively authorizing meatpackers to initiate origin designations on their own based on the same presumption of domestic origin methodology.

Given that the aforementioned regulation already authorizes meatpackers to initiate origin claims based on the presences and/or absence of markings or other devices, which also is based in whole or in part on a presumption of domestic origin methodology;[24] and, given that producers already are authorized to initiate origin claims based exclusively on a visual inspection of the animal to verify its origin ("[i]f 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"[25]), there is no discernable reason why meatpackers cannot be exclusively relied on to make the same visual inspection of the animal to verify its origin when the animal is presented for slaughter.

The largest meatpacker in the United States, Tyson, had requested that USDA simplify the process of livestock identification by allowing producers to visually identify origins based on import brands.[26] R-CALF USA now urges USDA to further simplify the processes of origin identification for cattle by eliminating producer affidavits from the regulations and exclusively authorizing meatpackers to initiate all origin claims for cattle based on import brands.

Because the proposed COOL rule does not revise 7 CFR § 60.500 (b)(1), it is presumed that the process of making origin claims based on a visual inspection for import markings is sufficient for making accurate claims as to what country each of the production steps of born, raising and

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[23] *See supra*, at 8, fn. 21.
[24] *See* 7 CFR § 60.500 (b)(1) ("[P]ackers that slaughter animals that are tagged with an 840 Animal Identification Number device without the presence of any additional accompanying marking (i.e., "CAN" or "M") may use that information as a basis for a U.S. origin claim. Packers that slaughter animals that are part of another country's recognized official system (e.g., Canadian official system, Mexico official system) may also rely on the presence of an official ear tag or other approved device on which to base their origin claims.")
[25] 7 CFR § 60.500 (b)(1).
[26] *See* Letter from Tyson to cattle suppliers, Oct. 14, 2008, attached hereto as Exhibit 11.

slaughter occurred. We agree. And, that is why our suggestion is not only compatible with the proposed COOL rule, but also, it compliments the proposed COOL rule because it would further reduce costs, recordkeeping requirements, and burdens on upstream cattle suppliers while simultaneously improving the efficiency of COOL implementation.

It is important to note that removing the burden on cattle producers to provide origin-related records, *i.e.*, producer affidavits, to meatpackers would itself address the WTO's criticism regarding disproportionate recordkeeping compared to the detail of information conveyed to consumers. In other words, the WTO's criticism would be addressed by actually reducing the amount of recordkeeping required from upstream cattle suppliers. This may be an important consideration should USDA, for whatever reason, decide that the proposed COOL rule must be materially modified.

C. The Proposed COOL Rule Should Include Additional Revisions to Address Other Widely Known Deficiencies in Current COOL Regulations.

The joint U.S. Senate letters discussed in Section I. B. above as well as the letter discussed therein written by Secretary Vilsack identify several needed changes to the proposed COOL rule that USDA has omitted. For example, both U.S. Senators and Secretary Vilsack highlighted the need to reverse current regulations that exempt covered commodities from labeling requirements when they undergo minimal processing such as curing, smoking, broiling, grilling, or steaming.[27] In addition both U.S. Senators and Secretary Vilsack highlighted the need to modify current regulations concerning ground beef. Secretary Vilsack specifically stated:

> The language in the Final Rule allows a label for ground meat product to bear the name of a country, even if product from that country was not present in a processor's inventory, for up to 60 days. This provision allows for labels to be used in a way that does not clearly indicate the product's country of origin. Reducing the time allowance to ten days would limit the amount of product with these labels and would enhance the credibility of the label.[28]

On August 22, 2012, R-CALF USA made a timely request that USDA initiate a rulemaking to, *inter alia*, address the current COOL regulation's deficiencies concerning the broad exemption for processed food items and the labeling of ground beef.[29]

R-CALF USA believes USDA must revise its current regulations to address these two glaring deficiencies if it is to achieve Congress' intent regarding COOL. R-CALF USA hereby requests that USDA include in its final rule a provision to disallow countries to be listed on a ground meat label if meat from such countries is not actually included in the ground beef product and a provision to eliminate the exemption for covered commodities that undergo minor processing from labeling requirements.

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[27] *See supra,* at 3-4, Exhibits 4 and 6.
[28] *Id.*, at 4, Exhibit 6
[29] *See* R-CALF USA letter to USDA and USTR, Aug. 22, 2012, attached hereto as Exhibit 12.

III. CONCLUSION

R-CALF USA appreciates this opportunity to comment on USDA's proposed COOL Rule and strongly encourages USDA to publish a final rule as quickly as possible that contains each of the following provisions:

1. The provision in the proposed COOL rule that eliminates the allowance of any commingling of muscle cut covered commodities of different origins.
2. The provision in the proposed COOL rule that requires labels to list the country where each of the production steps of born raising and slaughter occurred.
3. A new provision to eliminate the current requirement that cattle producers provide affidavits to meatpackers and, instead, to require meatpackers to initiate all origin claims for cattle based on their visual inspection of cattle presented for slaughter to determine the presence or absence of import markings or devices.
4. A provision to disallow countries to be listed on a ground meat label if meat from such countries is not actually included in the ground beef product.
5. A provision to eliminate the exemption for covered commodities that undergo minor processing from labeling requirements.
6. Though R-CALF USA provides no discussion on the issue of amending the definition for "retailer," we nevertheless support the provision in the proposed COOL rule to include any person subject to be licensed as a retailer under the Perishable Agricultural Commodities Act (PACA).

Sincerely,

Bill Bullard, CEO

Exhibits: 1-12

Exhibit B

September 26, 2008

Country of Origin Labeling (COOL)
Frequently Asked Questions

COOL Implementation: Legislative History and Status of Rulemaking

Q. *What are the basic requirements of COOL?*

A. The 2002 and 2008 Farm Bills amended the Agricultural Marketing Act of 1946 to require retailers to notify their customers of the country of origin of beef (including veal), lamb, pork, chicken, goat, wild and farm-raised fish and shellfish, perishable agricultural commodities, peanuts, pecans, ginseng, and macadamia nuts. The implementation of mandatory COOL for all covered commodities except wild and farm-raised fish and shellfish was delayed until September 30, 2008. The law defines the terms "retailer" and "perishable agricultural commodity" as having the meanings given those terms in section 1(b) of the Perishable Agricultural Commodities Act of 1930 (PACA)(7 U.S.C. 499 et seq.). Under PACA, a retailer is any person engaged in the business of selling any perishable agricultural commodity 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. The term perishable agricultural commodity means fresh and frozen fruits and vegetables.

Food service establishments are specifically exempted as are covered commodities that are ingredients in a processed food item. In addition, the law specifically outlines the criteria a covered commodity must meet to bear a "United States country of origin" designation.

Q. *What commodities require country of origin labeling?*

A. Covered commodities include muscle cuts of beef (including veal), lamb, pork, goat, and chicken; ground beef, ground lamb, ground pork, ground goat, and ground chicken; farm-raised fish and shellfish; wild fish and shellfish; perishable agricultural commodities; peanuts; ginseng, pecans and macadamia nuts.

Q. *When does COOL go into effect?*

A. The interim final rule for mandatory COOL for fish and shellfish became effective on April 4, 2005. The interim final rule for mandatory COOL for the remaining covered commodities that was published on August 1, 2008, will take effect on September 30, 2008, as directed by the statute. The requirements of this rule do not apply to covered commodities produced or packaged before September 30, 2008. In addition, during the six month period following the effective date of the regulation, AMS will conduct an industry education and outreach program concerning the provisions and requirements of this rule.

Q. *What legislation established and governs COOL?*

A. The Farm Security and Rural Investment Act of 2002 (2002 Farm Bill; P.L. 107-171) and the 2002 Supplemental Appropriations Act (P.L. 107-206) established COOL. Section 10816 of the 2002 Farm Bill (7 U.S.C. 1638-1638d) amended the Agricultural Marketing Act of 1946 to require retailers to notify their customers of the origin of covered

commodities. Covered commodities included muscle cuts of beef (including veal), lamb, and pork; ground beef, ground lamb, and ground pork; farm-raised fish and shellfish; wild fish and shellfish; perishable agricultural commodities; and peanuts.

With passage of the FY 2004 Consolidated Appropriations Act (P.L. 108-199), Congress delayed the implementation of mandatory country of origin labeling (COOL) for all covered commodities except wild and farm-raised fish and shellfish until September 30, 2006. Congress once again delayed the applicability of mandatory COOL for all covered commodities except wild and farm-raised fish and shellfish until September 30, 2008, with passage of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act of 2006 (P.L. 109-97).

The recently enacted Food, Conservation and Energy Act of 2008 (2008 Farm Bill) further amended the COOL program by expanding the list of covered commodities to include chicken, goat meat, ginseng, pecans and macadamia nuts as well as making a host of other changes.

Q. *What rulemaking activities has USDA completed for COOL?*

A. AMS published "Guidelines for the Interim Voluntary Country of Origin Labeling of Beef, Lamb, Pork, Fish, Perishable Agricultural Commodities, and Peanuts" in the Federal Register on October 11, 2002 (67 FR 63367).

During 2003, AMS held several "listening sessions" that provided interested parties and the public with an opportunity to make oral statements, to receive information about all aspects of COOL policy contained in the law, and to offer suggestions about how AMS might best go about implementing the program.

Following a review and analysis of the comments received on the voluntary guidelines, and taking into consideration the policy requirements contained in the law, AMS published the proposed rule for mandatory COOL of all covered commodities (68 FR 61944) on October 30, 2003.

On October 5, 2004, AMS published an interim final rule for fish and shellfish (69 FR 59708) that went into effect on April 5, 2005. On November 27, 2006, AMS reopened the comment period on the costs and benefit aspects of the interim final rule for fish and shellfish.

On June 20, 2007, AMS reopened a 60-day comment period on both the 2004 interim final rule for fish and shellfish and the 2003 proposed rule for a mandatory COOL program for all covered commodities.

On August 1, 2008, AMS published an interim final rule for the remaining covered commodities. The interim final rule contains definitions, labeling requirements for domestically produced and imported products, and recordkeeping responsibilities of retailers and suppliers. The rule also provides for a 60-day public comment period,

which closes September 30, 2008. Comments may be submitted via http://www.regulations.gov.

Processed Food Item Definition

Q. *What is the definition of a "processed food item"?*

A. AMS has defined 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, or tomato sauce). 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 (hot or cold), and restructuring (e.g., emulsifying and extruding).

Q. *Do processed food items require country of origin labels?*

A. The COOL law contains an express exclusion for an ingredient in a processed food item. Thus, retail items that meet the definition of a processed food item do not require labeling under the COOL interim final rule. However, many imported items are still required to be marked with country of origin information under the Tariff Act of 1930 (Tariff Act). For example, while a bag of frozen peas and carrots is considered a processed food item under the COOL interim final rule, if the peas and carrots are of foreign origin, the Tariff Act requires that the country of origin be marked on the bag. Likewise, while roasted peanuts, pecans, and macadamia nuts are also considered processed food items under the COOL interim final rule, under the Tariff Act, if the nuts are of foreign origin, the country of origin must be indicated to the ultimate purchaser. This also holds true for a variety of fish and shellfish items. For example, salmon imported from Chile that is smoked in the United States as well as shrimp imported from Thailand that is cooked in the United States are also required to be labeled with country of origin information under the Tariff Act. In addition, items such as marinated lamb loins that are imported in consumer-ready packages would also be required to be labeled with country of origin information as both Customs and Border Protection (CBP) and Food Safety and Inspection Service regulations require meat that is imported in consumer-ready packages to be labeled with origin information on the package.

Q. *What are some examples of a "processed food item"?*

A. Examples of processed food items excluded from COOL labeling requirements are: teriyaki flavored pork loin, roasted peanuts, breaded chicken tenders, marinated chicken breasts, a salad mix that contains lettuce and carrots, and a fruit cup that contains melons, pineapples, and strawberries.

Q. *Would a frozen vegetable medley that is packaged in the United States and contains both foreign and domestic produce have to bear country of origin information since it is a combination of different commodities?*

A. Yes. While this product is considered a processed food item and is therefore excluded from COOL labeling requirements, according to CBP rules and regulations, the process

of blanching, cutting, freezing, and combining and packaging different vegetables (or fruits) does not result in the item being excluded from CBP marking requirements.

Q. *Does cutting or slicing vegetables count as processing? What about dried fruit or mushrooms, are they covered commodities?*

A. A processed food item is a retail item derived from a covered commodity that has undergone processing resulting in a change in the character of the commodity or that has been combined with at least one other covered commodity or other substantive food components (e.g. breading, chocolate, salad dressing, and tomato sauce). Trimming, cutting, chopping, and slicing are activities that do not change the character of the product. Dried fruit is not subject to COOL labeling requirements since the drying process changes the character of the fruit. Mushrooms, if fresh, are covered. Dried mushrooms are not covered.

Q. *Why did USDA choose to define the term "processed food item" in this manner when in seems to result in many products being excluded from labeling?*

A. The definition of a processed food item developed for this rule has taken into account comments from affected entities and has resulted in excluding products that would be more costly and troublesome for retailers and suppliers to provide country of origin information. This definition is based on the definition for this term that was published in the interim final rule for fish and shellfish on October 5, 2004. Because the rule for the remaining covered commodities was also issued as an interim final rule and gave regulated parties only 60 days to implement it, USDA felt the best approach was to maintain the same definition that was used in the fish and shellfish program, which has been operating in retail stores for three years and provides retailers with a clear line as to what items require labeling. There is a 60-day comment period for the interim final rule, which closes on September 30, 2008. USDA will consider all comments received as it drafts a final rule for all covered commodities.

Retail Store Definition

Q. *What stores are required to comply with COOL?*

A. The COOL legislation defines "retailer" as having the meaning given that term in section 499a (b) of the Perishable Agricultural Commodities Act of 1930 (PACA). Under PACA, a retailer is any person engaged in the business of selling any perishable agricultural commodity 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. The term perishable agricultural commodity means fresh and frozen fruits and vegetables.

For purposes of COOL, the definition of "retailer" generally includes most grocery stores and supermarkets. Retail stores such as fish markets and butcher shops as well as other stores that do not invoice the threshold amount of fresh produce (fruits and vegetables) are exempt from this regulation. Restaurants and other food service establishments (cafeterias, lunchrooms) are also exempt.

Food Service Establishments

Q. *Are "Food Service Establishments" required to label the items they sell for country of origin?*

A. No, food service establishments are exempt from COOL requirements. The term "food service establishment" means a restaurant, cafeteria, lunch room, food stand, saloon, tavern, bar, lounge, or other similar facility operated as an enterprise engaged in the business of selling food to the public. Similar food service facilities include salad bars, delicatessens, and other food enterprises located within retail establishments that provide ready-to-eat foods that are consumed either on or outside of the retailer's premises.

Country of Origin Notifications

Q. *What information is a supplier required to provide to a retailer?*

A. Any person engaged in the business of supplying a covered commodity to a retailer, whether directly or indirectly, must make available information to the buyer 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.

Q. *What requirements does a product have to meet in order to be labeled as having a U.S. origin?*

A. A covered commodity may bear a declaration that identifies the United States as the sole country of origin at retail only if it meets the definition of United States country of origin. Under the interim final rule, beef, pork, lamb, chicken, and goat must be derived from animals exclusively born, raised, and slaughtered in the United States; from animals born and raised in Alaska or Hawaii and transported for a period of not more than 60 days through Canada to the United States and slaughtered in the United States; or from animals present in the United States on or before July 15, 2008, and once present in the United States, remained continuously in the United States. For perishable agricultural commodities, peanuts, ginseng, pecans, and macadamia nuts, products must be grown in the United States.

Q. *When labeling imported covered commodities, the regulation states that such declarations must be "consistent with other applicable Federal legal requirements". What are those "other Federal legal requirements?"*

A. In addition to the labeling requirements under the COOL regulation, other government agencies also have requirements for labeling the origin of imported products, including U.S. Customs and Border Protection (CBP) and USDA's Food Safety and Inspection Service (for meat products only) (FSIS). Thus, you should contact CBP (or FSIS if applicable) about consumer-ready, pre-labeled packages originating from a foreign country. CBP is authorized by provisions of Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304). The country of origin for marking purposes is defined at section 134.1(b) of the Customs Regulations (19 CFR 134.1(b)). You can contact CBP either electronically through their website (http://www.cbp.gov/) or by the mailing address provided on their website:

U.S. Department of Homeland Security
1300 Pennsylvania Avenue, NW
Washington, D.C. 20229

You may also contact the Tariff Classification and Marking Branch of CBP by phone at the following number: General Inquiries (202) 572-8813.

The FSIS Labeling and Consumer Protection staff can be reached on (202) 205-0623 or (202) 205-0279.

Marking the Country of Origin Designation

Q. *Are we required to state the country of origin on our packages?*

A. Retailers are required to notify the final consumer of the country of origin of covered commodities. The COOL statute provides suppliers and retailers with considerable flexibility in marking items offered for sale. The law allows country of origin information to be provided to consumers by means of 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. Suppliers are required to make country of origin information available to their buyers. Such notification can be provided either on the product itself, on the master shipping container, or in a document that accompanies the product through retail sale.

Q. *What marking methods does the law allow retailers to use in declaring the country of origin of covered commodities (and method of production, in the case of fish and shellfish)?*

A. The law provides retailers with a flexible variety of options for marking commodities, including a placard, sign, label, sticker, band, twist tie, pin tag, or other format. Country of origin declarations may also be in the form of a checkbox on the master container. Anecdotal evidence indicates that many retailers are asking or requiring their suppliers to pre-label products. When stickers are used on individual items, USDA encourages retailers to supplement stickers with point-of-purchase placards and other signage as a way to more clearly indicate information to consumers, because the efficacy of stickers is not 100%. USDA will address the issue of preponderance of stickers in its compliance and enforcement procedures to ensure uniform guidance is provided to compliance and enforcement personnel.

Q. *Do the rules specify font size, typeface, color or location of country of origin claims?*

A. No, the rules do not contain prescriptions for font size, typeface, color or location of country of origin claims. However, declarations must be legible and must be placed in a conspicuous location, which renders it likely to be read and understood by a customer under normal conditions of purchase.

Q. *What is "Method of Production" labeling?*
A. "Method of production" refers to the distinction between wild-caught or farm-raised fish and shellfish. COOL legislation also requires the country of origin notice to distinguish between wild and farm-raised fish.

Meats (Beef - including veal, Lamb, Pork, Goat Meat and Chicken)

Q. *When can muscle cuts of meat be labeled as "Product of the U.S.?*
A. Covered commodities may bear a US origin declaration if they are derived from animals born, raised and slaughtered in the US, from animals born in Alaska or Hawaii, and transported through Canada for less than 60 days and slaughtered in US, or from animals present in the US on or before July 15, 2008.

Q. *How do I label imported muscle cuts of meat?*
A. Imported commodities for which no production steps occur in the US retain the origin as declared to U.S. Customs and Border Protection.

Q. *How do I label muscle cuts of meat from animals raised in "Country X" but imported for immediate slaughter in the U.S.?*
A. Meat from animals imported for immediate slaughter in the U.S. shall be designated as Product of Country X and the U.S.

Q. ***Can a packer or intermediary supplier that processes whole muscle meat products derived from both mixed origin animals (e.g., Product of U.S., Canada and Mexico) and U.S. origin animals commingle and label these products with a mixed origin label?***
A. If meat covered commodities derived from U.S. and mixed origin animals are commingled during a production day, the resulting product may carry the mixed origin claim (e.g., Product of U.S., Canada, and Mexico). Thus, it is not permissible to label meat derived from livestock of U.S. origin with a mixed origin label if solely U.S. origin meat was produced during the production day.

Q. *How do I label muscle cuts of meat from animals that are in "Category B" (animals that were born, raised and/or slaughtered in the U.S. and not imported for immediate slaughter)?*
A. Meat from these animals should be labeled as, Product of the U.S., Canada, and Mexico or Product of the U.S., Canada, Mexico. To provide consistency in the labels and to avoid consumer confusion, the terms "or" and "and/or" in the country of origin designation declaration shall <u>not</u> be used (e.g., retailers should not label their products Product of the U.S., Canada, or Mexico or Product of the U.S., Canada, and/or Mexico).

In addition, more specific information can also be provided. For example, meat derived from hogs that may have been born in Canada but raised and processed in the United States can be labeled as, Product of the U.S. and Canada; From hogs born in Canada or Product of the U.S. and Canada; Processed in the United States.

Q. ***Can a retailer, like a meat packer, label meat products derived from livestock born, raised, and slaughtered in the United States (i.e., Product of USA) as having a mixed origin (e.g., Product of the United States, Canada, and Mexico)?***

A. Similar to packers and intermediary suppliers, retailers are permitted to market U.S. produced meat products under a mixed origin label *(e.g., Product of U.S., Canada and Mexico)* if they are commingled with meat of mixed origin. That is, if a retailer further processes meat at the store and the resulting package includes meat of both U.S. origin and mixed origin (e.g., Product of U.S., Canada and Mexico), the origin declaration can read Product of U.S., Canada and Mexico.

Q. *If a packer, intermediary supplier or retailer handles whole muscle meat products derived from both mixed origin animals (e.g., Product of U.S., Canada and Mexico) and direct for slaughter animals (e.g., Product of Canada and U.S.), can the product be commingled and labeled using the direct for slaughter label with all applicable countries of origin listed (i.e., Product of Country X, U.S. and Country Y)?*

A. Yes. If meat covered commodities derived from mixed origin and direct for slaughter animals are commingled, the resulting product may carry the direct for slaughter origin claim (i.e., Product of Country X and U.S.) with other countries of origin as applicable.

Q. *What should be stated on the origin declaration for ground meat covered commodities if raw materials from several different countries are used during the manufacturing process?*

A. In accordance with the interim final rule, all actual or reasonably possible countries of origin must be listed on the origin declaration, in any order. In determining what is considered reasonable, when a raw material from a specific origin is not in the processor's inventory for more than 60 days, that country shall no longer be included as a possible country of origin.\

Q. *Do non-muscle carcass components such as cheek meat, hearts, and added beef fat have to be identified with origin information when used in the manufacture of ground meat in accordance with the COOL interim final rule?*

A. In general, muscle cuts of meat derived from the Institutional Meat Purchase Specifications (IMPS) Series100 (beef), 200 (lamb), 300 (veal), 400 (pork) and 11 (goat) are all covered commodities. Products derived from Series 700 for Varietal Meats and Edible By-Products are excluded from COOL labeling requirements if sold at retail as a variety meat.

Thus, if a packer is using imported ("D" category) varietal meats in the manufacture of ground beef, that imported origin must be conveyed in the final product's COOL declaration. For example, the origin declaration for ground beef that contains cheek meat imported from Canada must include Canada. If those packers producing ground meats intend on marketing ground meat as "Product of the United States" ("A" category), then the supplier of that ground meat must ensure that all meat components are from livestock exclusively born, raised and slaughtered in the United States. For example, if marketed as "Product of the United States", ground beef containing cheek meat would require that

both the beef trimmings and the cheek meat be from cattle that were exclusively born, raised and slaughtered in the United States.

Meat Origin Categories	
A –	U.S. Origin
B –	Multiple Countries of Origin
C –	Imported for Immediate Slaughter
D –	Foreign Origin

Perishable Agricultural Commodities

Q. *Do fresh apples, strawberries, raspberries, blackberries and blueberries fall under COOL Regulations?*

A. The term "perishable agricultural commodity" has the meaning given in the Perishable Agricultural Commodities Act of 1930 (PACA), as amended (7 USC 499a (b)).
"Perishable agricultural commodity:
(A) means any of the following, whether or not frozen or packed in ice: fresh fruits and fresh vegetables of every kind and character; and
(B) includes cherries in brine as defined by the Secretary in accordance with trade usages."
Items such as apples, strawberries, raspberries, blackberries and blueberries are covered under PACA regulations and are subject to COOL labeling requirements.

Q. *We are a certified organic fresh herb producer who sells packaged and bunched culinary herbs to local stores. Will our products be subject to COOL labeling requirements as of September 2008?*

A. Fresh herbs are covered under PACA regulations and are subject to COOL labeling requirements.

Q. *Can a producer list multiple countries as potential origins for the product inside? Currently we use packaging that says "may contain" product from Mexico, Honduras or Chile.*

A. The origin designation must be specific. If the container contains product of multiple countries then all countries must be on the label. For example: "Contains Product of Mexico and Chile." The law does allow for comingling of product in retail bins as long as all possible countries of origin are listed. §65.300(g) and §65.400(d)

Q. *If a product is grown in the U.S. but packaged, cut and prepared outside the U.S., how should it be labeled?*

A. Product that has been grown in the United States then exported to another country for processing then returned to the U.S. for retail sale may retain the designation of being labeled "Product of U.S." provided a verifiable audit trail is maintained. §65.300(d)(2) Imported covered commodities that have been grown in the United States then exported to another country for processing and then returned to the U.S. for retail sale without a verifiable audit trail, shall retain their origin, as declared to U.S. Customs and Border

Protection (CBP) at the time the product entered the United States, through retail sale. §65.300(f))

Q. *What terminology is acceptable for marking imported perishable agricultural commodities?*

A. The declaration of the country of origin may be in the form of a statement such as: "Product of Country X," "Grown in Country X," "Produce of Country X," may only include the name of the country "Country X" or may be in the form of a checkbox provided it conforms with other Federal labeling regulations (i.e., CBP, FDA).

Q. *Our current invoices identify our business address. Do we need to provide any further information?*

A. A distributor's business location is insufficient to provide the country of origin of the products they sell. The country of origin of each commodity needs to be declared and provided to the subsequent recipient of that product.

Q. *What state, region or locality designations are acceptable?*

A. The 2008 Farm Bill allows labeling of the state, region or locality of the U.S. where the perishable agricultural commodity (or nut) was produced to be sufficient to identify the U.S. as the country of origin. The regulation expands this provision to also allow state, regional, or locality labels for imported products. Examples of acceptable U.S. State labeling designations include: Pride of New York, Jersey Fresh, Vermont Seal of Quality, Massachusetts Grown, Ohio Proud, Kentucky Proud, and New Mexico Grown with Tradition.

Q. *Are retail items such as salad mixes and fruit cups/fruit salads required to be labeled with country of origin information?*

A. Under the August 1, 2008, interim final rule, a covered commodity that has been combined with at least one other covered commodity is considered a processed food item and is therefore exempt from country of origin labeling requirements.

We have received numerous inquiries in the last few weeks, primarily from members of the produce industry, requesting clarification on exactly what is meant by "other covered commodity". Examples of the types of produce mixes include:

1. Fruit salads with different melons (watermelon, honeydew and/or cantaloupe)
2. Packages of different colored sweet peppers (green, yellow and/or red)
3. Salads mixes (iceberg lettuce, romaine lettuce)

In determining whether these types of products or other similar products that contain combined covered commodities are covered by COOL, the Agency will rely on U.S. Grade Standards for fruits and vegetables to make the distinction of whether or not the retail item is a combination of "other covered commodities".

Applying this policy to the first example of a fruit salad that contains watermelon, honeydew, and cantaloupe, each of these melon types have a separate U.S. Grade

Standard. Therefore, when they are mixed together in a fruit salad, fruit platter, etc., they will not be subject to country of origin labeling requirements.

In the second example, the different colored sweet peppers combined in a package will require country of origin notification because there is one U.S. Grade Standard for sweet peppers, regardless of the color.

The third example is similar to the melon mix. Because there are separate U.S. Grade Standards for iceberg lettuce and romaine lettuce, this type of salad mix will not be required to be labeled with country of origin information. While the Agency previously used this example in the preamble of the August 1, 2008, interim final rule and concluded that such a salad mix would be subject to COOL, based on questions received during recent outreach sessions, the Agency now believes the use of U.S. Grade Standards in determining when a perishable retail item is considered a processed food item provides a bright line to the industry.

There are limited exceptions to this policy. This exception occurs when there are different grade standards for the same commodity based on the region of production. For example, although there are separate grade standards for oranges from Florida, Texas, and California/Arizona, combining oranges from these different regions would not be considered combining "other covered commodities" and therefore, a container with oranges from Texas and Florida will have to be labeled with country of origin information.

Finally, there are many fruits and vegetables for which no grade standards have been developed. If you are uncertain whether the combination of commodities you are selling will be considered a processed food item we encourage you to contact AMS for guidance.

The USDA Grade Standards for fruits and vegetables can be found on the web at www.ams.usda.gov/AMSv1.0.

Peanuts, Pecans, Macadamia Nuts and Ginseng

Q. *Is peanut butter, or other prepared foods containing peanuts, pecans, macadamia nuts or ginseng subject to COOL regulations?*

A. The legislation excludes processed food items from labeling requirements. The definition of processed food items is contained in the interim final rule for the remaining covered commodities. Peanuts, pecans, macadamia nuts and ginseng in the raw state are subject to COOL requirements. Peanuts, pecans, macadamia nuts or ginseng combined with other substantive food ingredients, such as in a candy bar or a trail mix, are considered processed food items and therefore excluded from labeling requirements. Likewise, roasted peanuts, pecans or macadamia nuts are considered processed food items. They also are excluded from labeling requirements.

Recordkeeping

Q. *What are the recordkeeping requirements for COOL?*

A. In general, retailers must maintain records or other documentary evidence that permits verification of origin claims made at retail. These records may be maintained in any location and, unless specified otherwise, must be maintained for a period of 1 year from the date the declaration was made at retail. Upon request, these records must be provided to any duly authorized representatives of USDA within 5 business days of the request.

For covered commodities sold in pre-labeled consumer-ready packages, the record must identify the covered commodity and the retail supplier. For products that are pre-labeled with the origin information on the shipping container (or other type of outer container), the label itself is sufficient evidence on which the retailer may rely to establish the product's origin at the point of sale. In this case, retailers must still maintain a record identifying the covered commodity and the retail supplier. In addition, to allow substantiation of the origin claim, the retailer must either maintain the pre-labeled shipping container at the retail store for as long as the product is on hand, or ensure the origin information is included in the record identifying the covered commodity and the retail supplier. For products that are not pre-labeled, the retailer must maintain records that identify the covered commodity, the retail supplier, and the origin information.

Retail suppliers 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 1 year from the date of the transaction. Upon request, these records must be provided to any duly authorized representatives of USDA within 5 business days of the request and may be maintained in any location.

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.

For an imported covered commodity, the importer of record as determined by CBP, must ensure that records: provide clear product tracking from the United States port of entry to the immediate subsequent recipient and accurately reflect the country(ies) of origin of the item as identified in relevant CBP entry documents and information systems; and maintain such records for a period of 1 year from the date of the transaction.

Q. *Can we use a National Animal ID system on our livestock for COOL verification purposes?*

A. USDA continues to look for ways to minimize the recordkeeping burden associated with this rule. With that in mind, producers and feedlots with animals that are part of a National Animal Identification System (NAIS) compliant system may rely on the presence of an official ear tag and/or the presence of any accompanying animal markings on which origin claims can be based. In addition, animals that are part of another recognized official identification system (such as a Canadian official system or a Mexican official system) may also rely on the presence of an official ear tag and/or any

accompanying animal markings (i.e., "Can", "M") to base origin claims. This provision also applies to such animals officially identified as a group lot. Participation in a NAIS program is voluntary, but does provide a livestock producer "safe harbor" for COOL compliance.

Q. *What information must be on an affidavit for it to be considered acceptable for origin verification purposes for livestock?*

A. A producer affidavit shall be considered acceptable evidence for the slaughter facility or the livestock supply chain to use to initiate or transmit an 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. Evidence that identifies the animal(s) unique to a transaction can include a tag ID system, information such as the type and sex of the animal(s), number of head involved, the date of the transaction, and the name of the buyer.

Q. *Can a backgrounder, feedlot or other producer (after ownership has transferred from the farm or ranch of birth) use affidavits as first-hand knowledge of the origin information to then complete an affidavit affirming origin information to a subsequent purchaser of the livestock?*

A. Yes, provided the affidavits on which they are relying were from persons having first-hand knowledge of the origin of the animals and the identity of the animals were maintained. These types of affidavits are sometimes called "consolidated" affidavits and are an acceptable method of transferring origin information. The party preparing the consolidated affidavit would retain the original affidavits or other appropriate records to substantiate the claims.

Q. *Is the use of "continuous" affidavits an acceptable means to transmit origin information for livestock? (Continuous affidavits are those affidavits issued by a producer or other livestock handler that are valid for an indefinite period of time until cancelled by the party issuing the affidavit.)*

A. Yes, provided the continuous affidavits are linked to some record or other form of documentary evidence that identifies the animals unique to a transaction.

Q. *If a producer visually inspects their livestock and determines that there are no markings or other identification that would indicate that the animals are of foreign origin, can the producer issue an affidavit affirming firsthand knowledge that the animals are of U.S. origin?*

A. For the period July 16, 2008, through July 15, 2009, producers may issue affidavits based upon a visual inspection at or near the time of sale that identifies the origin of livestock for a specific transaction. However, affidavits of this kind may only be issued by the producer or owner prior to, and including, the sale of the livestock for slaughter (i.e., meat packers are not permitted to use visual inspection for origin verification). This provision is necessary to permit livestock currently in production without origin information to clear the channels of commerce.