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Re: R-CALF USA's Comments in Federal Trade Commission's Notice of Proposed Rulemaking for Its Made in USA (MUSA) Rulemaking, Matter No. P074204

Dear Sir or Madam:

The Ranchers Cattlemen Action Legal Fund United Stockgrowers of America (R-CALF USA) appreciates this opportunity to comment on the Federal Trade Commissions (FTC's) Notice of Proposed Rulemaking for its Made in USA (MUSA) Rulemaking, Matter No. P074204, available at 85 Fed. Reg., 43,162-165 (July 16, 2020).

R-CALF USA is the largest trade association that exclusively represents United States cattle farmers and ranchers within the multi-segmented beef supply chain. Its thousands of members reside in 44 states and include cow-calf operators, cattle backgrounders and stockers, and feedlot owners.

I. INTRODUCTION

R-CALF USA strongly supports the FTC's proposal in its MUSA Rulemaking. R-CALF USA believes the codification of the FTC's longstanding MUSA standards will highlight and clarify those standards for consumers as well as entities making MUSA claims. As such, the codification will aid in the prevention of deceptive MUSA claims on product labels. As discussed below, R-CALF USA offers suggestions for the FTC's consideration as it finalizes this matter.

Also, R-CALF USA's principal interest is in origin claims for beef and beef products in or affecting U.S. commerce that are imported into the United States and beef and products slaughtered, manufactured, or processed in the United States, including from cattle imported into the United States. Consequently, R-CALF USA greatly appreciates the FTC's specific request for comments and information regarding the identification of other federal statutes, rules, or policies relating to country of origin labeling that are duplicative, overlapping, or that conflict with the FTC's MUSA standards.

As discussed below, R-CALF USA alleges that the U.S. Department of Agriculture (USDA) Food Safety and Inspection Services' (FSIS') regulations and policies relating to "Product of USA" claims on beef and lamb are not only in conflict with the FTC's proposed MUSA standards; but also, are in conflict with the Tariff Act of 1930 and, in the case of lamb, in conflict with the mandatory country of origin labeling law, 7 U.S.C. 1638 et seq.

II. R-CALF USA's SUGGESTIONS FOR STRENGTHENING MUSA STANDARDS

R-CALF USA offers for the FTC's consideration a suggestion that proposed 16 CFR § 323.1(a) expressly include the terms "processed," "fabricated," and "packaged" as additional representations the FTC will consider when determining when MUSA claims are or are not consistent with its MUSA standards. While these first two terms are commonplace in the U.S. meat production industry, they are or may be applicable to non-meat products and services, such as metal fabrication and the processing of fibers for the textile and related industries. The latter term would potentially prevent the use of a label stating "Packaged in USA," which would obviously create confusion as to whether the package's contents were of USA origin. Adding these terms will further aid in clarifying the FTC's MUSA standards.

It is noted that the term "processing" is included in proposed 16 CFR § 323.2, but processing may occur earlier in the supply chain for products where final assembly or final processing is subsequently conducted immediately before entering commerce.

R-CALF USA is concerned that the USDA has already made overtures signaling its future plan to use such a misleading and deceptive label as "Product of USA" or "Made in the USA" for meat and meat products derived even from imported livestock (*i.e.*, the sole ingredient of the meat or meat product) provided the imported livestock are slaughtered and processed in the U.S.[1] Should the FTC promulgate its MUSA rule so as to prohibit such a confusing and deceptive label for other goods and services, it may well deter the USDA from pursing such an inappropriate labeling scheme for beef.

III. R-CALF USA's IDENTIFICATION OF CONFLICTING FEDERAL LAW

A. The USDA's Labeling Regime Conflicts With the FSIS' MUSA Standards and Existing Federal Law.

The Tariff Act of 1930 (Tariff Act) states the foreign-origin designation of imported products, which include meat and poultry, must be retained to the ultimate purchaser.[2] The Federal Meat Inspection Act (FMIA) implements the labeling requirements of the Tariff Act with respect to meat and poultry.[3] It establishes that imported meat must comply with the labeling requirements set forth in the Tariff Act by stating that imported meat "shall be marked and labeled as required by such regulations for imported articles[.]"[4]

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[1] *See* Perdue takes the 'Made in USA' beef labeling option over country of origin, Dan Flynn, Food Safety News, March 12, 2020, downloaded at https://www.foodsafetynews.com/2020/03/perdue-takes-the-made-in-usa-beef-labeling-option-over-country-of-origin/ ("Secretary of Agriculture Sonny Perdue said the USDA was going to try [] limiting the use of "Product of the USA" label to animals that are slaughtered and processed in the U.S."). *See also,* letter from Rachel A. Edelstein, USDA-FSIS, to petitioners, March 26, 2020, attached hereto as Attachment 1 ("[] FSIS has decided to initiate rulemaking to define the conditions under which the labeling of meat products would be permitted to bear voluntary statements that indicate that the product is of U.S. origin, such as "Product of USA" or "Made in the USA." [] [W]e intend to propose that such labeling be limited to meat products derived from livestock that were slaughtered and processed in the United States").

[2] *See* 19 U.S.C. § 1304(a).

[3] *See* 21 U.S.C. § 620(a).

[4] *Id.*

The regulations implementing the Tariff Act state the ultimate purchaser is generally considered the last person to purchase the product in the same form in which it was imported.[5] A processor, even if considered the ultimate purchaser, cannot change the country of origin designation of the beef, pork, or non-chicken poultry meat unless they subject the imported meat product to a process which results in the substantial transformation of the meat product.[6] If the imported meat is subject only to minor processing, the Tariff Act requires the foreign-origin designation must be retained by the person purchasing the meat from the processor, who is then deemed to be the ultimate purchaser.[7]

However, the FMIA, which incorporates by reference the Tariff Act's labeling requirements, omit from its regulations requirement that imported meat shall be subject to the labeling requirements of the Tariff Act and, instead, the regulations declare that all meat in the United States is domestic.[8]

Specifically, in 1989 the USDA issued the Foreign Products Rule, 9 C.F.R. § 327.18(a), to implement Section 620 of the FMIA. Though the FMIA required USDA to comply with the labeling requirements of the Tariff Act of 1930, 19 U.S.C. § 1304(a), the 1989 Foreign Products Rule failed to do so. Instead, the USDA deemed all imported beef to be domestic beef after it entered U.S. commerce. The USDA made clear that "[o]nce product offered for entry has been reinspected by FSIS inspectors and the official mark of inspection has been applied, FSIS considers that such product has been 'entered' into the United States, and therefore, is the regulatory equivalent of domestic product."[9]

Thus, USDA-FSIS regulations regarding the labeling of imported beef are in direct conflict with the labeling requirements of the Tariff Act of 1930.

The U.S. Congressional Research Service (CRS) has long recognized the conflict between the labeling requirements of the Tariff Act and the regulations of the FSIS and stated in 2016:

> All individual, retail-ready packages of imported meat products (for example, canned hams or packages of salami) have had to carry such labeling. Imported bulk products, such as carcasses, carcass parts, or large containers of meat or poultry destined for U.S. plants for further processing also have had to bear country-of-origin marks. However, once these non-retail items have entered the country, the federal meat inspection law has deemed them to be domestic products. When they are further processed in a domestic, FSIS-inspected meat or poultry establishment—which has been considered the ultimate purchaser for purposes of country-of-origin labeling—FSIS no longer requires such labeling on either the new product or its container. FSIS has considered even minimal processing, such as cutting a larger piece of meat into smaller pieces or grinding it for hamburger, enough of a transformation so that country markings are no longer necessary.
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> Meat and poultry product imports must comply not only with the meat and poultry inspection laws and rules but also with Tariff Act labeling regulations. Because

[5] *See* 19 C.F.R. § 134.1(d).
[6] *See id*.
[7] *See id*. § 134.1(d)(2).
[8] *See* 9 C.F.R. § 327.18(a).
[9] 54 Fed. Reg., at 41,045, (October 5, 1989).

> Customs generally requires that imports undergo more extensive changes (i.e., "substantial transformation") than required by USDA to avoid the need for labeling, a potential for conflict has existed between the two requirements.[10]

From 2009 into 2016, under the then requirements of the mandatory country-of-origin labeling law,[11] USDA required that imported beef and pork be labeled through retail sale, so that consumers buying those goods at retail could accurately determine the meat's country of origin.[12] This temporarily corrected the decades-long conflict between the Meat Inspection Act's statutory text (which mandates such labels in certain circumstances) and the agency's Meat Inspection Act regulations (which had not required such labeling).[13]

However, in 2016, acting on a bill that removed *other* country-of origin labeling requirements, USDA removed the regulations that had brought its application of the Meat Inspection Act into compliance with the statutory text.[14] The agency then reinstituted its original 1989 Foreign Products Rule, once again allowing beef and pork from animals slaughtered abroad to be reclassified as domestic goods without substantial transformation, and the mislabeling of foreign beef with a USA label resumed. This occurred despite the fact that the agency itself had previously recognized those rules conflict with the Meat Inspection Act's text.[15]

Under USDA's FMIA regulations, a domestic processing plant merely needs to unwrap and rewrap an imported piece of meat in order to remove the Tariff Act's required label because the rules only require the country-of-origin label to be retained if the product is sold in the same package in which it was imported.[16]

The FSIS affirmed this assertion in its letter to petitioners dated March 26, 2020. The FSIS stated:

> FSIS's meat import regulations require that the immediate container of meat products offered for import into the United States bear, among other things, the name of the country-of-origin preceded by the words "product of," immediately under the name or descriptive designation of the product (9 CFR 327.14(b)(1)). If such imported meat or meat products are intended to be sold at retail, the original packaging with the "product of country" labeling must remain with the product. However, if these products are repackaged or otherwise reprocessed in a federally inspected facility, they are deemed and treated as domestic product for voluntary "Product of USA" labeling purposes. In a 2001 Advance Notice of Proposed Rulemaking (ANPR) on product labeling for United States cattle and fresh beef, FSIS explained that "[Product of USA] has never been construed by FSIS to mean that the product is derived only from animals that were born, raised, slaughtered, and prepared in the United States.[17]

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[10] Joel L. Greene, Cong. Research Serv., Country-of-Origin Labeling for Foods and the WTO Trade Dispute on Meat Labeling, 31 (Mar. 8, 2016).
[11] 7 U.S.C. 1638(a).
[12] 78 Fed. Reg. (May 24, 2013), at 31,385, col. 3.
[13] *See* 21 U.S.C. § 601 et seq.
[14] *See* the Consolidated Appropriations Act, 2016 (Pub. L. 114-113) (amending the COOL law's requirements for muscle cuts of beef and pork, and ground beef and pork).
[15] *See* Geoffrey S. Becker, Cong. Research Serv. Country-of-Origin Labeling for Foods, 2 (June 3, 2005).
[16] *See* 68 Fed. Reg. at 61948.
[17] Letter from Rachel A. Edelstein, USDA-FSIS, to petitioners, March 26, 2020, attached hereto as Attachment 1 (citation omitted).

To make matters worse, the USDA-FSIS' Food Standards and Labeling Policy Book (Policy Book) authorizes the use of the "Product of U.S.A." label if "[t]he product is processed in the U.S. (*i.e.*, is of domestic origin)."[18] This means that imported products that unlawfully escape the Tariff Act's requirements for the retention of a foreign label simply by undergoing the minor process of unwrapping and rewrapping can be sold to unsuspecting U.S. consumers bearing the new label "Product of U.S.A," or, as FSIS states in Attachment 1, a "Made in the USA" label.

In 2017, R-CALF USA sought a judicial remedy to correct this newly resurfaced problem in the U.S. District Court for the Eastern District of Washington.[19] However, the court determined the effort to correct the 1989 Foreign Products Rule was time barred due to the applicable six-year statute of limitation. The court disagreed that the time limit should be reset as a result of the country of origin labeling law's enactment correcting the problem and its subsequent repeal.

The U.S. imports approximately three billion pounds of beef (packaged beef) each year. The harm to U.S. cattle farmers and ranchers and to American consumers is obvious. The USDA facilitates the multinational beef packers' practice of indiscriminately importing cheaper, undifferentiated beef as direct substitutes for U.S.-produced beef, and labeling that imported beef as a USA product, thus commandeering the good names and reputation of America's ranchers and reducing both the demand for and price of their U.S.A. cattle.

Although the court ruled R-CALF USA was time-barred from obtaining a remedy, it did find that U.S. cattle producers were financially harmed by the lack of country-of-origin labels.[20]

B. The USDA's Labeling Regime for Lamb Conflicts With the FSIS' MUSA Standards and Existing Federal Law.

Lamb was not among the covered commodities removed from the mandatory country of origin labeling law in 2016, the USDA-FSIS' policy described above that authorizes a meat product to bear a "Product of U.S.A." or "Made in the USA" label if it undergoes even minor processing in a U.S. processing plant is in direct conflict with the mandatory country of origin labeling statute. This is because the mandatory country of origin statue expressly prohibits a United States designation on lamb or ground lamb unless those products were derived exclusively from animals exclusively born, raised, and slaughtered in the United States.[21] Thus, the mandatory country of origin law brings lamb into compliance with the MUSA standard while the USDA labeling policy that would apply to lamb remains conflicted.

C. The USDA-FSIS Has Expressed Its Intent to Continue Deceiving the Public with Inaccurate Labels on Meat.

The USDA-FSIS has clearly expressed its intent to continue mislabeling beef for the benefit of a handful of multinational beef packers and a minority of U.S. cattle backgrounders and stockers and feedlots whose business plans include bypassing American cattle farmers and ranchers to, instead,

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[18] Standards and Labeling Policy Book. U.S. Department of Agriculture Food Safety and Inspection Service. Office Policy, Program and Employee Development, at 155-156 (August 2005).
[19] *See R-CALF USA et al. v. USDA.*
[20] *Id.*
[21] 7 U.S.C. 1638(a)(2)(A).

purchase imported cattle with which to maximize their profit margins at the expense of domestic producers.

That those whose business plans include importing foreign cattle are but a very small minority within the larger U.S. cattle industry is disclosed by USDA's own data. For example, the U.S. commercially slaughtered 33.6 million cattle in 2019,[22] while it imported only about 2 million head of cattle. Thus, the number of cattle imported annually into the United States represent less than 6% of the cattle slaughtered in the United States. Thus, the USDA-FSIS' plan expressed below caters to those who handle less than 6% of the cattle slaughtered in America.

The USDA-FSIS plan will benefit this minority group within the much larger U.S. cattle industry by allowing them to deceptively affix a USA label on beef derived exclusively from imported cattle, including fed cattle imported for immediate slaughter (*i.e.*, imported slaughter-ready cattle that arrive in sealed trucks and are unloaded at the beef packers' unloading dock).

The USDA-FSIS acknowledged this is its intent in its letter to petitioners, Attachment 1:

> FSIS has concluded that the concerns expressed about measures that could potentially affect the integrated livestock supply chains between the United States and Canada, as well as the integrated cattle supply chain between the United States and Mexico, have merit. [] Canada exports a significant number of live cattle, hogs, sheep, and goats to the United States every year for slaughter and processing, and Mexico exports a large number of cattle to the United States to be fed, slaughtered, and processed. Thus, many official U.S. slaughter and processing establishments use Canadian and Mexican cattle as the source animals for their meat and meat products. Therefore, after considering the issue[] [], FSIS [] has decided to initiate rulemaking to limit "Product of USA" and certain other voluntary U.S. origin statements to meat products derived from livestock that were slaughtered and processed in the United States. The Agency has determined that a voluntary U.S. meat product origin labeling policy that focuses on where the product is made, i.e., where the livestock are slaughtered and processed, without regard to where the source animals were born, may more accurately reflect what "origin" means with respect to meat products processed in the United States and will thus result in labels that are truthful and not misleading.

It is unfortunate but true that the USDA, which is supposed to work to strengthen America's family farm and ranch system of agriculture, instead consistently kowtows to a very small group of powerful players within the industry to assist them in deceptively labeling their foreign products in a manner that harms the vast majority of American cattle farmers and ranchers.

IV. CONCLUSION

For the reasons stated above, R-CALF USA encourages the Federal Trade Commission to consider its recommendations for strengthening the commission's Made in USA standards. And, it further appeals to the Federal Trade Commission to provide any assistance possible to correct the substantive conflicts

[22] Livestock Slaughter, USDA-National Agricultural Statistics Service (NASS), ISSN: 0499-0544, January 23, 2020, at 5, available at https://downloads.usda.library.cornell.edu/usda-esmis/files/rx913p88g/fn107f118/1257b8885/lstk0120.pdf

between existing federal law and the U.S. Department of Agriculture's past, present and future meat labeling schemes.

Sincerely,

Bill Bullard, CEO

Attachment