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September 3, 2003

A.J. Yates
Administrator
Agricultural Marketing Service
United States Department of Agriculture
1400 Independence Avenue, SW STOP 0249
Washington, DC 20250-0249

Sent via e-mail

Dear Mr. Yates:

Thank you for providing the opportunity for Brian Jennings and me to visit with you, Mr. Barry Carpenter, and Mr. Ken Vail on July 28, 2003, during which time we discussed the implementation of mandatory country of origin labeling. Upon learning of your Agency's concerns, I asked our legal counsel to research some of the issues raised during our meeting. This letter will set forth my understanding of your Agency's concerns (in bold type) followed by R-CALF USA's comments that have been formulated with the benefit of our recent research.

Time is of the essence regarding implementation of mandatory country of origin labeling (COOL Act). R-CALF USA would like to work with your agency to solve any real or perceived problems associated with the COOL Act within rules, and our research suggests this can be done.

USDA's jurisdiction begins at the point of slaughter as the country of origin labeling legislation (COOL Act) does not give USDA authority to require producers to keep or produce records (unless a producer is also a packer): R-CALF USA agrees with this interpretation of the COOL Act.

Because USDA does not have jurisdiction to impose a verification system on producers, the responsibility to develop and maintain a verification system must rest with retailers and packers, i.e., the verification system(s) for livestock shall be determined by, and imposed on producers by, retailers and their suppliers (packers): R-CALF USA's research suggests that USDA is given sufficiently broad discretion by the COOL Act to establish a system for verifying the origins of livestock. The COOL Act instructs the Secretary to "promulgate such regulations as are necessary to implement this subtitle." 7 USC § 1638c(b). While the COOL Act does not allow USDA to use a mandatory identification system to verify

whether an animal was born, raised, and slaughtered in the United States, it does suggest several models that USDA may use for purposes of verification, leaving the ultimate decision on the exact nature of the verification system to USDA.

USDA uses a presumption of domestic origin to administer its federal purchase programs because the applicable federal purchase program statutes prescribe a presumptive methodology. However, a presumptive standard cannot be used to implement the COOL Act because USDA is given no statutory authority similar to the federal purchase programs to do so: R-CALF USA's research finds no legal basis for this position. In fact, the COOL Act clearly states that USDA may use existing models that incorporate a presumptive standard, including the National School Lunch Act. R-CALF USA's research reveals that the agricultural commodity purchases by the Federal government under the National School Lunch Act and all other Federal Food assistance programs are governed by the Buy America Act which applies to all federal acquisitions. The "Buy America" Act allows the USDA the discretion to deviate from and provide specific definitions for what is acceptable as "domestic" production under USDA's purchasing contracts. Using that authority USDA has specifically defined what is acceptable as "domestic" production, and indicated that no livestock imported for immediate slaughter and no imported beef products are included as "domestic production". *See e.g.,* 42 U.S.C. § 1760(n); USDA-1 Articles 34 and 49; Announcement LS-2, June 2003, Ground Beef Products, Section I.F. R-CALF USA believes that USDA should likewise exercise the discretionary authority inherent under COOL to fill-in gaps in the statute and establish a standard for purposes of determining how to verify that an animal was born, raised, and slaughtered in the United States pursuant to the COOL Act. *See e.g.,* 7 USC § 1638c(b).

Because the COOL Act imposes a duty to label only specific meat products sold only by specific retailers, USDA is not authorized to prescribe a universal verifiable record keeping audit trail system for all meat packers for all meat derived from all livestock. Further, and in recognition of the limited scope of the COOL Act, USDA must approach the implementation of the COOL Act beginning only with the regulated meat retailers and working upstream with only the regulated suppliers: R-CALF USA's research suggests that USDA's interpretation is reasonable in that the COOL Act exempts covered commodities sold by certain retailers; and by extension, may exempt suppliers of such exempted commodities from being subject to any duty to maintain a verifiable recordkeeping audit trail. However, USDA, by virtue of its discretionary authority to require a verifiable recordkeeping audit trail combined with its broader authority to "promulgate such regulations as are necessary to implement this subtitle," has clear authority throughout the manufacturing process over covered commodities sold at retail, as well as authority over those who handle the covered commodities. Therefore, USDA can prescribe the exact nature of the information packers (who handle covered commodities) must use for purposes of determining the origin information that must be transferred from live animals to the resulting carcass at the point of slaughter. In addition, USDA also has the authority to impose strict limits on the information packers can obtain from livestock or livestock producers and, further, the

authority to prescribe the form that packers shall use to verify the origins of livestock used to manufacture covered commodities.

Using a marking system whereby imported livestock are required to be permanently marked with a mark of origin and all livestock not imported would remain unmarked and deemed to be born and raised in the U.S. may violate national treatment rules: R-CALF USA's previous research reveals that the U.S. and all other WTO members have express authority under Article IX of GATT 1994 to require marks of origin on imported goods, including livestock. The 1956 Report of the Working Party on Certificates of Origin and Marks of Origin (cited by the WTO Panel in Korean Beef) clarifies that while countries can require marks of the country of origin, markings beyond the mere indication of country of origin should be limited. Therefore, a national identification system requiring information regarding the specific place of birth and owner at time of birth of an imported animal would not likely be compliant while a simple mark of origin denoting only the country of origin is compliant. Further, while the Agreement of Rules of Origin impacts any marking requirement, it does not limit the U.S. from using such a marking requirement to implement the COOL Act. A country of origin marking requirement would require nothing other than country of origin information, and implementation of the COOL Act would require nothing other than a mere reading of the country of origin marking to verify the origin of the livestock. Therefore, marked livestock would not receive less favorable treatment than domestic, unmarked livestock after they enter the United States and would be in compliance with national treatment rules.

Livestock brands, tags, or tattoos are not permanent and therefore are not a reliable means of identifying livestock: R-CALF USA did not ask its legal counsel to research this issue because the practice of identifying livestock through brands, tags, and tattoos is an accepted industry practice recognized as the most effective means of identifying livestock. USDA APHIS approves the use of tags and tattoos to identify animals for purposes of eradicating Brucellosis, APHIS uses brands and tags on Mexican cattle in its effort to eradicate Tuberculosis. These identification methods are both time-honored and effective in identifying livestock as to their ownership, origin, and health status.

It should also be noted that many imported consumer products, including commodities subject to the COOL Act, are currently subject to an origin marking requirement satisfied with a mere sticker denoting the country of origin. These stickers are not permanent and can be readily removed by a handler (they can be rubbed off or pealed off). However, there must be a federal obligation on the part of handlers of imported products to maintain the integrity of origin markings, and handlers of imported livestock should be subject to the same obligation. It is unclear why USDA would suggest that livestock should be held to any higher standard than what is already in place for other goods and commodities.

The COOL Act does not allow any "grandfathering" of livestock residing in the United States and, therefore, USDA must have the means of verifying that livestock currently in the U.S. production system were born and raised in the United States or imported from another country: R-CALF USA's agrees with USDA in part and acknowledges that beginning September 30, 2004 all covered commodities must be marked for country of origin and "grandfathering" is not possible. With that said, RCALF believes our proposal to rely on a foreign marking system and presumption of domestic origin if unmarked would fulfill USDA's obligations under COOL. A USDA marking based system of identification for livestock as we suggest, would impose a duty on persons who slaughter livestock, for purposes of manufacturing covered commodities sold by retailers, to identify the resulting covered commodities according to the foreign marking or the lack of a foreign marking of cattle. By further requiring persons who slaughter animals to examine only the markings for determining the origins of livestock, the issue of compliance would be administratively addressed and no inconsistency would exist in the system. More importantly, USDA could choose to reduce the likelihood of objections or problems by working with the Department of Treasury to begin marking imported livestock earlier than September 30, 2004 (January 1, 2004, for example). The fact that all Mexican cattle are already identified with brands and/or metal ear tags and that Canadian cattle are ear tagged provides USDA another avenue to maintain the identity of these animals prior to the implementation of the COOL Act on September 30, 2004.

Mr. Yates, several Members of Congress have expressed their perception that USDA will not implement the COOL Act in a least-cost, least burdensome manner. There will likely be additional amendments filed to address their concerns. We believe these amendments could be avoided if USDA were to send a signal of its progress toward addressing the cattle industry's concerns. We would like to assist your agency in this regard. Please let us know how we may be of assistance.

Sincerely,

Bill Bullard
C.E.O.

CC: Barry Carpenter
Ken Vail
Brian Jennings