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February 26, 2007

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

Via Facsimile and Electronic Portal: 202-720-1112

**Re: Economic Impacts of the Interim Final Rule for Mandatory Country of Origin Labeling for Fish and Shellfish**

The Ranchers-Cattlemen Action Legal Fund – United Stockgrowers of America (R-CALF USA) appreciates this opportunity to submit its views regarding the costs and benefits of the interim final rule for mandatory country of origin labeling (COOL) for fish and shellfish. These comments are submitted in response to the Department's request for public input published at 71 Fed. Reg. 68,431 (Nov. 27, 2006). R-CALF USA is a non-profit cattle-producer association that represents over 15,000 U.S. cattle producers in 47 states across the nation. 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.

## 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. R-CALF USA believes that COOL should be implemented without further delay, and that any legitimate concerns about the costs of implementing COOL can be addressed by building on some of the improvements contained in the interim final rule for COOL for fish and shellfish.

[1] 7 U.S.C. § 1638 *et seq*.
[2] 7 U.S.C. § 1638a(a)(2)(A).

Opponents of COOL have argued that implementing mandatory COOL will be overly expensive and burdensome. Their arguments are largely based on draft COOL implementing regulations published by USDA in 2003, which contained numerous onerous record-keeping and retention requirements for suppliers and retailers.[3] The rule for beef has never been finalized, and the interim final rule for COOL released by the Department in 2004 only covers the labeling of fish and seafood.[4]

Cattle producers share concerns about the implementation costs of COOL, but believe that these 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 2004 interim final rule contained a number of important improvements over the draft 2003 rule that would appear to have reduced implementation costs without detracting from the country-of-origin information provided to consumers. Unfortunately, it appears that these cost savings were not reflected in the cost estimates for COOL contained in the interim final rule.[5] Thus, current cost estimates are likely excessive as they do not account for the reduction in record-keeping and other administrative burdens resulting from the revised rule. In addition, these cost estimates are the same as those contained in the 2003 draft COOL rule, which the Government Accountability Office found to be based on assumptions that were "questionable" and "not well supported."[6] It is important that these assumptions be corrected, and that the cost savings resulting from the improvements in the 2004 interim final rule be fully taken into account, as the Department proceeds in drafting new regulations for the implementation of COOL for other products such as beef. There are at least eight provisions in the interim final rule which reduced record-keeping burdens and costs, and these provisions should serve as templates for future COOL regulations.

## II. COST SAVINGS IN THE INTERIM FINAL RULE

### A. Interim Final Rule Simplified Labeling of Fish and Shellfish not Exclusively Hatched, Raised, Harvested, and Processed 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

[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] While the total first-year implementation costs estimated in the interim final rule are lower than those estimated in the 2003 draft rule, this is due to the lower volume of production affected by the rule (due to revised definitions of processed products). *2004 Fish Rule* at 59,731.
[6] General Accounting Office (subsequently re-named the Government Accountability Office), *Country-of-Origin Labeling: Opportunities for USDA and Industry to Implement Challenging Aspects of the Law*, GAO-03-780 (Aug. 2003) at 7.

exclusively born, raised, and slaughtered in the U.S."[7] Similarly, it states that farm-raised fish can only be labeled with a "U.S." label if it is "hatched, raised, harvested and processed" in the United States and that wild fish can only receive such a label if it is harvested and processed in the United States.[8] But the law does not specify how meat from an animal born or raised outside the U.S., but slaughtered or further processed within the U.S., should be labeled, or how fish harvested in another country but processed in the U.S. should be labeled, other than to prohibit labeling such products 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."[9] 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.

The interim final rule for fish and shellfish addressed this problem by simplifying labeling requirements for product entering the U.S. during the production process. The 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."[10] 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. By continuing to prevent the labeling of such products as U.S.-origin, as required by the COOL law, but no longer requiring additional specific information on every production step that has occurred in the U.S. (as contemplated in the 2003 draft rule), this solution upholds the letter of the law while reducing costs for producers.

### B. Interim Final Rule Simplified 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 or fish and shellfish products that exclusively contain U.S. animals. But the law does not provide guidance on how to label blended products incorporating meat from animals or fish and shellfish 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.[11] 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.

The 2004 interim final rule addressed this problem by allowing blended products to be labeled with a list of the countries of origin that may be contained in the final product. The rule

[7] 7 U.S.C. § 1638a(a)(2)(A).
[8] 7 U.S.C. § 1638a(a)(2)(C) - (D).
[9] *2003 Draft Rule* at 61,983 (§ 60.200(g)(1)).
[10] *2004 Fish Rule* at 59,745 (§ 60.200(g)(2)).
[11] *2003 Draft Rule* at 61,983 (§ 60.200(h)).

provides that the label on blended products shall "indicate the countries of origin contained therein or that ***may be*** contained therein."[12] 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 simplification gives consumers a reasonable indication of likely origin, while reducing implementation costs.[13]

### C. Interim Final Rule Allows 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.[14] The law also requires suppliers to provide retailers with country of origin information for products supplied to them.[15] 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.[16] 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.

The interim final rule addressed this problem by allowing a pre-labeled product's origin label alone to serve as sufficient documentation of origin, and only requires retailers 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."[17] There can be no willful violation of the COOL law by a retailer who relies on such labels. 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 already 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.[18] This is a central improvement over the 2003 draft rule, and should result in significant cost savings along the entire production chain.

### D. Interim Final Rule Ensures Processors Are Not Required to Have Legal Access to Producers' Records

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.[19] In addition, importers of record were required to ensure that their own records

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[12] *2004 Fish Rule* at 59,745 (§ 60.200(h)) (emphasis added).
[13] *2004 Fish Rule* at 59,715.
[14] 7 U.S.C. §§ 1638a(d) and 1638b(c).
[15] 7 U.S.C. § 1638a(e).
[16] *2003 Draft Rule* at 61,984 (§ 60.400(c)).
[17] *2004 Fish Rule* at 59,746 (§ 60.400(c)(1)).
[18] *See also 2004 Fish Rule* at 59,716 – 59,717 for an explanation and justification of the new system.
[19] *2003 Draft Rule* at 61,984 (§ 60.400(b)(1)).

"substantiate" origin claims.[20] Meat 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.[21]

The interim final rule eliminated the requirement that processors have "legal access" to other parties' substantiating origin documentation, and instead simply requires suppliers to possess such records.[22] In addition, the 2004 interim final rule only requires 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.[23] Separate substantiating documentation is not required given that existing import records already contain the required information.[24] This is because importer records should not have to themselves substantiate origin if accurate origin information is already accessible in Customs import documents.

These improvements should be expanded upon in the case of cattle and beef to allow packers to rely upon import marking on cattle in order to determine country of origin. Revised regulations for COOL should enable meat packers to use import markings to differentiate cattle of foreign origin from cattle of U.S. origin. Currently, cattle imported from Canada and Mexico are branded with a "CAN" or an "M," or arrive at packing houses in sealed conveyances, for health and safety reasons.[25] In addition, breeding stock from Mexico are required to be tagged with a permanent metal ear tag.[26] This allows packers to easily identify cattle that do not qualify for a "U.S." label under COOL. These marking requirements can be made permanent and universally applicable by removing cattle from the so-called "J-List," a list of products exempt from origin marking under Customs rules. Removing cattle from the J-List will also facilitate identification of imported cattle for animal health purposes. 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.

### E. Interim Final Rule Eliminated 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

[20] *Id*. at § 60.400(b)(4).
[21] *See* 7 U.S.C. § 1638a(f)(1).
[22] *2004 Fish Rule* at 59,745 (§ 60.400(b)(1)).
[23] *Id*. at § 60.400(b)(4).
[24] *See 2004 Fish Rule* at 59,716 for a discussion of the reasons for the change.
[25] *See* 9 C.F.R. §§ 93.420, 93.427(c)(1), 93.429, and 93.436(b)(3).
[26] *See* 9 C.F.R. § 93.427(d).

could result in fines.[27] 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.[28] 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.

The interim final rule deletes the chain of custody documentation requirement.[29] By eliminating the requirement for suppliers and retailers to document the chain of custody for each product, the rule recognizes as sufficient the maintenance by suppliers and retailers of 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 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 original producers of each product would still be identifiable through retailers' and suppliers' records on previous sources of their products. 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.[30]

### F. Interim Final Rule Eliminated 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."[31] 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.

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.[32] 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. Thus, the interim final rule deleted the separate tracking documentation requirement. The requirement should also be deleted in any new rule written for COOL for beef. Suppliers handling product of various origins should be free to establish and

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[27] 7 U.S.C. § 1638a(d).
[28] *2003 Draft Rule* at 61,984 (§ 60.400(a)(1)).
[29] *2004 Fish Rule* at 59,716.
[30] *Notice to the Trade: Mandatory Country of Origin Labeling for Fish and Shellfish*, USDA Agricultural Marketing Service, March 2005.
[31] *2003 Draft Rule* at 61,984 (§ 60.400(b)(5)).
[32] *2004 Fish Rule* at 59,717.

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. Interim Final Rule Reduced 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.[33] The record retention requirement adds an extra burden for suppliers and retailers to maintain files for two years after the date of a transaction. The interim final rule reduced the period of time for which suppliers and retailers must retain their records from two years to one year.[34] 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.[35] A similar change should be made in a revised COOL rule for beef.

### H. Interim Final Rule Rejected Suggestion that Supplier Affidavits and Third-Party Verification Audits Should Be Required

The law allows the Secretary to impose fines on a retailer who has "willfully violated" the COOL law.[36] 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."[37] 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.[38] 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.

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."[39] 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. 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. For example, any final rule should specify that the fact that a

[33] *2003 Draft Rule* at 61,984 (§ 60.400(b)(3) and (c)(2)).
[34] *2004 Fish Rule* at 59,745 – 59,746 (§ 60.400(b)(3) and (c)(2)).
[35] *Id*. at 59,716.
[36] 7 U.S.C. § 1638b(c).
[37] *2003 Draft Rule* at 61,984 – 61,985 (§ 60.400(b)(2) and (c)(3)).
[38] *Id*. at 61,951.
[39] *2004 Fish Rule* at 59,717.

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.

## III. BENEFITS AND NET ECONOMIC IMPACT OF COUNTRY OF ORIGIN LABELING

The Department's request for comments also seeks input on the economic benefits that have resulted from implementation of the interim final rule and the net economic impact of the interim final rule. Unfortunately, there is little public information documenting the full extent of the benefits of the interim final rule on COOL for fish and shellfish, given its recent implementation. However, there is extensive evidence regarding consumers' desire for COOL and their preference for U.S.-origin food products if they are available and marked as such. For example, after speaking with major consumer groups, including the Consumers Union, the Consumer Federation of America, and the Center for Science in the Public Interest, the Government Accountability Office found that COOL would benefit consumers who prefer to purchase meat from U.S. animals.[40] The GAO also cited a consumer survey commissioned by the National Cattlemen's Beef Association showing that 91 percent of consumers polled would purchase meats labeled "Product of the United States" rather than imported meat if given the choice, and two-thirds of those expressing such a preference attributed it to their desire to buy American and support American farmers and businesses.[41] The GAO also found that increased demand for U.S.-labeled products could benefit U.S. producers with higher sales and prices for their product.[42] Since that time, with the discovery of a Canadian animal with bovine spongiform encephalopathy in the United States and the closure of vital beef export markets around the world, consumer demand for clear differentiation of U.S. beef produced exclusively from animals born, raised, and slaughtered entirely in the U.S. has only grown, and thus so have the potential benefits of implementing mandatory COOL.

While these benefits may be difficult to quantify with complete precision, they are of vital importance to U.S. producers. R-CALF USA believes that these significant benefits substantially outweigh the costs of COOL, even more so if those costs are minimized through common-sense measures that reduce record-keeping and administrative requirements while maintaining the integrity of the law. The interim final rule provides a useful template for how to reduce such unnecessary costs while maintaining the substance of the original COOL law passed by Congress.

## IV. CONCLUSION

R-CALF USA appreciates this opportunity to submit comments on the costs and benefits of COOL in the context of the implementation of the interim final rule on fish and shellfish. R-CALF USA looks forward to working with the Department and with Congress to ensure that COOL is also fully implemented for beef, and that it is implemented in a manner that maximizes the benefits for U.S. cattle producers and for the consumers that seek to buy their product.

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[40] General Accounting Office (subsequently re-named the Government Accountability Office), *Beef and Lamb: Implications of Labeling by Country of Origin*, GAO/RCED-00-44 (Jan. 2000) at 19.
[41] *Id*. at 19 – 20.
[42] *Id*. at 20.

Sincerely,

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President