

September 29, 2008

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

Re: Docket No. AMS-LS-07-0081; LS-07-0081. Interim Final Rule with Request for Comments; Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts (73 Fed. Reg. 45106 (August 1, 2008))

Dear Sir or Madam:

This letter is submitted by the Canadian Cattlemen's Association ("CCA") and the Canadian Pork Council ("CPC"), in response to the Agricultural Marketing Service's ("AMS" or the "agency") request for public comment regarding the above referenced Interim Final Rule for mandatory country of origin labeling ("COOL") for beef, pork, lamb, chicken, goat meat, perishable agricultural commodities, peanuts, pecans, ginseng, and macadamia nuts ("Interim Final Rule"). As noted in the August 20, 2007 comments submitted by the CCA and CPC concerning the agency's Proposed Rule (*see* 72 Fed. Reg. 33917 (June 20, 2007)), the CCA is a national federation that encompasses eight provincial organizations of Canadian beef producers, numbering nearly 90,000. Among the CCA's objectives is to ensure its members have favorable access to international markets and to eliminate programs around the world that distort world trade. The CPC brings together the interests of its nine provincial members (representing approximately 9,000 producers) in, among other missions, maintaining access for exports of Canadian pork and hogs and defending Canadian hog producers' interests with respect to technical barriers to trade. With these objectives in mind, CCA and CPC join in responding to the agency's request for comments on the Interim Final Rule.

I. COOL is in violation of U.S. international trade obligations.

While the CCA and the CPC offer these comments in an effort to contribute to the fair and efficient implementation of COOL, we do so without prejudice to our position that COOL violates U.S. trade obligations pursuant to the North American Free Trade Agreement ("NAFTA"), the World Trade Organization ("WTO"), and the General Agreement on Tariffs and Trade ("GATT"). As detailed in the CCA's and CPC's August 20, 2007 comments to the

Proposed Rule, and as incorporated by reference here, COOL as provided for in the 2002 Farm Bill (and as modified in the 2008 Farm Bill) is inconsistent with U.S. NAFTA and WTO obligations. *See* CCA and CPC August 20, 2007 Comments, Section I, at pp 1-9. We therefore must respectfully disagree with the assertion in the Interim Final Rule that “the Agency has considered these obligations throughout the rulemaking process and concludes that this regulation is consistent with U.S. international trade obligations.” 73 Fed. Reg. at 45123. To the contrary, provisions of the Interim Final Rule do not cure the differential treatment of imported animals and products that leads inevitably to WTO/NAFTA violations.

II. COOL, as modified by the 2008 Farm Bill, still results in high costs to packers and retailers with negligible benefits to anyone.

The CCA and CPC August 20, 2007 comments (at pp. 9-12) expressed concern that while the benefits to be derived from the implementation of COOL are negligible, the costs of implementing COOL are very high. CCA and CPC incorporate here by reference their previous observations on these points since there is little in the Interim Final Rule that changes this cost-benefit analysis. In fact, by expanding COOL coverage to certain products exempt under the Proposed Rule (*e.g.*, hamburger, beef patties), the costs of implementing COOL may be even more than previously estimated.

In further support of CCA’s and CPC’s concerns, the agency’s Summary of Economic Analysis states:

USDA finds little evidence that consumers are willing to pay a price premium for country of origin labeling (COOL). USDA also finds little evidence that consumers are likely to increase their purchase of food items bearing the United States origin label as a result of this rulemaking. Current evidence does not suggest that United States producers will receive sufficiently higher prices for United States-labeled products to cover the labeling, recordkeeping, and other related costs. The lack of widespread participation in voluntary programs for labeling products of United States origin provides evidence that consumers do not have strong enough preferences for products of United States origin to support price premiums sufficient to recoup the cost of labeling.

73 Fed. Reg. at 45126. Given this assessment, the agency is left to respond to the cost-benefit concerns raised by commenters with the equivocal assertion that: “While it may be difficult to quantify the benefits associated with mandatory COOL, the COOL program must be implemented on September 30, 2008, in accordance with the statute.” 73 Fed. Reg. at 45125. The agency’s acknowledgement that the benefits of this rule are marginal at best dictates that the associated costs be minimized. We accordingly endorse the agency’s recognition that the purpose of COOL is *not* to impose economic inefficiencies and disrupt the orderly production, processing, and retailing of covered commodities. *Id.* at 45118. The following sections deal with the application of this general principle to particular provisions of the Interim Final Rule.

III. The CCA and CPC support USDA's interpretation permitting U.S. origin meat products to bear a label indicating multiple countries of origin.

The CCA and CPC support USDA's interpretation of COOL legislation permitting covered commodities from animals born, raised, and slaughtered in the United States ("Category A") to be labeled with multiple countries of origin ("Category B").¹ This flexibility in labeling is consistent with the legislative mandate to minimize the burden and recordkeeping requirements imposed by COOL on retailers and packers.² Indeed, prohibiting retailers, packers, or suppliers from labeling U.S. meat products with a label bearing multiple countries, especially in light of USDA's findings that consumers are not likely to pay the extra cost to purchase U.S. origin meat, could discourage the use of U.S. origin meat products.

The reality of the current market dictates that for a variety of reasons, packers and retailers meet their supply requirements through both domestic and foreign sources. In such an environment, the costs associated with segregating and labeling exclusively U.S. product will be borne when there is a true marketing benefit to do so.

The statutory language directing implementation of COOL provides for this flexibility in labeling a product exclusively of U.S. origin, but in a manner that safeguards the integrity of the U.S. origin label. To be labeled as U.S. origin, a product must have been born, raised, and slaughtered in the United States.³ While what can be labeled as of U.S. origin is narrowly defined, as urged by many U.S. producers, there is no requirement that all product exclusively of U.S. origin be so labeled. In fact while the statute requires that "Category D" commodities, *i.e.*, those strictly of foreign origin, *shall* be labeled as such, the statute provides that Category A commodities (those of exclusively U.S. origin) *may* be designated as being of U.S. origin, providing retailers and packers the flexibility of employing that label when it is market-wise to do so.

Allowing a U.S. origin product to be labeled as "U.S. origin" or "mixed origin" provides flexibility and reduced costs to a retailer or packer in a situation where the origin of the product is not a market driver (or not such a driver as to overcome the costs of labeling and segregation)

¹ See, e.g., May 9, 2008 Letter from Marc Kesselman, General Counsel, USDA, to The Honorable Bob Goodlatte, Ranking Member, Committee on Agriculture, U.S. House of Representatives. The referenced "Categories" as used in these comments (and in the Kesselman letter) refer to corresponding sections of the 2008 Farm Bill. Category A (§ 65.300(d)) pertains to commodities of United States origin; Category B (§ 65.300(e)(1)(i)) pertains to products with multiple countries of origin; Category C (§ 65.300(e)(1)(ii)) pertains to products from animals imported for immediate slaughter; Category D (§ 65.300(f)) pertains to products from imported animals not born, raised, or slaughtered in the United States.

² For example, the legislation prohibits USDA from requiring "a person that prepares, stores, handles, or distributes a covered commodity to maintain a record of a country of origin of a covered commodity other than those maintained in the course of the normal conduct of the business of such person."

³ The CCA and CPC, as noted in their August 20, 2007 comments, do not agree with the restrictive definition of what constitutes a product of U.S. origin and views it as violative of U.S. NAFTA and WTO commitments.

while putting consumers on clear notice that the product they are purchasing may have originated in one or more of the countries included on the label. Retailers and suppliers have every incentive to sell their products for the best possible price to the largest number of people; therefore, where there is demand for product strictly of U.S. origin, retailers and packers will take the steps necessary to provide product so labeled. In any event, those looking to purchase U.S. origin product will know with certainty that when they see a U.S. origin (Category A) label, they are purchasing product processed from animals born, raised, and slaughtered domestically.

IV. The Final Rule should clarify that products of mixed origin (Category B) can be labeled as either Category B, or as applicable, Category C (from animals imported for immediate slaughter).

Just as the statutory language implementing COOL allows flexibility in how U.S. origin products may be labeled, it also provides for flexibility in how products from multiple countries of origin may be labeled. The statute's use of "may" in describing the labeling required for Category B products logically provides the same flexibility provided by the use of "may" in Category A. Thus, as the use of the "may" in Category A allows Category A products to carry a Category B label, the use of "may" in Category B should permit Category B products to carry a Category C label. Pursuant to the Interim Final Rule, countries of origin for Category B commodities can be listed in any order, consistent with the plain language of the statute.⁴ In contrast, in the case of Category C products, countries of origin are to be designated as "Product of Country X and the United States." In other words, Category B commodities (multiple countries of origin (including the U.S.) from animals not imported for immediate slaughter) and Category C commodities (multiple countries of origin (including the U.S.) from animals imported for immediate slaughter) may share the exact same multiple countries of origin, but only under Category C is there a suggestion that the order of countries appearing on the label is mandated.

Category B and C products are both "muscle cut covered commodities of multiple countries of origin that include the United States" (*see* § 65.300(e)); the only difference between the two categories is whether the product is from an animal imported into the United States for immediate slaughter, a distinction without a difference to the consuming public.⁵ Clarification in the Final Rule that Category B products can employ the country order stipulated for use as to Category C products would promote efficiency and reduce labeling costs by allowing packers or processors to use the same label (when circumstances allow) for both mixed origin products and

⁴ The 2008 Farm Bill provides that in cases where a covered commodity has multiple countries of origin, the retailer "may designate the country of origin of such covered commodity as all of the countries in which the animal may have been born, raised, or slaughtered." H.R. 6124, § 11002. This provision does not impose any requirement that the countries of origin be listed in any particular order. If Congress considered it important that countries of origin in this category be listed in a specific order (*e.g.*, according to where the animal was born, raised, or slaughtered), it could have specified that a particular order be followed. Instead, Congress made a general rule stating only that the label list "all of the countries in which the animal may have been born, raised, or slaughtered," without any apparent concern about the order in which the countries should be listed.

⁵ More significantly, differentiation in the labeling of these two product categories serves only to discriminate against meat product from imported animals (primarily Canadian animals) in violation of U.S. international trade commitments (*e.g.*, GATT Article III, *see* CCA and CPC August 20, 2007 comments at 3-4.

products from animals imported for immediate slaughter when there is an identity of the countries of origin. Indeed, failing explicitly to authorize a common label in the Final Rule in these circumstances would be tantamount to compelling segregation in direct contravention of the agency's recognition that "the need to segregate animals will be limited to those suppliers that want to provide more specific origin information." 73 Fed. Reg. at 45123.⁶ Moreover, this flexibility is in keeping with congressional desire to minimize unnecessary burdens resulting from COOL and will not negatively affect consumers interested in knowing the origin of the meat they are purchasing.⁷

V. The expansion of the definition of "ground beef" is inconsistent with the exemption of "processed foods" from COOL, adding unnecessary costs to implementation of COOL.

Congress exempted processed food items from COOL requirements. Nonetheless, while ground meats are by definition, processed food items,⁸ ground beef, pork, and lamb were included as statutorily covered commodities for the purposes of COOL. Since all processed foods are exempt from COOL with the exception of ground meats, CCA and CPC urged that the term "processed food item" be consistently applied and the covered ground products narrowly construed.⁹ Despite CCA's and CPC's cautions, the inconsistency in application of COOL's processed food exemption has only been exacerbated by the Interim Final Rule's expansion of the definition of "ground beef" to include "hamburger" and "beef patties" (*see* 73 Fed. Reg. at 45110, 45115-45116). These additional products are separately defined in USDA's own regulations¹⁰ and had Congress intended a more expansive range of processed food products to

⁶ Allowing Category B products to carry a Category C label would be entirely consistent with the Interim Final Rule's abandonment of the requirement in the Proposed Rule of a specific sequence in the labeling of meat products derived from animals with mixed origin, with the country of export listed first, and the U.S. production steps listed second. Proposed Rule, 68 Fed. Reg. 61944, 61949 (Oct. 30, 2003). The Interim Final Rule has rejected these detailed labeling requirements in favor of the much more generic and flexible "Product of the United States and Country X" designation. Given the large number of permutations possible under this broad label, there is no reason for the United States to be listed first in all cases, regardless of the amount of processing done in the United States.

⁷ CCA's and CPC's position is consistent with related guidance published by USDA. *See* USDA, "Country of Origin Labeling (COOL) Frequently Asked Questions," at 8, *available at* <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5071922> (last visited Sept. 29, 2008) ("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.").

⁸ *See* CCA and CPC August 20, 2007 comments at 14 n. 45.

⁹ *Id.* at 12-15.

¹⁰ The Interim Final Rule bases its definition of "ground beef," "hamburger" and "beef patties" on 9 C.F.R. § 319.15. "Ground beef" is "chopped fresh and/or frozen beef with or without seasoning and without the addition of beef fat as such, and containing no more than 30 percent fat and containing no additional water, phosphates, binders or extenders"; "hamburger" is "chopped fresh and/or frozen beef with or without the addition of beef fat as such and/or seasoning, and shall not contain added water, phosphates, binders, or extenders"; "beef patties" are "chopped fresh and/or frozen beef with or without the addition of beef fat as such and/or seasonings. Binders or extenders, Mechanically Separated (Species) used in accordance with § 319.6 and/or partially defatted beef fatty tissue may be

be subject to COOL, it would have specifically included them, particularly where all other processed foods are categorically exempt from COOL requirements.

By expanding the definition of “ground beef” to include additional processed foods, the Interim Final Rule only makes worse a serious inconsistency in the statute. While specifically subjecting ground beef to COOL, neither the statute nor the Proposed Rule included “hamburger” or “beef patties.” There is no indication that Congress intended for a broad reading of ground beef, especially, when other processed foods are exempt from COOL requirements. This last minute decision to make these products subject to COOL when congressional intent was to exempt processed food products, is inconsistent and unwarranted, particularly when other restructured meat products retain their exempt status as processed food items.¹¹

The CCA and CPC request the agency to reconsider the definition of ground beef, and in particular, construe it narrowly. In addition to exempting hamburger and beef patties, COOL should not apply to products made of blended ground beef containing beef from more than one country and ground and blended in the United States. As noted in the CCA’s and CPC’s August 20, 2007 comments, blending different beef products of different chemical compositions creates new and unique processed food products of specific composition. Such products have different physical characteristics and are used by consumers in applications distinct from the products subject to blending. *See* CCA and CPC August 20, 2007 comments at 15.

VI. The agency should work towards consistent identification protocols applicable to domestic and imported animals.

The Interim Final Rule permits, but does not require, U.S. producers to rely on Canadian animal identification tags or other animal markings in assessing the origin of animals imported from Canada. *See* 73 Fed. Reg. 45123. No other guidance is provided regarding the records that will suffice for establishing the origin of imported animals. The CCA and CPC note that the identification tags and animal markings in present use with respect to cattle are the result of specific health circumstances that will not exist in perpetuity. Such specific identification requirements should be lifted as soon as the circumstances under which they were established no longer exist and COOL should not be used as an excuse to prolong them. At such time as these specific health driven identification regimes are no longer required, the same protocols for establishing animal origin that the Interim Final Rule extends to U.S. domestic animals should be available to foreign animals.

With respect to hogs, the CCA and CPC endorse the comments made by the Government of Canada (“GOC”) on this issue. Canada does not have an official animal identification system and the CCA and CPC are concerned that the Interim Final Rule will impose overly burdensome recordkeeping requirements on the hog industry. For example, as noted in the GOC’s comments, “[w]eanlings and feeder pigs quickly outgrow the initial marking requirements that would have identified them on the health certificate at export.” Resolving these animal identification matters

used without added water or with added water only in amounts such that the product characteristics are essentially that of a meat pattie.” *See* 9 C.F.R. § 319.15 (a), (b), and (c).

¹¹ The agency considers “fabricated steak” to be a processed food item since it is “restructured.” 73 Fed. Reg. at 45116.

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in a reasonable way that will not be overly burdensome to U.S. producers and processors is particularly important as hogs of Canadian origin presently represent approximately 10 percent of total U.S. slaughter.

VII. Development of a list of acceptable country abbreviations for use on labels would inform consumers and promote efficiency.

The Interim Final Rule asserts that “[i]n general, abbreviations are not acceptable” but permits use of abbreviations approved under Customs and Border Protection rules. *See* 73 Fed. Reg. at 45113. The CCA and CPC urge the agency to develop a comprehensive list of acceptable acronyms or abbreviations for use on country of origin labels. Such a list would save space on labels, making them clearer and more legible, while simultaneously ensuring that consumers are not confused as to a product’s country or countries of origin.

VIII. Conclusion

The CCA and the CPC appreciate the opportunity to submit these comments on the Interim Final Rule. If you have any questions regarding the information provided in these comments or anything else regarding this issue, please contact us.

Sincerely,

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