July 25, 2001

VIA FACSIMILE and FEDERAL EXPRESS

Mr. Robert Odom, Commissioner
Louisiana Department of Agriculture and Forestry
5825 Florida Boulevard
Baton Rouge, Louisiana 70806

Re: Louisiana Country of Origin Meat Labeling Rules

Dear Mr. Odom:

The Food Marketing Institute (FMI), on behalf of FMI and the Louisiana Retailers Association, is pleased to respond to the Louisiana Department of Agriculture and Forestry's (LDAF's) Notice of Intent to amend the state's meat labeling regulations to require country of origin labeling for meat products offered for sale in the state of Louisiana.[1] As discussed more fully below, FMI objects to the proposed regulation on the grounds that, among other things, it is an unconstitutional exercise of power in violation of several provisions of the United States Constitution, including the Commerce Clause of Article I, Section 8; the Supremacy Clause of Article VI, Section 2; the Free Speech Clause of the First Amendment; and the Due Process Clause of the Fourteenth Amendment.

Accordingly, we respectfully request that the Louisiana Department of Agriculture and Forestry withdraw the proposed regulation. If the Department decides to proceed in this matter, we hereby request that the agency state its reasons for overruling the grounds urged against adoption.

FMI is a non-profit association that conducts programs in research, education, industry relations and public affairs on behalf of its 1,500 members and their subsidiaries. Our membership includes food retailers and wholesalers, as well as their customers, in the United States and around the world. FMI's domestic member companies operate approximately 21,000 retail food stores with a combined annual sales volume of $300 billion, which accounts for more than half of all grocery sales in the United States. FMI's retail membership is composed of large multi-store chains, small regional firms, and independent supermarkets. FMI members operate approximately half of the 1,200 retail food stores in the state of Louisiana.

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[1] 27 La. Register 810 (June 20, 2001).

I. Louisiana Country of Origin Meat Labeling Regulation

By Act 487 of the 1999 Regular Session, the Louisiana legislature enacted a new provision to the state statutes to require meat[2] – whether fresh or frozen, processed or unprocessed – to be labeled with information concerning the meat's country of origin "to the extent allowed by the Federal Meat Inspection Act and applicable federal meat inspection regulations." [3] In particular, labeling on meat offered for sale in Louisiana must bear either (1) the name of the country of origin preceded by the words "Product of" or (2) one of the following designations that are specified in the statute: "Imported," "American," or "Blend" of imported and American meats.[4] The statement must appear on the immediate wrapping or container of the meat unless the meat is displayed unwrapped, in which case the statement may appear on a sign included with the display.[5] [cite] Prepared meat products sold for consumption on the premises and "fully cooked meat as defined by the U.S. Department of Agriculture" are specifically exempted from the scope of the law.[6]

Each violation of the statute is punishable by civil penalties of up to $500.00; each day on which a violation occurs is considered a separate offense under the statute. [7] The Louisiana Department of Agriculture and Forestry is charged with the administration and enforcement of the Act and directed to adopt the rules and regulations necessary for the Department to carry out the Act.[8]

Toward this end, the Department issued emergency regulations and published a Notice of Intent requesting comment on the new rules.[9] The rules became effective on May 17, 2001 upon signature by the Commissioner, and will remain in effect for 120 days, unless renewed by the Department or until permanent rules are promulgated in accordance with the law.[10]

The emergency regulations set forth the statutory requirements and add the following definitions:

- American: any meat that is produced in the United States;
- Blend: any combination of American and foreign meat;
- Imported: any meat produced in a foreign country.[11]

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[2] Neither the statute nor the regulations define the terms "meat" or "produced." The Louisiana Meat and Poultry Inspection Law also fails to define these terms. La. Rev. Stat. Ann. § 3:4201, et. seq.
[3] La. Rev. Stat. Ann. § 51:614.
[4] La. Rev. Stat. Ann. § 51:614(A).
[5] La. Rev. Stat. Ann. § 51:614(A).
[6] La. Rev. Stat. Ann. § 51:614(D).
[7] La. Rev. Stat. Ann. § 51:614(B).
[8] La. Rev. Stat. Ann. § 51:614(C).
[9] 27 La. Register at 810.
[10] Id.
[11] La. Admin. Code, tit. 7, § 135(A).

Consistent with the statute, the rules require all meat sold in Louisiana to indicate the meat's country of origin. The rules add a further provision that allows establishments that sell only domestically-produced meat to post a placard stating that only American meat is sold at the establishment.[12]

By way of rationale, the Commissioner offered the following:

> As a result of the current outbreak of foot and mouth disease in European livestock and the fact that meat consumed in the United States, including Louisiana, is imported from foreign countries, there is an imminent danger that Louisiana citizens will substantially decrease their consumption of meat, including meat raised or processed in Louisiana, if they cannot identify the source of the meat. Louisiana's livestock industry has suffered severe financial distress as a result of the four-year drought that this state has experienced. The threat of substantial decline in the consumption of meat poses an imminent peril to Louisiana's livestock industry. Additional economic losses threaten the continuation of the livestock industry in Louisiana. The livestock industry in Louisiana is a vital part of Louisiana's economic base. Therefore, financial deterioration and subsequent failures in the livestock industry pose an imminent peril to Louisiana's economy. . .[13]

II. Country of Origin Meat Labeling Regulation Violates Commerce Clause of U.S. Constitution

Article I, Section 8 of the U.S. Constitution enumerates the powers expressly delegated to Congress. In relevant part, the Commerce Clause of Section 8 provides that "the Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States . . .."[14] In addition to the direct grant of authority to Congress, the Commerce Clause has long been recognized to limit the power of states to erect barriers to trade.[15] Thus, under the so-called "dormant Commerce Clause," states are prohibited from imposing regulatory measures that are designed to benefit in-state economic interests by burdening foreign or out-of-state competitors.[16]

The Supreme Court has adopted what amounts to a two-tiered approach to analyzing state economic regulation under the Commerce Clause.[17] When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to

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12 La. Admin. Code, tit. 7, § 135(B)(4).

13 27 La. Register at 810.

14 U.S. Const., art. I, § 8.

15 *Hughes v. Oklahoma*, 441 U.S. 332, 326 (1979); *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525 (1949); *Welton v. Missouri*, 91 U.S. 275 (1873).

16 *See, e.g., Bacchus Imports, Ltd., v. Dias*, 468 U.S. 263 (1984).

17 *Brown-Forman Distillers v. NY Liquor Auth.*, 476 U.S. 573 (1986).

favor in-state economic interests over out-of-state interests, the Court has generally struck down the statute without further inquiry.[18] When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, the Court has examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.[19] There is, however, "no clear line" separating the categories of state regulation that are virtually *per se* invalid under the Commerce Clause and those that are subject to the balancing approach set forth in *Pike v. Bruce Church*; rather the critical consideration is the overall effect of the statute on both local and interstate activity.[20] In this case, regardless of the test that is applied, the Louisiana statute does not pass constitutional muster.

A. Louisiana Law Discriminates Against Non-Domestically Produced Meat Products

As discussed more fully above, the Louisiana statute and regulations require meat to be labeled with either a statement of the product's country of origin or a statement that the product is one of the following: "American," "Imported," or "Blend of Imported and American Meats."[21] Although labeling is required for domestically produced meats as well as imported products, the type of labeling required inherently discriminates against meats produced in countries other than the United States.

Specifically, domestically produced meats must be labeled in one of two ways, both of which identify the specific country of origin, namely, "Product of the USA" or "American." In contrast, meats produced in countries other than the United States may either be identified as "Product of [specific country]" or with a generic "Imported" designation. The fact that meats produced in countries other than the United States may be identified with only a generic statement of their non-domestic origin while domestic products must be identified as "Product of the USA" or "American" evidences an intent to discriminate against foreign commerce. Indeed, although the law and regulations require labeling of both domestic and imported meat products, the stated purpose for the labeling is to warn Louisiana consumers which meats are imported so that consumers will be able to choose Louisiana meat products and avoid imported products out of a misplaced fear of foot and mouth disease.[22] Thus, the labeling required under the Louisiana law is intended to and does discriminate against foreign products.

Moreover, the regulations favor domestic products by providing retailers with a regulatory incentive not to offer imported meats to customers. Specifically, the regulations allow retailers who offer only domestically produced meats to avoid the

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18 Id. at 579.

19 Id. at 579, citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

20 *Brown-Forman*, 476 US at 579.

21 La. Rev. Stat. Ann. § 51:614(A).

22 See 27 La. Register at 810. As discussed more fully below, the state's reasoning and logic suffers from several flaws, not the least of which is that foot and mouth disease "does not affect food safety or humans." USDA, "Foot and Mouth Disease Q's and A's" (March 2001).

regulation's on-pack label requirement and post a placard averring that the establishment sells only American meat.[23] Although the placard requirement is itself an unconstitutional burden on commerce (see discussion below), the fact that the Commissioner has chosen to offer this slightly less burdensome alternative to retailers who have "purged" their stores of imported meats and only offer "American" products is further evidence of the discriminatory intent underlying the regulations.

B. Louisiana Lacks Legitimate Interest in Country of Origin Labeling Regulations, which Are Motivated by Economic Protectionism

1. Louisiana Does Not Have Legitimate Interest in Country of Origin Meat Labeling Regulations

For a state law or regulation that impacts interstate or foreign commerce to withstand constitutional scrutiny, the state must have and must have articulated a legitimate interest in enacting the restriction. For example, a state generally has the authority to implement non-discriminatory legislation to protect the health, safety or welfare of its citizens, provided that the burden on interstate or foreign commerce does not clearly exceed the local benefits.[24] In this case, however, Louisiana has not articulated a legitimate interest in the state statute or regulations.

The preamble to the emergency rules sets forth the reasons for the enactment of the country of origin labeling statute and accompanying regulations.[25] In particular, the state blames "the current outbreak of foot and mouth disease in European livestock."[26] The state is concerned that, as a result of the FMD outbreak in Europe, "there is an imminent danger that Louisiana citizens will substantially decrease their consumption of meat," including meat raised or processed in Louisiana, if Louisiana consumers cannot identify the source of the meat.[27] The state is particularly concerned about the potential economic losses that might result to the Louisiana livestock industry because the state has recently experienced a four-year drought.[28] None of the foregoing, however, is sufficient to justify the conclusion that Louisiana has a legitimate interest in the country of origin meat labeling regulations.

First, foot and mouth disease is not a human disease. As USDA states, the disease does not affect food safety or humans and has no implications for the human food chain.[29] Thus, Louisiana consumers have no health or safety-based need to discriminate between meat products that were produced domestically or abroad because, even if meat

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23 La. Admin. Code, tit. 7, § 135(B)(4).

24 Brown-Forman Distillers v. NY Liquor Authority, 476 US 573, 579 (1986).

25 27 La. Register at 810.

26 Id.

27 Id.

28 Id.

29 See, e.g., USDA, "Food and Mouth Disease Q's and A's" (March 2001) (copy enclosed); USDA, "Foot and Mouth Disease" (March 2001) (copy enclosed).

from livestock that had been infected with FMD were present in the domestic food supply (which it is not), the meat would not present a risk of illness to Louisiana consumers.

Furthermore, the federal food safety laws and accompanying regulatory system provide substantial assurance that imported meat will not present any greater health or safety risk than domestically produced meat. Specifically, a comprehensive federal regulatory oversight system is in place to ensure that imported meat is safe, wholesome, and nutritious at the time of import.[30] Once the imported meat has passed inspection and gained entry into the U.S., it is treated as a domestic product and is, therefore, subject to all provisions of the Federal Meat Inspection Act and its implementing regulations. Accordingly, imported products must meet the same standards of quality, wholesomeness, nutrient content, and labeling that apply to domestically produced meats.

Second, even if FMD did have negative implications for the human food chain, the labeling proposed by the state would not assist consumers in a meaningful way. That is, although the statute and regulations allow meat to be labeled with a particular country of origin, specificity is not required; meats may be labeled "American" or "imported" or "blend." As noted above, the fear that Louisiana consumers "will substantially decrease their consumption of meat . . . if they cannot identify the source of the meat" is one of the principle justifications set forth in the preamble in support of the regulations. Nonetheless, although consumers will be able to tell whether meat labeled in accordance with the regulations was produced domestically or abroad, consumers will not necessarily be given information on the specific country in which the meat was produced or the "source of the meat," which the preamble claims is information essential to consumer confidence in Louisiana.

If Louisiana's intent was truly to inform consumers, the information on the country would be important because FMD has not affected all countries and, indeed, is limited to several specific countries. For example, Australia has been free of FMD for longer than the United States.[31] Louisiana's attempt to "tar" all non-domestic products with "imported" labeling lumps together products from countries that have been unaffected by FMD with countries that are or have recently experienced an FMD outbreak. Thus, the labeling set forth in the Louisiana standards only distinguishes

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[30] Meat from foreign countries is eligible for entry to the United States only if the inspection system in the foreign country has been evaluated and found acceptable by the U.S. Department of Agriculture's (USDA's) Food Safety and Inspection Service (FSIS). 9 C.F.R. § 327.2(a)(2). The system must have a program administered by the foreign national government and provide standards equivalent to those required in the United States. Only a small number of countries have been deemed by FSIS to have adequate inspection systems. Plants in eligible countries must be certified annually by officials of the foreign country's meat inspection system. Upon arrival in the United States, all imported meat and poultry must be reinspected by FSIS within 72 hours of arrival by an FSIS inspector at a designated official import inspection establishment.

[31] The most recent case in Australia occurred in 1872. See SafeMeat.org, "History of FMD in Australia" (2001) (prepared by Dr. Bob Biddle, Deputy Chief Veterinary Officer, Commonwealth Department of Agriculture, Fisheries and Forestry). The last case of FMD in the United States occurred in 1929. See, USDA, "Foot and Mouth Disease Q's and A's" (March 2001).

domestic products from imported, but does not advise whether FMD is or was a problem in the country of the meat's origin. Therefore, the statute does not meet its purported objective.[32]

Third, beyond USDA's authority over the safety of meat under the Federal Meat Inspection Act, USDA is also charged with protecting the health and well-being of the livestock population.[33] In this regard, the Animal and Plant Health Inspection Service (APHIS) at USDA has put in place substantial safeguards to minimize the likelihood that FMD will enter the United States.[34] These measures include the following:

- Prohibiting shipments from high-risk countries, including the United Kingdom, France, Ireland, the Netherlands, and Greece;[35]
- Increasing personnel at ports of entry;
- Tightening regulatory enforcement;
- Increased surveillance of incoming passenger and cargo;
- Enhanced monitoring and surveillance of domestic livestock;
- Strengthened federal, state and industry coordination;
- Implementation of public education campaigns; and
- Dispatching experts to the United Kingdom to assist in containment efforts.

USDA's safeguards already screen out any meat products that might have been contaminated with FMD.

The signage required by Louisiana will in no way prevent FMD from reaching the United States or prevent the spread of FMD if it does. If infected meat made it through USDA's substantial safeguards and reached a Louisiana retail location, the potential danger to the livestock industry would already be present. FMD is a disease that is highly contagious among animals.[36] If an infected carcass had been processed and packaged for sale, significant opportunities to expose the Louisiana livestock population

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[32] *Tupman Thurlow Co. v. Moss*, 252 F. Supp. 641 (M.D. Tenn. 1966) (requirement that foreign meats be labeled as such "would do nothing except inform the public that a meat product had its origin in a foreign country without conveying any information as to [the meat's] nature, quality or quantity"). And, in this case, the designation "imported" would not even inform consumers whether the country of origin was one in which FMD cases had been reported.

[33] See, e.g., 21 U.S.C. § 111 (prevention of contagious diseases).

[34] USDA, "USDA Safeguarding Measures Against Foot and Mouth Disease" (March 2001) (copy enclosed); see, also, Memorandum from J. Little, Chair of USDA's National Food and Agriculture Council, "On Guard Against Foot and Mouth" (June 12, 2001) (copy enclosed).

[35] As a precautionary measure, on March 13, 2001, APHIS also imposed import restrictions on meat from Austria, Belgium, Denmark, Finland, Germany, Italy, Luxembourg, Portugal, Spain and Sweden. Since no cases were reported in these countries and the outbreak is subsiding, on May 25, 2001, USDA lifted the import restrictions on these countries. See USDA, "USDA Removes Import Restrictions for Certain European Union Countries; Continues Vigilance at Border to Protect U.S. Agriculture Against Virus," News Release No. 0084.01 (May 25, 2001).

[36] USDA, "Foot and Mouth Disease" (March 2001).

and industry would have occurred long before the product arrived in the retail display case. Thus, the presence of an "imported" label on meat products displayed for sale would not protect Louisiana livestock.

The only way in which the labeling required by Louisiana might have any effect on FMD in the United States is by burdening foreign commerce and, thereby, reducing the quantity of meat products that are imported into the country. Even if this were a legitimate interest for a state or a legitimate means to attempt its achievement, Louisiana's restriction, which applies to all imported meat, is an overbroad burden on foreign commerce that is clearly unjustified given the comprehensive system that USDA has implemented to protect the United States from FMD. Thus, Louisiana has not expressed a legitimate interest sufficient to justify the country of origin labeling regulations or articulated how the country of origin regulations would effectively achieve that interest; the burdens placed on interstate and foreign commerce by the regulations clearly exceed any putative local benefits.

2. Louisiana's True Interest Is Economic Protectionism

The state's true motive for enacting country of origin meat labeling legislation and promulgating the accompanying regulations is to protect the Louisiana livestock industry from competition from imported meat. Apparently, the legislature feels the need to stifle competition from imported meat products in the wake of injuries suffered by the Louisiana livestock industry as a result of the four-year drought suffered by the state.[37] Although we sympathize with the Louisiana livestock producers for any hardship caused by the drought, the courts have clearly and repeatedly concluded that economic protectionism is not a legitimate basis for burdening foreign or interstate commerce.[38]

Indeed, in 1982, a federal court declared a comparable Louisiana statute unconstitutional as a violation of the Commerce Clause and enjoined the state from enforcing the statute.[39] Specifically, as written in the early 1980's, Section 614 of the Revised Statutes required all retail outlets that sold imported beef to label the product as "foreign;" no such labeling was required for domestic beef. The state justified Section 614 with three reasons: (1) promotion of the domestic beef industry; (2) concern regarding USDA standards and inspection procedures for imported beef; and (3) protection of the consumers' right to make a fully informed selection in the purchase of beef products. The federal court found that enforcement of Section 614 would tend to greatly reduce public acceptability of imported beef and that it discriminated against

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[37] See 27 La. Register at 810.

[38] *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269 (1988); *Tupman Thurlow Co. v. W.F. Moss*, 252 F. Supp. 641 (D. Ore. 1996); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Authority*, 476 U.S. 573 (1986); *National Meat Ass'n v. Deukmejian*, 743 F. 2d 656 (9th Cir. 1984), *aff'd* 469 U.S. 1100 (1985) (economic protectionism subject to virtually *per se* rule of invalidity).

[39] *New Orleans Cold Storage and Warehouse Co. v. Louisiana*, Civil Action No. 82-157 (E.D. La. May, 1982). Notably, one of the named defendants in the *N.O. Cold Storage* case is the current commissioner of the Louisiana Department of Agriculture and Forestry.

foreign commerce.[40] The court found the reasons offered by the state to be insufficient to justify the burden and interstate and foreign commerce.[41] With specific respect to the legitimacy of economic protectionism as grounds for burdening interstate or foreign commerce, the court held that the Commerce Clause prohibits a state from using its regulatory power to protect its citizens from outside competition.[42]

C. Country of Origin Meat Labeling Regulation Unduly Burdens Interstate Commerce

In addition to the foregoing, courts generally consider the impact of the state restriction on interstate or foreign commerce when conducting an inquiry under the Commerce Clause. In this case, the Louisiana statute and accompanying regulations would place significant costs and administrative burdens on retailers and wholesalers that would, in turn, place an undue burden on interstate and foreign commerce.

Specifically, once meat from abroad enters the United States, it enters the same distribution channels as domestic products. Separating fresh cuts of meat based on their country of origin will be difficult to do and will impose substantial recordkeeping and other administrative costs on retailers and wholesalers. Retailers and wholesalers will incur further costs to achieve compliance with the regulations, including the costs of training personnel in the necessary compliance measures, and the costs of labels and the labor necessary to apply them.

Moreover, the burdens of the labeling requirements will not be materially alleviated by the provision that a placard may be used in lieu of labels for retailers that sell only domestically-produced meat.[43] This alternative would not obviate the burden of tracing or determining the origin of meats.[44]

Furthermore, the statute and regulations are vague with respect to the steps retailers will be required to take to comply with the law to avoid the fines that will be imposed by the state for non-compliance. For example, neither the law nor the regulations define the standards for determining whether a given meat product is "produced in the United States" or "produced in a foreign country," standards that will be

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[40] Id. at 3.

[41] Id. at 6-7.

[42] Id. at 5.

[43] We note that flyers recently distributed by Louisiana Department of Agriculture officials suggest that the Department would consider posted signs a sufficient alternative to labels in all situations covered by Section 614. Although this would lessen the burden on interstate commerce to some degree and would be easier for our members to comply with, the requirement is still unconstitutional. We further note that, if the Department intends to interpret the statute in this manner, the current language of the regulation should be amended to reflect the Department's interpretation; as written, the regulation allows placards only for stores that carry only "American" products. Moreover, we question whether the Department has the authority to extend the placard alternative to all meat products – "American," "imported" or "blended" – given the language of the statute itself.

[44] See *Tupman Thurlow Co. v. Moss*, 252 F. Supp. 641, 646 (M.D. Tenn. 1966).

difficult for retailers to interpret with certainty. Cattle, for instance, often travel through more than one country during the raising, transportation, slaughtering and processing stages. Birth may occur in one location, while feeding takes place in a second, and slaughter and processing in further locations. For example, are cattle that were born and fed in Mexico, but slaughtered in the U.S. "produced in the United States" or "produced in a foreign country" for purposes of Louisiana's country of origin labeling requirements? Retailers might be forced to demand and review a life history for every piece of meat before it can be displayed for sale. Thus, the measures retailers will be required to employ to comply with the regulations will be extremely burdensome.

The burden will be felt in foreign commerce as well. As noted above, the only way in which the regulations might conceivably achieve their stated purpose of protecting the Louisiana livestock industry from FMD would be to discourage the importation of meat. Accordingly, the regulations are intended to and will burden foreign commerce.

D. Less Restrictive Measures Available

Assuming *arguendo* that the Louisiana legislature has a legitimate interest in ensuring that Louisiana consumers do not substantially decrease their consumption of Louisiana meat as a result of a misplaced fear of FMD in imported meat, there are more effective and less burdensome means to achieve this goal. If Louisiana is truly interested in allaying consumers' concerns regarding FMD, state officials should be distributing information on: (1) the decline of the FMD outbreak; (2) the measures state and federal officials are taking to safeguard domestic livestock industries; and (3) the fact that FMD is not a danger to humans. Regulating on the basis of misinformation will only confuse consumers and heighten any existing concern.

Furthermore, and as noted above, labeling meat already in the United States as "imported" will not prevent the spread of FMD in the unlikely event that infected meat products slip through USDA's comprehensive regulatory system. If the Louisiana authorities are truly concerned about the risk that FMD might pose to the livestock industry in Louisiana, the authorities could be enhancing their efforts to coordinate with the federal agency to prevent infected products or products from restricted countries from entering the United States, including the issuance of travel advisories to Louisiana citizens that are visiting or returning from countries that are experiencing or have recently experienced an FMD outbreak. These measures would have a greater impact on the potential for FMD to infect Louisiana cattle than labeling all meats produced outside the United States and sold in Louisiana as "imported."

III. Louisiana Country of Origin Meat Labeling Regulation Violates Supremacy Clause of U.S. Constitution

Article VI, Section 2 of the U.S. Constitution provides that, "the Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges

in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[45] Under the so-called Supremacy Clause, laws or regulations that conflict with federal law are without effect.[46] As discussed more fully below, Louisiana's country of origin meat labeling regulations and the underlying statute are preempted by Federal law, both expressly and by implication.

A. FMIA Expressly Preempts Louisiana Country of Origin Meat Labeling Regulation

The Federal Meat Inspection Act (FMIA) contains an express preemption provision regarding product labeling. In relevant part, the provision states as follows: "Marking, labeling, packaging or ingredient requirements . . . *in addition to, or different than*, those made under this chapter may not be imposed by any State . . .."[47] "Labeling" is defined under the FMIA as "all labels and other written, printed or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article."[48]

As the federal statute prohibits states from imposing any labeling requirements that differ from or add to the federal requirements, the clause preempts even those state regulations that are more stringent than the FMIA. Accordingly, courts have found state labeling requirements to be preempted not only when they directly conflict with the federal labeling requirement, making it impossible to comply with both, but also in circumstances in which a state attempts to enact a requirement that has no counterpart under federal law.[49]

The Louisiana country of origin meat labeling regulations would require retailers either to label meat products or to post a sign accompanying the products declaring the products' country of origin or whether the products were produced in the United States, a "foreign country," or both. The FMIA does not require country of origin labeling. As the Louisiana law would impose labeling that is in addition to and different than the federal labeling requirements, the Louisiana requirements are expressly preempted by federal law.

Moreover, the fact that the Louisiana statute acknowledges the preemptive nature of the FMIA at the outset by stating that the requirements only apply to the extent that they are "allowed by the FMIA and applicable meat inspection regulations" cannot save the Louisiana provisions from preemption. Whether or not the Louisiana statute

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45 U.S. Const. art. VI, § 2.

46 *Maryland v. Louisiana*, 451 U.S. 725 (1981).

47 21 U.S.C. § 678.

48 21 U.S.C. § 601(p).

49 *Anthony J. Pizza Food Products Corp. v. Wisconsin Dep't of Agriculture*, 676 F.2d 701 (7th Cir. 1982) (unpublished opinion adopting district court opinion); *National Broiler Council v. Voss*, 44 F. 3d 740 (9th Cir. 1994); *Armour & Co. v. Ball*, 468 F. 2d 76 (6th Cir. 1972), *cert. den'd*, 411 U.S. 981 (1973); *Grocery Manufacturers of America v. Gerace*, 581 F. Supp. 658 (S.D.N.Y. 1984), *aff'd in part and rev'd in part on other grounds*, 755 F.2d 993 (2d Cir. 1985).

recognizes the preemptive power of the federal statute is irrelevant; if the Supremacy Clause applies, the state statute will be preempted, even if it is silent in this regard. And, as the labeling requirements are preempted in their entirety, none of the statute is "allowed by the FMIA."

B. Labeling Required under Country of Origin Meat Labeling Regulation is Preempted by Implication

The Louisiana country of origin meat labeling regulation is also preempted by implication because the Louisiana rule conflicts with federal law. Specifically, the FMIA prohibits the sale, transport, offer for sale or transportation, or receipt for transportation in commerce of any meat products that are misbranded at the time of such sale, transportation, offer for sale or transportation, or receipt for transportation.[50] A product will be considered "misbranded" if its labeling is false or misleading in any particular.[51]

The country of origin labeling that would be required under Louisiana law implies that the imported meat products are of lesser quality or present some health risk. One court noted that country of origin labeling can be designed to make a consumer "feel that the product was something to be shunned, as a matter either of stimulated reaction against it from its labeling, or of uncertainty as to what might be the implications thereof."[52] Although domestic product will also be subject to labeling, it may be accomplished by a placard or with the more familiar sounding "American" or "Product of USA;" in contrast, the "imported" labeling is likely to raise consumer concerns regarding the safety of the product, particularly given the rationale offered by the Louisiana authorities in support of the regulations. As discussed more fully above, the rationale suggests that Louisiana consumers need protection from imported meat and FMD and that the labeling requirements were enacted to provide this protection against a foreign threat.

However, as USDA has enacted a comprehensive regulatory system to ensure that meat products from countries in and around those that have reported cases of FMD will not enter the United States and imported meat products are required to meet the same standards as domestically produced products, the inherent implication of country of origin labeling that imported meat may be adulterated or unsafe is false and misleading. To require false and misleading labeling clearly conflicts with the federal laws' prohibition against misbranded products and, therefore, the Louisiana country of origin meat labeling regulation is preempted by the federal laws by implication.

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50 21 U.S.C. § 610(c).

51 21 U.S.C. § 601(n)(1).

52 *Armour*, 270 F. Supp. at 945-46.

IV. Country of Origin Meat Labeling Regulation Violates Free Speech Clause of U.S. Constitution

The First Amendment of the U.S. Constitution provides that, "Congress shall make no law . . . abridging the freedom of speech . . .."[53] The First Amendment limits the government's ability to compel speech, as well as the government's ability to restrict speech.[54] The Louisiana law and accompanying regulations attempt to compel speech in an unlawful violation of the First Amendment.

The appropriate standard for determining whether a governmental compulsion of speech is unlawful is set forth in *Central Hudson Gas & Electric Corporation v. Public Service Commission*.[55] In order for compelled speech to meet the test set forth in *Central Hudson*, the government must assert a substantial interest in support of the compelled speech and the required speech must be narrowly tailored to advance the asserted substantial interest directly.

As discussed more fully above, Louisiana does not have a legitimate interest in requiring country of origin labeling; for the same reasons, the state lacks a compelling interest in country of origin labeling regulations. Moreover, Louisiana has not demonstrated that the speech that would be compelled under the regulation would advance the government's interest. As states must supply empirical evidence of direct advancement of the interest by the compelled speech, Louisiana has not met its burden in this regard, either.

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For the foregoing reasons, we respectfully urge the Louisiana Department of Agriculture (1) to withdraw the emergency country of origin meat labeling regulations and (2) to forego the promulgation of final country of origin meat labeling regulations.

Sincerely,

George Green
Vice President
General Counsel

Enclosures

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53 U.S. Const. amend. I, cl. 2.

54 *International Dairy Foods Association v. Amestoy*, 92 F.3d 67 (2d Cir. 1996); *Wooley v. Maynard*, 430 U.S. 705 (1977).

55 *Central Hudson Gas & Elec. Corp. v. Public Serv. Commission*, 447 U.S. 557 (1980).