THE VOICE OF FOOD RETAIL
Feeding Families Enriching Lives

February 4, 2013

Ms. Julie Henderson
Director, COOL Division
Livestock, Poultry, and Seed Program
Agricultural Marketing Service
U.S. Department of Agriculture (USDA)
STOP 0216
1400 Independence Avenue SW., Room 2620–S
Washington, DC 20250–0216

Re: Mandatory Country of Origin Labeling of Covered Commodities: Notice of Request for Revision of a Currently Approved Information Collection[1]

Docket No. AMS–LS–12–0047

Dear Ms. Henderson:

On December 4, 2012, the Agricultural Marketing Service (AMS) of the U.S. Department of Agriculture announced in the Federal Register its intention to request approval from the Office of Management and Budget, for an extension and revision to the currently approved information collection of the Mandatory Country of Origin Labeling (COOL) of Covered Commodities. On June 29, 2012, the World Trade Organization (WTO) Appellate Body issued a report upholding a WTO Dispute Settlement Body (DSB) panel report that ruled COOL was an illegal trade barrier. The WTO Arbitrator has granted the United States time until May 23, 2013, for the U.S. to implement the recommendations and rulings of the DSB. The Food Marketing Institute (FMI) believes that this Paperwork Reduction Act information collection request (ICR) review process provides an opportunity to change the program to make it more consistent with the rulings of the DSB, while reducing the burdens of the COOL regulation. Food retailers and wholesalers bear the greatest share of the COOL burden. FMI appreciates the opportunity to comment on this important matter.

FMI conducts programs in public affairs, food safety, research, education and industry relations on behalf of its nearly 1,250 food retail and wholesale member companies in the United States and around the world. FMI's U.S. members operate more than 25,000 retail food stores and almost 22,000 pharmacies with a combined annual sales volume of nearly $650 billion. FMI's retail membership is composed of large multi-store

[1] 77 Fed. Reg. 71773 (December 4, 2012).

chains, regional firms and independent operators. Its international membership includes 126 companies from more than 65 countries. FMI's nearly 330 associate members include the supplier partners of its retail and wholesale members.

Background

Food Retailing and Wholesaling

FMI members own and operate 25,000 retail stores that must comply with the COOL regulations. FMI members also operate distribution centers and warehouses that face significant regulatory burdens under the rules. The latest statistics indicate that 215 different food retailers operate distribution centers.[2] Many chains operate multiple distribution centers and large retailers may have 10, 20 or more than 30.[3] Nearly 1,200 food wholesalers operate in the U.S., and many of these wholesalers have multiple distribution centers.

COOL enforcement is focused at the retail level, with thousands of stores being inspected annually. In some years more than 8,000 retail locations have been inspected, representing nearly 25 percent of all retail outlets. Each inspection can take several hours and generally involves the store director as well as the produce, meat and seafood managers, imposing significant burdens and taking them away from their responsibilities of running store operations. The burdens of compliance are even greater and are discussed later in these comments.

WTO Case

On December 1, 2008, Canada requested consultations with the United States concerning COOL alleging that COOL violates the U.S.'s obligations under the WTO agreement. On December 12, 2008, Mexico and Nicaragua requested to join the consultations. The U.S. accepted the request of Mexico. On May 10, 2010, the Director-General composed the panel. On November 18, 2011, the DSB panel ruled that COOL was an illegal trade barrier.[4] The U.S. appealed and the Appellate Body upheld the DSB panel's ruling that the COOL program, as applied to beef and pork violated Article 2.1 of the Technical Barriers to Trade Agreement (TBT).[5] [6] The DSB

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[2] 2011 Chain Store Guide, Directory of Supermarket, Grocery and Convenience Store Chains.
[3] 2011 Chain Store Guide, Directory of Supermarket, Grocery and Convenience Store Chains.
[4] Panel Report, *United States—Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R, WT/DS/386/R (November 18, 2011).
[5] Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favorable than that accorded to like products of national origin and to like products originating in any other country."
[6] Appellate Body Report, *United States—Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R, WT/DS/386/AB/R (June 29, 2012).

adopted the Appellate Body report and the panel report as modified by the Appellate Body Report. A WTO Arbitrator set a deadline of May 23, 2013, for the United States to implement the recommendations and rulings of the DSB. If the U.S. fails to change COOL to comport with the DSB rulings by this time, it will be required to compensate Canada and Mexico or face sanctions, including tariffs amounting to billions of dollars,[7] that could result in the loss of tens of thousands of jobs. Although the Appellate Body's ruling applied to beef and pork in particular, we believe it has implications for all other commodities in the COOL program. USDA and the Office of Management and Budget should use this ICR as an opportunity to reevaluate and change COOL to make it more compliant with the rulings of the DSB.

Protectionism and COOL

FMI opposed enactment of COOL because of concerns that it would impose enormous burdens on the supermarket industry and make it more costly and difficult to carry imported products. These concerns have been borne out. Since the implementation of COOL by USDA, FMI members have stopped selling foreign products and decided to not stock others because of the increased costs of handling imported items under the program. As a result U.S. consumers face fewer choices and higher prices. Consumers are paying tens of millions of dollars every year in higher food costs as a consequence of this rule. In a year when food costs are projected to rise 3-4%, this is the last thing consumers need.

Consumer Response to COOL

While the regulatory burdens of COOL have led retailers and wholesalers to stop handling and selling many imported items, studies have found little to no impact on consumer purchasing behavior. A study of shrimp purchases found no difference between consumer purchases before the implementation of COOL and those after it went into effect.[8] In assessing the study, USDA stated:

> The implications of the research suggest that price is a more important determinant of buyer behavior than COOL, a finding consistent with various consumer surveys. Consumers may also feel that retail outlets, the brand of fish, or existing health and safety regulations provide adequate assurance of the quality and safety of the product without having to rely on country-of-origin labels.[9]

Similarly, a study conducted by researchers from Kansas and Oklahoma State found COOL had no impact on consumer demand for meat items.[10]

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[7] http://www.reuters.com/article/2013/01/14/us-meat-canada-usa-idUSBRE90D0YK20130114
[8] "Do Consumers Respond to Country-of-Origin Labeling?" by Fred Kuchler, Barry Krissoff, and David Harvey, in *Journal of Consumer Policy*, 2010, Vol. 33, pp. 323-337.
[9] http://www.ers.usda.gov/amber-waves/2012-june/consumers-appear-indifferent.aspx
[10] Tonsor, Lusk et al. Mandatory Country of Origin Labeling: Consumer Demand Impact, November 2012 http://www.agmanager.info/livestock/policy/Tonsor_KSU_FactSheet_MCOOL_11-13-12.pdf.

Reports from FMI members have confirmed these findings that COOL has not impacted consumer demand.

Voluntary Efforts Can Be Effective

FMI believes a voluntary program to replace the mandatory COOL program can work to the benefit of retailers and consumers. A voluntary program would save consumers hundreds of millions of dollars in increased food costs while providing them with information comparable to that required by COOL.

Time and time again, the industry has demonstrated its commitment to consumers by going above and beyond federal and state requirements to provide shoppers with more information about the products they buy.

Recently, FMI and the Grocery Manufacturers Association have invested tens of millions of dollars in the voluntary Facts Up Front front-of-package labeling system to assist consumers in selecting more nutritious foods. In addition to Facts Up Front, many other retailers have made significant investments in shelf-tag labeling systems to help consumers identify healthier options.

Voluntary programs are often more efficient and effective. They also are more nimble than federal regulatory mandates, and better able to respond to the changing needs of consumers in the marketplace.

COOL Reform

FMI supports the following reform proposals to address the Appellate Body ruling:

Reforms Proposed by Canada and Mexico

- **Reestablishment of Voluntary Country of Origin Labeling Program**

A voluntary country of origin labeling program would most likely comply with Article 2.1, placing the U.S. back in compliance with its international trade obligations and satisfying Canada and Mexico. Canada submitted that a voluntary program could contribute to the objective of providing consumers with country of origin information while being "significantly less trade-restrictive, because segregation costs would be borne only by those livestock producers catering to interested consumers, and it would not impose a differential burden on the use of Canadian livestock."[11] Mexico contends that a voluntary program could maintain the same strict labeling criteria on origin the current COOL regime ". . . while allowing market forces to fill consumer demand for this

[11] Canada's other appellant's submission, para. 78.

information to the extent that such a demand exists."[12] Reestablishment of a voluntary COOL program would save food retailers, wholesalers and others in the supply chain billions of dollars in regulatory costs.

- **Mandatory COOL Based on Substantial Transformation, Voluntary Provision of Born, Raised and Slaughtered Information**

This system would require that meat and poultry products receive a country of origin designation based on where the product was substantially transformed. Canada contends that this option would be less trade restrictive than the COOL measure because it "would not require segregation for the portion of the market that did not require voluntary labels."[13] In addition, Canada and Mexico argue that a combined mandatory-voluntary system would ensure that all consumers are provided with information on the origin of the meat they purchase on the same basis as they currently are for imported processed meat products and would permit additional information to be conveyed to those who are interested.[14]

The Appellate Body acknowledged that such a system would be less trade restrictive stating:

> We note that a mandatory labeling system according to which the country of origin is the one in which substantial transformation—that is, slaughter—took place would not entail costs of segregation of livestock for purposes of country of origin labeling. In practice, there would be no restriction or limitation imposed on imported livestock since all meat products derived from cattle and hogs slaughtered in the United States would bear a "Product of the US" label.[15]

This proposal would provide a small degree of relief to the supermarket industry, but alone would not have a major impact in reducing the overall burdens retailers and wholesalers face from the existing COOL program.

Reforms Achievable By Agency Under Current Authority

FMI believes USDA can use its existing authority to make the below reforms through the rulemaking process, guidance and changes to enforcement policy. The Dispute Panel found that the costs of compliance with COOL "cannot be fully passed on to consumers."[16] The Appellate Body accepted this finding. The Appellate Body noted

[12] Mexico's other appellant's submission, para. 62.
[13] Canada's other appellant's submission, para. 86.
[14] Canada's other appellant's submission, para. 87; Mexico's other appellant's submission, para. 64.
[15] Appellate Body Report, para. 485.
[16] Panel Report, *United States—Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R, WT/DS/386/R (November 18, 2011) para. 7.349.

that the recordkeeping and verification requirements of the COOL program "necessitate" segregation, meaning that their associated compliance costs are higher for entities that process livestock of different origins. It is these compliance costs which have led to and continue to cause retailers, wholesalers and processors to stop sourcing Canadian, Mexican and other foreign products. While a reduction in the recordkeeping and verification requirements is unlikely to put the U.S. fully in compliance with Article 2.1, it will move the program in a more compliant direction. The following comments also respond to USDA's solicitation of comments on ways to minimize the burden of the collection of information on those who are to respond to the ICR.

Reducing Recordkeeping Requirements and Verification Burdens for Retailers

- **Reducing the Number of Items in Which Records are Requested During Store Reviews from 5 to 2**

Currently, reviewers are directed to request store records for five items during each inspection. This has imposed a very significant burden on retailers as responding to each record request can be very complex and time-consuming. Limiting the number of items for which records are requested would significantly reduce the verification burden for retailers.

- **Reducing the Number of Items Inspected in Stores**

Currently, reviewers are inspecting hundreds of items in retail supermarkets. Inspections take 2-4 hours or more, imposing significant burdens on retailers. Rather than scouring the store in search of a handful of noncompliant items out of hundreds, reviewers should be directed to examine a limited number of items. Limiting the number of items inspected would significantly reduce the verification burden on the rule, and provide relief to overworked state agencies as well.

- **Reducing Recordkeeping Requirements for Prelabeled Product**

Prelabeled products are items that have the country of origin and method of production and the name and place of business (city and state) of the manufacturer, packer or distributor on the covered commodity itself, on the consumer package or on the master shipping container. A significant proportion of the foods sold within a retail store are prelabeled. For these items a store-order invoice or store log alone should be a sufficient record for purposes of documenting chain of custody. Additional records such as a shipping manifest, bill of lading, purchase order etc. should not be required. Reducing this recordkeeping burden would provide relief to retailers and wholesalers.

- **Changing Standard on Preponderance of Stickers/Tags**

COOL reviewers are currently instructed to flag retailers for an NC-2 violation (declaration not legible and/or placed in an inconspicuous location) when less than 50 percent of items within a bin are stickered or otherwise individually labeled with country of origin. Because consumers are constantly handling produce items, stickers fall off. For items in bunches, (e.g. bananas and tomatoes), individual fruits may fall off of the bunch. The loose fruit remaining in the bin may result in less than 50 percent of the items in the bin being labeled. USDA should reduce the standard to 25 percent of items within a bin. This will still provide the consumer with information on country of origin, but not unduly burden retailers.

- **Reducing In-Store Inspections and Refocusing on Compliance Assistance**

COOL reviewers have been inspecting an enormous proportion of all retail supermarkets annually—20%-25%—while the agency has found that 97 percent of items are labeled correctly. AMS should dramatically reduce the thousands of reviews conducted annually and instead focus on assisting retailers and wholesalers in complying with the rule. Reducing the number of inspections would provide significant relief from the regulatory burden. Retailers and wholesalers are complying with the rule as is evident in the 97 percent compliance rate of all items inspected. The industry however, continues to face an enormous number of inspections every year. In-store inspections can take 3-5 hours or more and can significantly disrupt store operations. Responding to record requests arising from each inspection consumes hours of staff time. Most retail companies have the food safety staff handle COOL inspections and follow up documentation, so this is time not spent on their core food safety responsibilities. Reducing the number of inspections retailers face would significantly lower the regulatory burden of the COOL program.

- **Redefining the Term "Raised" to Majority of Animal's Life**

The term raised is not defined in the COOL statute. Raised is defined by the agency in the COOL regulations to mean the period of time from birth until slaughter or in the case of animals imported for immediate slaughter, the period of time from birth until the date of entry into the United States.[17] As a consequence, animals born in the U.S. but transported to Canada for feeding, even for a single day, must bear a label indicating both U.S. and Canada as countries of origin. Similarly, records must be maintained verifying this declaration, and this product must be segregated from U.S. product by wholesalers and within retail stores. Changing the definition of raised to the period constituting the majority of time between birth and slaughter would provide some relief from the burdens of COOL and address the Appellate Body's finding that the

[17] 7 C.F.R. § 65.235.

recordkeeping and verification requirements impose a disproportionate burden on upstream producers and processors.[18]

We appreciate your consideration of these comments.

Sincerely,

Erik R. Lieberman
Regulatory Counsel

[18] Appellate Body Report, para. 349.