



THE VOICE OF FOOD RETAIL

Feeding Families  Enriching Lives

April 11, 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 Beef, Pork, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng and Macadamia Nuts¹

Docket No. AMS–LS–13-0004

Dear Ms. Henderson:

On March 12, 2013, the Agricultural Marketing Service (AMS) of the U.S. Department of Agriculture (USDA) published in the Federal Register a proposed rule to amend the Country of Origin Labeling (COOL) regulations to change the labeling provisions for muscle cut covered commodities among other things (Proposed Rule). On June 29, 2012, the World Trade Organization (WTO) Appellate Body (AB) 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 Proposed Rule has been issued in response to the DSB rulings and recommendations. The Food Marketing Institute (FMI) does not believe the Proposed Rule satisfies the requirements of the DSB rulings. The Proposed Rule however, will impose significant additional new burdens on food retailers and wholesalers. As such, compliance with any final rule should only be required if the WTO rules that it makes the COOL program comport with the DSB rulings and recommendations. Furthermore, in the unlikely event that the WTO rules any final rule fully addresses with DSB rulings and recommendations, we do not believe that compliance with such final rule should be required until at least 18 months following its date of publication in the Federal Register. FMI appreciates the opportunity to comment on this important matter.

¹ 78 Fed. Reg. 15645 (March 12, 2013).

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 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.

Summary

I. USDA should not require compliance with the final rule until a final ruling is made by the WTO as to whether or not the final rule fully addresses the DSB report. If the final rule does not fully address the DSB report, it should be rescinded.

II. The Proposed Rule imposes significant burdens on retailers and wholesalers for no benefit.

III. The Proposed Rule will lead more retailers to drop meat and poultry muscle cuts of non-U.S. origin.

IV. The Proposed Rule does not satisfy the requirements of the DSB rulings and recommendations.

V. USDA should make the existing COOL program less burdensome to reduce segregation costs.

Background

A. 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.

² 2011 Chain Store Guide, Directory of Supermarket, Grocery and Convenience Store Chains.

³ Id.

B. 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 AB upheld the DSB 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 adopted the AB report and the panel report as modified by the AB 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 dollars⁷ that could result in the loss of tens of thousands of jobs. Although the DSB report applies beef and pork in particular, we believe it has implications for all other commodities in the COOL program.

C. Existing Trade Effects of COOL

FMI opposed enactment of the COOL law because of concerns that it would impose enormous burdens on the supermarket industry and make it more costly and difficult to carry imported products, resulting in higher costs for consumers and reduced choices. 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 discussed later in these comments, the Proposed Rule will serve only to exacerbate the trade restrictiveness of the COOL program and lead even more retailers to stop sourcing meat and poultry cuts of foreign origin.

FMI recently polled its members on how the existing COOL rule affects their decisions on whether or not to carry product of foreign origin. They also commented on how it impacts the availability of foreign product in the U.S. market. A number of their responses are below:

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).

⁷ <http://www.reuters.com/article/2013/01/14/us-meat-canada-usa-idUSBRE90D0YK20130114>

- Our commodity pork supplier dropped Canadian pork from our program.
- Our ground beef supplier dropped Mexican beef from our program.
- We have trimmed our product of China from six items to two.
- There have been sporadic out of stock issues due to COOL. Causing lost sales but there's no way to put a dollar to that – only negative customers satisfaction.
- In an effort to simplify and ensure compliance with the mandatory country of origin labeling, we opted to go with USA only product, which has exacerbated an already low supply. As a result, we lost 30% of our beef supply.
- We eliminated seat sourcing from everywhere except for USA and USA/Canada.
- Seafood Operations- we often attempt to source products that are product of and processed in the same country to avoid using labor above and beyond what I've listed above.
- We currently only carry products that we can label, product of the U.S., due to our systems not being able to handle the labeling requirements of other countries.
- We are already restricted to U.S. products.

Because of the COOL regulation, U.S. consumers face fewer choices and higher prices. Profit margins in the supermarket industry are well under 1%, and consequently many regulatory costs must be passed to consumers in the form of higher prices. Consumers are paying tens of millions of dollars every year in higher food costs as a consequence of COOL and the Proposed Rule will increase those costs. In a year when food costs are projected to rise 3-4%, this is the last thing consumers need.

D. The Proposed Rule

The Proposed Rule would require that muscle cut covered commodities (beef, lamb, chicken, goat, and pork) be labeled to declare the country or countries in which “all of the production steps” took place. Current COOL regulations identify three production

steps for muscle cuts: the locations where the animal was born, raised, and slaughtered. The Proposed Rule identifies several different country of origin scenarios:

- Animals currently eligible to be labeled “Product of the U.S.” would be labeled under the Proposed Rule “Born, Raised, and Slaughtered in the United States.”
- Animals born, raised, and slaughtered in different countries would need labels declaring the country for each stage of the process (e.g., “Born and Raised in Country X, Slaughtered in the United States”).
- For animals raised in both a foreign country and the U.S., the label usually would be able to omit the foreign country from the raising step. For example, a product from an animal born in Country X, raised in Country X for a period of time, raised in the U.S. for a period of time, and slaughtered in the U.S. could be labeled “Born in Country X, Raised and Slaughtered in the United States.”
- The Proposed Rule provides two exceptions that would require the foreign country be declared for the raising step:
 - When the animal is raised in another country and the animal is imported into the U.S. for immediate slaughter, the foreign country must be declared as the place of raising.
 - When omitting the foreign country would make it appear as though the product was entirely of U.S. origin, the foreign country must be declared (e.g., if the animal was born in the U.S., raised in Country X and in the U.S., and slaughtered in the U.S., Country X must be declared).
- Imported muscle cut covered commodities from an animal slaughtered in another country would retain their origin as declared to U.S. Customs and Border Protection (e.g., “Product of Country X”).

The Proposed Rule would prohibit the commingling of muscle cut covered commodities with different countries of origin. For example, the current COOL regulation permits in certain situations mixed commodities to be declared as “Product of the United States, Country X, and Country Y.” Such a practice would not be authorized under the Proposed Rule.

Finally, the Proposed Rule would revise the definition of “retailer” to mean “any person subject to be licensed as a retailer under [PACA].” This revision would include as a “retailer” any party subject to licensing under PACA, even if that party were not actually licensed. This change in definition would apply to all covered commodities and to fish and shellfish.

AMS projects the Proposed Rule would cost the economy between \$16,989,000 and \$47,326,500 to implement, with “comparatively small” incremental benefits compared to the 2009 final rule implementing COOL.

I. USDA Should Not Require Compliance with the Final Rule Until the WTO Process is Complete

It would be unfair, and unreasonably burdensome, to require the food retailing and wholesaling industries to invest tens of millions of dollars retooling labels, upgrading equipment, training staff and segregating more product in stores and in the supply chain to comply with a regulation crafted for purposes of meeting WTO requirements, before the WTO actually issues a ruling on the regulation. If the WTO rules that the Proposed Rule fails to fully address the DSB rulings and recommendations—which we believe will be the case—the whole purpose of the Proposed Rule will not exist and there will be no justification for moving forward in implementing it. USDA should not require compliance with any final rule until a final ruling is made by the WTO as to whether or not the final rule fully addresses the recommendations and rulings of the DSB. If the final rule does not fully address the DSB report, the rule should be rescinded. In the unlikely event that the WTO determines the final rule does fully address the recommendations and rulings of the DSB, USDA should give retailers and wholesalers at least 18 months to comply with any new requirements.

II. The Proposed Rule Imposes Significant Burdens on Retailers and Wholesalers for No Benefit

A. Burdens on the Supermarket Industry

We polled our members on existing COOL compliance costs and based on their responses we estimate that large retailers expend \$6,000,000-\$17,000,000 annually on compliance costs (1000+ stores), medium size retailers (125-1000 stores) expend \$2,000,000-\$6,000,000 annually and small retailers (1-125 stores) expend \$10,000 - \$2,000,000 annually.

The Proposed Rule will require each grocery chain to expend hundreds of thousands to millions of more dollars each year to comply with the new requirements it poses. USDA estimates that more than 30,000 retail establishments will be impacted by the Proposed Rule. Many retailers will have to buy new scales or purchase new software. A new printer scale suitable for labeling meat in the store costs \$3,500, this cost does not include staff time to redo labels, segregate more product, undergo training and maintain more complex sets of records. If every retail outlet were required only to purchase a one new scale, the cost of the Proposed Rule would exceed \$100 million. USDA is estimating that the Proposed Rule is going to cost each retail outlet less than \$100. We believe this estimate is far too low.

Certain retailers repack muscle cuts and the Proposed Rule will impose an additional layer of complexity and cost. Labels will have to be redone for such products, further

segregation will be required and more complex records (and recordkeeping systems) will have to be maintained. USDA has failed to consider these costs in the cost analysis of the Proposed Rule.

The Proposed Rule will impose ongoing annual costs on the supermarket industry of tens of millions of dollars related to product segregation, training, recordkeeping and training.

We polled our members on what costs and challenges they would incur in complying with the Proposed Rule, responses are summarized below:

- Our current scale labels will not hold all the information required by USDA currently plus a statement of where the animal was born, raised and slaughtered. We also have multiple types of scales for different needs like multi ingredient products that require ingredients listed on the labels. These scales are at capacity currently.
- The proposed changes would cost us \$6.5 million to implement:
 - Training--The additional cost to re-train associates at xx stores would be \$1,603,500.
 - Scale Upgrades--Modifying the existing COOL labeling in the scale system would cost est. \$1,525,507.
 - Distribution System Upgrades—Implementing a new distribution system that would allow for the tracking of COOL related information for invoices and manifests would cost est. \$3,366,000.
- Existing scale systems would require a significant upgrade and be a substantial burden.
- Cost to updates to our scale/labeling systems.
- Associate labor to execute and verify labeling on a daily basis (Labor costs would be an approximate ~\$2 million a year).
- For our meat labels we have reached our "character limit" and would not be able to make the changes if the current requirements were modified. I am told we would need to purchase new software to accommodate any meat labeling changes.
- Some of the labels will require label redesign since we have preprinted COO on the label.

- In the event the format requires change due to regulations then there will be significant work necessary to reformat, test, pilot and deploy the new formats in accordance with IT deployment cadence. This is a time consuming effort.
- We at this point, do not have the capacity to add all of the proposed information to our labels. To update information on our labels would be extremely costly and require major configurations.
- Our current scale systems have even less space since the implementation of the mandatory meat nutrition labeling (see Exhibit A). To include the “Born XXXXX, Raised YYY and Slaughtered ZZZZ”, would not only be impossible, but a significant burden to all of our retailers if mandated. The cost of a printer scale is in the \$3,500 range (x hundreds of stores), not to mention installation, software and training. This initiative would cost the industry as a whole, tens of millions of dollars to implement and tens of millions more to maintain.

Exhibit A



- No, our current scales in most stores do not have enough reserved fields to allow the addition of this information. It would require the printing of a second label. That would increase costs for labor, materials, processing, and management to ensure correct information is being entered/printed/placed on right packages.
- We would be required to purchase new scales and program our systems to handle these new statements. The cost would be in excess of \$1.5 million (purchase equipment- scales- for more than 1000 stores, computer systems upgrade costs, associates training costs).
- We currently source all our protein products from US sources. However, we do not know the origin or grow out locations of all these products. Having to identify, confirm, document, and label would be a significant concern and cost. If this was required, it could easily require the addition of 2-4 FTEs to manage traceability issues and add another daily 0.25-0.5 FTE time at store level.

In addition, USDA should contemplate that proposed new labeling required for enhanced muscle cuts will further limit labeling space (See Exhibit B below).

Exhibit B



B. Zero Benefit: E.O. 12866/13563 Cost-Benefit Analysis

Earlier this year, President Obama issued Executive Order 13563 which states:

Our regulatory system . . . must identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends. . . As stated in (Executive Order 12866) . . . each agency must . . . propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs. . . (and) tailor its regulations to impose the least burden on society.⁸

The burdens of the regulation are clear and will amount to tens of millions of dollars for food retailers and wholesalers in the first year of compliance and tens of millions of dollars going forward. One major retailer estimated that implementing the Proposed Rule would cost \$6.5 million. Others have estimates into several millions of dollars. USDA has estimated that compliance costs per store will be less than \$100 which does not come close to reflecting the true costs of compliance. Ongoing burdens will cost the industry tens of millions of dollars. We believe that the burden on the supermarket industry, when combined with the burdens on other affected sectors, and overall impact to the economy, including increases in prices, easily exceeds \$100,000,000 annually into the future. The Proposed Rule should be considered a significant regulatory action under Executive Order 12866 and subject to all applicable review requirements by the Office of Management and Budget.

Meanwhile, USDA has failed to quantify a single benefit arising from the promulgation of the Proposed Rule: “The Agency has been unable to quantify incremental economic benefits from the proposed labeling of production steps . . .”⁹

E.O. 13563 requires agencies to “take into account benefits and costs, both quantitative and qualitative.”¹⁰ USDA has not quantified any benefits of the Proposed Rule in spite of E.O. 13563.

The costs of the Proposed Rule clearly outweigh any benefits. The only potential benefit of the Proposed Rule is whether or not it places the U.S. in compliance with its international trade obligations. That is why it was issued.¹¹ As discussed earlier in these comments, USDA should wait until the WTO rules to decide whether or not to require compliance with any final rule.

⁸ Exec. Order No. 13563 (January 18, 2011).

⁹ 78 Fed. Reg. 15647 (March 12, 2013).

¹⁰ Exec. Order No. 13563.

¹¹ “The United States has until May 23, 2013 to comply with the WTO ruling. As a result of this action, the Agency reviewed the overall regulatory program and is issuing this rule. . .” 78 Fed. Reg. 15645.

C. Consumer Response to COOL

Studies have found that COOL has 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.¹² 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.¹³

Similarly, a study conducted by researchers from Kansas and Oklahoma State found COOL had no impact on consumer demand for meat items.¹⁴

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

D. A Label Bearing Born, Raised & Slaughtered Information will Confuse Consumers and be Unappetizing

For all other products in a retail store, country of origin is listed as “product of country X” under the Tariff Act of 1930 and country of origin is based on substantial transformation of the product. Under the Proposed Rule these rules do not apply and labels must bear separate born, raised and slaughtered information. Consumers are likely to be confused by this information and will ask questions of associates, consuming staff time. Furthermore, placing such information on the label is unappetizing and will likely lead to a decline in meat sales. Alternatives to the term “slaughtered” should be considered.

III. The Proposed Rule Will Lead More Retailers to Stop Sourcing Meat and Poultry Muscle Cuts of Non-U.S. Origin

FMI polled its members and many of them indicated that the Proposed Rule, if implemented, would cause them to stop sourcing more meat and poultry muscle cuts of non-U.S. origin due to the increased regulatory burden.

Below are a number of their comments:

¹² "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.

¹³ <http://www.ers.usda.gov/amber-waves/2012-june/consumers-appear-indifferent.aspx> .

¹⁴ 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.

- Yes (it will make us less likely to source non-U.S. product).
- There is a possibility that this could impact our sourcing decisions if the added requirements/complexity increased the compliance risk significantly. Additionally, consumer demand for simple and clear labeling may drive a consumer preference for a single country declaration.
- Born, raised and slaughtered requirements could potentially force us to purchase USA only, as managing inventory and store PLU integrity would be challenging.

IV. The Proposed Rule is Unlikely to Satisfy the Requirements of the DSB Rulings and Recommendations

A. Legal framework of TBT Article 2.1

Article 2.1 of the TBT provides that “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.” The AB in the *COOL* case reviewed an earlier Panel decision finding that *COOL* violated TBT Article 2.1, and upheld that conclusion on different grounds. While the Panel had ruled that the measure’s detrimental impact on imported products constituted a violation of Article 2.1, the AB held that the finding of detrimental impact alone was insufficient for this ruling. Instead, to constitute less favorable treatment and a violation of Article 2.1, the measure must be applied in a manner that is not “even-handed.”

The “even-handedness” test applied by the AB was first articulated in the *US – Clove Cigarettes* case.¹⁵ In that case, the AB explained that a measure lacks even-handedness when it is designed or applied in a manner that constitutes unjustifiable or arbitrary discrimination. The analysis is two-pronged: first, a Panel must evaluate whether the measure at issue distorts the competitive conditions to the detriment of imported products; and second, whether the detrimental impact on imported products “stems exclusively from a legitimate regulatory distinction” rather than reflecting discrimination against the group of imported products.¹⁶

B. The Proposed Rule does not appear to satisfy the U.S.’s obligations under TBT Article 2.1

¹⁵ World Trade Organization, United States – Measures Affecting the Production and Sale of Clove Cigarettes, Appellate Body Report, WT/DS406/AB/R (April 24, 2012), available at [http://www.worldtradelaw.net/reports/wtoab/us-clovecigarettes\(ab\).pdf](http://www.worldtradelaw.net/reports/wtoab/us-clovecigarettes(ab).pdf)

¹⁶ *Id.* at paras. 174, 175, 182.

The Proposed Rule appears to fail the “even-handedness” test for two reasons: first, the Proposed Rule adds additional onerous requirements on meat producers, with only marginal gain toward achieving the stated objective of the COOL regulations. Second, the Proposed Rule does not address the exemptions of food service establishments to the COOL regime, a carve-out that will surely be in dispute in the future.

With respect to the former, the Proposed Rule still reflects discrimination against the imported products. The AB affirmed the Panel’s finding that COOL’s recordkeeping and verification requirements lead to a detrimental impact on imported livestock in the U.S. market, because these requirements “necessitate segregation,” creating “an incentive for U.S. producers to process exclusively domestic livestock and a disincentive to process imported livestock.”¹⁷ The requirements in practice effectively require producers to use various methods to segregate animals falling into different labeling categories (for example, by placing them in separate pens, processing livestock of different origin categories on different days, or simply refusing to handle imported cattle or hogs). Therefore, a strong incentive exists to source animals exclusively from domestic providers in order to avoid having to comply with the regulations. Because different stages of North American livestock and meat production frequently take place in more than one country, and because there is substantial cross-border trade in livestock, the COOL measure disrupted trade and had a detrimental impact on the imports of Canadian and Mexican products. Under the Proposed Rule, meat producers would likely still face the same problems, and the discrimination would likely still occur.

The detrimental impact found by both the Panel and the AB can only be justified, then, if it stems from some legitimate regulatory distinction. In its query for assessing legitimacy, the AB appears to engage in some level of balancing analysis when it discusses the “lack of correspondence” between the requirements for producers and the benefits to consumers. It found that “the informational requirements imposed on upstream producers under the COOL measure are disproportionate as compared to the level of information communicated to consumers through the mandatory retail levels.”¹⁸ The AB seems to be weighing generally not just the right to regulate against a responsibility not to discriminate, but also specifically the detrimental impact of a measure against its benefits. A regulatory distinction that results in discrimination but offers only marginal benefit may not meet the legitimacy standard.

Adding more information to the label would not render the discrimination as “stem[ming] exclusively from a legitimate regulatory distinction.” Providing further information on labels to address the AB’s concern about the “lack of correspondence” between the detrimental impact and the consumer benefit doesn’t actually redress that imbalance. The detrimental impact appears to still heavily outweigh any increased benefit consumers derive from access to information about the steps of the production, so the

¹⁷ Appellate Body Report, *United States—Certain Country of Origin Labelling (COOL) Requirements*, at para. 348.

¹⁸ *Id.* at para. 347.

“lack of correspondence” still exists. In other words, the discrimination cannot stem exclusively from a legitimate regulatory distinction because of the gaping distance between the marginal benefit to consumers and the extreme discrimination against imported products. The detrimental impact would not disappear under the Proposed Rule. On the contrary, the impact would be intensified, as producers shoulder further costs or avoid importation altogether, which would further tip the scales toward discrimination and increase the burden on USDA to show that these impacts are commensurate with a legitimate regulatory purpose.

C. TBT Article 2.2

It is worth noting that though the AB did not reach a conclusion about Article 2.2 of the TBT, which requires that the technical regulations be no more restrictive of trade than necessary to achieve a legitimate objective,¹⁹ the Proposed Rule also appears to violate this provision. Even if consumer access to information, provided in the manner described in the Proposed Rule, is assumed to be a legitimate objective, it is difficult to see how the hardship it imposes could constitute a necessary restriction of trade. The AB was clearly skeptical that the COOL rule complies with Article 2.1, but eventually concluded that it could not “complete the analysis” because the Panel had not made necessary findings on certain key facts. The Article 2.2 issue will be resurrected in any DSU Article 21.5 compliance proceeding, and the U.S. is at very high risk of losing on this as well.

V. USDA Should Reduce the Burdens of the Existing COOL Program to Reduce Product Segregation Costs

As an alternative to the Proposed Rule, FMI believes the following changes to COOL should be implemented to reduce the burdens of COOL and the associated segregation costs.

A. Reducing Store Inspections

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

¹⁹ TBT Article 2.2 reads: “Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products.”

seafood managers, imposing significant burdens and taking them away from their responsibilities of running store operations. Meanwhile, USDA has determined that the overall compliance rate for items subject to COOL is 97%. Retailers and wholesalers take compliance with the COOL program very seriously and are achieving extremely high rates of compliance. Given these high rates of compliance, FMI feels the high number of inspections at retail is unnecessary and should be significantly reduced. The high volume of inspections creates disincentives to carrying foreign product because many of these separate records must be retrieved in the inspection process.

B. Reforms Proposed by Canada and Mexico

1. 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.”²⁰ 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 information to the extent that such a demand exists.”²¹ Reestablishment of a voluntary COOL program would save food retailers, wholesalers and others in the supply chain billions of dollars in regulatory costs.

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.

²⁰ Canada’s other appellant’s submission, para. 78.

²¹ Mexico’s other appellant’s submission, para. 62.

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.

2. 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.”²² 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.²³

The AB 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.²⁴

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.

3. 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 DSB found that the costs of compliance with COOL “cannot be fully passed on to consumers.”²⁵ The AB accepted this finding. The AB noted that the recordkeeping and verification requirements of the COOL program “necessitate” segregation, meaning that their

²² Canada’s other appellant’s submission, para. 86.

²³ Canada’s other appellant’s submission, para. 87; Mexico’s other appellant’s submission, para. 64.

²⁴ Appellate Body Report, *United States—Certain Country of Origin Labelling (COOL) Requirements*, para. 485.

²⁵ Panel Report, *United States—Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R, WT/DS/386/R (November 18, 2011) para. 7.349.

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. The following comments provide suggestions for reducing the segregation costs of COOL imposed by the recordkeeping and verification requirements.

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 of the COOL regulations, and provide relief to overworked state agencies as well.

- **Reducing Recordkeeping Requirements for Pre-labeled Product**

Pre-labeled 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 pre-labeled. 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 COOL. Reducing the number of inspections would provide significant relief from the regulatory burden. Retailers and wholesalers are complying with COOL 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.²⁶ 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 DSB finding that the recordkeeping and verification requirements impose a disproportionate burden on upstream producers and processors.²⁷

²⁶ 7 C.F.R. § 65.235.

²⁷ Appellate Body Report, *United States—Certain Country of Origin Labelling (COOL) Requirements*, para. 349.

Ms. Julie Henderson
April 11, 2013
AMS-LS-13-0004
Page **19** of 19

We appreciate your consideration of these comments. Please contact me at elieberman@fmi.org if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Erik R. Lieberman". The signature is fluid and cursive, with the first name "Erik" being the most prominent.

Erik R. Lieberman
Regulatory Counsel