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August 9, 2002

Via Messenger

The Honorable Bill T. Hawks
Under Secretary for Marketing & Regulatory Programs
Room 228-W
1400 Independence Avenue, SW
Washington, DC 20250

Re: Implementation of Country of Origin Labeling Program

Dear Under Secretary Hawks,

The Food Marketing Institute[1] (FMI) is pleased to provide the U.S. Department of Agriculture (USDA) with initial comments on our interpretation of Section 10816 of the Farm Security and Rural Investment Act of 2002. Section 10816 amends the Agricultural Marketing Act of 1946 by appending a new Subtitle D, which requires the Secretary of Agriculture, acting through the Agricultural Marketing Service (AMS), to develop a program for informing consumers regarding the country of origin of specified meat, fish, peanut, and perishable agricultural commodities at the point of retail sale. 7 U.S.C. § 1638. Subtitle D requires AMS to issue guidelines establishing a country of origin

[1] Food Marketing Institute (FMI) conducts programs in research, education, industry relations and public affairs on behalf of its 2,300 member companies — food retailers and wholesalers — in the United States and around the world. FMI's U.S. members operate approximately 26,000 retail food stores with a combined annual sales volume of $340 billion — three-quarters of all food retail store sales in the United States. FMI's retail membership is composed of large multi-store chains, regional firms and independent supermarkets. Its international membership includes 200 companies from 60 countries.

labeling program by September 30, 2002 and regulations in this regard by September 30, 2004.

FMI and its members are committed to working with AMS and the entire food distribution chain to establish a feasible system for providing meaningful country of origin information to consumers in compliance with Subtitle D. Development and implementation of a program that will provide meaningful and accurate country of origin information to consumers will require the concerted and cooperative efforts of the entire food distribution chain, as well as AMS. Subtitle D clearly recognizes this reality and distributes the responsibility across the entire food chain from growers and producers to packers, distributors, suppliers to retailer. AMS's guidelines, and ultimately its regulations, should recognize the scope and breadth of Subtitle D and inform all members of the supply chain of their responsibilities toward providing country of origin information to consumers.

Despite the clear overall framework, Subtitle D implementation will require the resolution of a number of difficult legal and practical issues, such as country of origin identification for products that do not meet the statutory standard for U.S. country of origin, and the scope of the exemption for processed food ingredients and food service establishments. Clear and specific guidelines are essential to the implementation of the program during the voluntary period, although we recognize that more time may be necessary to resolve some of the more complex issues in a meaningful way as well as the innumerable practical implementation questions that will arise. We look forward to working with you and your staff to resolve these implementation issues as you develop the guidelines and ultimately the regulations that are required under Subtitle D.

1. To Ensure Accuracy of Information to Consumers, Suppliers Must Determine Country of Covered Commodities' Origin and Label Individual Covered Commodities Accordingly

Section 282(a)(1) of newly enacted Subtitle D requires retailers to inform consumers, at the final point of sale,[2] of the country of origin of the covered commodities identified in the legislation. 7 U.S.C. § 1638a(a)(1). However, determining a product's country of origin is not always a simple matter. (See section 6, below.) Retailers certainly cannot determine country of origin simply by inspecting the commodity when it is received on the loading dock. In contrast, suppliers do know the country of origin and, as required by Section 282(e), must bear the responsibility for conveying the information to retailers so that retailers, in turn, may provide the information to consumers.

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[2] Some of our members have expressed concern that USDA might require country of origin information to be included in retailer advertising, such as newspaper circulars. However, as the legislation clearly requires the information to be passed along to consumers at the final point of retail sale, we would appreciate confirmation in the guidance that country of origin information will not be required in advertising.

For example, some covered commodities, such as fresh produce, may proceed through a multi-stage distribution process, beginning with the grower, proceeding through a packer, a food broker, and a distribution center before ultimately arriving at the retail store. Despite the succession of distribution steps or where they occur, the country of origin for fresh produce will not change. Similarly, the country of origin for meat and fish products as stipulated in Section 282 will be established well before the commodity reaches the distribution center or the retail store, as will the fish's method of production, *i.e.*, farm-raised or wild-caught.

Country of origin is a factual determination about a food product, just like an ingredient statement. Retailers are obligated to pass along the ingredient information that is on a processed food product, but are not and cannot reasonably be responsible for determining the ingredients that are in a given product. Similarly, retailers can meet their obligation under Section 282(a) to inform consumers of the country of origin of covered commodities, but they can only do so by conveying the information that is *required to be provided to them by suppliers* under Section 282(e).[3] And, just as suppliers – not retailers – affix ingredient statements to each product before it arrives in the store, suppliers should, to the extent practicable,[4] affix a country of origin determination to each covered commodity before it arrives in the store.[5] A requirement of this nature would be consistent with the Florida country of origin labeling law, which requires country of origin markings to be made before products enter the state.[6]

If country of origin labeling will be meaningful to consumers, USDA's guidelines must rely upon the Section 282(e) authority and require a mechanism to ensure that suppliers convey the necessary information to retailers and that the information is accurate. The requirement must apply first to the point in the distribution chain at which the covered commodities' origin is established – often the grower or producer – to determine the country of origin within the meaning of the statute and to transfer that information to the next stage in the distribution channel. Consistent with Section 282(e),

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[3] Section 282(e) broadly requires any person "engaged in the business of supplying a covered commodity to a retailer" to provide information indicating the country of origin to the retailer. As the statute places responsibility on all who are "engaged in the business" of supplying a covered commodity, the statute explicitly reaches all segments of the food production and distribution chain relative to each covered commodity to the extent that it will be destined for retail sale. In the case of fish, AMS should interpret the requirement to provide information on country of origin to include information on whether the fish is farm-raised or wild-caught.

[4] As discussed more fully below, not all covered commodities are amenable to product labels, thus, retailers would still bear substantial responsibility for a significant number of covered commodities.

[5] As discussed below (section 2), the average retailer displays more than 400 different types of fresh produce alone on any given day. The produce market is extremely fluid and availability varies greatly, so the types of produce displayed may change daily, if not hourly, as may the suppliers and points of origin for the commodities. Subtitle D grants USDA sufficient authority to place the responsibility for labeling commodities with country of origin on suppliers where practicable (see Section 3).

[6] See Fla. Stat., TitleXXXIII, § 504.012 ("[A]ny fresh fruit or vegetable . . . produced in any country other than the United States and offered for retail sale in Florida shall be marked individually in a conspicuous place . . . in such manner as to indicate to an ultimate purchaser the country of origin. Markings shall be done prior to delivery into Florida.")

each successive handler and distributor must bear responsibility for ensuring that the information reaches the retailer, who is, in turn, responsible for ensuring that the information reaches the consumer.

To achieve the accurate dissemination of country of origin information to consumers, we urge the Department to require suppliers to certify the country of origin of all covered commodities to retailers. Given the multiple distribution steps through which each covered commodity must pass, certification will be accomplished most effectively and accurately by requiring the supplier to place – and each individual covered commodity unit to bear – a label, stamp or other mark immediately upon the commodity or upon any packaging placed around the individual commodity unit that identifies the product's country of origin as determined by the supplier to the extent that application of such labels is practicable.[7] Many produce items currently bear "price look-up" or PLU stickers that are applied by the supplier; these should be modified to include country of origin information. In this way, the country of origin information will be available to consumers even after the product leaves the store and is brought home.

If the supplier can demonstrate that affixing a label either to the individual product or to its immediate packaging is not impracticable, the guidelines should require the supplier to include with each shipping container of the covered commodity signs or labels sufficient to identify the product's country of origin to consumers at the final point of retail sale.[8] Examples of situations where affixing labels on final individual products or packaging may not be practicable are meat supplied to retailers in carcass form that will be cut into consumer-sized portions, whole fish, leaf lettuce (which is washed and trimmed at retail), and bulk supplies of small produce items, such as cherries, peas or string beans. In these cases, suppliers should be required to provide retailers with sufficient labels or signage for the number of individual packages or retail displays that will result from the bulk package.

2. Accuracy of Country of Origin Determination Must Be Verified at Supplier Level

Verifying the accuracy of the country of origin determination is important to ensuring the integrity of the country of origin information program. It is unrealistic, however, to expect to do so at the retail store level. Although AMS may intend to verify that retailers are providing country of origin information to consumers in compliance

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[7] Indeed, such practice would be consistent with the Customs Department's country of origin labeling requirements in other areas, as well. See, 19 C.F.R., Part 134 (manufacturers or importers of goods – not retailers – are required to place country of origin information on consumer packages).

[8] USDA should not, however, specify the size, font, color or any other design parameters with respect to signs or labels.

with Section 282(a) at the retail store level,[9] the *accuracy* of the country of origin determination can most effectively be evaluated at the supplier level.

As discussed above, suppliers – not retailers – are properly positioned to render the factual determination regarding a covered commodity's country of origin. AMS can verify that a determination was made by looking at the labels that accompany products at retail, but will need to check the suppliers' records to assess the integrity of the determination itself.

On any given day, the average retailer displays more than 500 different products that might fall within the "covered commodity" definition and, thus, be required to carry country of origin information.[10] The specific products displayed and the suppliers thereof may change daily or even hourly for fresh items, such as produce.[11] The task of providing the labeling required under Subtitle D at the retail level is extraordinarily daunting. Retaining a complete audit trail at each retail store for each of the covered commodities that is displayed from each supplier for a period of even thirty days would necessitate an enormously large and complex record keeping system the likes of which is not required for any other food regulatory program, even those that are directly related to consumer health or food safety.

Section 282(d) allows USDA to require "any person that prepares, stores, handles, or distributes a covered commodity for retail sale [to] maintain a *verifiable recordkeeping audit trail that will permit the Secretary to verify compliance* with Subtitle D, including the regulations promulgated under Section 284(b)." 7 USC § 1638a(d) (emphasis added). Several aspects of the provision bear particular note. First, the provision's reach is quite broad: it applies to anyone who "prepares, stores, handles or distributes" a covered commodity for retail sale and, thus, covers not just retailers, but growers, packers, distributors and anyone else who contacts a covered commodity on its way from production to retail.[12]

Second, it allows AMS to require that each of the previously identified entities maintain some type of records establishing that they met the requirements of Subtitle D,

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[9] A willful violation of this requirement will subject a retailer to a fine of up to $10,000. See 7 U.S.C. § 1638b(c).

[10] Retailers display more than 400 fresh produce items and 100 fresh meat products, as well as many different fish items. Depending on the way in which USDA interprets the exception for "ingredients in processed foods," the numbers of commodities affected might be even greater. (See Section 5, below.)

[11] Indeed, one produce expert estimates that his company utilizes an average of 2 to 3 different suppliers for each item of fresh produce, which translates to a minimum of 800 to 1200 suppliers for produce alone.

[12] One possible exception to the scope would be those who handle or produce the "precursors" to covered commodities; for example, live animals technically are not "covered commodities" and, therefore, those suppliers who raise live animals might be beyond the scope of AMS's authority under Section 282(d). Nonetheless, as these suppliers are clearly "persons engaged in the business of supplying a covered commodity to a retailer," AMS may properly require them to keep records demonstrating their compliance with Section 282(e).

which, for suppliers, includes providing accurate country of origin information to retailers under Section 282(e). Thus, AMS can require suppliers to keep those records necessary to demonstrate that the supplier passed along the requisite country of origin information to the retailer and to demonstrate that the country of origin determination is accurate. Third, the provision requires that the records be sufficient to permit the Secretary to verify compliance with Subtitle D. The standard therefore implicitly envisions that the Secretary will conduct verification audits of all those who are required to keep records – from growers, producers, distributors, brokers and suppliers to retailers.

Section 282(d), then, clearly gives USDA the authority to require all those who produce, supply or sell covered commodities to retain records establishing that they have met all of the requirements of Subtitle D, including the requirements to determine country of origin accurately and to pass along the determination to each successive stage of the distribution chain and, ultimately, to the consumer. Moreover, Section 282(d) clearly envisions that AMS will have access to and review those records on a regular basis to meet its burden to verify that the information provided to consumers is consistent with the analysis required by law.

3. Subtitle D Grants AMS Authority To Require Suppliers To Label Their Products with Country of Origin Information and To Keep Verifiable Records Regarding the Determination

As discussed above, Section 282(a) of Subtitle D requires retailers to inform consumers regarding the country of origin of covered commodities and Section 282(e) requires "[a]ny person engaged in the business of supplying a covered commodity to a retailer [to] provide information to the retailer indicating the country of origin of the covered commodity." Section 282(d) authorizes USDA to require "verifiable recordkeeping audit trails" to permit USDA to verify compliance with Subtitle D.

Section 284 requires the Secretary through AMS to issue guidelines and to promulgate "such regulations as are necessary to implement this subtitle," thereby requiring AMS to interpret the statutory language in a manner that would allow for the effective and efficient execution of the law. For the reasons discussed more fully above, AMS should interpret these requirements to find that labeling commodities at the point in the distribution chain at which country of origin is established will allow for the most efficient and effective execution of Subtitle D and that records sufficient to support the accuracy of the determination must be maintained at the point in the supply chain at which the determination was rendered.

Subtitle D gives USDA the necessary enforcement tools to carry out this interpretation of the law. Specifically, Section 283(a) states that Section 253, which is codified at 7 U.S.C. § 1636b, shall apply to violations of Subtitle D, except in the case of retailers (see below). Section 1636b grants USDA substantial enforcement authority, including the ability to levy civil penalties of up to $10,000 per violation per day against

"any packer or other person that violates" Subtitle D or to issue cease and desist orders to prevent continuing violations. Thus, a supplier's failure to provide retailers with the requisite country of origin information constitutes a *per se* violation of Section 282(e) of Subtitle D, and is, therefore, subject to the penalties set forth in Section 1636b. Likewise, failure to comply with a regulation implementing Section 282(e) that requires suppliers to label covered commodities with the country of origin or to maintain records sufficient to allow USDA to verify that determination, would constitute a violation subject to the enforcement provisions of Section 1636b.

USDA also has significant enforcement authority to ensure that retailers meet their obligations under the statute. Specifically, if USDA determines that a retailer is in violation of Subtitle D, USDA must notify the retailer of the determination and provide the retailer with a 30-day period during which the retailer may take steps necessary to comply with Subtitle D. If, after the 30-day period, USDA determines that the retailer has willfully violated Subtitle D, USDA may fine the retailer in an amount of up to $10,000 for each violation. Thus, USDA has more than adequate authority to ensure that retailers inform consumers as required under Section 282(a).

The construction of the enforcement section deserves particular attention because it underscores the conclusion that Congress intended AMS to exercise enforcement authority over suppliers – not just retailers – in implementing Subtitle D. Specifically, paragraph (a) of Section 283 explicitly incorporates 7 USC § 1636b, which applies on its face to *any person* who violates Subtitle D and allows AMS to exercise the array of enforcement mechanisms discussed above. Clearly, Congress could have let this provision apply to *all* who violated Subtitle D – including retailers. Instead, however, Congress chose to add paragraphs (b) and (c) to Section 283, which establish a separate (and arguably more lenient) enforcement standard for retailers. For example, before fines may be imposed against a retailer for violating Subtitle D, Section 283(b) requires AMS to notify the retailer of the Secretary's determination that the retailer is in violation and then to provide the retailer with a 30-day period in which to remedy such violations. AMS is not required (and arguably is not authorized) to provide for such warnings and opportunities for remediation to those persons (*i.e.*, non-retailers) subject to the enforcement mechanisms of 7 USC § 1636b through Section 283(a).

Similarly, a simple violation of Subtitle D – regardless of the person's intent – is sufficient to subject any person (but retailers) to a fine of up to $10,000 per violation under 7 USC § 1636b, as incorporated by Section 283(a). However, under Section 283(c), AMS can only fine retailers for violating Subtitle D if the Secretary first finds that the retailer *has willfully violated* Section 282.[13] The addition of a *mens rea* element – indeed, a very high *mens rea* element – to the standard for retailer violations clearly limits AMS's enforcement authority against retailers in a way that AMS's enforcement

[13] The standard for willful violation of the statute requires careful consideration and complete discussion. As AMS need not reach this issue for purposes of the guidance document, we urge the agency to address this issue through the rulemaking process, rather than the guidance phase. We would be pleased to provide AMS with a detailed analysis in this regard.

authority is not limited against all others who violate Subtitle D. Thus, AMS has greater authority to enforce Subtitle D against non-retailers to whom the statute applies, underscoring the point that Congress intended AMS to enforce Subtitle D, not just against retailers, but against all persons to whom the statute applies. AMS must exercise its enforcement authority with respect to all persons subject to Subtitle D, not just retailers.[14]

4. Scope of Retailer Definition and Food Service Establishment Exemption

FMI represents a diverse community of establishments that supply food to consumers through a variety of different models, some of which do not fall neatly within the retailer definition or food service establishment exemption. During the guideline implementation period before USDA issues regulations, it will be important to explore some of the different formats and their status under Subtitle D.

The requirement to provide country of origin information does not apply to a covered commodity if the covered commodity is:

(1) prepared or served in a food service establishment; and
(2) (a) offered for sale or sold at the food service establishment in normal retail quantities; or
(b) served to consumers at the food service establishment.

Section 282(b). "Food service establishment" is defined as a restaurant, cafeteria, lunch room, food stand, saloon, tavern, bar, lounge or other similar facility operated as an enterprise engaged in the business of selling food to the public. Section 281(4). As discussed more fully below, those portions of retail food establishments that function as food service establishments should not be required to provide country of origin information for otherwise covered commodities.

For example, some of our members operate largely as food service establishments; that is, they feature daily or weekly menus and a significant percentage of the foods that they sell are prepared dishes, similar to those offered in restaurants. Moreover, many retailers offer food to consumers through salad bars or deli counters, and often provide complete restaurant seating areas with tables and chairs at which consumers can enjoy their purchases. Through these operations, retailers prepare or serve food that

[14] The suggestion has been made that AMS will focus its enforcement efforts on retailer compliance with Subtitle D and will interpret the statute to require retailers to verify the accuracy of the country of origin determinations provided by suppliers by, for example, requiring retailers to conduct third party audits of their suppliers. As noted above, retailers easily have 800-1200 different suppliers for produce alone. The cost associated with third party audits of 800-1200 suppliers would be enormously prohibitive, particularly for smaller retailers. Costs would be passed along to consumers and retailers would be forced to limit the number of suppliers from whom they could offer products to consumers, thereby limiting consumer choice and marketplace efficiencies. AMS is not required to interpret its statute in this regard and FMI would strongly oppose any suggestion in AMS's forthcoming draft guidelines that retailers be required to conduct third party audits of suppliers to establish the retailer's compliance with Subtitle D.

is either offered for sale in normal retail quantities or served to consumers on site. Thus, these operations are identical to those in restaurants and other establishments specifically identified in the food service establishment definition and exempt from the Section 282 requirements. Accordingly, covered commodities served or sold to consumers through these operations conducted at retail stores should not be required to carry country of origin information.

5. "Ingredient in Processed Food Item" Prong of "Covered Commodity" Definition

Section 281 defines terms relevant to Subtitle D. Paragraph (2) of Section 281 sets forth the following two-part definition of "covered commodity:"

> (2) Covered Commodity. –
>
> (A) In general.—The term 'covered commodity' means –
>
> (i) muscle cuts of beef, lamb, and pork;
> (ii) ground beef, ground lamb, and ground pork;
> (iii) farm-raised fish;
> (iv) wild fish;
> (v) a perishable agricultural commodity; and
> (vi) peanuts.
>
> (B) Exclusions.—The term 'covered commodity' does not include an item described in subparagraph (A) if the item is an ingredient in a processed food item.

As food products listed in subparagraph (2)(A) will not be considered "covered commodities" subject to country of origin labeling if they are "ingredients in a processed food item," the scope of the products intended to be covered by the phrase "ingredients in a processed food item" is important, but it is not further defined in the statute.

In the absence of a definition in the statute of interest, it is appropriate to look to related statutes. The Federal Food, Drug, and Cosmetic Act (FD&C Act), which applies to most of the food items listed in paragraph (2)(A), defines "processed food" as "any food other than a raw agricultural commodity and includes any raw agricultural commodity that has been subject to processing, such as canning, cooking, freezing, dehydration, or milling." 21 U.S.C. § 321(gg). The Food and Drug Administration (FDA) has issued guidance interpreting the phrase "processed food." In particular, the agency concluded that certain activities, such as washing, coloring, waxing, hydro-cooling, refrigeration, nut shelling, and removal of stems, leaves and husks, are post-harvest activities that do not constitute processing, while canning, freezing, cooking, pasteurization, irradiation, milling, grinding, chopping, slicing, cutting or peeling are processing activities.[15] Accordingly, food (including items that would otherwise be considered perishable agricultural commodities, peanuts, and seafood) that has been subject to these latter activities are "processed foods" for the purpose of the FD&C Act. An item that is listed in paragraph (2)(A) becomes an ingredient in a processed food item once it undergoes the processing activities described above.

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[15] See, FDA, "Antimicrobial Food Additives – Guidance" at 7-8 (July 1999).

A second source for guidance is the Organic Food Production Act (OFPA). As you know, AMS is responsible for administering the OFPA, just as it is responsible for administering the Agricultural Marketing Act, including the newly enacted country of origin provisions. The OFPA applies to all of the food items identified in paragraph (2)(A). It is desirable for the agency to interpret these two statutes consistently.

Unlike the FD&C Act, the OFPA does not define the term "processed food." The OFPA does, however, define the term "processing," which includes cooking, baking, heating, drying, mixing, grinding, churning, separating, extracting, cutting, fermenting, eviscerating, preserving, dehydrating, freezing or otherwise manufacturing. See 7 U.S.C. § 6502(17). Ergo, foods that have undergone these activities may be considered "processed foods."

The presence of an ingredient statement has been suggested by some commenters as the basis for establishing that a product is a processed food and, thus, would not be required to bear country of origin information, even if the product contained an item identified in paragraph (2)(A). Although we would not oppose this standard for packaged products, it clearly does not cover the universe of processed food products. For example, salads subject to the FD&C Act that are prepared and sold in bulk from the deli counter or unpackaged baked goods need not bear a label with an ingredient line, but they are certainly "processed foods" as envisioned by the exclusion in paragraph (2)(B). Moreover, the FD&C Act and OFPA definitions discussed above provide a strong basis for concluding that "processed food" is broader than the types of foods required to bear an ingredient statement.

In determining the scope of the "covered commodity" definition, AMS should also consider the products that are already required to bear country of origin labeling under the Tariff Act of 1930, as amended, and the implementing regulations promulgated by the U.S. Customs Service. Specifically, with certain exceptions, the Tariff Act requires imported products, including food, to bear the name of the country of origin of the product. Products on the so-called "J-List" are not required to bear country of origin information, unless they are imported in a container, in which case, the outermost container in which the article ordinarily reaches the ultimate purchaser is required to be marked to indicate the origin of its contents. See 19 U.S.C. § 1304; 19 C.F.R. § 134.33. Natural products, such as vegetables, fruits, nuts, berries, and live or dead animals, fish and birds, which are in their natural state or not advanced in any manner further than is necessary for their safe transportation are J-List items that are not required to bear country of origin marking, unless they are enclosed in consumer packaging. Id.

As these packaged products will already be required to bear country of origin information, and a country of origin determination under U.S. Customs Service rules may differ from a country of origin determination made under the standards set forth in Subtitle D, it might behoove AMS to consider natural products that are enclosed in consumer packaging (which will, therefore, be required to bear an ingredient statement

under the relevant federal food statutes[16] and country of origin labeling under the Customs Service regulations) to be processed food products within the meaning of the second prong of the "covered commodity" definition.

In sum, one of AMS's key responsibilities in implementing Subtitle D – both in guidance and in regulations – will be interpreting the "covered commodity" definition, particularly with respect to the exclusion for "ingredients in processed food." We urge AMS to adopt a view of the exclusion that is consistent with the related acts discussed above to minimize confusion in the marketplace and to consumers.

6. Country of Origin Determination

Section 282(a)(1) requires retailers to inform consumers of the country of origin of all covered commodities not otherwise excluded. Section 282(a)(2) explains the circumstances under which a covered commodity will qualify to be designated as originating in the United States. However, Subtitle D does not explain how products that do not qualify for U.S. country of origin must be designated. For example, should cattle born in the U.S., but fed for a brief period of time in Mexico, before returning to the U.S. for slaughter and further processing be identified as "Product of Mexico," simply because the cattle did not meet Subtitle D's "born, raised, and slaughtered" criteria for U.S. country of origin? Would labeling of this nature mislead consumers regarding the actual origin of the meat? How should carrots that are grown in the U.S., but sliced and packaged in Canada before being returned to the U.s. for sale be identified? If a U.S. meat processor or retailer mixes beef from Australia with beef from the U.S. to get a higher lean/lower fat ground beef mixture, how should the product be labeled? What if the mixture is comprised of meat from Australia and Canada?

In the absence of guidance on the standards for determining country of origin for products that do not meet the standards set forth for U.S. country of origin, retailers will not be able to comply with their responsibilities under Subtitle D. We urge AMS to clarify these standards in the forthcoming guidance.

7. State of Origin Identification Should Be Sufficient for Covered Commodities Eligible for "U.S. Country of Origin" Identification

Many covered commodity suppliers currently operate voluntary state of origin identification and marketing programs through retailers. Examples include Georgia peaches, New Jersey corn, and beef that is guaranteed from Iowa and Colorado. The retailer and supplier communities have expended substantial resources to develop these programs and consumers recognize and enjoy them.

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[16] See 21 U.S.C. § 343(e) and (i) (together require packaged food products fabricated from two or more ingredients to bear ingredient statements) and 21 U.S.C. § 601(n)(9) (requiring meat products fabricated from two or more ingredients to bear an ingredient statement); see also 9 CFR § 317.2(c).

Covered commodities that meet Subtitle D's statutory standard for U.S. country of origin and are identified by state of origin should not also be required to declare that they are products of the U.S. Requiring a country of origin statement in addition to a state of origin declaration would be redundant and imply consumer ignorance. AMS should find and specifically set forth in the guidance that identification of state of origin satisfies the retailer obligation under Section 282(a) to provide notification of country of origin, provided, of course, that the covered commodity meets the statute's standards for U.S. country of origin.

8. Large Numbers of Covered Commodities and Implementation Challenges Necessitate Flexibility at Retail

The challenges that retailers will face in implementing the country of origin program will be complex and far-ranging. Retailers bear the ultimate responsibility for informing consumers regarding country of origin and the recordkeeping burdens may well be substantial, given the enormous number of covered commodities, which number is further magnified by the fact that retailers purchase products from multiple suppliers as a function of marketplace efficiency.

Moreover, daily implementation of the country of origin program at the retail level is likely to raise a myriad of practical difficulties that have yet to be identified. Some that have already arisen include the status of food prepared at retail for individual consumption, *e.g.*, salad bars and other consumer packages prepared at retail. Similarly, even if USDA requires labels on individual covered commodities applied by the supplier, labels will not be feasible for all products, such as fish sold from the retail display case and bulk produce items such as string beans, peas, cherries and mushrooms.

USDA will undoubtedly receive comments from numerous representatives of the food production chain, each of which identifies their individual concerns regarding implementation of Subtitle D. However, with at least 500 different covered commodities in the average store on any given day, all of the problems faced by individual suppliers will be concentrated and thus magnified exponentially at the retail store where our members are charged with the ultimate responsibility of disseminating accurate country of origin information for each of these products to consumers. Given the magnitude of the charge and the logistical uncertainties inherent in fulfilling this mandate, equity and fairness necessitate that AMS issue guidance that provides retailers with the maximum possible flexibility in fulfilling their statutory obligations. Our members will face innumerable operational hurdles in implementing Subtitle D; it is incumbent upon AMS to allow retailers maximum flexibility in figuring out how best to meet the statutory burdens placed upon them, especially during the pre-regulation stage while the guidance document is in effect.

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We hope that the foregoing comments will assist USDA and AMS in the development of guidelines and regulations to implement the country of origin program required under Section 10816 of the Farm Security and Rural Investment Act of 2002. We welcome the opportunity to discuss these issues further as the guidelines are drafted and stand ready to work with you and the members of the overall food distribution chain throughout the development of this program.

Sincerely,

Tim Hammonds
President and CEO

cc: The Honorable Ann Veneman, Secretary of Agriculture
A.J. Yates, Administrator, Agricultural Marketing Service
Kenneth C. Clayton, Associate Administrator, AMS
Barry L. Carpenter, Deputy Administrator, AMS
Robert C. Keeney, Deputy Administrator, AMS
Eric M. Forman, Associate Deputy Administrator, AMS
William T. Sessions, Associate Deputy Administrator, AMS

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