



August 27, 2008

**MEMORANDUM FOR AMI GENERAL MEMBER REPRESENTATIVES;
BOARD OF DIRECTORS; INSPECTION COMMITTEE; INTERNATIONAL
TRADE COMMITTEE; WASHINGTON REPRESENTATIVES**

FROM: MARK DOPP

SUBJECT: Mandatory Country of Origin Labeling Interim Final Rule

During the time since the Agricultural Marketing Service (AMS or the agency) published in the *Federal Register* the interim final rule (IFR or the rule) for mandatory country of origin labeling (COOL) for beef, pork, lamb, chicken, goat meat, perishable agricultural commodities, peanuts, pecans, ginseng and macadamia nuts additional information has been gathered about how the rule likely will be interpreted and administered. This memorandum updates the July 29, 2008, memorandum from AMI.¹

The IFR becomes effective September 30, 2008, and because the IFR published in the *Federal Register* on August 1, comments are due September 30. Significantly, the rule applies to cover commodities “produced or packaged” after September 30, 2008. In addition, in the preamble the agency explains that, although the rule is effective September 30 and the agency looks for industry compliance, AMS efforts will largely focus on an industry outreach and education program for the first six months after the effective date. A summary of the IFR follows.

Country-of Origin Labeling Applies to Certain Meat Products Sold at Retail and Exempts Certain Processed Items

COOL is a retail labeling law that requires retailers to provide country of origin information regarding “covered commodities,” which include certain meat products.² Because mandatory COOL is limited to retail sales, products sold at restaurants and other food service establishments are exempt and need not bear COOL.³

¹ The IFR can be found on the web at

<http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5070926>

² Only retailers meeting the Perishable Agricultural Commodities Act definition of retailer – a “person that is a dealer engaged in the business of selling any perishable agricultural commodity at retail” – are subject to COOL.

³ The IFR includes a lengthy list of food service establishments: restaurants, cafeterias, taverns, lunch rooms, food stands, saloons, bars, lounges, and other similar establishments. Food service also

For meat, a “covered commodity” includes “muscle cuts” of beef, lamb, chicken, goat, and pork, as well as ground beef, ground lamb, ground chicken, ground goat, and ground pork.⁴ Ground beef is defined using the Food Safety and Inspection Service’s (FSIS) standards of identity for ground beef, hamburger, and beef patties.⁵ Other ground products do not have comparable standards of identity established by FSIS and are defined as comminuted [species] of skeletal origin that is produced in conformance with the applicable FSIS labeling guidelines.

The law exempts from COOL, however, a product that otherwise would be subject to labeling if that product “is an ingredient in a processed food item.” Although the law does not define “processed food item,” the rule defines it as:

“...a retail item derived from a covered commodity that has undergone specific processing resulting in a change in the character of the covered commodity, or that has been combined with at least one other covered commodity or other substantive food component (e.g., chocolate, breading, tomato sauce), except that the addition of a component (such as water, salt, or sugar) that enhances or represents a further step in the preparation of the product for consumption, would not in itself result in a processed food item. Specific processing that results in a change in the character of the covered commodity includes cooking (e.g., frying, broiling, grilling, boiling, steaming, baking, roasting), curing (e.g., salt curing, sugar curing, drying), smoking (hot or cold), and restructuring (e.g., emulsifying and extruding). Examples of items excluded include teriyaki flavored pork loin, roasted peanuts, breaded chicken tenders, and fruit medley.”⁶

Thus, the rule treats all cooked items (e.g., cooked sausages, cooked roast beef) and breaded products (breaded veal) as processed food items and outside the scope of a covered commodity. The rule also exempts as processed an item if it has been cured, smoked, or restructured (e.g., emulsified, extruded, compressed into blocks and cut into portions). Thus, other examples of meat products that are not covered commodities include sausages (cooked or fresh), meatballs in tomato sauce, breaded veal, teriyaki flavored pork tenderloin, smoked ham, fabricated steak, and corned beef, among others.⁷ In addition, ground beef, hamburger, or beef patties that “contain seasonings and/or other ingredients such as binders or extenders would

includes salad bars, delis, and meal preparation stations in which a retailer sets out ingredients for the consumer to assemble and take home.

⁴ Veal is included in the definition of beef.

⁵ See 9 CFR 319.15(a)-(c).

⁶ 7 CFR 65.220. Freezing does not constitute processing for purposes of exempting a product.

⁷ This list is not exhaustive. In that regard, the preamble provides examples of produce products that are processed and thus exempt – salad mix that contains lettuce and a dressing packet, salad mix with lettuce and carrots, a fruit cup with melon, banana, and strawberries, and a bag of mixed vegetable with peas and carrots. Analogous meat products likely also are exempt. In addition, AMS has a Question and Answer document on its website that provides an opportunity for affected persons to ask whether a product is considered to be a covered commodity. The Q&A document is at www.ams.usda.gov/cool/Q&A.htm and questions about covered commodities can be submitted to cool@usda.gov.

meet the definition of processed food item and would therefore not be covered....” Adding salt or sugar to a product, however, does not exempt a product.

The Law Establishes Four Categories of Origin for Meat

Beef, lamb, pork, goat, and chicken products that are muscle cuts and covered commodities fall into one of four categories established by the new law:

1. Product of the United States
2. Multiple Countries-of-Origin
3. Imported for Immediate Slaughter
4. Covered Commodity that is Foreign Country-of-Origin

The eligibility of a product to bear labeling identifying it as a “Product of the United States” remains as originally established in 2002. Specifically, a meat product may be designated as “having a United States country of origin” only if it is “exclusively from an animal that is exclusively born, raised, and slaughtered in the United States.”⁸ Recognizing that some livestock may not have records associated with them such that their origin cannot be determined, the law also “grandfathers” in as eligible to be designated as a Product of the U.S. meat from an animal that was in the United States on or before July 15, 2008, and remains in the United States thereafter until slaughter. Meat derived from such livestock is eligible to be labeled as a Product of the United States, regardless of heritage. The supplier of an animal that enters the U.S. after July 15 has an obligation to ascertain the origin of the animal that yields the covered commodity.

The multiple countries of origin category applies to a wide array of livestock, such as cattle that are born in Mexico, spend part of their lives there as well as in the United States, and then are slaughtered in the United States.⁹ Similarly, hogs born in Canada and raised and slaughtered in the U.S. are in the multiple countries of origin category. In short, the multiple countries of origin category captures covered commodities from animals with an affiliation with more than one country, but are not from animals that are imported for immediate slaughter.¹⁰

Critically important is the flexibility provided in the IFR for animals of U.S. origin, as well as those with multiple countries of origin. The rule allows a relatively simple declaration for muscle cuts from an animal with multiple countries of origin, with the U.S. being one of those countries.¹¹ Specifically, the rule provides that a covered commodity from an animal that was “born, raised and/or slaughtered in the United States and was not imported for immediate slaughter ...may be designated as Product of the United States, Country X and/or (as applicable) Country Y where

⁸ 7 U.S.C. 1638a. See also 7 CFR 65.260. There is an exception for cattle raised in Hawaii and Alaska that are transported through Canada.

⁹ 7 CFR 65.300(e).

¹⁰ 7 CFR 65.180.

¹¹ 7 CFR 65.300(e).

Country X and Country Y represent the actual or possible countries of foreign origin.”¹² (Emphasis added)

For example, the label for a covered commodity derived from an animal born in Canada and finished and slaughtered in the U.S. could read “Product of U.S. and Canada” or in the alternative might read simply “Product of US, Canada.” Importantly, because the statute and the rule provide considerable flexibility, that same label can be used for a covered commodity from an animal eligible for the “Product of U.S.” label but harvested at the same plant that slaughtered the animal born in Canada and finished in the U.S. Similarly, a plant that harvests “Product of the U.S.” cattle, as well as cattle born in Mexico or Canada and finished in the U.S., could utilize the following label: “Product of U.S., Canada, and Mexico” or “Product of US, Canada, Mexico.”¹³

Whole muscle cuts from animals imported for immediate slaughter will be labeled as Product of Country X and the United States. For example, the covered commodity from a market hog delivered directly to a slaughter plant in the U.S. would be labeled “Product of Canada and U.S.” or simply Product of Canada, US.” Recognizing that these animals can spend brief periods in the U.S. before processing, AMS adopted a provision consistent with existing Animal and Plant Health Inspection Service regulations that define “immediate slaughter” as “[C]onsignment directly from the port of entry to a recognized slaughtering establishment and slaughtered within 2 weeks from the date of entry.”¹⁴

The last category covers foreign origin products and captures covered commodities from an animal for which no production steps (born, raised, or slaughtered) occur in the United States.¹⁵ Such a product is deemed to be a product of the country as determined by Customs and Border Protection (CBP) requirements. Thus, for example, beef that comes into the United States from Canada and from which a covered commodity is derived would still be labeled as a “Product of Canada” when offered for sale at retail. Significantly, that same labeling requirement would still apply even if some further cutting or other minimal processing occurred to the meat in the United States, assuming the processing was not enough to convert the product into a processed item, exempting it from the rule.

The IFR Offers Greater Flexibility for Ground Product Labeling

Country of origin labeling applies not only to muscle cuts sold at retail, but also to ground beef, ground pork, ground goat, ground chicken, and ground lamb. Because of statutory changes the rule allows ground product to bear labeling that declares the country or countries of origin of the inputs that went into the product or, in the alternative, declare the countries that “may be reasonably contained therein.”¹⁶

¹² 7 CFR 65.300(e)(1)

¹³ AMS has indicated that using the term “and” or simply listing the relevant countries using commas is more consistent with existing Customs and Border Protection labeling precedent.

¹⁴ See the definition of immediate slaughter at 7 CFR 65.180 citing 9 CFR 93.400.

¹⁵ 7 CFR 65.300(f).

¹⁶ 7 CFR 65.300(h)

The IFR establishes what is “reasonable” regarding the use of a raw material such that if the material “is not in a processor’s inventory for more than 60 days, that country shall no longer be included as a possible country of origin.”¹⁷ Thus, if a ground beef processor uses ground beef inputs from the United States, Canada, Australia, and New Zealand within the last 60 days, the product label could read “Product of Australia, Canada, New Zealand, and the United States” or in the alternative, “Product of US, Canada, Australia, New Zealand.” even if beef trimmings from all four countries are not used to make the specific product lot bearing the label.¹⁸ If, however, the processor fails to use raw material from New Zealand within the 60 day time frame the above label would be inappropriate.

The IFR Establishes Marking and Notification Requirements

The rule allows origin markings to be conveyed in a variety of ways, including on product labels, signs in the meat case, placards, *etc.* The rule provides that the origin information must be “legible” and in a “conspicuous location.”¹⁹ However, the IFR is also flexible in that it allows origin information to be provided on a package in locations other than the principal display panel (PDP), *e.g.* the information panel. In the preamble, however, AMS encourages entities to provide the information on PDP if possible.

That same flexibility, however, is lacking when it comes to allowing the use of abbreviations, providing that “[I]n general, abbreviations are not acceptable.”²⁰ Specifically the IFR provides that “[O]nly those abbreviations approved for under CBP rules, regulations and policies, such as ‘U.K.’ ..., ‘Luxemb’ for Luxembourg, and ‘U.S.’ for the United States are acceptable.”²¹ Indeed, the agency in the preamble rejects the concept of allowing a retailer to use abbreviations and providing a key for consumers to consult in the store. AMI will file comments on the difficulties such a narrow reading affords companies, particularly with respect to ground beef produced with limited space and as many as five or six possible countries as suppliers of raw material.

COOL Imposes Recordkeeping Requirements on Packers and Processors

The law and the rule impose recordkeeping requirements on packers and processors and anyone else who supplies a covered commodity to a retailer. The law allows the Secretary of Agriculture to audit any person who “prepares, stores, handles, or distributes a covered commodity for retail sale” and requires such persons to keep records so that an audit trail exists to ensure compliance. The law also now specifies that “records maintained in the normal conduct of the business” can serve as verification of the country of origin of a covered commodity. Those

¹⁷ *Id.*

¹⁸ In the case of ground beef, the order of the countries does not matter. Importantly, however, this provision does not change the limitation that a product may only be labeled as “Product of U.S.” only if the animal was exclusively born, raised, and slaughtered in the United States.

¹⁹ 7 CFR 65.400(a).

²⁰ 7 CFR 65.400(e).

²¹ *Id.*

records may include animal health papers, import or customs documents, as well as producer affidavits.²²

The rule allows records to be kept in either electronic or hard copy format, and those records must be kept for one year.²³ Significantly, the rule does not require retailers to retain records at store level and allows such records to be maintained at any location.²⁴ Moreover, the rule allows records to be provided within five business days of a request being made by an AMS representative.

The recordkeeping requirements in terms of the information that both retailers and their suppliers must keep also is simpler. In that regard, the rule does not reference lot code tracking and product unique to the transaction. Rather, suppliers must maintain a record of the immediate previous source and immediate subsequent recipient of a product that is pre-labeled with country of origin. For non-pre-labeled products the records must also identify the products' country of origin.²⁵

A Packer is the Initiating Supplier and can accept Affidavits

Also of consequence to companies that slaughter livestock is the agency's position that the packer is the "initiating supplier" of the covered commodity and as such the packer "must possess or have legal access to the records that are necessary to substantiate that claim."²⁶ Significant for that purpose is a change in the law that allows, in addition to "normal production and other records," producer affidavits as a record that can provide verification as to the origin of the animal that yields a covered commodity. In that regard, a producer affidavit is "acceptable evidence on which the slaughter facility may rely to initiate the claim, provided it is made by someone having first-hand knowledge of the origin of the animal(s) and identified the animal(s) unique to the transaction."²⁷

A new concept not previously introduced but included in the rule is the reference to NAIS. The rule specifically provides that "[P]ackers that slaughter animals that are part of a NAIS compliant system or other recognized official identification system (e.g. Canadian official system, Mexico official system) may also rely on the presence of an official ear tag and/or the presence of any accompanying animal (*i.e.*, 'Can', 'M'), as applicable, on which to base their origin claims."²⁸

²² Interestingly, the law prohibits the Secretary from requiring affected persons to keep records of the country-of-origin, other than those kept in the normal conduct of business, raising a question as to the agency's authority if such records do not establish country of origin.

²³ 7 CFR 65.500(a)(1).

²⁴ 7 CFR 65.500(a)(2).

²⁵ The preamble provides that a "pre-labeled" product is one that has been labeled for country-of-origin by the firm or entity responsible for making the initial claim or by a further processor or repacker (*i.e.*, firms that receive bulk products and package the products as covered commodities in a form suitable for the retailer).

²⁶ 7 CFR 65.500(b)(1).

²⁷ *Id.*

²⁸ *Id.* The rule also allows this approach to apply to animals officially identified as a "group lot."

There initially will be an Industry Outreach and Education Program before Enforcement and Federal Preemption applies

In the preamble the agency makes clear that at least for the first six months it will be actively engaged in an education and outreach program. The preamble also makes clear that the law does not provide for a private right of action and that only AMS, not state entities nor private persons are allowed to initiate enforcement actions for alleged violations. For enforcement purposes AMS will expand the existing memoranda of understanding with state agencies to capture all covered commodities.

In the preamble, the agency also acknowledges changes made to the enforcement provisions pursuant to the 2008 Farm Bill. Specifically, AMS recognizes that for there to be a violation a retailer or supplier must have failed to make a good faith effort to comply with the law. Interestingly, previous agency documents included a “liability shield,” which allowed retailers and others to rely on the reasonable country-of-origin representations of their suppliers. The IFR omits this concept entirely, which raises questions as to how much substantiation a retailer or those who supply a covered commodity to a retailer will need to possess. In that regard, a packer as the initiating supplier may be forced to require more substantiation than if the liability shield concept had remained in place. The agency also reminded the affected industry that a violation of this law and rule also could be a violation of other applicable laws, e.g. the Federal Meat Inspection Act, the Food, Drug, and Cosmetic Act or, for produce, the Perishable Agricultural Commodities Act. Finally, in the preamble AMS makes clear that state country of origin labeling programs that encompass commodities governed by the IFR are expressly preempted.

The Food Safety and Inspection Service has promulgated a Rule providing for Generic Labeling Approval for COOL Purposes.

The Food Safety and Inspection Service (FSIS) has put on public display its own interim final rule that will publish in the *Federal Register* in the next few days. The FSIS IFR allows for generic approval of changes to meat and poultry product labeling necessitated COOL. To be consistent with the COOL statute and the AMS IFR the FSIS rule also will become effective on September 30, 2008, and its provisions do not apply to covered commodities produced or packaged before September 30, 2008.

More specifically, the FSIS rule recognizes amends that agency’s regulations to 1) provide that adding country of origin labeling statements to comply with the AMS IFR will be considered to be generically approved and 2) require that a country of origin statement on the label of a meat or poultry product that is a covered commodity to be sold by a retailer must comply with the AMS’ interim final rule. The FSIS rule, however, does not change the regulatory requirements or labeling policies for non-covered commodities.²⁹

²⁹ A separate memorandum discussing the FSIS Generic labeling Approval rule was disseminated on August 27, 2008.

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If you have any questions regarding this memorandum or anything related to mandatory country of origin labeling, please contact me at mdopp@meatami.com or 202 587 4229.