



January 15, 2009

**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 Final Rule

The Agricultural Marketing Service (AMS or the agency) posted for public display the final rule (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. The rule becomes effective 60 days after publication in the *Federal Register*, which is expected to occur on Thursday, January 15, making the effective date Monday, March 16, 2009.

Many aspects of rule remain the same as the interim final rule (IFR) that became effective on September 30, 2008. Some noteworthy changes include a narrowing of the definition of the term “ground beef,” revising the labeling options for muscle cuts derived from animals with multiple countries of origin, an easing of the recordkeeping requirements for retailers, a somewhat different recordkeeping burden on packers as initiating suppliers of a covered commodity, and the reinstatement of a safe harbor provision for intermediary suppliers and retailers.

When the IFR was published the agency explained that, although the IFR became effective September 30 and the agency expected industry compliance, AMS efforts would largely be focused on an industry outreach and education program for the first six months after that effective date. Notwithstanding requests for a 90 day extension of that education program, the preamble does not contemplate any such extension. Thus, more active enforcement could begin on or about April 1, 2009. A summary of the rule follows.¹

¹ The rule can be found at <http://edocket.access.gpo.gov/2009/pdf/E9-600.pdf>.

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

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 The preamble provides guidance as to what the agency considers to be muscle cuts. In that regard, the obvious elements include “cuts of meat (with or without bone) derived from a carcass (e.g. beef steaks, pork chops, chicken breast, *etc.*)....” The preamble also provides, however, that cuts removed during the “covers ion of an animal to a carcass (e.g. variety meats such as pork hearts, beef tongues, *etc.*)” are not deemed to be muscle cuts. Similarly, items sold as “bones practically free of meat” or “fat practically free of meat” are not viewed as muscle cuts.

Ground beef is defined using the Food Safety and Inspection Service’s (FSIS) standards of identity for ground beef and hamburger.⁵ That definition is narrower than what was in the IFR in that beef parties are no longer included in the definition of ground beef.⁶ 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, and the rule, 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 adopted the definition provided in the IFR and 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.,

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 rule 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 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 and mutton is included in lamb definition.

⁵ See 9 CFR 319.15(a)-(b).

⁶ See 9 CFR 319.15(c). The agency concluded that because some of the possible ingredients in beef patties are not muscle cuts, inclusion of products in that standard of identity was inappropriate.

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.”⁷

The rule adopted, *en toto*, the definition of processed food item provided in the IFR. 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). 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, meatloaf, breaded chicken tenders, flank steak with portabella stuffing, steakhouse sirloin kabobs with vegetables, cooked and smoked meats, blue cheese angus burgers, cured hams, bacon, corned beef briskets, and prosciutto rolled in mozzarella cheese, among others.⁸ In addition, ground beef or hamburger that “contain seasonings and/or other ingredients such as binders or extenders would 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.

Conversely, the preamble also provides examples of processing that are “considered to further prepare product for consumption.” In that regard, meat products that have been “needle-tenderized or chemically tenderized using papain or other similar additive” are not deemed to be processed, and thus are not exempt. Similarly, the agency states that “dextrose is a sugar, phosphate is a salt, and beef stock and yeast are flavor enhancers” and their use does not exclude a product as processed. Thus, products injected with sodium phosphate or similar solutions are not processed, nor are products enhanced by tenderizers such ficin and bromelain processed. The agency contrasted these activities with marinating a product with Cajun, lemon-pepper and like flavoring, which would exempt a product.⁹

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

⁸ 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.

⁹ The rule notes that although an item might be processed under COOL, other laws, such as the Tariff Act of 1930, might still impose labeling requirements.

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 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.”¹⁰ 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 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.¹¹ 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.¹²

The rule keeps the labeling flexibility provided in the IFR and even expands it somewhat. Specifically, subsection 65.300(e)(1) provides that muscle cuts derived from animals born in a country other than the U.S. and raised and slaughtered in the U.S. (but not animals imported for immediate slaughter), “may be designated as Product of the United States, Country X, and (as applicable) Country Y.”¹³ 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.”

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

¹¹ 7 CFR 65.300(e).

¹² 7 CFR 65.180. Imported for immediate slaughter adopts the definition provided in 9 CFR 93.400, “consignment directly from the port of entry to a recognized slaughtering establishment and slaughtered within 2 weeks from the date of entry.”

¹³

Subsection 65.300(e)(2) allows packers to keep the flexibility provided in the statute in that it allows muscle cuts derived from animals eligible for the U.S. only label that are “commingled during a production day with muscle cut covered commodities described in 65.300(e)(1)” and both types of muscle cuts may be labeled as “Product of the U.S., Country X, and (as applicable) Country Y.” (Emphasis added). This language does not focus on when the animals are slaughtered but when the muscle cuts from those animals are processed and commingled. Thus, if muscle cut covered commodities derived from an animal eligible for the “Product of U.S.” label are commingled on the same production day with muscle cuts from an animal born in Canada and finished in the U.S. all of the products may be labeled as “Product of the U.S., Canada.” 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 U.S., Canada, Mexico.”¹⁴

Subsection 65.300(e)(3) provides that meat products from animals imported for immediate slaughter “shall be designated” 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.”¹⁵

Subsection 65.300(e)(4) is new and provides that muscle cut covered commodities from animals born in Canada or Mexico but raised and slaughtered in the U.S. can be commingled with muscle cuts from animals imported for immediate slaughter and all of those products may be designated as “Product of the U.S., Canada (Mexico).” That same subsection provides that “In each case of paragraphs (e)(1), (e)(2), and (e)(4) of this section the countries may be listed in any order.” Thus, with the exception of meat products derived only from animal imported for immediate slaughter, the order of the countries is not mandated. For example, in subsection (e)(1) if the plant commingles muscle cuts from animals born, raised, and slaughtered in the U.S. with some animals born in Canada and others born in Mexico, but all raised and slaughtered in the U.S., the commingled muscle cuts could be designated as “Product of Canada, U.S., Mexico” or Product of U.S., Mexico, Canada,” or other labels with the variations on the order of the three countries. Similarly, if muscle cuts from imported for immediate slaughter animals are commingled with, for example, muscle cuts from animals born in Canada and raised and slaughtered in the U.S. the rule does not require the countries be ordered in a particular manner such that the products could designated as “Product of the U.S, Canada” or “Product of Canada, U.S.”

¹⁴ 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.

¹⁵ See the definition of immediate slaughter at 7 CFR 65.180 citing 9 CFR 93.400.

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.¹⁶ 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, to the extent Food Safety and Inspection Service and Customs and Border Protection regulations permit, that same labeling requirement could 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, thereby exempting it from the rule.

The Rule Retains 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.”¹⁷

The rule follows the precedent of the IFR outlining what is “reasonable” regarding the use of a raw material such that “when a raw 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.”¹⁸ Thus, if a ground beef processor has in its inventory 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 U.S., Canada, Australia, New Zealand” even if beef trimmings from all four countries are not used to make the specific product lot bearing the label.¹⁹ If, however, the processor fails to have in inventory raw material from New Zealand, for example, within the 60 day time frame the above label would be inappropriate. Interestingly and significantly, the preamble does not distinguish between a ground beef supplier and a retailer. Thus, the 60 day inventory allowance provision is available not only to the processor, but the retailer as well.²⁰

¹⁶ 7 CFR 65.300(f).

¹⁷ 7 CFR 65.300(h)

¹⁸ *Id.*

¹⁹ 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.

²⁰ Compare the flexibility offered with agency’s notable limitations on retailers concerning muscle cuts and multiple countries of origin labeling at retail. See discussion *infra*.

The Rule 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.”²¹ However, the rule 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. AMS has encouraged entities to prove the information on the PDP if possible.

The rule retains the IFR’s general prohibition with respect to allowing the use of abbreviations, providing that “[I]n general, country abbreviations are not acceptable.”²² Specifically, the rule provides that “[O]nly those abbreviations approved for use under Customs and Border Protection rules, regulations, and policies, such as ‘U.K.’ ..., ‘Luxemb’ for Luxembourg, and ‘U.S. or USA’ for the United States are acceptable.”²³

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 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 records may include animal health papers, import or customs documents, as well as producer affidavits.²⁴

The rule allows records to be kept in either electronic or hard copy format.²⁵ Suppliers and retailers must make records available to USDA representative within five (5) days of a request being made and those records may be kept at any location.²⁶ For the packer as an initiating supplier records must be kept for one year from the date of the transaction.

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.

²¹ 7 CFR 65.400(b).

²² 7 CFR 65.400(e).

²³ *Id.* Symbols and flags alone may not be used.

²⁴ 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.

²⁵ 7 CFR 65.500(a)(1).

²⁶ 7 CFR 65.500(a)(2).

A Packer is the Initiating Supplier and can accept Affidavits to establish Origin

Important to companies that slaughter livestock is the agency's position that the packer is the "initiating supplier" of a covered commodity and as such the packer "must possess records that are necessary to substantiate that claim for a period of one year from the date of the transaction."²⁷ This provision is narrower than the IFR in that a packer must now possess the relevant records. The IFR allowed the packer to possess or have access to the records establishing origin. Interestingly, the preamble acknowledges that the agency's authority regarding records is limited to those entities dealing with covered commodities, stating that "packers may specify the length of time records need to be maintained by entities outside the packer's system."

The law allows, in addition to "normal production and other records," a producer affidavit as a record that can provide verification as to the origin of the animal that yields a covered commodity and the rule expands on that concept. Specifically, the rule provides that producer affidavits "shall also be considered acceptable records that suppliers may utilize to initiate origin claims, provided it is made by someone having first-hand knowledge of the origin of the covered commodity and identifies the covered commodity unique to the transaction."²⁸ Unclear is why the rule references covered commodities when cattle or hogs, which are likely to be focal point of a producer affidavit, are not covered commodities. Rather cattle or hogs are the livestock sold by a producer from which a covered commodity is derived. A new element to the final rule is a recognition by the agency that a producer affidavit "may be based on visual inspection of the animal to verify its origin." In the absence of markings to indicate the animal is of foreign origin the animal may be considered to be U.S. in origin. The rule provides that this visual inspection approach is available to cattle only. However, the preamble speaks more generally to livestock, inviting a technical correction if appropriate.

Another concept retained from the IFR is safe harbor offered to packers that acquire animals tagged with an 840 Animal Identification Number device.²⁹ The rule specifically provides that "[P]ackers that slaughter animals that are tagged with an 840 Animal Identification Number device without the presence of any additional accompanying marking (*i.e.*, 'Can', 'M') may use that information as a basis for a U.S. origin claim."³⁰ In addition, the rule allows packers to use another country's animal identification system (e.g. Canadian official system, Mexico official system) to rely on the presence of an official ear tag or other approved device to base an origin claim.³¹

²⁷ 7 CFR 65.500(b)(1).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* The rule also allows this approach to apply to animals officially identified as a "group lot."

The rule reestablishes the liability shield concept such that an intermediary supplier of a covered commodity will not be held liable if that supplier “relied on the designation provided by the initiating supplier or other intermediary supplier.”³² That protection can be lost if the intermediary supplier “willfully” disregards information that the origin information provided was false.

Retailer Notification and Recordkeeping Responsibilities

The rule precludes from retailers at least some of the flexibility that packers and processors are provided regarding labeling covered commodities with multiple countries of origin. Specifically, the rule provides that

[O]nly if the retailer physically commingles a covered commodity of different origins in preparation for retail sale, whether in a consumer ready package or in bulk display (and not discretely packaged), *i.e.* full service meat case, can the retailer initiate a multiple country of origin designation that reflects the actual countries of origin for the resulting covered commodity.³³

This provision, although unfortunate, is consistent with the agency’s position articulated in the September 26, 2008 Q&A document that was posted on the AMS website. It means that the retailer does not have the same flexibility available to packers and processors with respect to using multiple countries of origin labels, as provided in section 65.300. Rather, a retailer must physically commingle different covered commodities not by production day but by consumer package in order to have the labeling flexibility that packers can utilize.

Records and other evidence used to establish origin have to be maintained at the retail store or another location so long as the product is on hand and must provide the records within 5 days if requested. For pre-labeled products, the label itself is sufficient for retailer reliance.³⁴

The Industry Outreach and Education Program has not been extended and Federal Preemption applies

Assuming the rule publishes in the *Federal Register* on January 15, it will become effective on March 16, 2009, and the IFR will no longer be in effect. In the preamble to the IFR the agency indicated that for the first six months it would be actively engaged in an education and outreach program. That program has not been extended. Thus, there could be more active enforcement of the rule as of April 1, 2009.³⁵

³² 7 CFR 65.500(b)(2).

³³ 7 CFR 65.500(c).

³⁴ Pre-labeled product must bear the name and place of business of the packer, manufacturer or distributor. 7 CFR 65.218.

³⁵ A challenge facing AMS in that regard, is the extensive training that will be necessary of federal and state officials who will be called upon to enforce the rule. That training program has not started.

The preamble also makes clear that the law does not provide for a private right of action and that only AMS, not state entities or private persons, is 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.

The agency has acknowledged changes made to the enforcement provisions pursuant to the 2008 Farm Bill. Specifically, AMS recognized 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. 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, AMS reiterated that state country of origin labeling programs that encompass commodities governed by the rule are expressly preempted. Beyond that, for meat and poultry products state country of origin labeling laws also could be preempted by the Federal Meat Inspection Act or the Poultry Products Inspection Act.

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

As a reminder, the Food Safety and Inspection Service (FSIS) published an interim final rule in the *Federal Register* allowing generic approval of changes to meat and poultry product labeling necessitated COOL. The FSIS rule became 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 and amends the agency's regulations to 1) provide that adding country of origin labeling statements to comply with the AMS rule 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' final rule. The FSIS rule, however, does not change the regulatory requirements or labeling policies for non-covered commodities.³⁶

* * * * *

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.

³⁶ A separate memorandum discussing the FSIS Generic labeling Approval rule was disseminated on August 27, 2008. [<http://www.meatami.com/ht/a/GetDocumentAction/i/41592>].