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Country of Origin Labeling Program, Room 2607-S  
Agricultural Marketing Service (AMS)  
U.S. Department of Agriculture  
STOP 0254  
1400 Independence Avenue, S.W.  
Washington, D.C. 20250-0254

**Re: USCA Comments on the Interim Final Rule for Mandatory Country-of-Origin Labeling of Beef and Other Products, Docket No. AMS-LS-07-0081**

The United States Cattlemen's Association (USCA) appreciates this opportunity to submit its views regarding Department's interim final rule for mandatory country-of-origin labeling (COOL) for beef and other products. This submission responds to the Department's request for comments published in the Federal Register on August 1, 2008.<sup>1</sup> USCA is a national organization that represents an effective voice for the United States cattle industry on issues including mandatory country-of-origin labeling, international trade, market competition, reform of the mandatory beef checkoff, animal health, welfare and identification, and private property rights.

## **I. Introduction**

USCA is pleased to see that many aspects of the interim final rule (IFR) follow the intent of Congress and represent significant improvements over the COOL regulations proposed by the Department in the past. These improvements will make COOL a much more workable and effective program than previously envisioned, helping to maximize the benefits of the program for U.S. producers and consumers. Below, USCA also proposes additional improvements that should be considered to improve the efficiency and effectiveness of the labeling program.

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<sup>1</sup> *Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts, Interim Final Rule*, 73 Fed. Reg. 45,106 (Aug. 1, 2008). Hereinafter "COOL IFR."

Despite these improvements, USCA is deeply concerned that at least one aspect of the rule – the Department’s proposed regulations for “multiple countries of origin” labels for beef and other meat products – directly contradicts the statute as recently amended by Congress. The COOL provisions enacted by Congress in the 2008 Farm Bill were the result of long, intense, good-faith negotiations among U.S. producers who supported COOL and the packers and processors that had traditionally opposed mandatory country-of-origin labeling. The carefully-crafted compromise reached through those negotiations was passed by Congress and signed into law by the President. The Department’s IFR on multiple country of origin labels upsets this compromise, contradicts the plain language of the statute, defies the will of Congress, and has no basis in the law.

Unless the rule is revised, consumers will in all likelihood be denied the opportunity to select U.S.-origin meat at the retail level. Moreover, we note that undermining the U.S.-origin label at the retail level will also deny food service establishments the ability to voluntarily rely on origin information on pre-labeled meat in order to meet market demand for U.S. meat. Whatever concerns prompted the Department to deviate so sharply from the statute, the Department does not have the authority to implement regulations that contradict the law. Therefore, we respectfully urge the Department to revise this regulatory language to ensure it faithfully implements the language passed by Congress in the 2008 Farm Bill.

## **II. Positive Progress in the Interim Final Rule**

There are a number of important improvements in the IFR over the Department’s previous regulatory proposals for COOL.<sup>2</sup> While many of these improvements appropriately reflect changes that Congress enacted when it amended the COOL statute in the 2008 Farm Bill, other improvements reflect wise policy choices by the Department. These choices are sincerely appreciated by U.S. cattle producers, and they not only effectuate the basic spirit and underlying purpose of the law, they also ensure that law will be implemented in a more effective and efficient manner. We urge the Department to preserve this important progress in its final regulations.

First, USCA commends the Department for defining the ground beef products that will be subject to labeling requirements in a manner that provides meaningful coverage of this important product. The IFR language for 7 C.F.R. § 65.155 states that ground beef shall include three categories of product: ground beef as defined in 9 C.F.R. § 319.15(a), hamburger as defined in 9 C.F.R. § 319.15(b), and beef patties as defined in 9 C.F.R. § 319.15(c). Thus, the ground beef products subject to mandatory COOL labeling requirements include chopped fresh and/or frozen beef with or without the addition of beef fat and, in the case of beef patties, water.

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<sup>2</sup> See *Mandatory Country of Origin Labeling of Beef, Lamb, Pork, Fish, Perishable Agricultural Commodities, and Peanuts; Proposed Rule*, 68 Fed. Reg. 61,944 (Oct. 30, 2003). Hereinafter “2003 COOL Rule.”

A comprehensive definition of ground beef adheres to the Congressional policy in favor of labeling embodied in the rule. Moreover, a broad definition of the product to be labeled is consistent with the less stringent labeling requirements for such ground beef products enacted by Congress in the 2008 Farm Bill<sup>3</sup> and reflected in the IFR at 7 C.F.R. § 65.300(h). Finally, as noted by the Department, the narrower definition of ground beef previously proposed by the Department would likely have caused confusion for consumers, who would be faced with origin labels on ground beef but not on hamburger or beef patties.<sup>4</sup> The new definition will eliminate such confusion.

Second, USCA appreciates certain improvements the Department has made to the recordkeeping requirements for the COOL program. The IFR reduces burdens on suppliers and retailers by, among other things, allowing retailers to rely on pre-labeled products for origin information at 7 C.F.R. § 65.500(c)(1). This eliminates unnecessary, duplicative paperwork and builds upon elements of the country-of-origin labeling program for fish and shellfish that have already been successfully implemented by the Department.<sup>5</sup>

In addition, USCA is pleased to note provisions in the IFR at 7 C.F.R. § 65.500(b)(1) that permit suppliers to rely on producer affidavits, the presence of an official ear tag, and/or the presence of animal markings as a basis for origin claims. USCA has worked closely with other producers and with packers and processors to develop a standardized, industry-wide affidavit that may be used as the basis of these origin claims. We are pleased to note that USDA Under Secretary for Marketing and Regulatory Programs Bruce Knight facilitated and approved these efforts, and we urge the Department to formally recognize the affidavit submitted to the Department by more than 30 livestock industry groups and businesses on September 5, 2008 as an acceptable basis for origin claims in its final rule.

Moreover, USCA strongly supports allowing suppliers to rely on animal ear tags and markings as a basis for origin claims. This comports with Congressional instructions to the agency to permit reliance on records kept in the normal course of business, including animal health papers and import or customs documents, in order to verify origin.<sup>6</sup>

In sum, there are numerous aspects of the IFR that represent significant improvements over the agency's previous proposed rulemaking to implement COOL. These improvements accurately reflect the language of the statute, effectuate congressional intent, will facilitate compliance with COOL requirements by the industry as a whole, and will ensure that COOL provides meaningful origin information to consumers. We urge the Department to preserve these improvements in its final regulations.

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<sup>3</sup> See 7 U.S.C. § 1638a(a)(2)(E), as amended.

<sup>4</sup> *COOL IFR* at 45,115.

<sup>5</sup> 7 C.F.R. § 60.400(c)(1). See also *Mandatory Country of Origin Labeling of Fish and Shellfish; Interim Final Rule*, 69 Fed. Reg. 59,708, 59,716 – 59,717 (Oct. 5, 2004). Hereinafter “2004 Fish Rule.”

<sup>6</sup> 7 U.S.C. § 1638a(d)(2), as amended.

### **III. Additional Improvements Needed in the Interim Final Rule**

While USCA appreciates the progress that has been made in the IFR, we believe there are other areas in which the Department could further refine the rule to strengthen the COOL program consistent with the terms of the COOL statute and the will of Congress. Such changes are needed to ensure that the regulations are not too narrowly drawn to unnecessarily exempt covered product from labeling requirements and to impose unduly burdensome requirements for the verification of animal origin.

First, the rule in the IFR at 7 C.F.R. § 65.300(h) permitting the inclusion of countries of origin on the label for ground beef as long as raw material of that origin has been in the processor's inventory in the past 60 days would dilute the utility of the origin label on ground beef. Processors are able to track inventory in much more frequent intervals than 60 days, and they utilize such tracking systems to ensure product can be traced and identified in the event of product recalls. The rule should be amended to provide for a more reasonable time period that reflects the practices of the industry and will ensure greater accuracy in the labeling of ground beef.

Second, the definition of "processed food item" in the IFR at 7 C.F.R. § 65.200 will exempt a broad range of products from labeling requirements. As the Department notes, this definition would exempt cured meats, fruits and vegetables sold in mixed packages, and roasted nuts.<sup>7</sup> The rule should be revised to ensure that suppliers cannot avoid labeling requirements through minimal alterations to a covered commodity. Cooking, curing, frying, boiling, baking or smoking do not substantially alter covered commodities nor introduce covered commodities with different origins, and thus such steps should not exempt a product from the labeling requirements of the law. Of particular concern to producer agriculture is the potential for certain products which are primarily sold in a state other than their raw or unmingled state – such as frozen fruits and vegetables, pork products, and nuts – to be almost completely exempted from labeling under the IFR. Therefore, USCA urges the Department to reconsider the definition of processed products to ensure the fullest possible practical application of the COOL labeling requirements. An alternative USCA would encourage the Department to consider is the use of an "exemption processed food item list," in which the Department could specify products that would be considered processed under the definition being used, but for practical purposes origin determination can easily be maintained through out the food chain. These products, such as cooked or cured meat products, would continue to be subject to origin labeling requirements.

Third, USCA is concerned that the IFR language regarding origin labeling of covered commodities presented at the retail level in a bulk container not be misused to subvert the individual commodity labeling requirements of the law. The IFR states: "A bulk container (e.g., display case, shipper, bin, carton, and barrel), used at the retail level to present product to consumers, may contain a covered commodity from more than one

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<sup>7</sup> IFR at 45,107.

country of origin provided all possible origins are listed.”<sup>8</sup> The statute provides that the origin information required by law may be provided on the commodity itself or “on the package, display, holding unit, or bin containing the commodity at the final point of sale to consumers.”<sup>9</sup> However, the specificity and accuracy of the information required does not vary according to whether it is provided on the commodity itself, its package, or a display, holding unit, or bin. In all cases, the origin information provided must be that required by the COOL statute itself.<sup>10</sup> Thus, nothing in the law expressly permits such labels on displays, holding units, or bins to merely provide information regarding “all possible origins” of the commodities contained therein, as suggested by the IFR.

There may be limited instances in which covered commodities are not pre-labeled by suppliers and it is not practicable for retailers to segregate these commodities according to origin within the displays or holding units at the final point of sale. Any flexibility to accommodate such situations should be narrowly tailored so as not to undermine the plain intent of the statute that consumers be able to clearly discern to country of origin of all covered commodities. In the vast majority of instances – such as the presentation of unpackaged meat products in a butcher display case, fruits and vegetables in grocery stands, or nuts in bulk aisles – it is practicable and, indeed, common for retailers to segregate products by type. It should be just as practicable to segregate such products by origin and provide consumers with accurate origin information in such instances. Only where pre-labeling and segregation are not practicable should retailers be permitted to rely on group labels as contemplated in the IFR. But, even in these situations, the IFR should follow the guidance provided by Congress with regard to ground meat and require the label on the bulk container to list “all countries of origin contained therein or that may be reasonably contained therein.” This provides a standard that will provide more certainty to consumers than merely allowing retailers to list “all possible origins” of the commodities in the bulk container.

Fourth, USCA believes that the requirement in the IFR at 7 C.F.R. § 65.500(b)(1) requiring suppliers to have legal access to records that are necessary to substantiate an origin claim is unduly burdensome and should be removed. As reviewed above, the livestock industry has reached consensus on the format for a producer affidavit regarding origin claims, and we urge the Department to recognize in the final rule that provision of such an affidavit is sufficient basis for origin claims. Suppliers should not also be required to maintain on-going legal access to producers’ records substantiating origin claims.

Fifth, the IFR should recognize that visual inspection of the animal by a supplier can provide sufficient basis for substantiating an origin claim. USCA appreciates the fact that the IFR permits suppliers to make origin claims on the basis of the “presence of an official ear tag and/or the presence of any accompanying animal markings.”<sup>11</sup> For

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<sup>8</sup> IFR at 45,151 (7 C.F.R. § 65.400(d)).

<sup>9</sup> 7 U.S.C. § 1638a(c)(1), as amended.

<sup>10</sup> *Id.*

<sup>11</sup> IFR at 45,151 (7 C.F.R. § 65.500(b)(1)).

example, under an already existing program created for health and safety reasons, cattle imported from Canada and Mexico are branded with a “CAN” or an “M,” or arrive at packing houses in sealed conveyances,<sup>12</sup> and breeding stock from Mexico are required to be tagged with a permanent metal ear tag.<sup>13</sup> As recognized by the Department, visual inspection of such tags and markings allows packers to easily identify cattle that do not qualify for a “U.S.” label under COOL. Similarly, the rule should recognize that visual determinations regarding the absence of such tags and markings indicating foreign origin should provide sufficient basis for a U.S. origin claim. Such recognition should be made a permanent part of the COOL regulations.

#### **IV. Complying With the Statute on Multiple-Countries-of-Origin labels**

The Department’s IFR impermissibly departs from the statute in its provisions on the multiple countries origin label for meat. There are four categories of origin labels provided for in the statute: 1) United States country of origin; 2) multiple countries of origin; 3) imported for immediate slaughter; and 4) foreign country of origin. While the IFR closely tracks the statutory language for three of these categories, it inexplicably deviates from the statute regarding the label for meat from multiple countries of origin.

The statute provides that a retailer “may designate the country of origin of {a} covered commodity as all of the countries in which the animal may have been born, raised, or slaughtered” if, and only if, such commodity meets each of the following three criteria:

- 1) the animal was not exclusively born, raised, and slaughtered in the United States,
- 2) the animal was born, raised, or slaughtered in the United States, and
- 3) the animal was not imported into the United States for immediate slaughter.<sup>14</sup>

These requirements are plain from the language of the statute itself, and from the statutory scheme providing for four separate labeling categories. Moreover, the statute clarifies that nothing in the multiple countries origin provisions “alters the mandatory requirement to inform consumers of the country of origin of covered commodities.”<sup>15</sup>

Thus, meat from an animal that was exclusively born, raised, and slaughtered in the United States may not be labeled with a multiple countries origin label, because such animals do not meet the first criterion in the statute.<sup>16</sup> Meat from such animals must be labeled as U.S. origin under the statute.<sup>17</sup> Furthermore, meat from an animal that was neither born, nor raised, nor slaughtered in the United States may not be labeled with a multiple countries origin label, because such animals do not meet the second criterion in the statute.<sup>18</sup> Meat from such animals must be labeled as foreign origin under the

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<sup>12</sup> See 9 C.F.R. §§ 93.420, 93.427(c)(1), 93.429, and 93.436(b)(3).

<sup>13</sup> See 9 C.F.R. § 93.427(d).

<sup>14</sup> 7 U.S.C. § 638a(a)(2)(B)(i), as amended (emphasis added).

<sup>15</sup> 7 U.S.C. § 638a(a)(2)(B)(ii), as amended.

<sup>16</sup> See 7 U.S.C. § 638a(a)(2)(B)(i)(I), as amended.

<sup>17</sup> See 7 U.S.C. § 1638a(a)(2)(A), as amended.

<sup>18</sup> See 7 U.S.C. § 638a(a)(2)(B)(i)(II), as amended.

statute.<sup>19</sup> Finally, meat from an animal that was imported for immediate slaughter may not be labeled with a multiple countries origin label, because such animals do not meet the third criterion in the statute.<sup>20</sup> Meat from such animals must be labeled with the country from which the animal was imported and the United States under the statute.<sup>21</sup>

Rather than follow this clear statutory language, however, the IFR completely disregards it. Instead of repeating the statutory formulation, the IFR provides at 7 C.F.R. § 65.300(e)(1)(i) that a retailer may designate the country of origin of a covered commodity as all of the countries in which the animal may possibly have been born, raised, or slaughtered if the meat is derived from an animal that “was born, raised, and/or slaughtered in the United States and was not imported for immediate slaughter.”<sup>22</sup> The rule provides no discussion of why the language of the statute on multiple countries of origin has been abandoned in favor of this alternative formulation. The use of the “and/or” conjunction introduces unnecessary vagueness into the labeling requirements, and it opens the door for retailers to label product that is exclusively U.S. as product that may be from a list of possible countries.

The Department recently issued a clarification intended to address concerns that the IFR would allow processors to label U.S.-only meat as multiple-countries-of-origin meat. However, the clarification fails to ensure that the statute will be faithfully implemented. For example, the clarification released September 26, 2008 by the Department states that U.S.-origin beef will only be permitted to be labeled as multiple-countries-of-origin beef if such U.S. meat was produced on the same production day as mixed-origin meat.<sup>23</sup> It is unclear from the document whether this standard applies only if the U.S. meat is physically “commingled” with the multiple-countries-of-origin meat in the same package, or if it would also apply to allow packers to mis-label U.S. meat that is produced in the same facility and on the same day as multiple-country-of-origin meat but not physically “commingled” with that meat. In the latter case, packers will be able to circumvent the law by running at least one foreign animal through their facilities each day and then mis-labeling all U.S. animals that are also processed that day. The only way to avoid this outcome and ensure the statute is complied with is to amend the IFR to conform with the law.

If the text of the IFR is not amended, permitting retailers to sell U.S.-origin meat as multiple-countries-of-origin meat will severely undermine the entire country-of-origin labeling program for meat. Consumers would be deprived of the ability to distinguish U.S.-origin meat at the final point of retail sale and to choose to purchase such meat. Producers of U.S.-origin meat would be unable to market their goods as a distinct product from meat derived from animals that are not exclusively born, raised, and slaughtered in

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<sup>19</sup> See 7 U.S.C. § 1638a(a)(2)(D), as amended.

<sup>20</sup> See 7 U.S.C. § 638a(a)(2)(B)(i)(III), as amended.

<sup>21</sup> See 7 U.S.C. § 1638a(a)(2)(C), as amended.

<sup>22</sup> IFR at 45,150 (7 C.F.R. § 65.300(e)(1)(i)).

<sup>23</sup> USDA, *Country of Origin Labeling (COOL): Frequently Asked Questions* (Sept. 26, 2008) at 7. Available on-line at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5071922>.

the U.S. In the place of no origin information, consumers would be provided with origin information so vague as to be essentially meaningless.

Such subversion of the statutory scheme appears to also have been contemplated in the Department's discussion of the COOL legislative language in a May 9, 2008 letter to Congressman Bob Goodlatte, ranking member of the House Committee on Agriculture. In that letter, the Department claims that mis-labeling U.S.-origin meat as multiple countries of origin meat is permitted because the statute merely provides that a retailer "may" designate meat from animals exclusively born, raised and slaughtered in the U.S. as U.S. origin meat.<sup>24</sup>

Yet that statutory provision is structured in a restrictive manner, to permit retailers to label meat as U.S.-origin only when it meets certain criteria, thus retailers "may" label meat as U.S. "only if" the commodity meets the criteria designated. This structure does nothing to weaken the overarching, binding requirement of the law: "a retailer of a covered commodity shall inform consumers ... of the country of origin of the covered commodity."<sup>25</sup> Moreover, the statute explicitly provides that the multiple countries of origin provision does not alter "the mandatory requirement to inform consumers of the country of origin of covered commodities" cited above.<sup>26</sup> The Department's regulations would write out that mandatory provision, and ignore Congress's instructions that the multiple-countries-of-origin label does not affect that mandatory provision. The Department's regulations would render the mandatory provision meaningless, by permitting retailers to fail to inform consumers of the country of origin of a covered commodity by mis-applying the multiple-countries-of-origin label to exclusively U.S.-origin product.

The weakness of the Department's legal argument is revealed in a footnote to the May 9 letter. The footnote attempts to dismiss the clear language of the statute that explicitly prohibits use of a multiple-countries-of-origin label for product from an animal that was exclusively born, raised, and slaughtered in the United States.<sup>27</sup> The letter states that complying with the clear language of the statute would, in the Department's view, impose burdensome handling and recordkeeping requirements on producers. Because Congress did not characterize the mandatory labeling requirements as handling and recordkeeping requirements, the Department concludes that the plain language of the statute cannot mean what it says. According to the Department's circular logic, a clear statutory prohibition need not be complied with where that compliance would impose handling and recordkeeping burdens (as compliance with many statutes does), and where, in the Department's view, the statutory prohibition itself does not "qualify" as a handling and recordkeeping requirement.

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<sup>24</sup> 7 U.S.C. § 1638a(a)(2)(A), as amended.

<sup>25</sup> 7 U.S.C. § 1638a(a)(1), as amended (emphasis added).

<sup>26</sup> 7 U.S.C. § 1638a(a)(2)(B)(ii), as amended.

<sup>27</sup> 7 U.S.C. § 1638a(a)(2)(B)(i)(I), as amended.

Moreover, in light of the Department's strained reading of the rest of the statute discussed above, the Department concludes with regard to this clear prohibition that "it would place undue emphasis on this one clause to read this language (which applies to retailers) as mandating segregation at the producer level." Yet all of the law's requirements apply to retailers, and all have the potential to result in some level of burden on producers who supply those retailers. It is not up to the Department to determine which burdens are acceptable and which are not, and then ignore portions of the statute accordingly. The Department's responsibility is to implement the law as written by Congress.

The illogic of the Department's position is further revealed by the Department's admission in the same footnote: "Where a product is derived from an animal known to have been exclusively born, raised, or slaughtered in the United States, it would not qualify" for the multiple-countries-of-origin label. But the element of producer or retailer knowledge is not relevant to the question of whether or not a product qualifies for a certain origin label. Knowledge of an animal's origin only becomes relevant as an element is assessing a producer or retailer's liability for mis-labeling product under the statute.<sup>28</sup> By reading a knowledge loophole into the law for the multiple-countries labeling provision, the Department appears to be inviting retailers to violate the plain language of the statute while acknowledging there may be liability for such violations if they are knowingly committed.

Such a result contradicts the plain language of the statute, would undermine the purpose of the law, and would frustrate the will of Congress. USCA therefore urges the Department to revise the regulations regarding multiple-countries-of-origin labels to comply with the statute. Anything less will jeopardize the COOL program. Failing to revise this language to adhere to the statute will deprive consumers and U.S. cattle producers of the accurate and meaningful country-of-origin labeling they have sought for so many years. This result can be easily avoided by simply implementing the language that Congress has enacted.

## **V. Conclusion**

USCA appreciates this opportunity to comment on the Department's IFR for COOL, and commends the Department on the many areas in which substantial progress has been made. However, we believe that areas for additional improvement remain, and we are deeply concerned that the IFR for multiple-countries-of-origin labels fails to faithfully implement the law. We urge the Department to revise the rule and publish an amended final rule that addresses these concerns.

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<sup>28</sup> 7 U.S.C. § 1638b(b)(2), as amended (requiring willful violation in order for fines to be imposed).

Thank you for your attention to these important issues. If you have any questions please feel free to contact us.

Sincerely,

A handwritten signature in black ink, appearing to read "Jon Wooster". The signature is fluid and cursive, with a long horizontal stroke at the end.

Jon Wooster, President  
United States Cattlemen's Association