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February 27, 2004

The Honorable William T. Hawks
Under Secretary for Marketing and Regulatory Programs
U.S. Department of Agriculture
Country of Origin Labeling Program
Agricultural Marketing Service
Stop 0249 Room 2092-S
1400 Independence Avenue, SW
Washington, DC 20250-0249

Re: Comments on Proposed Mandatory Country of Origin Labeling Regulations (Docket No. LS-03-04)

Dear Secretary Hawks:

The Food Marketing Institute[1] (FMI) is pleased to respond to the U.S. Department of Agriculture's (USDA's) request for comments on the Department's proposed regulations to implement the mandatory country of origin labeling (COL) program as required by Subtitle D of the Agricultural Marketing Act (AMA), pursuant to Section 10816 of the Farm Security and Rural Investment Act of 2002 (2002 Farm Bill). 68 Fed. Reg. 61944 (Oct. 30, 2003). We respectfully request that the Department respond fully to each of our concerns on the record.

FMI filed detailed comments with the Department regarding the scope of the statutory provision and the Voluntary Country of Origin Labeling Guidelines that USDA published in October, 2002. These comments fully explain FMI's interpretation of the statute as a whole, our members concerns with its structure, and the likely impact on the marketplace. To avoid duplication, these comments are attached hereto and fully incorporated by reference herein.

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[1] 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.

Our comments below are divided into four subject areas. The first concerns the scope, timing and import of USDA's final COL regulations. We urge USDA to promulgate *interim* final regulations to enable implementation of the overall program for seafood as quickly as possible. Given the extraordinarily short period of time from promulgation of final regulations to statutory effective date, the Department should emphasize compliance rather than enforcement in the immediate term.

The second section addresses liability and enforcement matters, including the need for USDA to clearly identify the liability that will attach to suppliers for their failure to meet the obligations imposed upon them by Subtitle D. Section 10816 cross-references non-retailer liability provisions that are codified elsewhere in the Agricultural Marketing Act. It is incumbent upon the Department to identify them fully and clearly in the final regulations to provide proper notice to the regulated community of their potential liability. We also urge the Department to clarify several issues related to the retailer enforcement provisions.

The third area concerns the proposed recordkeeping portions of the regulations. Our members have expressed particular concern with the store level recordkeeping requirement. Country of origin or method of production information that is provided by a supplier or that appears directly on the food product should be sufficient to satisfy the store level record requirement.

The final section identifies several implementation concerns, including the type of notice that must be provided to consumers, notifications that can be used for remote sales, the exemption for in-store food service establishments, and the applicability of state and regional labeling.

I. Scope, Timing and Import of Final Regulations

Section 285 of the AMA was amended in January by an omnibus appropriations bill to delay implementation of the mandatory country of origin labeling provisions of the statute until September 30, 2006 for all covered commodities, except seafood. Retailers will be obligated to inform consumers of the country of origin and method of production of all covered seafood products as of September 30, 2004, a mere seven months from now. USDA specifically requested comment on the implications of the statutory mandate for retail labeling beginning September 30, 2004, relative to the amount of lead time necessary for firms in the supply chain to comply with this rule. 68 Fed. Reg. at 61952. We respectfully urge USDA to take the following steps regarding the scope, timing and import of the final regulations.

A. Issue Regulations To Implement Seafood Program Quickly

Until final regulations are issued, the food supply chain will not know what is required and cannot begin implementation in earnest. As the statute becomes effective on September 30, 2004, USDA must expeditiously analyze the comments filed on the proposed regulations and promulgate final regulations relative to the implementation of seafood country of origin and method of production labeling as soon as possible. The Department should focus its resources on the final regulations relevant to seafood and delay promulgation of those sections of the regulations specific to the other covered commodities until it becomes necessary to do so.

B. Final Regulations Should Be Issued on an Interim Final Basis

We recognize that USDA has expended significant resources over the past year to understand the affected industries and the impact that the statute will have on them. However, despite the Department's determined educational efforts, it is reasonable to expect that implementation challenges may be discovered once the final rules are issued. Therefore, to facilitate any necessary modifications on an expedited basis, we urge the Department to issue the regulations in interim final form.

C. Emphasize Compliance Rather than Enforcement Both at Federal and State Levels for One Year Following Promulgation of Final Regulations.

Although retailers and the entire food supply and distribution chain have been involved in preliminary efforts to prepare for the implementation of the law, until the regulations are finalized, the food industry cannot know what will be required in terms of systems. For example, with respect to records, it may be necessary to develop complex new software systems depending on the requirements of the final rules. It would be costly and inefficient to design systems around proposed standards, which are likely to change in the final regulations.

Our members have advised that, depending on the type and complexity of systems ultimately required, it may take one year or more to design and implement the programs necessary to comply with the final regulations. As the mandatory program under the statute becomes effective for seafood in only seven months, and it is unreasonable to expect the final regulations to be issued in less than 60 days, retailers will not have adequate time to design and implement systems before September 30, 2004.

Accordingly, we urge the Department to implement a program emphasizing compliance rather than enforcement by both federal and state officials for the first year during which the law is fully effective. USDA should conduct programs to educate the

food community about the requirements of the final regulations and to assist the food industry in implementing programs to transfer information quickly and efficiently to consumers rather than impose harsh and punitive enforcement measures. Clear communication to any state authorities with which the Department partners under the statute will be critical in this regard.

D. Permit Packaged Products with Extended Shelf-Life To Continue To Bear Pre-Section 10816 Country of Origin Declarations

Similarly, we urge the Department to exercise its enforcement discretion to allow products with extended shelf lives that were packaged and labeled with country of origin information prior to the effective date of the final regulations to continue to be sold after the effective date of the statute. It would be extraordinarily wasteful to prohibit the sale of these food products simply because they were packaged before the country of origin requirements were finalized.

II. Liability and Enforcement Issues

A. Suppliers Must Be Held Fully Accountable for the Country of Origin and Method of Production Information Provided To Retailers and Final Regulations Must Specify Supplier Liability To Give Proper Notice to Regulated Community

Section 283 of the Agricultural Marketing Act as amended by the 2002 Farm Bill sets forth the enforcement provisions for Subtitle D. The section is divided into three paragraphs. Paragraphs (b) and (c) expressly refer to situations in which retailers have violated the statute; paragraph (a) applies to all other violations of the subtitle and specifically states that "Section 253 [of the Agricultural Marketing Act] shall apply" to all other violations of Subtitle D. Section 253, which is codified at 7 USC § 1636b, specifically provides as follows:

> (a) Civil penalty
>
> (1) In general.—Any packer *or other person* that violates this subchapter [which includes Subtitle D] may be assessed a civil penalty by the Secretary of not more than $10,000 for each violation. [emphasis added]
>
> (2) Each day during which a violation continues shall be considered to be a separate violation.
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> *****

(b) Cease and desist

In addition to, or in lieu of, a civil penalty under subsection (a), the Secretary may issue an order to cease and desist from continuing any violation.

(c) Notice and hearing

No penalty shall be assessed, or cease and desist order issued, by the Secretary under this section unless the person against which the penalty is assessed or to which the order is issued is given notice and opportunity for a hearing before the Secretary with respect to the violation.

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(f) Injunction or restraining order

(1) In general

If the Secretary has reason to believe that any person subject to this subchapter has failed or refused to provide the Secretary information required to be reported pursuant to this subchapter, and that it would be in the public interest to enjoin the person from further failure to comply with the reporting requirements, the Secretary may notify the Attorney General of the failure.

(2) The Attorney General may apply to the appropriate district court of the United States for a temporary or permanent injunction or restraining order.

7 USC § 1636b.

The preamble to the proposed regulation describes retailer liability in detail but omits any discussion of the foregoing statutory provisions relative to suppliers. 68 Fed. Reg. at 61952. To provide full and proper notice to the regulated non-retailer community of their obligations and potential liability under the mandatory Country of Origin Labeling law, the final regulations should clearly describe or at least reiterate the statutory standards for non-retailers; the following particularly notable aspects of Section 253 should be emphasized in the final regulations.

First, non-retailers may be assessed penalties of up to $10,000 ***per violation, per day***. 7 USC 1636b(a)(2). That is, for each day on which a violation is not remedied, the

non-retailer is subject to additional, cumulative penalties. (This standard does not apply to the retailer liability provision in Section 283.) USDA should elaborate on the scope of activity that will constitute a violation for purposes of Section 253, but, failure to convey information on a covered commodity's country of origin is clearly a violation of Section 282(e) of the statute. Moreover, as USDA seems to have determined that the retailer's obligation to inform consumers inherently includes a requirement that the information provided is accurate, *USDA must also hold suppliers liable for the accuracy of the information that they are required to provide to retailers under Section 282(e).*

Second, unlike the enforcement provisions relative to retailers, which are discussed more fully below, suppliers are liable for penalties for per se violations of the statute; that is, although USDA must find that a retailer has "willfully" violated the statute in order to subject the retailer to penalties, no *mens rea* applies to the non-retailer enforcement provisions. 7 USC 166b(a)(1). In addition, although retailers must be given notice of the alleged violation and 30 days to remediate, no such procedural protections are afforded to non-retailers.

Third, Section 253 grants USDA a panoply of additional enforcement tools and equitable remedies against non-retailers, such as cease and desist orders and injunctive relief. See 7 USC 1636b(f).

Clearly, then, Congress recognized that non-retailers were the parties with the critical information to convey to consumers and, therefore, that non-retailers should be held to a higher enforcement standard. *Congress has given USDA adequate enforcement authority to ensure that non-retailers are held accountable for their actions under Subtitle D. USDA's regulations and enforcement activities must reflect the proper scope and congressional intent in this regard.*

B. Retailer Willfulness Liability Standard

Section 283 of the Agricultural Marketing Act as amended specifies the enforcement authorities that USDA has under Subtitle D. Paragraphs (b) and (c) pertain to retailers. Paragraph (b) states that, "if the Secretary determines that a retailer is in violation of Section 282, the Secretary shall –

(1) notify the retailer of the determination; and
(2) provide the retailer a 30-day period, beginning on the date on which the retailer receives the notice under paragraph (1), during which the retailer may take necessary steps to comply with Section 282."

7 USC § 1638b(b). If on completion of the 30-day period, USDA determines that the retailer "has willfully violated section 282," USDA may fine the retailer up to $10,000 for each violation after providing notice and an opportunity for a hearing. 7 USC § 1638b(c). In order to afford the regulated community due process, USDA's regulations

must set forth the Agency's interpretation of the relevant enforcement provisions and elaborate upon the procedural protections provided by Congress.

1. Willful Violation Standard

a. Legal Meaning of "Willful"

One of the key issues presented by Section 283 is the standard for "willfulness." Although the precise definition of "willful" depends upon its context, the Supreme Court has concluded on several occasions that the word denotes an act which is intentional rather than accidental. *See, e.g.* U.S. v. Illinois Central R.R., 303 U.S. 239 (1938); United States v. Murdock, 54 S.Ct. 223 (1933); Screws v. U.S., 325 U.S. 91 (1945).

In the context of statutes implemented by the U.S. Department of Agriculture, courts have interpreted "willful" to mean knowing and intentional. For example, under the Packers & Stockyards Act, "willfulness" means "an intentional misdeed or such gross neglect of a known duty as to be the equivalent thereof." Hutto Stockyard, Inc. v. USDA, 903 F.2d 299, 304 (4th Cir. 1990) (quoting Capital Packing Co. v. United States, 350 F.2d 67, 78-79 (10th Cir. 1965). According to the courts, "a less stringent definition may collide with the requirements of administrative due process and would betray the plain meaning of the word." *Id.*

Courts have applied this same stringent "intentional misdeed" or "gross neglect" standard in interpreting "willfulness" under the Perishable Agricultural Commodities Act (PACA). Capital Produce Co. v. United States, 930 F.2d 1077, 1079 (4th Cir. 1991); Potato Sales Company v. Department of Agriculture, 92 F.3d 800 (9th Cir. 1996). Courts have specifically rejected the notion that willfulness may be equated with neglect. *Id. See also*, Eastern Produce Co. v. Benson, 278 F.2d 606 (3rd Cir. 1960). Some courts have interpreted "willful" under PACA to describe an act "done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements." American Fruit Purveyors v. U.S., 630 F.2d 370, 374 (5th Cir. 1980). *See, also,* Sid Goodman & Co. v. U.S., 945 F.2d 398 (4th Cir. 1991), slip op. at 12; Tipco, Inc. v. Yeutter, 953 F.2d 639 (4th Cir. 1992). The practical effect of this latter definition, however, is the same. A willful act is more than negligent; it is done knowingly and intentionally.

In conformity with this legal precedent, AMS itself interprets "willful" stringently. For example, to explain the meaning of "willful violations" in the National Organic Act, AMS gives the examples of "making a false statement" or "knowingly affixing a false label." 65 F.R. 80623 (December 21, 2000).

In short, a "willful" act is done deliberately. The word "willful" has been determined by the courts to mean intentional and knowing, as distinguished from neglectful or accidental. In interpreting the term "willfully" within the meaning of Section 283(c), AMS is encouraged to adhere to this legal precedent.

b. Interpretation of "Willful" in Context of Subtitle D

In preparation for enforcing Subtitle D, USDA should clarify how the Department will apply the standard of "willfulness." FMI respectfully submits the following recommendations in this regard.

First, USDA should recognize expressly that if the majority of individual covered commodity items bear a label indicating the product's country of origin, the retailer has met the Section 282 requirement to inform the consumer of the country of origin of that covered commodity and has not willfully violated the statute. For example, one efficient way to ensure that consumers receive accurate country of origin information on some covered commodities, such as produce, is for suppliers to sticker the individual items with country of origin information. However, given the nature of the items or adhesive efficacy, not all covered commodities will be stickered.

A case in point: suppliers currently apply one or two stickers to a hand of bananas that may be comprised of six or seven individual bananas. Consumers frequently separate individual bananas from the "hands" in which they were shipped so that not all bananas will be labeled throughout their display, even if the supplier labeled each hand prior to shipment. Similarly, although the technology for label adhesives has improved, no label adhesive is effective all of the time. The preamble to the proposed regulation states that USDA will take these considerations into account when determining retailer liability, but this statement is too vague to provide meaningful guidance to the regulated community. 68 Fed. Reg. at 61952. Therefore, USDA should recognize that, if the majority of a covered commodity items on display bears country of origin labels, the retailer has met its obligation to inform the consumer of the country of origin of the covered commodity and has not willfully violated the statute.

Second, USDA should expressly recognize in the regulations and the preamble circumstances under which retailers will not be considered to have violated the statute willfully. For example, USDA should state that the Agency will not conclude that a retailer has willfully violated the statute for providing inaccurate country of origin or method of production information for a covered commodity if the retailer has the results of an audit that the covered commodity supplier obtained from USDA or another third party that demonstrates that the supplier has a system for determining country of origin or method of production upon which the retailer may reasonably rely.

Third, given the fraudulent and intentional nature of the acts necessary to constitute "willfulness," USDA should not find that a retailer willfully violated Section 282 unless the retailer internationally removed or changed information provided by the supplier.

Fourth, with respect to the protections afforded by the statute, we recommend that USDA's final regulations set forth the mechanism by which the Agency will advise the retailer of the Secretary's initial determination that a retailer has not met its Section 282 obligation. The notice should provide detailed information on the retail location(s) at which such failure is alleged to have occurred, the covered commodities at issue, and the date(s) upon which such alleged failures may have occurred. A copy of any relevant inspection reports should be included with the notice. The regulations should also specify the process that will be afforded through the hearing.

Fifth, the final regulations should recognize that USDA will not impose punitive action if a retailer takes corrective action within 30 days of notice of an alleged violation. Specifically, the statute grants the retailer the opportunity to remediate within the 30 days following the notice that USDA must give to the retailer under Section 283(b). Accordingly, the regulations should provide that, if the retailer corrects the concerns USDA alleged in the 30-day notice, then the retailer will not be found liable for willfully violating the statute.

Sixth, USDA should elaborate on the acts that will constitute a single violation. For example, it would be unreasonable for the Agency to take the position that each unlabeled covered commodity constitutes a separate violation. Rather, we recommend that USDA adopt a broad view of a violation and look to the overall performance of the retailer's country of origin labeling program to determine if the retailer has willfully violated the statute. For example, if the retailer has a program in place to ensure the presence of accurate country of origin information and 60% of the different types of covered commodities within the store bear complete labeling, USDA should not conclude that the retailer willfully violated Section 282.

Seventh, USDA should establish a sliding scale for penalties. The statute provides that penalties of up to $10,000 may be assessed against retailers for each willful violation. The Agency should distinguish between minor violations that have nonetheless reached the "willfulness" threshold and those violations that are fraudulent and show a repeated and wanton disregard for the statute. Only the most egregious violations should warrant the assessment of a $10,000 penalty against the retailer.

C. Retailers Must Be Fully Protected from Liability for Supplier Mistakes or Misrepresentations of CoO/MoP

Section 282(a)(1) of Subtitle D requires retailers to inform consumers of the country of origin of the covered commodities identified in the legislation. 7 U.S.C. § 1638a(a)(1). However, country of origin as defined by the statute and interpreted by the agency necessitates information regarding the food product's entire life cycle. Retailers cannot determine country of origin or method of production (CoO/MoP) 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.

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 must be able to rely upon the country of origin and method of production information provided by suppliers without incurring liability for the accuracy of the information.

In this regard, proposed Section 60.400, "Recordkeeping," includes a paragraph that appears to provide some protection for retailers from liability for supplier misinformation. Specifically, proposed Section 60.400(c)(3) states as follows:

> Any retailer handling a covered commodity that is found to be mislabeled for country of origin shall not be held liable for a violation of the Act by reason of the conduct of another if the retailer could not have been reasonably expected to have had knowledge of the violation from the information provided by the supplier.

We urge the Department to retain a clear statement of regulatory protection for retailers in the final regulations, with the following modifications.

First, and most importantly, the legal standard set forth in the proposed regulation significantly dilutes the statutory standard for retailer liability.[2] As discussed more fully above, a retailer cannot be held liable for a violation of Subtitle D unless the Department finds that the retailer willfully violated the Act. The standard proposed above – "could not have been reasonably expected to have had knowledge of the violation" – is a general negligence standard. Any regulatory protection should reflect the high *mens* rea standard set forth in the statute and discussed more fully above. The preamble should articulate that retailers may accept the country of origin and method of production declarations provided by suppliers without liability and without obligation to investigate the declarations given or the systems put in place by the suppliers to ensure the accuracy of the declarations. In the absence of such assurance in the final regulations, retailers are likely to insist that their suppliers obtain third party audits to ensure the accuracy of the information presented.

Second, the regulatory protection granted to retailers should extend to misstatements of method of production as well as country of origin; we respectfully urge USDA to add supplier statements regarding method of production to the provision.

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[2] We further note and object to the fact that USDA has utilized the same general negligence standard in the comparable proposed regulation for suppliers. As discussed more fully elsewhere in our comments, supplier liability under Section 253 of the Agricultural Marketing Act is a *per se* standard. USDA is changing the statutory *mens rea* standard through the regulatory process in an unacceptable manner.

Third, the genesis of the provision is unclear. It is somewhat vague and does not have a specific statutory basis in the Agricultural Marketing Act. The preamble offers no explanation at all of this section. If retailers are to rely upon the provision to provide meaningful legal protection, it would be helpful for the preamble to the final regulation to provide some further evidence of its basis.

For example, the Perishable Agricultural Commodities Act requires all declarations made regarding a perishable agricultural commodity to be truthful, but provides the following exclusion from liability: "a person other than the first licensee handling misbranded perishable agricultural commodities shall not be held liable for a violation of this paragraph by reason of the conduct of another if the person did not have knowledge of the violation or lacked the ability to correct the violation." 7 USC 499b(5). Although this provision clearly provides retailers with some protection for potential violations of PACA for misstating country of origin on a perishable agricultural commodity, Congress did not choose to incorporate the same protections into Subtitle D of the Agricultural Marketing Act. If this is the basis for USDA's proposed regulation, it would be helpful to understand the Department's application of the PACA standard to claims required under the Agricultural Marketing Act for not only perishable agricultural commodities, but also meat, seafood, and peanuts.

D. State Enforcement

Section 284 of the Farm Bill directs USDA to enter into partnerships with the states. Specifically, the provision states that, "[i]n promulgating the regulations, the Secretary shall, to the maximum extent practicable, enter into partnership with States with enforcement infrastructure to assist in this administration of this subtitle." 7 USC 1638c(c). As required by the statute, USDA's regulations should explain the mechanism that the Agency intends to employ in order fulfill the mandate to partner with the states. In this regard, for purposes of fulfilling the enforcement goals relevant to food retailers, we urge USDA to partner only with those state agencies that currently inspect retail facilities.

USDA should also ensure that state agencies will carry out enforcement responsibilities with respect to ensuring that suppliers are complying with their obligations under the statute. As discussed more fully above, the accuracy of the information that is given to consumers on the country of origin of covered commodities depends on the integrity of the country of origin determination rendered by the suppliers. The state agencies with which USDA partners should verify suppliers' compliance with the statute, as well as retailer compliance.

E. Inter-Relationship of Mandatory COL Statute with Relevant State and Federal Statutes

1. Federal Program Preempts State Country of Origin Labeling Laws

We agree with USDA's conclusion that, although the mandatory country of origin labeling law does not contain an express preemption provision, it clearly preempts State law and urge the Agency to reiterate this conclusion with a clear statement of its legal basis in the preamble to the final regulation. See 68 Fed. Reg. at 61952.

2. Final Regulations Should Reflect Liability under Related Federal Statutes

In addition to liability for country of origin under Subtitle D, statements regarding product origination must comply with several other federal statutes. For example, misrepresenting region of origin is a serious violation of PACA.[3] See 7 USC 499b(5); 7 CFR § 46.45(a)(1). The Federal Meat Inspection Act and the Federal Food, Drug, and Cosmetic Act also govern labeling for products considered "covered commodities" under Subtitle D. See 21 USC §§ 601, et seq.; 21 USC §§ 301, et seq. Both statutes prohibit labeling that is false or misleading in any particular with respect to the foods that they govern. 21 USC §§ 601, 610; 21 USC §§ 331, 343. Accordingly, inaccurate country of origin labeling by suppliers as required by Subtitle D may also give rise to penalties under these statutes as well, depending on the covered commodity.

The preamble to the proposed regulation identifies these additional liabilities. 68 Fed. Reg. at 61952. The final regulations should likewise recognize the interaction between these statutes.

III. Recordkeeping Issues

Section 282(d) authorizes USDA to "require that any person that prepares, stores, handles or distributes a covered commodity for retail sale maintain a verifiable recordkeeping audit trail that will permit the Secretary to verify compliance with this subtitle (including the regulations promulgated under section 284(b))." 7 USC 1638a(d). Section 284(b) requires USDA to promulgate "such regulations as are necessary to implement this subtitle," in all of its facets. 7 USC 1638c(b). Among other things, the subtitle requires "any person engaged in the business of supplying a covered commodity

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[3] Significantly, however, a person other than the first licensee handling misbranded perishable agricultural commodities shall not be held liable for a violation of section 2(5) of the act by reason of the conduct of another if the person did not have knowledge of the violation or lacked the ability to correct the violation. Id. Thus, PACA, too, recognizes the increased level of responsibility that those who are in a position to render a country of origin determination must bear vis a vis the enforcement of the law.

to a retailer" to "provide information to the retailer indicating the country of origin of the covered commodity." 7 USC §§ 1638a(e).

A. General Recordkeeping Requirements Should Clarify Standards for Chain of Custody Determination and Retain Reasonable Standard for Record Production

The proposed regulations set forth several general recordkeeping requirements, including these of particular note. Specifically, various forms of documentation will be acceptable, *provided the chain of custody of the covered commodity can be determined* and the origin and method of production claims can be substantiated. Proposed 7 CFR S. 60.400(a)(1)(emphasis added). Records must be produced "in a timely manner during normal hours of business and at a location that is reasonable in consideration of the products and firm under review." Id. at S. 60.400(a)(2).

The preamble provides no explanation of the records that the Department would deem necessary to establish chain of custody of a product. Establishing legal chain of custody for every individual covered commodity (e.g., single string beans) would be exceedingly difficult to achieve and is not necessary for purposes of a non-criminal marketing statute. Indeed, the standard set forth in FDA's recordkeeping authority under the Bioterrorism Act is not as high. Therefore, USDA should remove the requirement for chain of custody records from the final regulations. On the other hand, the proposed record production standard is fairly reasonable and should be retained in the final regulation.

B. Supplier Recordkeeping

1. Suppliers Should Be Required To Provide Affidavits Regarding Accuracy of CoO/MoP Claims and Sufficiency of Underlying Records Maintenance to Retailers

In the preamble, AMS invites comment on whether suppliers should be required to provide an affidavit for each transaction to the immediate subsequent recipient certifying that the country of origin and method of production claims were truthful and that the required records were being maintained. 68 Fed. Reg. at 61951.

FMI supports such a requirement because it will provide an important level of assurance that the retailer can rely upon the information provided by the supplier for which the retailer bears a certain element of risk. Reliance upon an affidavit of this nature should serve as an affirmative defense to any claim that the retailer willfully violated the statute by providing inaccurate country of origin or method of production information to consumers when such information was predicated on statements made in the affidavit. Retailers should not be required to maintain such records although the absence of same might limit the protection from liability that such records would afford.

2. Suppliers Should Continue To Bear Responsibility for Records Documenting Segregation of Product

Proposed Section 60.400(a)(5) would require each supplier that handles similar covered commodities subject to different country of origin declarations to be able to document that the origin of the product was separately tracked, while in their control, during any production and packaging processes to demonstrate that the identity of the product was maintained. We urge the Department to retain a provision of this nature in the final regulations, with the following modifications.

First, all suppliers of covered seafood products must also separately track and document method of production.

Second, the preamble should expressly state that suppliers, such as wholesalers, who simply distribute pre-packaged product are not required to document that product was separately tracked.

3. Suppliers Should Keep Records Until Final Retail Sale of Covered Commodity

Proposed Section 60.400(b)(3) would require any person engaged in the business of supplying a covered commodity to a retailer to maintain records to establish and identify the immediate previous source and immediate subsequent recipient of a covered commodity in such a way that identifies the product unique to that transaction for a period of two years from the date of the transaction.

We understand that USDA chose the two-year recordkeeping requirement because it was consistent with PACA's requirements; it does not, however, reflect the needs of Subtitle D. For example, in order to verify whether a beef steak is properly designated as "Product of US," it will be necessary to verify that the underlying cow was born, raised and slaughtered in the United States. Beef production does not always occur within a two year window. We understand that some dairy herds are not ready for slaughter until they are several years old. Therefore, ranchers and others who are responsible for a cow during its life time should be required to retain records to document the country or countries of birth and feeding of the animal until the meat that it produces is sold at retail plus whatever period thereafter retailers will be required to maintain records, otherwise the retailer records cannot be substantiated. Similar standards should apply for seafood and perishable agricultural commodities.

4. Supplier Self-Certification Cannot Be Sufficient Basis for Country of Origin or Method of Production Claims

The statute requires any person engaged in the business of supplying a covered commodity to a retailer to make information available to the retailer indicating the country of origin and method of production of the covered commodity. The preamble to the proposed regulations asserts that self-certification by such persons is not sufficient. 68 Fed. Reg. at 61944. In so doing, USDA reflects the statutory standard, which requires "a verifiable recordkeeping audit trail," as well as the substantial body of precedential law that undergirds the necessity for the adequate substantiation of consumer claims. For the reasons elaborated more fully below, USDA's final regulations must continue to provide that self-certification alone cannot be sufficient to substantiate a country of origin or method of production declaration.

a. Statute Requires More Than Self-Certification

Section 282(d) allows USDA to require the maintenance of "a verifiable recordkeeping audit trail," which is significant because it expressly recognizes that the records should be capable of being both audited and verified. Self-certification is capable of neither. Thus, the statute on its face requires more than mere self-certification in support of the country of origin determination.

There are those who have suggested that USDA should establish an "honor" system under Subtitle D and note that taxpayers need not have their tax returns audited before the returns are filed with the Internal Revenue Service. According to this logic, those suppliers who provide declarations regarding country of origin of a covered commodity should be trusted to state the truth to their customers and should not be required to provide the results of an audit to support their statement.

Although taxpayers are not required to provide an audited statement to the IRS, if those same taxpayers are audited by the IRS, they had better be able to produce verifiable records to document the deductions claimed on their tax returns. It is not sufficient for one who is audited to appear before the agency and simply aver that the tax return is correct. Rather, the party who is audited must be able to substantiate the accuracy of the claims made on the tax form. In the absence of verification of the statements averred, the IRS audit will result in fines and penalties assessed against the taxpayer.

Moreover, the IRS is not subject to penalties or fines if it turns out that the audited party accidentally or fraudulently misinformed the agency. In fact, the agency receives monetary remuneration in the form of penalties, back pay and interest for errors made on the part of the auditee. Under the COL law, retailers (the functional equivalent of the IRS in this analogy) are subject to substantial penalties if the information that they are relying

upon the auditee/supplier to provide is inaccurate. Accordingly, the analogy to the tax system as a basis to support the claim that self-certification should be sufficient fails on its face.

b. Legal Doctrine of Substantiation Requires More Than Self-Certification

Requiring evidence greater than a simple self-certification is also consistent with the doctrine of substantiation. Claims made on labels or labeling regarding any consumer product must be supported by adequate substantiation; even if they are true, if the claimant cannot support the statements with substantiation at the time at which the claim is made, the claimant may be liable.

It is a well-established principle in the area of consumer protection that affirmative claims or statements made in advertising or labeling must be truthful and not misleading. For example, the Federal Trade Commission (FTC) has adopted a substantiation policy in connection with its broad statutory authority to prohibit deceptive advertising practices. A general principle of this policy is that an advertiser must possess adequate substantiation for all claims conveyed by an advertisement as determined by the FTC at the time the claim is made. Harm to the consumer is presumed when a claim is found to be unsubstantiated. An objective statement capable of being proven or disproven will require substantiation.

In determining if the level of substantiation provides a "reasonable basis" for the claim, the FTC considers a number of factors, including the type and specificity of the advertising claim. A higher level of substantiation is required for a claim whose truth and falsity would be difficult for consumers to evaluate by themselves. Thompson Medical Co., 104 FTC at 823.

USDA's Livestock and Seed (LS) Program, through the Meat Grading and Certification Branch (MGCB), provides certification of beef carcasses for a number of marketing programs making claims concerning breed of cattle and carcass characteristics, or only for carcass characteristics. These characteristics go beyond the requirements for official USDA grades. MGCB certification is often the basis for approval of meat product labels making a variety of marketing claims. The carcass certification programs vary widely in the level of claims for "quality".

"Process verified" is generally used by AMS, rather than "certified," when a company would like to make claims about how an animal is raised (e.g., antibiotic free). AMS cannot simply look at the meat product to confirm that it meets the animal raising claim. Therefore, rather than "certify" at a plant, AMS "verifies" that the company is following an appropriate husbandry program by (1) initially approving the company's program; and (2) auditing the facilities.

Process verified programs are more complex than certified claims. First, the applicant must establish a program (i.e., explain how the animals are raised) and justify the claims that would be made often by working in conjunction with the agency. Once the program has been completed and submitted to USDA, the agency will conduct a formal review of the program, including an on-site audit. By the time of the on-site audit, the program must be well-established and every person at a facility must be well acquainted with his responsibilities.

In this case, the country of origin labeling program, which must take into account the entire production cycle of the product and cannot be verified simply by looking at the final product is analogous to a process verification program type claim. USDA requires significant documentation for process verified claims, including on-site audits. Accordingly, consistency with AMS's other process verified programs requires that the agency insist on more than mere self-certification in support of the process verified claims related to country of origin.

C. Retailer Recordkeeping Issues

The proposed regulations would require retailers to retain records and other documentary evidence relied upon at the point of sale to establish a covered commodity's country of origin and method of production. These point of sale or retail level records would be required to be kept at retail or otherwise be "reasonably available" to inspectors who enter retail establishments for at least seven days following the retail sale of the product. Proposed 7 CFR § 60.400(c)(1). The proposal cites a shipping receipt from a central warehouse as an example of a record acceptable in this regard.

In addition, records that identify the retail supplier, the "product unique to the transaction," and the country of origin and method of production of the product must be maintained for a period of two years from the date the declaration was made at retail. These records may be maintained at the retailer's point of distribution, warehouse, central offices or other offsite location. Proposed 7 CFR § 60.400(c)(2). We offer the following comments on the retailer recordkeeping provisions.

1. Supplier Provided Record Accompanying Product Should Be Sufficient To Satisfy Proposed In-Store Recordkeeping Requirement

The proposed regulation identifies a shipping receipt from the central warehouse to the retail store as an example of the type of record that would be sufficient to satisfy the proposed in-store recordkeeping requirement. Although some retailers or wholesalers may be able to modify their electronic recordkeeping to provide this information from distribution center to retail store, many have expressed extreme difficulty with this. The challenge is that distribution center product management systems were not designed to capture country of origin and method of production information, either when the product

enters the distribution center in pallet format or when the pallets are broken down into the individual cases that are shipped to retail stores. Re-tooling electronic systems to capture this information or capturing it manually by handwriting would both be inordinately costly.

As an alternative, USDA's final regulations should expressly recognize that a document identifying the country of origin and method of production provided by the supplier that accompanies the product from the supplier all the way through to the retail store would serve as an adequate record upon which the retailer could justifiably "rely at the point of retail sale to establish a covered commodities" origin and production status. Information substantiating a covered commodity's origin and production claims that was accessible through an electronic supplier-retailer database should also meet USDA's requirements for the information to be reasonably available to inspectors at store level.

Moreover, pre-labeled products should not require any additional documentation at retail level. The label itself is the documentary evidence upon which the retailer is relying to establish the product's country of origin and method of production. As discussed more fully above, country of origin and method of production are fact-specific declarations that cannot be determined by the retailer; this information is known only to the supplier and retailers should not be accountable for its accuracy. It would be unnecessarily redundant and costly for a supplier of frozen bagged shrimp that had the country of origin and method of production printed on the bag itself to supply an additional document to the retailer that required initial and ongoing labor and systems costs to maintain when the document provided information identical to that printed on the product itself.

2. Record Retention Time Frames

As discussed more fully above, proposed Section 60.400(c) would require retailers to retain records at store level for at least seven days following retail sale and at corporate for two years. The preamble requests comment on whether a one year record retention period is more appropriate for perishable covered commodities and observes that the Food and Drug Administration's proposed Bioterrorism Act recordkeeping regulations set forth this standard.

a. Retailers Should Not Be Required To Maintain Store Level Records Following Sale of Covered Commodity Because Such Records Duplicate Existing Information Without Serving Any Useful Purpose

As stated repeatedly above, retailers are required to inform consumers of the country of origin and method of production of covered commodities at the final point of retail sale. USDA has indicated that the purpose of retail level records is to allow

inspectors to conduct audits and inspections beginning at the point of sale to verify the claims that retailers are required to make under Subtitle D. Toward that end, USDA expects retailers to be able to provide some basis for any claims that are being made in the store regarding the country of origin and the method of production of the product.

In the case of pre-packaged or pre-stickered product, the information or label on the product itself is the retailer's claim and basis, and the statute specifically allows for this. See 7 USC § 1638a(c). We understand USDA's interest in reviewing a document at retail for non-packaged product, such as a retail display of salmon fillets, however, once the product has been sold, the in-store documentation is no longer necessary.

First, in-store inspectors will not try to ascertain the basis for a declaration for a product that is not physically present in the store at the time of inspection. Second, if a question arises regarding the perspicacity of a country of origin or method of production declaration once the product has been sold to the consumer, the corporate level records that the retailer is separately required to maintain should provide an adequate basis for the inspectors to find the original source of the claim (which will not be the retailer) to verify its accuracy and basis. Records retained at store level for seven days following retail sale will in no way enhance this process or serve any purpose if the information can already be obtained through corporate level records.

Moreover, in order to retain records after the product is sold, in many cases, new and entirely duplicative records would need to be created. Country of origin and method of production information will appear directly upon many of the covered commodities that will be sold at retail. For example, the majority of fresh produce items now bear stickers with country of origin information. It is reasonable to expect that all of the frozen covered commodities – fruit, vegetables, fish, shellfish, meat products – will have country of origin information printed directly on the package. Canned seafood will likewise bear the necessary country of origin and method of production information directly on the label.

The information printed directly on the product adequately serves as the basis upon which the retailer is making its country of origin/method of production notification and the statute specifically allows such labels to meet the retailer's Subtitle D obligations. Retailers are not required to restate country of origin information if it is already provided by label, stamp or mark. Indeed, the statute specifically states that the retailer is not required to provide any additional information to comply with the statute if the covered commodity is already individually labeled for retail sale with country of origin. See 7 USC § 1638a(c)(2).

However, if retailers are required to retain store level records for the sole purpose of capturing the information – that is in many cases directly affixed to the product – so that it is available in the store for seven days after sale, it will require the development of systems simply to duplicate and maintain information that is already available to the

consumer and that is already required to be maintained at corporate level. This would be an extraordinarily costly undertaking with no associated benefit in terms of informing consumers or facilitating enforcement.

Although a seven-day post-retail sale record retention requirement mitigates some of the costs that would have been associated with the two-year recordkeeping system set forth in the Voluntary Guidelines, the primary costs for many retailers will be in the development of the systems to capture the information in the first place, rather than the ability to store it for seven days instead of two years. The costs are particularly difficult to rationalize for packaged products with long shelf lives, such as canned tuna fish, which has a prolonged shelf life. If the final regulations conclude that canned tuna fish is a non-processed covered commodity, tuna fish processors and canners will modify their labels to include the requisite country of origin and method of production information, which will be plainly and readily available to consumers and inspectors directly on the product for an extended period of time. It makes no sense to require retailers to develop systems to copy this information just so that they will have a separate record of it for the prolonged period of time that the tuna fish may be on retail display plus seven days after the product is sold.

b. Retail Corporate Record Retention Requirement Should Not Exceed 6 Months for Perishable Products

The preamble notes that FDA's proposed Bioterrorism Act recordkeeping regulations include a one year recordkeeping requirement for perishable food products and requests comment on whether this would be a better standard for corporate level record retention under Subtitle D. As discussed more fully above, suppliers should be required to maintain records until they can be reasonably certain the food will no longer be available for retail sale. For example, the country of origin declaration for a steak requires documented information on the entire life cycle of the cow that was the source of the food product because the declaration depends on where the cow was born, raised and slaughtered. The finished consumer meat product may be deemed "perishable" but it would be essential for the livestock producers that fostered the cow during its development to maintain the records necessary to document the lifecycle of the cow for substantially longer than one year or six months because the food product would not even enter the channels of retail distribution within that time period.

In contrast, once they have entered the retail distribution system, perishable products sold from retail can reasonably be expected to be consumed well within six months following retail sale. Accordingly, the corporate level retail recordkeeping requirement should extend no more than six months for perishable products.[4]

[4] The Agency seems somewhat concerned that a one-year recordkeeping requirement might conflict with PACA, which requires the records required under that statute to be retained for two years. These concerns are unfounded. First, PACA doesn't require country of origin labeling at all. Second, PACA only

c. USDA Should Explain "Date of Declaration" Standard

The proposed regulations would require retailers to maintain corporate records for a period of two years "following the date the origin declaration was made at retail." Proposed 7 CFR § 60.400(c)(2). The preamble to the final regulations should state that this date is the date upon which the product was received at the retail store.

3. USDA Should Omit the Requirement To Identify "Product Unique to the Transaction" from the Final Rules

Proposed Section 60.400(c)(2) would require retailers to be able to identify products "unique to the transaction" through recordkeeping. Although the term is not explained in the preamble it presents a potentially extraordinarily high standard that would be inordinately costly to achieve, particularly for the implementation of a marketing statute. For example, many of the bulk commodities that will require labeling under Subtitle D simply cannot be individually identified. Shrimp, individual string beans, and bulk peanuts are all examples of covered commodities that cannot be individually identified and therefore retailers would have no way of being able to specify which individual items were unique to which transaction.

IV. Implementation Issues

Executing the Subtitle D mandatory country of origin labeling program presents a host of implementation issues to the retail food community. As discussed more fully below, the final regulations should address the following: statutory flexibility regarding the vehicle for consumer notification; the clear exemption of food service establishments within retail facilities from the Subtitle D labeling requirements; application of the Subtitle D requirements to remote (e.g., Internet sales); and the use of state and regional labeling to satisfy Subtitle D.

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applies to perishable agricultural commodities. Subtitle D applies immediately to seafood and, in the future, it will apply to beef, pork, lamb and peanuts, as well as produce. Therefore, any perceived inconsistencies should not raise concern. Indeed, necessary PACA records will still be required for two years, regardless of USDA's ultimate resolution of the Subtitle D record retention standard.

A. Statute Requires Flexible Methods of Country of Origin Notification at Retail [Proposed 7 CFR §§ 60.200, 60.300]

1. Type of Notification

The statute allows country of origin information to be provided by means of a "label, stamp, mark, placard or other clear and visible sign on the covered commodity or on the package, display, holding unit, or bin containing the commodity at the final point of sale to consumers." 7 USC 1638a(c). The Voluntary Guidelines generally followed the statute and further provided that the information must be "conspicuous," and either typed, printed or handwritten. 67 Fed. Reg. at 63374.

The proposed regulations include two separate sections relevant to this statutory section: Section 60.200, "Country of Origin Notification," and Section 60.300, "Markings." Proposed Section 60.300 generally follows the parameters set forth in the statute and reiterated in the Voluntary Guidelines by permitting the country of origin designation to be made in the form of a placard, sign, label, sticker, or other format that allows consumers to identify the country of origin and method of production. Proposed 7 CFR § 60.300(a). Paragraphs (b) and (c) require the information to be typed, printed or handwritten and placed "in a conspicuous location so as to render it likely to be read and understood by a customer under normal conditions of purchase."

In contrast, Section 60.200 states as follows in relevant part:

> In providing notice of the country of origin as covered by the Act, the following requirements *shall* be followed by retailers:
>
> (a) Each covered commodity offered for sale individually, in a bulk bin, carton, crate, barrel, cluster, or consumer package *shall bear* a legible declaration of the country of origin as set forth in this regulation.
>
> *******
>
> (d) The notice of country of origin for fish and shellfish *shall include* and distinguish between wild and farm-raised fish and shellfish as those terms are defined in this regulation.

Proposed 7 CFR § 60.200 (emphasis added). To ensure internal regulatory consistency and consistency with the statute itself, we urge the Department to make the following modifications in the final regulations:

(1) **Include Proposed 7 CFR § 60.300(a).** We urge the Secretary to recognize the express language in the statute and maintain flexibility in the final regulations regarding the ways in which retailers satisfy their statutory obligations to inform consumers of the country of origin of covered commodities.

(2) **Delete Proposed 7 CFR § 60.200(a).** The statute allows retailers to inform consumers of the country of origin of covered commodities through a broad number of mechanisms, including placards, signs, etc. Paragraph (a) appears to require that each individual covered commodity bear the declaration directly on the product, blurring the long-recognized distinction between "labeling" (information that can accompany the product) and "labels" (information that is affixed to the product). The statute clearly permits a broad range of labeling, which is especially appropriate in light of the fact that some products, such as fish fillets or bulk shrimp displayed in a retail case, cannot be individually labeled. Proposed Section 60.200(a) is confusing and contrary to the statute and, therefore, should be deleted.

(3) **Clarify the "conspicuous location" requirement to include any place on the package or product.** USDA should expressly recognize that country of origin information can be considered "conspicuous" even if it is a label placed on the back of a random weight package. The country of origin declaration for hamburger set forth in the proposed regulations could cover a substantial amount of the product surface area if it was required to appear on the front of the package with all of the other federally mandated labeling. Indeed, some localities limit the amount of package surface that may be covered to avoid concealing products from consumers. Accordingly, provided that the information is presented to consumers in a manner in which they can readily access it, the information should be considered conspicuous, regardless of where it appears. Indeed, since the statute can be satisfied by providing a sign at the store, to the extent that the information is affixed any where on the package, it will be available to the consumer for a greater period of time.

With respect to in-store labeling, the preamble should recognize that "conspicuous" labeling may be provided in a broad number of ways, including signs adjacent to a bulk display, pin tags for seafood in a display counter, or a conspicuously located blackboard that identifies covered commodities and their country of origin. This approach might be particularly useful for retailers who decide to offer limited covered commodities or covered commodities from a limited number of countries. For example, if a retailer chooses to source all of the seafood that will appear in its retail display case from Canada because that country can fulfill all of its seafood needs on a year-round basis, a declaration on a blackboard above the seafood counter that the store proudly offers only seafood wild caught from the cold, clear waters of Canada should be sufficient to satisfy Subtitle D's mandate.

(4) **Permit the seafood method of production declaration to be made separately from the country of origin declaration.** Proposed Section 60.200(d) suggests that the method of production declaration must be made in the same place as the country of origin declaration. USDA has the discretion to permit the declarations to be made separately and we urge the Department to maximize the flexibility given to retailers to provide information to consumers. Retailers should be allowed to provide the information required under the statute in any way that may reasonably be expected to inform consumers.,

B. Food Service Areas of Grocery Stores and Food Banks Are Properly Exempted under Food Service Establishment Provision of Statute [Proposed 7 CFR § 60.109]

Under the statute, 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.

7 USC § 638a(b). Congress defined a "food service establishment" 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. 7 USC § 1638(4). USDA's Voluntary Guidelines recognized that food service establishments should include salad bars, delicatessens, and other prepared food enterprises that provide ready-to-eat foods that are consumed either on or outside of the retailer's premises. 67 Fed. Reg. at 63372. FMI's comments encouraged USDA to continue this approach in the proposed regulations and to recognize explicitly that "other similar facilities" include food banks and reclamation centers; our comments in this regard are incorporated by reference fully herein.

USDA's proposed regulations define the phrase "other similar facility" that is included in the statutory language to include salad bars, delicatessens, and other food enterprises located within retail establishments that provide ready-to-eat foods that are consumed either on or outside of the retailer's premises. Proposed 7 CFR § 60.109. Such ready-to-eat foods should expressly include fruit salad, or trays or bowls of a single sliced fruit item, as well as all other food items that are prepared and sold to consumers for their consumption either on or outside of the retailer's premises, such as grilled fish.

We concur with the Department's proposed definition and recommend that it be included in the final rule with the modification indicated in *italics* to ensure that food banks like charitable organizations will be considered food service establishments.

> …Similar food service facilities include salad bars, delicatessens, and other food enterprises located within retail establishments that provide ready-to-eat foods that are consumed either on or outside of the retailer's premises. *Similar food service facilities include food banks, and reclamation centers or other organizations that deliver food to food banks or other charitable organizations that prepare and serve food to consumers in normal retail quantities.*

C. Country of Origin Information for Remotely Purchased Products Should Be Allowed *Either* at Time of Customer Selection *or* at Time of Product Delivery [Proposed 7 CFR § 60.200(i)]

The statute requires retailers to inform consumers of the country of origin and method of production for all covered commodities at the final point of retail sale. 7 USC § 1638a(a)(1). In the case of remote sales, USDA's Voluntary Guidelines interpreted the "final point of sale" standard to require the retailer to provide country of origin information on the sale vehicle, such as the internet site. 67 Fed. Reg. at 63371.

Our comments to the Department pointed out that this approach is not required by the law and explained the practical and logistical difficulties inherent in this approach. (Our comments in this regard are hereby incorporated by reference.) Proposed Section 60.200(i) requires retailers to provide country of origin information to consumers at the time that the product is delivered to the consumer.

We are pleased that the Department recognized the inherent difficulties that requiring country of origin to appear on the internet sales vehicle at all times would present, but respectfully request that the final regulations permit country of origin and method of production information to be provided to consumers *either* on the sales vehicle at the time of selection *or* at the time that the product is delivered to the consumer. For example, a retailer may reasonably choose to satisfy its Subtitle D obligations by posting a notice on the website, if, for example, the retailer chooses to source only New Zealand lamb for its marketing cache. Since the information is not subject to change in this scenario, posting it once on the website might be the most reasonable approach.

Alternatively, consumers may be informed of the country of origin/method of production of the product at the time that the product is delivered through one of several options. Some products will bear the information directly, such as a labeled can of tuna fish or an apple that bears a sticker with country of origin information. Bulk shrimp that is wrapped with a scale label that sets forth not only the weight and product identity but its country of origin and method of production would also give the consumer the requisite Subtitle D information. If the information cannot be affixed to the product itself, USDA should permit the retailer to include the information on the receipt or other document that is provided to the consumer at the time of delivery.

D. State/Regional Labeling

The mandatory country of origin labeling law requires retailers to inform consumers of the *country* of origin of the covered commodity. In the Voluntary Guidelines, the Department "determined that state and regional labeling programs … do not meet this requirement" and therefore cannot be accepted in place of country of origin labeling. 67 Fed. Reg. at 63371. In subsequent public presentations on the country of origin labeling law, Department representatives averred that state and regional labeling cannot be accepted in the U.S. without allowing imported products to similarly rely on regional labeling and that such labeling would not sufficiently inform U.S. consumers of the country of origin of covered commodities so labeled. Therefore, to ensure that retailers were meeting their obligations to inform consumers of the *country* of origin in a manner that did not subject the U.S. government to potential trade law violations, USDA concluded that state and regional labeling would not be sufficient.

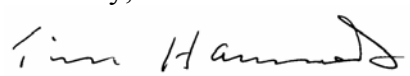
The proposed regulations are somewhat contradictory in this regard. Section 60.300(f) provides that state or regional label designations are not acceptable in lieu of country of origin labeling. However, paragraph (e) of the same section would allow the "adjectival form of the name of a country *or region/city within a country*" to be used as proper notification of the country of origin of imported commodities. Proposed 7 CFR § 60.300(e) (emphasis added).

As we did in our comments on the Voluntary Guidelines, we urge USDA to take a reasonable approach with respect to this issue and to allow retailers to identify covered commodities by their state of origin as a reasonable alternative to country of origin. If this approach truly runs afoul of U.S. obligations under international law, these obligations should clearly be articulated in the preamble to the final regulations.

* * *

We recognize that implementation of Subtitle D presents USDA with some significant challenges and urge the Agency to use the foregoing in constructing and implementing the final regulations. If we can provide you with any further information in this regard, please do not hesitate to call on Deborah White (dwhite@fmi.org or 202.220.0614) or myself.

Sincerely,



Tim Hammonds
President and CEO