Your Neighborhood Supermarkets

February 26, 2007

Via E-Mail to cool@usda.gov

Country of Origin Labeling Program
Room 2607-S
Agricultural Marketing Service
United States Department of Agriculture
STOP 0254
1400 Independence Avenue, SW
Washington, DC 20250-0254

Re: Costs/Benefits of Interim Final Rule for Mandatory Country of Origin Labeling of Fish and Seafood; Docket Number LS-03-04

Dear Sir or Madam,

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 interim final rules for the mandatory country of origin labeling of fish and shellfish. 71 Fed. Reg. 68431 (Nov. 27, 2006). In particular, USDA is seeking data on the costs and benefits of the interim final rules and their net economic impact.

As discussed more fully below, although we applaud USDA's concerted efforts to cure a faulty law through implementing regulations, the law itself is flawed and will continue to impose unnecessary burdens on retailers and seafood suppliers alike.[2] These

[1] Food Marketing Institute (FMI) conducts programs in research, education, industry relations and public affairs on behalf of its 1,500 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 retail food 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 50 countries.

[2] FMI filed detailed comments with the Department regarding the scope of the statutory provision, the Voluntary Country of Origin Labeling Guidelines that USDA published in October, 2002, the proposed regulation that USDA issued in October 2003, and the interim final rule that USDA published in October, 2004. 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 fully incorporated by reference herein.

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statutory flaws have resulted in a program that is costly for retailers and suppliers to implement and has not provided any demonstrable benefits to either group. In fact, the costs actually experienced by retailers were as much as ten times the estimated first year implementation costs set forth in the preamble to the interim final rule.

Furthermore, not a single retailer or supplier was able to document any benefit attributable to the mandatory country of origin information – the information did not impact consumer purchasing decisions, nor did consumers value the information enough to allow retailers to charge more (to cover their costs and return a surplus to suppliers who may have believed that country of origin information would generate increased revenues). Indeed, as all retailers are required to provide the information, it can not even be used as a point of differentiation. Accordingly, the net economic benefit was strongly negative for our members and for their intermediary suppliers who shared data with them.

FMI and its members strongly believe that country of origin and other comparable information about food products can best be provided to consumers through voluntary, consumer-oriented marketing programs that stress the unique aspects of different products. Marketing programs, such as "Wild Alaskan Salmon," "Georgia Peaches," or "Vidalia Onions," resonate with consumers who are often interested in purchasing products sourced from local or regional suppliers. Mandatory, standardized country of origin information will not – in fact, cannot – market products more effectively than well-devised marketing partnerships between suppliers and retailers.

A. Country of Origin Labeling Statute Is Itself Flawed

The Farm Security and Rural Investment Act of 2002, PL 107-17, also known as the 2002 Farm Bill, amended the Agricultural Marketing Act of 1946 by adding a new Subtitle D, entitled, "Country of Origin Labeling" (COL). Under Subtitle D, USDA is required to implement a mandatory country of origin labeling program for seafood, meat, produce, and peanuts. As discussed more fully below, the statute itself is fundamentally flawed in several respects that cannot be ameliorated by implementing regulations, although we appreciate the Department's efforts in this regard.

First, the statute places the obligation on retailers to provide country of origin information to consumers. Section 282(a)(1). Retailers do not have any firsthand knowledge of the country of origin of the foods that they supply to consumers. Retailers cannot look at a hand of bananas or a package of hamburger and know the country (or countries) in which the product originated. Supporters of mandatory country of origin labeling for these food products often cite the fact that other consumer products, such as televisions or clothing, bear country of origin information. However, the retailer is not responsible for determining and identifying the country of origin of those products -- the retailer does not put the country of origin label on the shirts that it sells. Rather, these products are pre-labeled by the suppliers who are in the best position to know and identify the actual country of origin of the product.

Second, the statute encompasses a broad number of covered commodities. Section 281. Special retail labeling requirements for a broad number of food products without any demonstrated benefit (see below) imposes unnecessary costs on retailers and their suppliers.

Third, the statute requires knowledge of the entire life cycle of each covered commodity. Section 282(a)(2). For example, farm-raised fish cannot bear labeling identifying it as a product of the United States, unless the fish was hatched, raised, harvested and processed in the United States. Thus, retailers must know where each stage of the fish's life occurred. An even more extreme example is beef that may only be identified as U.S. beef under the instant statute if the cow from which the beef was derived was born, raised and slaughtered in the United States. Retailers cannot look at a steak and know the country or countries in which it resided over the course of its 18 month or longer lifetime. Thus, the statute itself requires detailed life cycle tracking of the source of the food product and imposes challenges on retailers who are required to identify a specific country of origin for the covered products that they sell.

Fourth, retailers face substantial penalties for claims of which they have no firsthand knowledge. Section 283. The statute imposes penalties of up to $10,000 per violation if USDA determines that the retailer willfully violated the statute. Although the interim final rule as interpreted by USDA allows retailers to rely to some extent on the information provided by their suppliers, even minor, store level implementation errors may result in fines imposed by USDA under the current statute.

These are all elements of the statute itself that cannot be fixed through, even the most reasonable, regulatory activity. Accordingly, FMI continues to believe that the statute itself must be fixed by Congress.

B. COL Does Not Provide Any Quantifiable Benefits

In its most recent Federal Register notice, USDA requested data that demonstrate the benefits of country of origin labeling under the mandatory program. Specifically, USDA asked whether the country of origin and method of production information provided for seafood generated any increased demand for the product and whether it affected consumer purchasing decisions.

Our members have advised that they have not seen any increase in sales as a result of the governmentally required information, nor have they seen any other benefits either at store level or in terms of consumer response. Indeed, one large retail member noticed a drop in seafood sales during the first 30 days following seafood country of origin labeling implementation. Although the retailer could not tie it directly to the new labeling, nothing else changed within their stores during that period; seafood sales stabilized within 45 to 60 days following implementation.

Nor have our members reported an ability to charge more for seafood because of the availability of country of origin information, despite the fervent belief of those who support mandatory labeling that the presence of this information will provide a corresponding economic benefit in the form of higher prices paid to retailers and passed back to suppliers. The observed result is consistent with several studies that show that consumers are not, in fact, willing to pay more for country of origin information for their food products. See, e.g., Umberger, W.J., D.M. Feuz, C.R. Calkins, and B.M. Sitz, "Fact Sheet on Country of Origin Labeling Research," May 15, 2003.

Moreover, in the most recent year for which FMI obtained data of this nature, only 2 percent of consumers polled considered the country of origin of seafood to be an important attribute when they were selecting seafood. (Indeed, 17 percent of those polled indicated that *they do not purchase seafood at all* so there are 8 times more consumers who do not purchase seafood at all than who care about its country of origin.) FMI, "US Grocery Shopper Trends 2005" at Table 33. Rather, 62 percent of consumers consider quality to be the most important attribute and 19 percent find price most important in selecting seafood. Accordingly, neither FMI nor its members were surprised to learn that providing government-mandated country of origin and method of production information did not increase sales of seafood or provide any other economic benefits to retailers or suppliers.

C. COL Imposes Significant Costs on Retailers and Suppliers Alike

1. Summary of Costs

As noted above, USDA requested information on the costs that retailers and suppliers incurred to implement mandatory country of origin labeling under the interim final rules. Before discussing the actual costs, we note that USDA estimated that retailers would incur first year implementation costs under the interim final rules of $1,530 per store and that intermediary suppliers would incur first year implementation costs of $1,890 per firm. 69 Fed. Reg. 59708, 59731 (Oct. 5, 2004). These estimates should be compared to USDA's estimates for overall first year implementation costs under the more burdensome proposed regulations of $6,018 to $48,073 per retail store for *all* covered commodities – beef, pork, lamb, seafood, produce and peanuts – and for supplier firms from $4,048 to $42,602.

As discussed more fully below, retailers saw actual first year implementation costs of $9,000 to $16,500 per store (for seafood alone) and intermediary suppliers saw first year implementation costs of $200,000 to $250,000 per firm. Clearly, the actual costs for implementing seafood alone vastly exceeded the cost estimates in the interim final rule and even exceeded the estimates to implement overall country of origin labeling for all covered commodities under the more cumbersome proposed regulations.

2. Specific Costs

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Implementation costs for seafood country of origin labeling have been difficult to quantify for retailers and suppliers but the information below represents the feedback we received from our members regarding their own and some of their intermediary suppliers' costs. As discussed more fully below, retailers were required to implement operational changes, such as in their methods of receiving and displaying product, and capturing and retaining information regarding the products. Moreover, retailers incurred significant additional capital costs to purchase or upgrade scales, software and hardware, labels, signage kits, tools for capturing COL/MOP information, and segregating products. As mandatory country of origin labeling is a retail labeling program that requires store level employees of varying degrees of sophistication and experience to follow specific procedures to capture, retain, and display information along all steps from receiving through sale, training and auditing programs are essential and labor-intensive, as are the procedures that employees must follow to comply with the ongoing regulatory requirements.

One fairly large regional chain determined that its actual costs to implement mandatory country of origin labeling for seafood were approximately $16,500 per store, more than an order of magnitude greater than the USDA estimate of first year implementation costs of $1,530 per store. (Costs would have been higher, except that the company had spent over $3 million to upgrade its software and hardware at the warehouse and distribution level shortly before mandatory country of origin labeling was implemented.) The costs included retail store level training, recordkeeping systems development and scale overhaul work. (In fact, this company hired special experts to upgrade their scales with new hardware, software, equipment, and supplies overnight so that their seafood departments could remain operational during the day.) In addition, the retailer saw a 1.68 percent (or $0.07 per pound) increase in cost of goods from its suppliers directly attributable to the requirements necessary to comply with country of origin labeling.

Another member company found that its implementation costs for mandatory COL for seafood were approximately $9,000 per store and that their ongoing compliance costs were approximately $16,500 per store per year. This company incurred costs for new tools to record the country of origin/method of production information, new scales to replace those that would not accommodate method of production information, sign kits, tag stock, file folders, stickers, and label stock.

For this company, too, labor constituted the substantial portion of costs. First, costs were encountered to design and develop a program sufficient to meet the federal regulatory requirements. Then, this retailer conducted classroom training (but did not include trainer time or travel cost in its estimate), and store level training for store managers, meat department managers, and meat department employees.

This retailer also evaluated its ongoing costs to implement mandatory country of origin labeling. The retailer found that costs are incurred to receive, re-stock, and control inventory of seafood based on the product's country of origin and method of production.

Additional costs are involved to work with the retailer's suppliers and ensure that the information received meets the federal standards for recordkeeping. To ensure that program standards are maintained, the company conducts audits and sends out communications to its stores on a regular basis. The company also factored in 10 hours per year to work with USDA in response to compliance audits, an estimate that is likely to be low given the frequency of audits, even for a company that has as well-developed a compliance program as this retailer does. These procedural and operational changes are consistent, in FMI's experience, with the steps taken by the vast majority of retailers to comply with the interim final rules' requirements. Overall, the company estimated nearly $16,500 in average yearly maintenance costs experienced each year since they invested $9,000 per store to implement mandatory country of origin labeling for seafood.

In some cases, retailers have relied on their suppliers to help them meet the regulatory requirements. For example, some retailers have asked their suppliers to start providing laminated records with the requisite store level recordkeeping information along with each seafood item shipped to their stores. Retailers have discontinued business relationships with suppliers who have not been able to provide the documentation that the retailer required. Shifting business among suppliers and the transaction costs necessitated by shifting contracts is significant, but difficult to quantify. Of course, the suppliers who lost business as a result of the retailers' change in business practice likewise experienced costs associated with the retailers' compliance program.

Intermediary suppliers have reported to their retail customers that the USDA program cost between $200,000 and $250,000 per firm to implement, with annual maintenance costs at or above the implementation cost levels. Implementation costs for intermediary suppliers include time spent planning and developing compliance programs, software programming, employee training, recordkeeping required by regulation or by retailers, and hardware (such as label machines, labels and printers). Our members report that the ongoing maintenance costs experienced by their suppliers include labor, packaging and labeling to segregate products from multiple countries of origin.

One retailer's direct store delivery vendor experienced a 33 percent increase in the amount of time (and, therefore, labor cost) necessary to place orders in stores. This vendor services 500 stores and was able to set seafood displays up in stores at a rate of 6 stores per hour prior to mandatory COL; with the addition of the records and signage mandated by the seafood COL regulations, productivity dropped to 4 stores per hour. Thus, they experienced a productivity decrease of 33%, which imposed significant additional labor costs on the company.

Overall, then, the actual costs to implement mandatory country of origin labeling for seafood are greater than the costs estimated by USDA in the interim final rule or the proposed regulation (as it pertained to seafood). No offsetting economic benefits have been observed.

D. Recordkeeping Provisions Must Be Clarified in Final Rules

Although the Agency did not request comments at this time on the substance of the interim final rules for seafood country of origin labeling, we believe that the Department should reopen the comment period in this regard, as well, before issuing final regulations. Our members have significant concerns regarding the recordkeeping provisions of the interim final rules. We have attached the comments that we filed on February 2, 2005, in response to the Department's request for comments on the interim final rule, that more fully explain our concerns and recommendations in this regard. Although we appreciate the Notice to the Trade that USDA issued in March 2005, five months after the interim final rules were published, we believe a thorough re-examination of the recordkeeping regulations is still warranted.

* * *

As explained more fully above, retailers and their suppliers have incurred significant costs to comply with the mandatory country of origin labeling regulations for seafood and have not seen any benefits. We appreciate the opportunity to provide our comments to USDA on this very important matter and respectfully request that you consider our comments on the record and respond to them fully as you proceed.

Sincerely,

Deborah R. White
Vice President and
Associate General Counsel

cc: Martin O'Connor,
Chief, Standards, Analysis and Technology Branch
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February 2, 2005

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 Interim Final Rule for Mandatory Country of Origin Labeling of Fish and Shellfish (Docket No. LS-03-04)

Dear Secretary Hawks:

The Food Marketing Institute[3] (FMI) is pleased to respond to the U.S. Department of Agriculture's (USDA's) request for comments on the Department's interim final rule (IFR) to implement the mandatory country of origin labeling (COL) program 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). 69 Fed. Reg. 59708 (Oct. 5, 2004). 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, the Voluntary Country of Origin Labeling Guidelines that USDA published in October, 2002, and the proposed regulation that USDA issued in October 2003. These comments fully explain FMI's interpretation of the statute as a whole, our

[3] 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.

members concerns with its structure, and the likely impact on the marketplace. To avoid duplication, these comments are fully incorporated by reference herein.

The Department has worked diligently through its three interpretations of the mandatory COL statute to create a regulatory system to implement a flawed law in the most reasonable way possible. For example, in the IFR, USDA specifically recognized that a label applied by a supplier to a package should serve as a complete record sufficient to satisfy the retailer's recordkeeping obligations at store level for that product. Given the time constraints, we appreciate the fact that USDA issued the previous rulemaking as an interim final rule with this opportunity to comment and has indicated that compliance will be emphasized over enforcement in the period immediately after the IFR becomes effective. We appreciate these and the other changes discussed below that USDA incorporated in the interim final rule.

However, the retail food and distribution industries continue to be concerned with the mandatory law and with the recordkeeping provisions in USDA's regulations. Although we fully recognize that USDA cannot impact the underlying statute, we urge you to amend the regulatory recordkeeping provisions in the final rule.

Specifically, our membership has difficulty understanding the current requirements and how the records described therein will assist either USDA or the food industry in substantiating the origin and production claims required by the statute. Accordingly, and as discussed more fully below, we respectfully request that you simplify the final regulation's recordkeeping requirements to allow a complete record applied to an individual package or to a carton of bulk product by the supplier with knowledge to serve as the only record necessary at retail and remove the requirement that this information be captured by intermediary suppliers along the supply chain. Moreover, the specific parties who are required to maintain records should only be required to do so until product is sold at retail.

Under this system, which is explained more fully below, USDA inspectors will be able to go directly to the source of the claim, without tracing the product through each step of the distribution system since the basis for the claim itself cannot change once it is fixed by the knowledgeable supplier. This more efficient approach is also likely to increase accuracy since each time information is captured and transferred, there is some inherent risk of inaccuracy.

In addition, we strongly urge the Department to establish a new effective date for the final rule, rather than relying on the effective date for the interim final rule, and we respectfully request that you consider applying USDA's Food Safety and Inspection Service's uniform compliance date policy to the final regulations that will be issued on country of origin labeling by USDA's Agricultural Marketing Service.

I. <u>Recordkeeping</u>

As noted above, the food retail and distribution industries continue to find the regulatory recordkeeping provisions for mandatory COL difficult to understand and to implement. Based on a number of discussions with interested parties, we have the following suggestions for simplifying the regulations to better serve everyone's interests. A brief review of the evolution of the current requirements may shed some light on how they came to pass and how they may be improved.

A. Background

1. Development of Current Regulations

Section 282(d) of the COL statute 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 to a retailer" to "provide information to the retailer indicating the country of origin of the covered commodity." 7 USC 1638a(e).

In the October 2002 voluntary guidelines that USDA first issued to interpret the statute, USDA indicated that retailers (and everyone else along the chain) should retain records for two years. USDA received numerous comments on this element, including from the retail community, which responded that keeping records for each covered commodity (which included meat and produce in addition to seafood) at every grocery store for two years after sale would create a mountain of paperwork.

USDA understood the potential magnitude of the problem and, in the proposed rule issued in October 2003, the Department allowed retailers to divide up their record retention obligations. Specifically, the proposed regulation would have required retailers to maintain the minimum information necessary for USDA to verify claims – method of production and country of origin – at store level while the remainder of the information could be kept at corporate headquarters or a warehouse. USDA also shortened the retention period to require store level records to be kept for 7 days and corporate records to be retained for one year.

Although simpler than the original recordkeeping system, the retail community pointed out that USDA would not be verifying the accuracy of claims made on product once it had left the store. Accordingly, we recommended that USDA remove the requirement to maintain store level records for seven days past retail sale. We also urged USDA to permit a label applied to a packaged product by a supplier with knowledge to serve as the only record required at store level for that product. This approach recognizes that the supplier has the requisite information to support the claim and that there is no

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reason for a retailer to duplicate that information simply to have a separate record available for the 7-day post-sale requirement.

2. IFR Recordkeeping Requirements

As an outgrowth of the foregoing interpretations – and to the best of our understanding – the interim final rule sets forth the following recordkeeping requirements.

Retailers are required to keep the following information for one year "from the date the declaration is made at retail" at store level or another reasonably accessible location, such as a warehouse or corporate headquarters:

(a) Retail supplier;
(b) Product unique to the transaction "by means of a lot code number or other unique identifier"; and
(c) Country of origin and method of production for products that are not pre-labeled.

7 CFR 60.400(c)(2). In addition, retailers must have available at store level until the product is sold those records upon which they relied to make the requisite origin and production declarations. 7 CFR 60.400(c)(1). However, for "pre-labeled products," the label itself is sufficient evidence upon which a retailer may rely to establish the product's origin and method of production. Id.

Suppliers also have recordkeeping obligations. Specifically, they are required to keep records to establish the "immediate previous source and immediate subsequent recipient" in such a way that identifies the "product unique to the transaction by means of a lot number or other unique identifier." These records must be maintained for one year from the date of the transaction. 7 CFR 60.400(b)(3).

In addition, "suppliers responsible for initiating" origin and production claims must keep records that are necessary to substantiate those claims. 7 CFR 60.400(b)(1). USDA does not specify a period of time for which these records must be maintained.

Although not recordkeeping, *per se*, these same regulations also set forth suppliers' obligations to transfer information on the origin and production methods for the products they convey. Specifically, anyone engaged in the business of supplying a covered commodity directly or indirectly to a retailer must make information available to the buyer about the country of origin and method of production of the covered commodity being supplied. 7 CFR 60.400(b)(1). This information may be provided as follows:

> …[E]ither on the product itself, on the master shipping container, or in a document that accompanies the product through retail sale provided that it identifies the product and its country(ies) of origin and method(s) of production, unique to that transaction by means of a lot number or other unique identifier.

7 CFR 60.400(b)(1).

B. Comments on Improving the Recordkeeping Requirements

1. Concerns

Despite our best efforts to distill the regulatory language on recordkeeping into useable guidance, it remains difficult to understand and use. For example, it is not clear from the structure of the language and the regulation whether the information on product, origin, and lot code, which is currently tacked on at the end of Section 60.400(b)(1) applies only to the document option for conveying information or to the master shipping container and product options as well. If USDA intended the former, the basis for the distinction is not clear.

Furthermore, USDA includes a one-year record retention requirement for retailers but does not require the "supplier who initiates a claim" to maintain the substantiating records for any period of time. Since it is this information that is essential to verifying the claims that retailers are required to make, the final rule should also include a record retention standard for these types of records.

Along the same lines, the IFR imposes a one-year record retention requirement on retailers to be measured "from the date the declaration is made at retail." For bulk raw product, the date will be within a relatively small range, however, for some products with a lengthy shelf life (*e.g.*, frozen shrimp), it is nearly impossible to understand how to apply the record retention requirement.

Another example relates to "pre-labeled" products. The IFR allows the label on "pre-labeled products" to serve as a sufficient record at retail – a concept supported by the retail community – however, the regulation does not define "pre-labeled," so questions have arisen as to whether this might include product labeled by the retailer before it is displayed for retail sale. Similarly, it is not clear whether for these pre-labeled products the label is intended to serve as the only record required at store level or the only record retailers are required to maintain for the product at all.

In addition, the IFR incorporates several concepts that have not appeared in either the Voluntary Guidelines or the proposed COL regulations but instead reflect elements of the *proposed* regulation that the Food and Drug Administration (FDA) issued in October 2003 under the records maintenance authority recently granted to that Agency by the Bioterrorism Act. It is worth noting that FDA's final rule in this matter – which was issued in December 2004, two months *after* USDA's October 2004 IFR was published –

declined to retain the most significant of these elements, namely, lot code tracking. Much of the rationale that FDA employed to support the Agency's decision to remove the lot code tracking requirement from its final regulation, which is related to food security, should inform USDA's process for issuing the seafood COL regulation, which, as USDA has long recognized, relates fundamentally to marketing, rather than food safety or security.

As the foregoing concerns illustrate, although we believe that the recordkeeping provisions in the current IFR are essentially well-meaning and intended to respond to issues raised at each of the many turns in the lengthy regulatory process, we recommend that USDA revisit the recordkeeping provisions in their entirety, starting with the terminology, and adopt instead the framework set forth below.

2. Recommendations

a. **Terminology**

Part of the challenge in making sense of the IFR requirements is the variability in the language used by USDA in the recordkeeping section of the regulations to identify different persons along the supply chain. USDA seems to distinguish among different participants or suppliers according to their place in the chain but does not set forth clear definitions that are used consistently throughout. Accordingly, for purposes of these comments we will use the following terms and recommend that USDA adopt similar terminology in the final regulation:

> **Supplier**: *Anyone engaged in the business of supplying a covered commodity to a retailer, whether directly or indirectly, or any person that prepares, stores handles or distributes a covered commodity for retail sale*. An "umbrella" term for suppliers would help facilitate the overall discussion. This definition recognizes the statutory standard for persons subject to the recordkeeping requirements and encompasses the following two types of suppliers.
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> **Knowledgeable Supplier**: *A supplier who handles a covered commodity at the final stage at which the covered commodity's country of origin or method of production is determined and, therefore, is responsible for associating a specific origin and method of production with a specific product, thereby initiating an origin or production claim*. This term recognizes the distinction among certain types of suppliers that USDA brushes against in the interim final rule. Suppliers who are responsible for initiating claims should have distinct recordkeeping requirements as they are the ultimate and definitive source of the information retailers are required to supply to consumers.
>
> **Intermediary Supplier**: *A supplier who handles a covered commodity as it is distributed from a Knowledgeable Supplier to a Retailer, but who does not possess any independent knowledge of the origin or production of the covered*

commodity or impact the origin or production status of the covered commodity. This definition recognizes that distributors who simply pass product along the chain stand in a different position from a Knowledgeable Supplier with respect to their ability to impact the accuracy of the claim ultimately made at retail and, therefore, with their obligation to retain information.

In addition, rather than distinguishing among different types of information that can or should be retained at different levels, we recommend that USDA adopt the concept of a Complete Record, which we propose as follows:

Complete Record: *A record provided by a Knowledgeable Supplier that travels with the covered commodity to the retailer that includes all of the information necessary for USDA to verify the accuracy of the claim ultimately made by the Knowledgeable Supplier, including the following: the Knowledgeable Supplier's name, address, and telephone number; the identity of the covered commodity; the covered commodity's country of origin and method of production; and, if necessary, the unique identifier that the Knowledgeable Supplier will use to locate the supporting records relevant to that particular product.*

b. **Recordkeeping Proposal**

Using the foregoing terminology, we recommend that USDA adopt the following simplified recordkeeping framework.

1. **A Complete Record provided with a covered commodity by a Knowledgeable Supplier directly or indirectly to a Retailer and held at store level until retail sale satisfies the Retailer's recordkeeping obligations in full.**

2. **Intermediary Suppliers should not be required to record or maintain any information on a covered commodity that is accompanied by a Complete Record attributable to the Knowledgeable Supplier as it passes through the Intermediary Supplier on the way to a Retailer.**

3. **Knowledgeable Suppliers should be required to maintain detailed records necessary to substantiate the claims made until the covered commodity is sold at retail.**

Together the foregoing three principles serve as the basis for a sound regulatory recordkeeping system that adequately supports the ability of USDA to enforce the mandatory country of origin labeling law without imposing any more burden than is necessary on any sector of the production, supply, or retail chain.

Specifically, this system would ensure that all of the information necessitated by USDA to enforce the statute would be readily available to the inspector, thereby

increasing the efficiency of USDA's investigative resources. We recognize that the retail community initially objected to keeping two years worth of complete records at store level for all covered commodities. As the recordkeeping provisions have evolved, however, USDA has recognized that it is not necessary to retain records at store level past retail sale. Therefore, holding complete information until retail sale for the limited number of commodities covered by the seafood COL regulation is possible, particularly if the store level requirement replaces the need to capture the information along the distribution chain (*e.g.*, from distribution center to retail store) or to capture and retain the information at corporate level.

This approach is supported by USDA's recognition in the IFR that the label applied by a supplier on a "pre-labeled product" is a sufficient record.[4] In fact, the approach enumerated in the principles above is simply the logical extension of USDA's position with respect to the label on pre-labeled products serving as an adequate store level record, *e.g.*, USDA can look at the information generated by the supplier (the Knowledgeable Supplier, using the terminology we recommend) and return directly to that supplier to verify the accuracy of the information provided. Provided the Complete Record is given in a form that adequately assures USDA that all information was provided by the Knowledgeable Supplier and the Knowledgeable Supplier is responsible for its accuracy, we believe this approach is directly parallel to the approach set forth in the IFR for pre-labeled product; we are here simply proposing to extend it to all products, including bulk product where the Complete Record accompanies the bulk carton to retail.

Moreover, the principles enumerated above would increase the accuracy of the information at store level. Despite all efforts to ensure accuracy to the greatest degree possible, there are inevitable mistakes made when information is recorded and transmitted again. Just as in the old game of telephone, information initiated at the start of the chain is likely to differ from the information generated at the end. The distribution system is not currently set up to capture the information, including lot codes, that would be required to be retrieved and forwarded under the IFR. Establishing these systems would be costly and without any benefit in terms of enforcement if the information can be transferred to store level in a manner that gives a high degree of assurance that the information was generated by the Knowledgeable Supplier.

In this regard, we understand the Department's concern with labels that are applied to cartons in an *ad hoc* fashion (*e.g.*, a sticker that simply says "wild" without further information) or with check boxes that are printed on the side of the carton but filled in manually; namely, the Department does not have a reasonable basis to know who along the distribution chain applied an *ad hoc* label to a carton or who might have checked a particular box on the outside of a carton as the carton was passed from Knowledgeable Supplier to Intermediary Supplier(s) to Retailer. Accordingly, the concept that we have proposed of a Complete Record pre-supposes that the information will be supplied in a way directly attributable to the Knowledgeable Supplier, in the same

[4] Although USDA does not define the term "pre-labeled product," we expect the Department is referring to consumer-sized packages of product that are individually labeled by the supplier.

fashion that USDA has a high degree of confidence in the integrity of the label applied to a pre-labeled product (as evidenced by Section 60.400(c)(1)). Accordingly, we believe that a Complete Record in the form of a label applied to the side of a bulk carton, in much the same way as a label is applied to an individual, consumer package of product, should serve as an adequate record to allow USDA to return to and verify the claims made by the Knowledgeable Supplier.

Although not directly related to recordkeeping, as noted above, USDA sets forth the suppliers' obligation to provide information on origin and production to subsequent recipients of the covered commodity in Section 60.400(b)(1). USDA allows that information to be transferred through any of the three methods stated above. We respectfully submit that, if a Complete Record is provided by any of these methods from the Knowledgeable Supplier to the Retailer, there is no need for Intermediary Suppliers to capture and maintain information as the covered commodity passes through them as long as the Complete Record stays with the covered commodity. Similarly, this system obviates the need for retailers to retain this information at corporate level for one year.

We realize that USDA originally incorporated the one-year corporate level retention requirement for retailers as a compromise from the initial requirement to keep two years of complete records at the retail store. However, once USDA recognized that it is not necessary to keep records at store level past retail sale, the same logic applies to the corporate level recordkeeping requirement when a Complete Record travels with the product from Knowledgeable Supplier to store level.

The information required in the record also bears some discussion. First, USDA's IFR picks up the Bioterrorism Act requirement that persons in the food chain need to maintain records on the immediate previous source and immediate subsequent recipient of food products. That requirement is written into the Bioterrorism Act, which amends the Federal Food, Drug, and Cosmetic Act, and has no bearing on any statutes for which USDA is responsible; no comparable language appears in the mandatory COL statute. Under the principles enumerated above, there is no need to capture the identity of each step along the supply chain when USDA can refer to the Complete Record available at retail to return immediately to the source of the claim to verify its accuracy. As the mandatory COL law is – as USDA has repeatedly recognized – a marketing law, the only step in the chain that USDA needs to know in order to administer the mandatory COL law is the identity of the Knowledgeable Supplier. It is not necessary to trace back through each step of the distribution chain when a Complete Record attributable to the Knowledgeable Supplier is available at retail.

Second, the IFR also picks up language in the *proposed* regulations FDA issued to interpret the Bioterrorism Act records maintenance provision with respect to lot code tracking. Specifically, FDA's proposed regulation would have required any person who manufactures, processes, packs, transports, distributes, receives, holds or transports food for human consumption in the U.S. to maintain records on the lot or code number or other identifier of the food. Proposed 21 CFR 1.337, 1.345, 68 Fed. Reg. 25188 (May 9,

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2003). Although lot code tracking had not appeared in any of the previous interpretations of the statute that USDA issued, the IFR (issued after the FDA proposal) requires suppliers and retailers to keep track of product "unique to the transaction by means of a lot number or other unique identifier." *See, e.g.*, 7 CFR 60.400(b)(3), 60.400(c)(2).

In its final Bioterrorism Act recordkeeping rule promulgated in December 2004 (two months after USDA's seafood COL IFR was published), FDA deleted the requirement that distributors and retailers retain lot code information and only required those who manufacture, process or pack food to do so to the extent that their systems already utilize lot codes. In the preamble to the final rule, FDA acknowledged several sound policy reasons for this choice including: lot code numbers do not facilitate (and may hinder) food safety recalls; the systems to track lot code numbers through distribution centers and at retail do not currently exist and would be disproportionately expensive to create;[5] and the inherent inaccuracy that manual transcription of lot codes would involve since systems are not currently widely available to capture this information. 69 Fed. Reg. 71562, 71599-71600 (Dec. 9, 2004).

To a large degree, we encourage USDA to adopt the same thinking and remove the requirement for lot code information from the final country of origin labeling regulations. However, if the Department decides that it is necessary for the Knowledgeable Supplier to include some unique identifier in the Complete Record so that the Knowledgeable Supplier can produce the substantiating records specific to the product that USDA is investigating, USDA should include the requirement, but not require Intermediary Suppliers or Retailers to capture or maintain the information in any way. Moreover, USDA should allow flexibility if this requirement is adopted, including permitting a pack date or "sell by" date to suffice if such an identifier would be sufficient for the supplier to locate the necessary records.

Finally, the third principle includes the standard that Knowledgeable Suppliers be required to maintain detailed records to substantiate the claims made. We recognize (and appreciate) that the IFR includes protection from liability for Retailers and Intermediary Suppliers who rely in good faith on statements made by their Suppliers regarding the origin and method of production of covered products. However, Retailers have a bond of trust with their customers that is jeopardized when, as in this case, Retailers are forced by law to make representations to consumers about products for which they have no firsthand knowledge. Accordingly, the final regulations should require Knowledgeable Suppliers to keep records that are detailed and sufficient to substantiate the claims that retailers must make and USDA must verify for as long as the covered commodity is available for retail sale.[6]

II. Definitional Issues

[5] This is particularly noteworthy given the food security rationale underlying the Bioterrorism Act.

[6] In this regard, see discussion of sufficiency of supplier records in Comments on Proposed Regulation at 13-17 (Feb. 27, 2004) (copy attached).

In addition to the foregoing, we have the following comments on some of the definitions set forth by USDA.

A. Retailer

Section 282(a) of the COL statute requires a "retailer" of a covered commodity to inform consumers of the country of origin and method of production of covered seafood products. Section 281(6) states that, for purposes of the mandatory country of origin labeling law, the term "retailer" has the same meaning given the term in the Perishable Agricultural Commodities Act (PACA). 7 USC 499a(b).

PACA includes a very complex definition of "retailer," which incorporates cross-references to several other definitions within PACA. The IFR definition glosses over the standard significantly by simply defining a "retailer" as anyone who is licensed as a retailer under PACA. No further explanation is provided in the preamble. Although we certainly understand why USDA would choose the simpler definition for the COL rule, we recommend that you provide the complete PACA definition in the preamble and provide the opportunity for those who are licensed as retailers under PACA but do not truly meet the statutory definition to opt out of the COL program if they so choose.

B. Processed Food

Perhaps one of the most controversial elements of the interim final rule (and, really, each of the previous iterations that USDA issued) is the scope of the processed food definition. The foods deemed "processed" by USDA in the IFR are different from those deemed processed in the proposed regulation; these, in turn, differed from the foods considered processed in the voluntary guidelines. Recognizing that the Department cannot possibly satisfy everyone on this issue, we instead opt for a degree of consistency and encourage the Department to retain the IFR processed food definition in the final regulation.

C. Food Service

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 has clarified in each of the subsequent regulatory interpretations of this

provision, including the interim final rule, that "food service" includes 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 retailers premises. 7 CFR 60.107.

We concur with the Department's approach and recommend that it be included in the final rule with the modification indicated in *italics* to ensure that food banks and like charitable organizations will be considered food service establishments exempt from the mandatory COL requirements:

> …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.*

III. Labeling

A. Commingling

The interim final regulation permits product with different countries of origin or methods of production to be sold from the same bulk container. Specifically, Section 60.300(d) states as follows:

> 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 country of origin and/or more than one method of production (wild and farm-raised) provided *all possible* origins and methods of production are listed.

7 CFR 60.300(d) (emphasis added). We believe this is an important element of the interim final rule and strongly encourage USDA to retain this provision in the final rule.

The foregoing provision allows retailers to address some of the practical difficulties that would have been created by a strict segregation requirement while still providing customers with the information required by statute. As we discussed in previous comments, strict segregation would lead to waste of perfectly acceptable product. For example, if a retailer sourced shrimp from Thailand but that product was running low and the only available product in the store was from Malaysia, the retailer would have to put out two separate bins of otherwise identical shrimp, one of which would only contain a few items and, therefore, would be unlikely to appeal to consumers. Displaying a second bin of shrimp would further mean that another item would need to be removed from the retail case as retailers have a limited amount of display space in the retail seafood case. Accordingly, we strongly support this provision.

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We urge the Department to include further discussion of the phrase "all possible" in the preamble to the final rule as this phrase is subject to multiple interpretations. Informal discussions suggest that the Department intends this phrase to limit labeling to only those countries (or production methods) that are available in the store at the time at which the claim is made. "All possible origins" might, however, be interpreted as all countries from which shrimp may be sourced by the particular retailer over the course of or in general.

B. Retailers Should Have Discretion in Methods Used To Inform Consumers

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 flexibility set forth in the statute was generally reflected in the Voluntary Guidelines and the proposed regulations.

The interim final rule likewise allows broad discretion, adding twist ties, pin tags, stickers, bands, check boxes or other formats to the list enumerated in the statute and allowing the country of origin and method of production designations to be made jointly or separately. 7 CFR 60.300(a). Similarly, the interim final rule does not prescribe font sizes but rather allows the information to be typed, printed or handwritten, provided that it complies with other federal labeling laws. 7 CFR 60.300(c).

We encourage USDA to retain these standards in the final regulation.

C. Remotely Purchased Products

Section 60.200(i) of the interim final rule addresses the way in which retailers may provide origin and production information for covered seafood commodities that are remotely purchased, *e.g.*, internet sales, home delivery sales. The regulation allows retailers to provide the necessary information either on the sales vehicle or at the time the product is delivered to the consumer. We agree with this approach and urge USDA to maintain it in the final regulation.

IV. <u>Timing and Enforcement</u>

A. Effective Date

One critical element of the final rule will be the effective date. The interim final rule has an effective date of April 4, 2005. The final rule should have an effective date that is adequate to allow the regulated industry to understand and comply with the new requirements. An April 4, 2005 effective date simply is not realistic considering all of the product that is already in the distribution pipeline.

We recommend that the Agricultural Marketing Service (AMS) use the uniform compliance date for food labeling policy that AMS's sister agency within USDA – the Food Safety and Inspection Service (FSIS) – announced recently. 69 Fed. Reg. 74405 (Dec. 14, 2005). In particular, the policy states that labeling regulations promulgated between January 1, 2005 and December 31, 2006 will have an effective date of January 1, 2008. The stated purpose of USDA-FSIS's policy is to "minimize the economic impact of labeling changes by providing for an orderly industry adjustment to new labeling requirements" and to harmonize with FDA's approach. Id. This effective date would provide adequate time to prepare and would allow packaging to be changed once to accommodate any regulatory changes required within this time period by USDA or FDA.

B. Educational Outreach

As discussed in our previous comments, we encouraged USDA to emphasize compliance and education in the period immediately following the effective date of the interim final rule. We commend USDA for announcing a period of industry education and outreach for the six months following the effective date of the interim final rule (69 Fed. Reg. at 59709) and encourage USDA to take the same approach following the promulgation of the final rule. Likewise, we encourage USDA to publish the compliance document for industry that is mentioned in the preamble to the interim final rule as soon as possible after the final rule is promulgated. See 69 Fed. Reg. at 59709.

C. Clearing the Channels of Trade

To allow channels of trade to be cleared of product that was harvested before the interim final rule was issued, USDA provided that the IFR does not apply to fish or shellfish caught or harvested prior to December 6, 2004. We believe this approach is appropriate and encourage USDA to take a comparable approach after the final rule is promulgated.

D. Transparency on State Partnerships

The statute directs USDA to partner with states with enforcement infrastructure. Along these lines, USDA has indicated that the Department will enter into memoranda of understanding with states who will assist in enforcing the statute. USDA has further indicated that the federal agency will determine the scheduling and procedures for compliance reviews and that only USDA will initiate enforcement actions. 69 Fed. Reg. at 59709. We encourage USDA to publish a draft document and make it available for public comment before finalizing the procedures that will be used with the states to enforce the law.

E. Preemption

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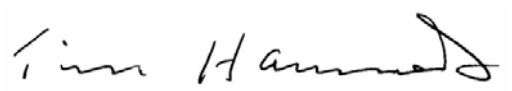
We agree with the conclusion that USDA has expressed repeatedly and reiterated in the interim final rule that, although the mandatory country of origin labeling law does not contain an express preemption provision, it nonetheless clearly preempts State law. See, e.g., 69 Fed. Reg. at 59710. We urge the Department to restate this conclusion in the final regulation.

* * *

We appreciate the opportunity to bring these matters to your attention and look forward to your response. If you have any questions on the foregoing, please do not hesitate to contact me or Deborah White at 202 220 0614.

Sincerely,



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