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December 30, 2002

Garry McKee, Ph.D., Administrator
Food Safety and Inspection Service
U.S. Department of Agriculture
1400 Independence Avenue, SW
Washington, DC 20250

Re: Determination that Mississippi Country of Origin Labeling Statute and Regulations Are Unconstitutional

Dear Dr. McKee:

The purpose of this letter is to advise the U.S. Department of Agriculture (USDA) of meat labeling regulations that were recently finalized in Mississippi and to request a determination from the highest levels of the Department that the Mississippi statute and regulations are preempted by federal law, including the Federal Meat Inspection Act (FMIA) and the recently amended Agricultural Marketing Act (AMA), and are, therefore, unlawful.[1] We urge USDA to act expeditiously to protect the clear scope of the Agency's jurisdiction over meat labeling and to prevent Mississippi from enforcing an unlawful and unconstitutional law. The Mississippi law and the reasons for our concern are discussed more fully below and in the enclosed documents.

Food Marketing Institute (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.

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[1] In this regard, enclosed please find an August 12, 1999 letter from USDA setting forth a determination that a similar law in Wyoming was preempted by the FMIA, and a February 25, 2002 letter from USDA determining that a comparable law in Louisiana was likewise preempted by the FMIA and PPIA.

I. Mississippi Country of Origin Meat Labeling Regulation

Senate Bill 2367, which was signed by the Mississippi governor, enacted a new provision to the state statutes to require unprocessed meat – whether fresh or frozen – to be labeled with information concerning the meat's country of origin "to the extent allowed by the Federal Meat Inspection Act and applicable federal meat inspection regulations." In particular, the new law requires labeling on meat offered for sale in Mississippi to bear either (1) the name of the country of origin preceded by the words "Product of" or (2) one of the following designations that are specified in the statute: "Imported," "American," or "Blend" of imported and American meats.[2] The statute requires the statement to appear on the meat or the immediate wrapping or container of the meat, unless the meat is displayed unwrapped, in which case the statement may appear on a sign included with the display.[3] Prepared meat products sold for consumption on the premises and "fully cooked meat as defined by the U.S. Department of Agriculture" are specifically exempted from the scope of the law.[4]

Each violation of the statute is punishable by civil penalties of up to $500.00; each day on which a violation occurs is considered a separate offense under the statute.[5] The Mississippi Department of Agriculture and Commerce is charged with the administration and enforcement of the Act and directed to adopt the rules and regulations necessary for the Department to carry out the Act.[6]

Toward this end, on October 1, 2002, the Department issued a memorandum addressed to "All Retail Food Establishments" with a proposed regulation interpreting the law and authorizing comments to be submitted until October 30, 2002.[7] The proposed regulation broadly defined meat as "the edible parts of the carcass of mammals and their organs and glands."[8] The proposal stated that labels on meat products may declare the product to be of U.S. origin only if the animal was exclusively born, raised and slaughtered in the U.S.[9] Product that is blended of imported meat and American meat would be required to be labeled as "Blend of American and imported meat from 'the country where produced.'"[10] The proposed regulations allowed a retailer that "sells only

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2 S.B. 2367, Sec. 1(1).

3 Id.

4 Id. at Sec. 1(4).

5 Id. at Sec. 1(2).

6 Id. at Sec. 1(3).

7 Although this notice was apparently posted on the Department's website and mailed to the corporate headquarters of some companies doing business in Mississippi, we are aware of no other form of notice given to the public. The Due Process Clause of the Fourteenth Amendment of the U.S. Constitution necessitates the provision of adequate notice of regulatory proceedings to afford the public an opportunity to participate in rulemaking, which may substantially alter their constitutionally protected interests.

Neither the memorandum nor the draft regulations indicate the proposed codification of the regulation; accordingly, for purposes of this comment, the proposed regulations will be cited as "COL Proposal."

8 COL Proposal, Sec. 1(a).

9 COL Proposal, Sec. 2(b).

10 COL Proposal, Sec. 2(c).

American meat" to display a single sign stating that fact, such as "only American meat sold here."[11]

The draft regulations provide some flexibility with respect to the labeling that appears to exceed the scope of the underlying statute. Specifically, COL Proposed Section 3(a) allowed the country of origin labeling information to be provided by means of a label, stamp, mark, placard or other clear and visible sign on the "covered commodity"[12] or on the package, display, holding unit, or bin containing the commodity at the final point of sale.[13] Nonetheless, if a placard or sign is used, the proposed regulations required the sign to be at least 8.5" x 14", with a minimum of 1" lettering.[14]

COL Proposed Sec. 3(b) also provided that the retailer was not required to provide any additional information on any "covered commodity" that was already individually labeled for retail sale regarding country of origin in a manner that complies with COL Proposed Sec. 2.[15]

Subsequently, the Mississippi Department of Agriculture and Commerce promulgated final regulations implementing the new law, which was codified in Title 75 of the Mississippi Code. See Miss. Code Ann. Sec. 75-35-327. The final rules narrow the definition of meat to "fresh or frozen muscle cuts of beef and includes ground beef" and define "unprocessed" to mean that the "meat contains no added ingredients and is in its raw fresh or frozen state." COL Rules at 1(a), (c).[16] The country of origin for blended products must still be declared under the final rules, but the "country that contributes the majority of the meat in the blended product shall be listed first." COL Rules at 2(c). The final rules also broaden the signage requirement to allow a person that sells only meat from any one country (instead of just the United States, as in the proposal) to post a single sign stating the fact. COL Rules at 4.

Neither the statute, the proposed rules, nor the final rules are accompanied by any rationale or explanation for the need for country of origin labeling on meat in Mississippi.

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[11] COL Proposal, Sec. 4.

[12] "Covered commodity" is not a term of art used either in the Mississippi statute or draft regulations. This provision appears to be taken directly from Section 10816 of the Farm Security and Rural Investment Act of 2002 (P.L. 107-171) (the Farm Bill), which amended the Agricultural Marketing Act of 1946 to establish a retail country of origin labeling program for "covered commodities," including meat, perishable agricultural commodities, seafood, and peanuts. The "covered commodity" language was not used in the final rules.

[13] In contrast, the statute appears to delineate the appropriate method of labeling according to whether the meat is wrapped or unwrapped at the time that it is displayed to the public. See S.B. 2367 at Sec. 1(1). The language of the proposed regulation is apparently derived from Section 10816 of the Farm Bill.

[14] COL Proposal, Sec. 4.

[15] This, too, appears to be derived from Section 10816 of the Farm Bill.

[16] It is unclear where the regulations are codified, so they are referred to here for simplicity as COL Rules." A copy of the final rules is enclosed for your reference.

II. Mississippi Country of Origin Meat Labeling Regulation Violates Supremacy Clause of U.S. Constitution

Article VI, Section 2 of the U.S. Constitution provides that, "the Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[17] Under the so-called Supremacy Clause, laws or regulations that conflict with federal law are without effect.[18] As discussed more fully below, Mississippi's country of origin meat labeling regulations and the underlying statute are preempted by Federal law, both expressly and by implication.

A. FMIA Expressly Preempts Mississippi Country of Origin Meat Labeling Regulation

The Federal Meat Inspection Act (FMIA) contains an express preemption provision regarding product labeling. In relevant part, the provision states as follows: "Marking, *labeling*, packaging or ingredient requirements . . . *in addition to, or different than*, those made under this chapter may not be imposed by any State . . .."[19] "Labeling" is defined under the FMIA as "all labels and other written, printed or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article."[20]

As the federal statute prohibits states from imposing any meat labeling requirements that differ from or add to the federal requirements, the clause preempts even those state regulations that are more stringent than the FMIA. Accordingly, courts have found state labeling requirements to be preempted not only when they directly conflict with the federal labeling requirement, making it impossible to comply with both, but also in circumstances in which a state attempts to enact a requirement that has no counterpart under federal law.[21]

The Mississippi country of origin meat labeling regulations would require retailers either to label meat products or to post a sign accompanying the products declaring the products' country of origin or whether the products were produced in the United States, a "foreign country," or both. The FMIA does not require country of origin labeling. As the Mississippi law would impose labeling that is in addition to and

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17 U.S. Const. art. VI, § 2.

18 *Maryland v. Louisiana*, 451 U.S. 725 (1981).

19 21 U.S.C. § 678 (emphasis added).

20 21 U.S.C. § 601(p).

21 *Anthony J. Pizza Food Products Corp. v. Wisconsin Dep't of Agriculture*, 676 F.2d 701 (7th Cir. 1982) (unpublished opinion adopting district court opinion); *National Broiler Council v. Voss*, 44 F. 3d 740 (9th Cir. 1994); *Armour & Co. v. Ball*, 468 F. 2d 76 (6th Cir. 1972), *cert. den'd*, 411 U.S. 981 (1973); *Grocery Manufacturers of America v. Gerace*, 581 F. Supp. 658 (S.D.N.Y. 1984), *aff'd in part and rev'd in part on other grounds,* 755 F.2d 993 (2d Cir. 1985).

different than the federal FMIA labeling requirements, the Mississippi requirements are expressly preempted by federal law.[22]

Moreover, the fact that the Mississippi statute acknowledges the preemptive nature of the FMIA at the outset by stating that the requirements only apply to the extent that they are "allowed by the FMIA and applicable meat inspection regulations" cannot save the Mississippi provisions from preemption. Whether or not the Mississippi statute recognizes the preemptive power of the federal statute is irrelevant; if the Supremacy Clause applies, the state statute will be preempted, even if it is silent in this regard. And, as the labeling requirements are preempted in their entirety, none of the statute is "allowed by the FMIA."

B. Labeling Required under Country of Origin Meat Labeling Regulation Is Preempted by Implication under FMIA and Agricultural Marketing Act

The Mississippi country of origin meat labeling regulation is also preempted by implication because the Mississippi rule conflicts with federal law in several important respects. First, the FMIA prohibits the sale, transport, offer for sale or transportation, or receipt for transportation in commerce of any meat products that are misbranded at the time of such sale, transportation, offer for sale or transportation, or receipt for transportation.[23] A product will be considered "misbranded" if its labeling is false or misleading in any particular.[24]

The country of origin labeling that would be required under Mississippi law implies that the imported meat products are of lesser quality or present some health risk. One court noted that country of origin labeling can be designed to make a consumer "feel that the product was something to be shunned, as a matter either of stimulated reaction against it from its labeling, or of uncertainty as to what might be the implications thereof."[25] Although domestic product will also be subject to labeling, it may be accomplished by a placard or with the more familiar sounding "American" or "Product of USA;" in contrast, the "imported" labeling may raise consumer concerns regarding the safety of the product.

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[22] Note, too, that the recent passage of the country of origin labeling program in Section 10816 of the Farm Bill does not save the Mississippi law from constitutional infirmity. First, the FMIA prevents states from imposing any labeling that is in addition to or different than those required by the FMIA, but does not prohibit the U.S. Congress from enacting additional labeling requirements. Second, the Farm Bill in conjunction with the FMIA evidence a comprehensive labeling scheme for country of origin labeling declarations with respect to meat to the extent that the federal government occupies the field and impliedly preempts any further state governmental activity in this arena. (See discussion below)

[23] 21 U.S.C. § 610(c).

[24] 21 U.S.C. § 601(n)(1).

[25] *Armour*, 270 F. Supp. at 945-46.

However, as imported meat products are required to meet the same standards as domestically produced products,[26] the inherent implication of country of origin labeling that imported meat may be adulterated or unsafe is false and misleading. To require false and misleading labeling clearly conflicts with the federal laws' prohibition against misbranded products and, therefore, the Mississippi country of origin meat labeling regulation is preempted by the federal laws by implication.

The recent passage of Section 10816 of the Farm Bill, which amends the Agricultural Marketing Act (AMA), provides a second basis for the implied preemption of the Mississippi law. Specifically, state law is preempted if Congress legislates comprehensively, that is, occupies an entire field of regulation evidencing an intent to leave no room for the states to supplement federal law. When determining whether Congress intended to occupy the field, or whether a state law conflicts with federal law, courts consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written.

In this case, the recently amended AMA, as supplemented by the country of origin labeling guidelines USDA recently published, sets forth a comprehensive scheme for country of origin labeling for an extremely broad range of products, including meat. The comprehensive regulatory system, which became effective upon the passage of the Farm Bill in May 2002, requires the development of federal guidelines, a period during which the program can be implemented without penalties, and, ultimately, a system of mandatory country of origin labeling. Under Section 10816 of the Farm Bill, retailers are required to inform consumers of the country of origin of all "covered commodities," including meat, produce, seafood, and peanuts, at the point of retail sale. Accordingly, the AMA evidences federal Congressional intent to occupy the field of country of origin meat labeling regulation, thereby impliedly preempting state laws of this nature, including the Mississippi Country of Origin Meat Labeling Law.

II. Country of Origin Meat Labeling Regulation Violates Commerce Clause of U.S. Constitution

Article I, Section 8 of the U.S. Constitution enumerates the powers expressly delegated to Congress. In relevant part, the Commerce Clause of Section 8 provides that "the Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States . . .."[27] In addition to the direct grant of authority to Congress, the Commerce Clause has long been recognized to limit the power of states to erect barriers to trade.[28] Thus, under the so-called "dormant Commerce Clause," states are prohibited from imposing regulatory measures that are designed to benefit in-state economic interests by burdening foreign or out-of-state competitors.[29]

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[26] See 21 U.S.C. § 620(a).

[27] U.S. Const., art. I, § 8.

[28] *Hughes v. Oklahoma*, 441 U.S. 332, 326 (1979); *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525 (1949); *Welton v. Missouri*, 91 U.S. 275 (1873).

[29] *See*, *e.g.*, *Bacchus Imports, Ltd., v. Dias*, 468 U.S. 263 (1984).

The Supreme Court has adopted what amounts to a two-tiered approach to analyzing state economic regulation under the Commerce Clause.[30] When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, the Court has generally struck down the statute without further inquiry.[31] When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, the Court has examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.[32] There is, however, "no clear line" separating the categories of state regulation that are virtually *per se* invalid under the Commerce Clause and those that are subject to the balancing approach set forth in *Pike v. Bruce Church*; rather the critical consideration is the overall effect of the statute on both local and interstate activity.[33] In this case, regardless of the test that is applied, the Mississippi statute does not pass constitutional muster.

A. Mississippi Law Discriminates Against Non-Domestically Produced Meat Products

As discussed more fully above, the Mississippi statute and regulations require meat to be labeled with either a statement of the product's country of origin or a statement that the product is one of the following: "American," "Imported," or "Blend of Imported and American Meats."[34] Although labeling is required for domestically produced meats as well as imported products, the type of labeling required inherently discriminates against meats produced in countries other than the United States.

Specifically, domestically produced meats must be labeled in one of two ways, both of which identify the specific country of origin, namely, "Product of the USA" or "American." In contrast, meats produced in countries other than the United States may either be identified as "Product of [specific country]" or with a generic "Imported" designation. The fact that meats produced in countries other than the United States may be identified with only a generic statement of their non-domestic origin while domestic products must be identified as "Product of the USA" or "American" evidences an intent to discriminate against foreign commerce.

Moreover, the regulations only provide a definition for U.S. product – the meat must be "born, raised and slaughtered" in the U.S. to qualify for this designation. The regulations are silent with respect to determining country of origin for product that does not meet this definition.

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30 *Brown-Forman Distillers v. NY Liquor Auth*., 476 U.S. 573 (1986).
31 Id. at 579.
32 Id. at 579, citing *Pike v. Bruce Church, Inc*., 397 U.S. 137 (1970).
33 *Brown-Forman*, 476 US at 579.
34 COL Proposal, Sec. 2.

Furthermore, the regulations favor domestic products by providing retailers with a regulatory incentive not to offer imported meats to customers. Specifically, the regulations allow retailers who offer products from only a single country to declare the fact in a single sign as an alternative to complying with the remainder of the regulatory requirements. As a significant percentage of meat products sold at retail are claimed by suppliers to be of U.S. origin, the option may give retailers a regulatory incentive not to sell imported products. Although the placard requirement is itself an unconstitutional burden on commerce (see discussion below), the fact that the Department has chosen to offer this slightly less burdensome alternative to retailers who have "purged" their stores of imported meats is further evidence of the discriminatory intent underlying the regulations.

B. Mississippi Lacks Legitimate Interest in Country of Origin Labeling Regulations

For a state law or regulation that impacts interstate or foreign commerce to withstand constitutional scrutiny, the state must have and must have articulated a legitimate interest in enacting the restriction. For example, a state generally has the authority to implement non-discriminatory legislation to protect the health, safety or welfare of its citizens, provided that the burden on interstate or foreign commerce does not clearly exceed the local benefits.[35] In this case, however, Mississippi has not expressed the basis for its interest in the state statute or regulations. We were unable to locate any legislative history on the underlying statute and neither the draft nor final regulations were accompanied by a preamble that in any way explained the state's interest in the country of origin meat labeling regulations.

In the absence of an expressly declared interest, the state cannot be presumed to have a legitimate interest. Indeed, the state's true motive for enacting country of origin meat labeling legislation and promulgating the accompanying regulations is likely to be economic protectionism.

C. State Country of Origin Meat Labeling Regulation Unduly Burdens Interstate Commerce

In addition to the foregoing, courts generally consider the impact of the state restriction on interstate or foreign commerce when conducting an inquiry under the Commerce Clause. In this case, the Mississippi statute and accompanying regulations would place significant costs and administrative burdens on retailers and wholesalers that would, in turn, place an undue burden on interstate and foreign commerce.

Specifically, once meat from abroad enters the United States, it enters the same distribution channels as domestic products. Separating fresh cuts of meat based on their country of origin will be difficult to do and will impose substantial recordkeeping and

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[35] *Brown-Forman Distillers v. NY Liquor Authority*, 476 US 573, 579 (1986).

other administrative costs on retailers and wholesalers. Retailers and wholesalers will incur further costs to achieve compliance with the regulations, including the costs of training personnel in the necessary compliance measures; the costs of labels, signs, placards and the labor necessary to apply them; segregating meat products by country of origin; and, especially, costs of determining product country of origin from suppliers. Indeed, given the length of livestock production and the short implementation time of this regulation, retailers will be hard-pressed to determine whether product meets the state's "born, raised and slaughtered" standard for U.S. meat.

Moreover, the burdens of the labeling requirements will not be materially alleviated by the provision that a placard may be used in lieu of labels for retailers that sell meat produced in a single country. This alternative would not obviate the burden of tracing or determining the origin of meats.[36]

The burden will be felt in foreign commerce as well, as foreign suppliers will be required to utilize resources and adopt measures that will serve no other purpose but to satisfy the discriminatory Mississippi law. Accordingly, the regulations are intended to and will burden foreign commerce.

D. Less Restrictive Measures Available

In reviewing state action to determine whether or not it is permissible under the Commerce Clause, a reviewing court looks to see whether the state government used the least restrictive means possible to achieve a legitimate interest. In this case, as no legitimate interest was articulated, it is unnecessary to consider whether any less restrictive measures are available.

IV. Country of Origin Meat Labeling Regulation Violates Free Speech Clause of U.S. Constitution

The First Amendment of the U.S. Constitution provides that, "Congress shall make no law . . . abridging the freedom of speech . . .."[37] The First Amendment limits the government's ability to compel speech, as well as the government's ability to restrict speech.[38] The Mississippi law and accompanying regulations attempt to compel speech in an unlawful violation of the First Amendment.

The appropriate standard for determining whether a governmental compulsion of speech is unlawful is set forth in *Central Hudson Gas & Electric Corporation v. Public Service Commission*.[39] In order for compelled speech to meet the test set forth in *Central Hudson*, the government must assert a substantial interest in support of the compelled

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[36] See *Tupman Thurlow Co. v. Moss*, 252 F. Supp. 641, 646 (M.D. Tenn. 1966).

[37] U.S. Const. amend. I, cl. 2.

[38] *International Dairy Foods Association v. Amestoy*, 92 F.3d 67 (2d Cir. 1996); *Wooley v. Maynard*, 430 U.S. 705 (1977).

[39] *Central Hudson Gas & Elec. Corp. v. Public Serv. Commission*, 447 U.S. 557 (1980).

speech and the required speech must be narrowly tailored to advance the asserted substantial interest directly.

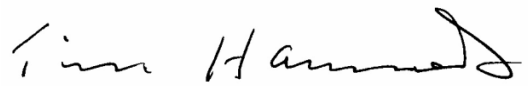
As discussed more fully above, Mississippi has not articulated a legitimate interest in requiring country of origin labeling; therefore, the state lacks a compelling interest in country of origin labeling regulations. Moreover, Mississippi has not demonstrated that the speech that would be compelled under the regulation would advance the government's interest. As states must supply empirical evidence of direct advancement of the interest by the compelled speech, Mississippi has not met its burden in this regard, either.

Finally, the vagueness with which Mississippi's regulations implement the statute suggests an additional Constitutional infirmity with First Amendment implications. The regulations require the retailer to provide a statement of the meat's country of origin, but only provide a definition for U.S. country of origin. Mississippi's simplistic approach fails to account for the innumerable complications of present-day meat production. How, for example, should a retailer identify meat that is born in Canada, and raised and slaughtered in the U.S. under the Mississippi law? The product would not qualify for a "Product of the U.S." designation under the state standards, but the regulations fail to advise retailers how to comply under these circumstances. USDA has addressed these difficult questions in recent guidelines, but Mississippi's regulations ignore them, thereby subjecting retailers to potential fines and penalties because the regulations do not articulate a clear standard but rather require "the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application."[40]

* * *

We trust you will agree that the Mississippi statute and regulations are preempted by the Federal Meat Inspection Act, as well as the recent amendments to the federal Agricultural Marketing Act. For the foregoing reasons, we respectfully urge the U.S. Department of Agriculture to issue a letter stating that the Mississippi law and regulations regarding country of origin meat labeling are preempted pursuant to the Federal Meat Inspection Act and that USDA will intervene if the State of Mississippi takes regulatory steps against meat products that are labeled in conformance with the federal law.

Sincerely,



Tim Hammonds
President and CEO

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[40] Zwickler v. Koota, 389 U.S. 241 (1967)

Enclosures

CC: Bill Hawks
Elsa Murano
Linda Swacina
Phil Derfler

Enclosures:

- USDA's WY and LA preemption letters
- COL law
- COL proposed rules
- COL final rules