FOOD MARKETING INSTITUTE

August 20, 2007

Country of Origin Labeling Program
Room 2607-S
Agricultural Marketing Service
US Department of Agriculture
1400 Independence Ave, SW
Washington, DC 20250-0254

Re: Comments on Interim Final Rule for Seafood and Proposed Rule for All Covered Commodities; RIN 0581-AC26; Docket No. AMS-LS-06-0166; LS-03-04; LS-06-0081; LS-04-04

Dear COOL Program Officials,

The Food Marketing Institute (FMI)[1] is pleased to respond to your request for comments on the country of origin labeling (COL) regulations the Agricultural Marketing Service (AMS) of the U.S. Department of Agriculture (USDA) has published to date: the interim final rule for seafood (69 Fed. Reg. 59708 (Oct. 4, 2004)) (hereinafter "seafood IFR") and the proposed rule for all covered commodities (68 Fed. Reg. 61944 (Oct. 30, 2003)) (hereinafter "proposed rule"). As the rulemakings will ultimately produce a single final regulation, we have consolidated our comments on both proceedings into a single letter.[2]

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[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 $680 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] Likewise, in lieu of enclosing physical copies, we are hereby incorporating by reference all of the comments that we filed with USDA on the country of origin labeling statute and the accompanying rulemaking proceedings. See letters from FMI to USDA dated August 9, 2002; February 21, 2003; April 9, 2003; July 2, 2003; February 27, 2004; February 2, 2005, and February 26, 2007.

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FMI represents the retail and wholesale grocery industry, from small independent grocers to regional and national chains, as well as all types of wholesalers. As such, our members have had firsthand experience with the implementation of the COL statute as it relates to seafood. Our comments reflect our members' expertise in this area and their considered reflection on how best to apply the law to meat, produce and peanuts.

I. Introduction

At the outset, please note that FMI continues to oppose mandatory country of origin labeling as required by the Farm Security and Rural Investment Act of 2002 (2002 Farm Bill). Marketing programs, such as country of origin labeling, are better handled by the private sector on a voluntary basis. Indeed, many of our members currently provide origin and other information of interest to consumers through a broad array of market-driven programs.

Mandatory country of origin labeling does not and cannot impact the safety of the food that is labeled. Even the most ardent supporters of the COL law agree that this is the case. For example, at a 2003 hearing of the House Agriculture Committee, David J. Frederickson, the president of the National Farmers Union, was asked if he agreed with the statement that country of origin labeling is not a food safety question but a marketing question. Mr. Frederickson replied, "...I agree with the statement."[3] All federal agencies that oversee our food supply must exercise all available authorities and employ all necessary resources to ensure that all food that enters the United States food supply is as safe as possible. Marketing programs, such as country of origin labeling, are best handled on a market-driven basis, and should never be perceived as a substitute for an adequate food safety system.

Moreover, as USDA has found as the result of two extensive cost-benefit analyses set forth in the preamble to both the proposed rule and seafood IFR, the costs for mandatory country of origin labeling far exceed the benefits. Indeed, USDA found in the proposed rule that the costs for implementing mandatory country of origin labeling for all covered commodities was likely to approach $3.9 billion, resulting in higher food prices and reduced food production in the tenth year after implementation. In contrast, the agency found that "the estimated benefits associated with the rule are likely to be negligible." FMI prepared and filed comments with USDA that found that the costs to implement seafood COL were approximately ten times as great as USDA predicted in the interim final rule.

[3] Question posed by Rep. Charlie Stenholm. See Committee on Agriculture, United States House of Representatives, "Mandatory Country of Origin Labeling," (Hearing Transcript – Serial Number 108-12), June 26, 2003, pp. 56. Accessed online at http://agriculture.house.gov/hearings/108/10812.pdf, August 14, 2007.

These impacts are likely to be especially pronounced on smaller entities throughout the supply chain, particularly once country of origin is implemented for the full panoply of covered commodities set forth in the statute. For example, several of our members told us that they ended commercial relationships with seafood suppliers that could not provide the records necessitated by the law and the simplified regulations. We expect this phenomenon to continue with implementation for other covered commodities, such as perishable agricultural products, which has many smaller suppliers.

Given the lack of demonstrable benefit and the cost that will ultimately be borne by consumers, FMI cannot support mandatory country of origin labeling as embodied by the 2002 Farm Bill provision. Nonetheless, despite our opposition to the statute, FMI appreciates the effort expended by USDA and the COOL Program within AMS in developing and implementing regulations that will effectuate the law in a fair and reasonable manner. Toward that end, we respectfully request that you consider our comments below and respond to them on the record. Our comments are organized in the order of the regulations and do not reflect the relative importance of the issues.

II. Comments

A. Executive Summary

As noted above, although FMI opposes the statute underlying the mandatory country of origin labeling regulations, we appreciate USDA's efforts in crafting reasonable rules. In this regard, we note that USDA made significant progress in the seafood IFR, which represents substantial improvement in many areas of the regulations. Thus, we generally encourage the Agency to follow the progress of the IFR and apply these standards to all covered commodities in the final rules. The specific points we make are summarized below:

- Retain the "food service establishment" definition and incorporate meal preparation services;
- Retain the IFR's "processed food" definition and incorporate appropriate changes for perishable agricultural products, meat and peanuts that recognize the value-added processing that retailers perform for consumers as "processing" within the meaning of the statute;
- Permit countries of origin to be identified by the full name of the country (without a "Product of..." statement) or a reasonable abbreviation;
- Codify the Agency's interpretation of the "conspicuous location" requirement;

- Retain the IFR's standard for blended covered commodities and recognize that country of origin will be adequately identified if the majority of items in a bulk bin bear stickers;

- Simplify records for retailers and intermediary suppliers, such as wholesalers;

- Provide that "good faith" efforts demonstrate that a retailer is not "willfully violating" the statute;

- Retain the "liability shield" and preemption standards recognized in the IFR; and

- Provide for reasonable implementation of the final rules by using the uniform compliance date for some, if not all, covered commodities.

B. Definitions

1. "Food Service Establishment"

Section 282 of the Agricultural Marketing Act, as amended by the 2002 Farm Bill requires retailers to inform consumers of the country of origin of covered commodities, but exempts from that requirement covered commodities that are "prepared or served in a food service establishment and offered for sale or sold at the food service establishment in normal retail quantities or served to consumers at the food service establishment." Both the proposed rule and the IFR include the same definition of "food service establishment," which expressly 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 the retailers' premises. Thus, foods prepared in these enterprises are exempt from mandatory country of origin labeling.

We encourage USDA to retain the "food service establishment" definition in the final rule and to add "meal preparation services" as another example. Basically, meal preparation services are those programs offered by retailers and others in which the retailer sets out the ingredients for different meals and consumers assemble the ingredients into meals to take home. Meal preparation services are, therefore, simply the latest extension of food service convenience that retailers provide for their consumers. Accordingly, USDA should expressly recognize this service in the final rule or the preamble thereto.

2. "Processed Food Item"

The underlying statute directs retailers to inform consumers of the country of origin of all covered commodities, which term expressly excludes any item that is an "ingredient in a processed food item." Both the proposed rule and the seafood IFR defined the term. We encourage USDA to apply the seafood IFR definition to all covered commodities in the final rule and to provide for the clarifications discussed below.

Specifically, the IFR defines a "processed food item," in relevant part, as follows:

> ...a retail item ... that has undergone specific processing resulting in a change in the character of the covered commodity, or that has been combined with at least one other covered commodity or other substantive food component ...

Helpfully, the IFR provides examples of the types of activities that constitute processing, as well as specific foods that the Agency deems processed. In particular, the IFR states that processing that results in a change in the character of the covered commodity includes the following:

> ...cooking (e.g., frying, broiling, grilling, boiling, steaming, baking, roasting), curing ..., smoking ..., and restructuring... Examples of items excluded include fish sticks, surimi, mussels in tomato sauce, seafood medley, coconut shrimp, soups, stews, and chowders, sauces, pates, salmon that has been smoked, marinated fish fillets, canned tuna, canned sardines, canned salmon, crab salad, shrimp cocktail, gefilte fish, sushi, and breaded shrimp.

FMI supports the Agency's definition, including the types of activities USDA has identified as "processing," and urges the Agency to use this definition, expanded to cover all covered commodities, in the final rule. Over the nearly three years in which this definition has been in effect, our members have found it to provide a relatively clear line that is, therefore, relatively straightforward to implement. Inspectors have been trained in this standard. Our members have developed systems that are based on this standard to ensure that the resources necessary to implement the program are targeted at the correct products. Accordingly, we encourage USDA to retain this definition in the final rule, applying it to all covered commodities, and to address the following specific issues in the final rule.

a. Perishable Agricultural Commodities

With respect to perishable agricultural commodities, we encourage the Agency to recognize that "processing" looks different for these covered commodities than it does for

meat or seafood. In addition to canning and cooking, which are clearly processing for produce, too, much value-added processing occurs in simpler preparations for produce. For example, retailers might peel, core, chop and package a fresh pineapple for customers. These steps result in a "change in character" of the covered commodity from a bristly fruit that is difficult for some consumers to approach to a ready-to-eat product that the consumer can eat the minute she leaves the store. Thus, USDA should expressly recognize that perishable agricultural commodities that retailers prepare and package for consumers' immediate consumption have undergone "specific processing resulting in a change in the character of the covered commodity" and are, therefore, "processed foods items".

This approach would be consistent with the approach USDA took in the IFR under which cooked seafood products are considered "processed," and, therefore, not subject to labeling. Specifically, USDA determined that cooking is processing that results in a change in the character of the covered commodity and, indeed, it does. Cooked shrimp are ready to eat without any further effort on the part of the consumer. Similarly, a pineapple that has been peeled, cored, cut and packaged is also immediately ready to eat. That is, the retailer has changed the character of the perishable agricultural commodity in the same way that the retailer has changed the character of seafood products by cooking them. Thus, perishable agricultural products that retailers take steps to prepare for consumers, similar to the cooking step that transforms raw shrimp into a ready-to-eat product, should likewise be considered processed.[4]

b. Peanuts

The preamble to the proposed rule states that shelled and/or roasted peanuts are not considered processed simply because "the vast majority" of peanuts sold at retail are shelled, roasted and salted. Similarly, the Agency concluded that peanuts that have been combined with other non-substantive ingredients such as oil, salt and other flavorings would also be subject to the labeling requirements, although candy-coated peanuts, peanut brittle and peanut butter would be excluded.

Under the IFR definition of a processed food item, cooking is properly recognized as a process that results in the change in character of the covered commodity. Indeed, in the IFR, USDA noted that most shrimp sold at retail are either cooked or breaded and still concluded that cooked shrimp are properly considered "processed." USDA should not conclude that cooking is processing for seafood, but not for peanuts; accordingly, USDA

[4] Alternatively, USDA could reasonably conclude that these products are eligible for exclusion under the "food service" exemption, discussed above. Specifically, retailers will prepare and package produce and offer it in that format in many areas of the store, including delis. It would be inconsistent to exclude the same package of peeled, cored, cut and packaged pineapple from labeling if it was placed in the deli section, but not if it was across the aisle in the produce section.

should likewise conclude that cooked or roasted peanuts are processed and, therefore, should not be subject to mandatory country of origin labeling.

c. Meat

We believe that the activities USDA identified in the IFR should likewise constitute "processing" for meat. We expect that products such as sausage, stir fries, and marinated ribs would be deemed "processed" under the definition and encourage USDA to provide specific meat examples in the final rule.

C. Country of Origin Notification

1. Blended Products

Food today is sourced from multiple locations all over the world. Consumers expect a wide variety of fresh, wholesome produce, seafood and meats in their stores every day. As the same covered commodity sourced from different locations may be offered to consumers at the same time, USDA's regulations include a provision on blended products.

The proposed rule permits retailers to display blended or commingled items comprised of the same covered commodity, such as bagged lettuce or ground beef, provided that the label lists the countries of origin alphabetically for all raw materials contained therein. The proposed rule would have required (1) facilities to document that the origin of a product was separately tracked and (2) the labeling to specify precisely the countries of origin represented within each individually packaged retail product.

The seafood IFR, however, harmonizes the requirements of this statute with the existing requirements of the US Customs and Border Protection legal requirements so that covered commodities that are not substantially transformed in the US that were blended with like covered commodities from any other origin would be identified in accordance with existing federal legal requirements; for imported covered commodities that are substantially transformed in the US and commingled with other imported covered commodities and/or US origin covered commodities, the declaration is required to indicate the countries of origin that are *or may be* contained therein.

In practice, this standard allows retailers to rely more reasonably on the declarations provided by their suppliers. It also allows for sensible solutions such as a single lobster tank at store level rather than separate ones for lobsters from Canada and from the United States, provided that consumers are informed of the country of origin (and method of production) of the lobsters. Similarly, this approach means that

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wholesalers do not have to dedicate additional warehouse slots to segregate like products by country of origin (or method of production).

Accordingly, FMI supports the approach adopted in the seafood IFR and urges USDA to codify it in the final rule so that it will apply to all covered commodities. USDA should expressly recognize the wholesaler slotting example in the preamble to the final rule and confirm that wholesalers are not required to slot covered commodities by country of origin. If the costs for source segregation of seafood alone were sufficient rationale for the Agency to adopt the approach in the seafood IFR, clearly the costs for separate tracking, segregation and control for all covered commodities, which would be substantially greater, are sufficient to justify this approach in the final rule.

2. Remotely Purchased Products

Internet shopping is a small, but growing and important segment of the retail and wholesale food supply chain. Consumers value the convenience of selecting products on-line and receiving the products at home. To address the logistical challenges associated with providing country of origin labeling information in this environment, both the proposed and interim final rule allow the retailer to provide the country of origin (and method of production) notification either on the sales vehicle or at the time the product is delivered to the consumer. FMI supports this important regulatory provision and urges USDA to include it in the final rule.

D. Markings

1. Country Name

Section 60.300(a) of the proposed regulation allows the required country of origin declaration to be made either as a statement, such as "Product of USA," or as simply the country name, such as "USA" or "Mexico." The seafood IFR omitted this provision without explanation. As discussed more fully below, FMI encourages USDA to reinstate this provision in the final rule, at least for labels with small surface areas if not for all products.

As USDA is aware, country of origin labeling is currently accomplished thru any number of mechanisms. Both the proposed rule and the seafood IFR expressly authorize country of origin to be placed on placards, signs, labels, stickers, bands, twist ties, pintags, or other formats that will allow the information to be provided to consumers. Many of these devices, particularly those used for perishable agricultural commodities, such as twist ties, bands, or stickers, have very small surface areas.

For example, "Price Look Up" or PLU stickers are the labels that are applied to many fruits and vegetables today with codes that allow cashiers to process the produce items more quickly as consumers are checking out. Given their ubiquity, PLU stickers are a common method of providing consumers with country of origin information and consumers understand that if a country is stated on a produce PLU sticker that the produce is a product of that country. However, these stickers have very small surface areas to ensure that they adhere to the produce better and to allow consumers to see more of the individual produce items.

To facilitate continued use of PLU stickers, bands and twist ties as a mechanism for providing country of origin information to consumers, USDA should reinstate the provision that allows the name of the country standing alone to serve as a sufficient declaration. Indeed, if the entire statement must be put on the sticker, the size of the country name will need to be reduced. Therefore, USDA should allow retailers to inform consumers of the country of origin of covered commodities by simply stating the country name alone, rather than requiring the country name to be set forth in a "Product of..." statement.[5]

2. "Conspicuous Location" Requirement

Both the proposed rule and the seafood IFR require the country of origin (and method of production) declaration to be placed in a "conspicuous location, so as to render it likely to be read and understood by a customer under normal conditions of purchase." We urge USDA to include this provision in the final rule and to clarify it in two respects.

First, in practice, USDA has interpreted this requirement to mean that, if a reasonable consumer can find the information on the product or the information is provided in close proximity to a bulk display, the information is sufficiently conspicuous. That is, USDA does not currently require the information to appear on a specific panel of pre-packaged food products or to appear in a certain size or type face or any other pre-determined location on or around the product. For lobsters, for example, country of origin printed on the bands placed around lobster claws is deemed sufficient because the consumer can inspect the band when the lobster is removed from the water to determine the crustacean's country of origin.[6] For over-wrapped seafood, retailers can provide the information any where on the package, including the bottom, where it cannot obscure the consumers' view of the seafood products. We support USDA's approach and encourage the

[5] If the Agency's concern is consistency with the regulations of U.S. Customs and Border Protection, we respectfully refer you to the discussion in Section D.4., "Abbreviation" of our comments.

[6] Method of production must also be identified, but that can be accomplished by means of separate signage.

Agency to briefly explain the "conspicuous location" standard in the preamble to the final rule. Such clarification will ensure a common understanding of the Agency's interpretation of "conspicuous location" across the regulated and regulating communities.

Second, we recommend that USDA clarify that the retailer will have satisfied its obligation to provide country of origin information in a conspicuous location through stickers, such as PLU stickers, even if all items in a bulk bin display do not bear a PLU sticker. As noted above, PLU stickers are an important method of informing consumers of the country of origin of perishable agricultural commodities. However, stickers cannot reasonably be applied to every single item in a bulk bin and, even if they are, some are likely to fall off during transport and display. Despite the best efforts of suppliers, stickering efficacy cannot be guaranteed to be perfect.[7] Accordingly, we recommend that the Agency state that stickers on the majority of perishable agricultural products in a bulk bin will be sufficient to satisfy the notification requirement.

Indeed, ensuring that the majority of perishable agricultural commodities in a bulk bin bear stickers will suffice to notify consumers of the country of origin even if the products are sourced from multiple countries. For example, under USDA's seafood IFR, retailers may display shrimp from two or more countries in the same bowl in a service case, provided that the accompanying information indicates the countries from which the shrimp may have been sourced, but there is (logically) no requirement to identify which individual shrimp came from which country. A consumer interested in country of origin will look at the produce in a bulk bin for stickers indicating country of origin and, therefore, receive notice of the multiple origins of the product. Indeed, consumers in this scenario will have a greater ability to determine the country of origin of the individual item purchased than they do in the shrimp example.

3. Bulk Bin

Both the proposed rule and the IFR permit bulk containers to hold covered commodities from more than one country of origin. FMI encourages USDA to retain this provision in the final rule.

The ability to place like items in the same bulk bin even if they are from different countries of origin is extremely important in terms of retail operations. Retailers have limited shelf and floor space. Products, such as perishable agricultural commodities, can be sourced from numerous different countries. Segregating products by bin would be costly and inefficient, ultimately increasing the costs for the fresh foods that USDA and

[7] Quite frankly, consumers would resent PLU stickers with adhesive strong enough to guarantee that they would never fall off.

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FDA are encouraging more Americans to eat and decreasing the variety of those products that retailers offer to consumers. Accordingly, the provision allowing retailers to include covered commodities from multiple countries in the same bulk display should be retained in the final rule.[8]

4. Abbreviations

Both the proposed rule and the seafood IFR permit the use of abbreviations and variant spellings that "unmistakably indicate" the country of origin of the covered commodity. As an example, both the proposed rule and the IFR cite the use of "U.K." for "The United Kingdom of Great Britain and Northern Ireland." FMI supports this provision and its reasonable interpretation, which is that "U.K." is simply one example of an abbreviation that retailers can employ.

In practice, however, USDA has recently concluded that there are no other unmistakable abbreviations and that all other country names must be written out in their entirety, with the exception of the United States of America, for which USDA will accept "U.S.A." or "U.S." We understand that USDA bases its position on the US Customs and Border Protection's (CBP's) interpretation of the Tariff Act. However, USDA should not follow Customs here as two different statutes are involved and inserting Customs's extremely narrow interpretation of its statute is neither required nor appropriate in the instant case. Indeed, it is highly inconsistent with USDA's interpretation of the remainder of the statute, which tends to be broad and reasonable.

First, the statutes are very different and clearly not *in pari materia* . The language of the statutes is different as are their statutory structures and purposes. Therefore, USDA is under no legal obligation to follow CBP's interpretation.

Second, USDA states in the preamble to the proposed rule that the policy objective in adopting the CBP standard for the AMS regulations was to avoid imposing conflicting obligations on importers and retailers who already face Customs' regulations on country of origin marking. Although a laudable goal, the application has backfired and produced precisely the opposite result. Namely, although USDA will accept all manner of abbreviations from intermediary suppliers and others (who are subject to Customs's regulations in various contexts) on records, the Agency will only accept fully stated names of countries in the signage retailers are required to post at store level.

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[8] Requiring separate bins would have a ripple effect on the food supply chain. For example, if retailers were required to segregate like products from different countries, wholesalers would likewise experience increased costs in terms of the slotting space that would be required in warehouses. These costs would expand exponentially deeper back in the supply chain if packing houses were required to segregate carcasses and cow/calf producers were required to segregate back to the farm.

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Retailers are not subject to CBP's regulations for this type of signage, therefore, consistency with CBP's standards does not simplify retailers' regulatory burden nor does failure to adhere to the Customs' standard impose conflicting obligations. Indeed, requiring retailers to hew to the CBP standard that is otherwise unknown to retailers does itself impose significant obligations upon retailers, particularly once retailers will be required to identify country of origin for products with potentially lengthy declarations, such as ground beef. Consumers are just as likely to understand that "Product of Mex" or "Product of Can" means that the products are, respectively, from Mexico or Canada as they are to know that "Product of UK" means that the item is from Great Britain or Ireland.

As USDA is not legally bound to adopt the Customs standard and that standard imposes burdens that the Agency stated it was trying to avoid, we urge USDA to take a more reasonable stance in the final regulations. Consumer understanding should be the key, not CBP's regulations. Therefore, unless USDA has a basis to believe that consumers would not understand an abbreviation in the context presented, USDA should permit the use of the abbreviation under this statute, regardless of CBP's interpretation of the Tariff Act.

E. Recordkeeping

The underlying 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." Both the proposed rule and the seafood IFR include recordkeeping provisions. In addition, USDA issued a "Notice to the Trade" (March 2005) shortly after the final rule was published further clarifying the recordkeeping requirements.

The seafood IFR requires retailers to maintain at store level records upon which the retailer relied to establish the covered commodity's country of origin (and method of production). Retailers are not required to maintain any store level records for products pre-labeled for country of origin (and method of production) by the supplier, such as bags of frozen, raw shrimp. The records required at store level must only be maintained by retailers until the product is sold.

In addition, under the IFR, retailers are required to maintain for one year records that identify the retail supplier and the product unique to that transaction; the records must include CoO/MoP if the product was not pre-labeled by the supplier. USDA's March 2005 Notice to the Trade clarifies that the tracking number or unique identifier is something that allows USDA to link the record with the specific product itself and is not necessarily a lot code number although that would suffice. The regulations allow these records to be maintained at store level or "point of distribution, warehouse, central offices

or other off-site location" and require them to be maintained for one year "from the date the declaration is made at retail."

The approach set forth in the IFR is preferable to the approach in the proposed rule and should be used for all covered commodities in the final rule, with the following modifications. First, retailers should continue to have flexibility for maintaining supplier information. For companies with a corporate headquarters or just more than one location, it often makes sense to centralize supplier records. USDA should continue to permit all but the basic country of origin (and method of production) information to be maintained off-site. To facilitate Agency review, USDA might indicate in the final rules that these records must be provided to USDA within a reasonable amount of time, such as 3 business days, following a request or inspection conducted at store level.

Second, USDA should distinguish between suppliers with firsthand knowledge and intermediary suppliers. The former, on whose veracity and recordkeeping the ultimate declarations depend, should be required to maintain records for at least the expected shelf life of the ultimate product. Those records should set forth the country of origin of the product and the basis thereof. In contrast, wholesalers and other intermediary suppliers who do not impact the country of origin declaration in any way should not be required to keep records beyond those necessary to identify their immediate suppliers and subsequent corporate recipients.

F. Enforcement/Compliance

The statute provides the following with respect to enforcement. First, the Secretary must notify the retailer if the Secretary "determines that a retailer is in violation of the statute" and provide the retailer with 30 days "during which the retailer may take necessary steps to comply" with the statute. Second, if the Secretary determines after completion of the 30-day period that the retailer has "willfully violated" the statute, the Secretary may fine the retailer up to $10,000 for each violation after giving the retailer notice and an opportunity for an administrative hearing. Given the nature of the statutory language, the regulated community would benefit from the clarifications set forth below, in the preamble, if not in the regulations themselves.

1. "Willful Violation"

First, the statute only permits the Secretary to impose fines on a retailer that has "willfully violated" the statute. The statute does not further define the term, nor does the legislative history provide any further insight into congressional intent. Nonetheless, the regulated community would benefit from a better understanding of the term. As discussed more fully below and based on the following case law, we urge USDA to recognize in the

final regulations or at least in the preamble thereto that a willful violation does not occur where a party is exercising good faith efforts to comply with the statute.

Specifically, the Supreme Court has repeatedly recognized, that the term "willful," is a "word of many meanings, its construction often being influenced by its context." See, e.g., *Spies v. United States*, 317 U.S. 492, 497, 63 S.Ct. 364, 367, 87 L.Ed. 418 (1943); *United States v. Murdock*, 290 U.S. 389, 54 S.Ct. 223, 78 L.Ed. 381. Although the term has not been interpreted in the context of the mandatory country of origin labeling provision of the Agricultural Marketing Act, several cases have interpreted the concept in the context of other statutes enforced by USDA.

For example, in reviewing the meaning of "willful" during the review of alleged violations under the Perishable Agricultural Commodities Act (a statute expressly cross-referenced in the mandatory country of origin labeling law), the courts have held that "an action is willful if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements." See, e.g., *Coosemans Specialties*, 482 F.3d at 567 (quoting *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 778 (D.C.Cir.1983). In reviewing a suspension under the Packers and Stockyards Act, courts have held that "willfulness" means "an intentional misdeed or such gross neglect of a known duty as to be the equivalent thereof." See, e.g., *Capitol Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir.1965); *Hutto Stockyard, Inc. v. USDA*, 903 F.2d 299, 304 (4th Cir.1990). In reviewing violations of the Animal Welfare Act, an act was deemed "willful" when "knowingly taken by one subject to the statutory provisions in disregard of the action's legality." *Hodgins v. United States Dep't of Agric.*, No. 97-3899, 2000 WL 1785733 (6th Cir. Nov. 20, 2000)("actions taken in reckless disregard of statutory provisions may also be considered willful"); *see also, Cox v. United States Dept. of Agriculture*, 925 F.2d 1102, 1105 (8th Cir.), cert. denied, 502 U.S. 860, 112 S.Ct. 178, 116 L.Ed.2d 141 (1991) ("willfulness"... includes not only intent to do a prohibited act but also careless disregard of statutory requirements.")

The concept of willfulness has thus been held to involve careless disregard of statutory requirements or gross neglect that rises to the level of an intentional misdeed.

Clearly, then, a retailer that has and continues to make good faith efforts to comply with the statute is not intentionally or carelessly disregarding the statutory requirements and, therefore, cannot properly be found to be "willfully violating" it. In this context, good faith efforts would include a clear program for providing comprehensive labeling of all covered commodities at store level, recognizing that, given the large number of covered commodities involved and the diversity of suppliers that some small percentage (perhaps 10 or 15%), of covered commodities might not bear labeling on any given day.

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Once the final rule takes effect and all covered commodities are subject to the statute, we estimate that approximately 800 to 1,000 different stock keeping units (or SKU's) will need to bear country of origin (and method of production) labeling in any given store. These products will be sourced from all over the world, from hundreds of suppliers, and the country of origin information will be provided in innumerable different ways. Some sophisticated suppliers will be able to provide country of origin information directly on the products; others may be local growers that do not have the ability to provide PLU stickers on their products or whose records might be lacking in certain respects.

Given the breadth of products involved and the high legal standard of willfulness set by the statute, a good faith effort to comply with the statute would be evidenced by labeling on 85% or 90% of covered commodities in the store. To avoid the vagaries of inconsistent enforcement, we urge the Agency to recognize in the final rule or the preamble that a retailer's good faith efforts to comply with the statute demonstrate that the retailer is not willfully violating the statute.

2. "Liability Shield"

Both the proposed and interim final rules provide for a so-called "liability shield" that entitles retailers and others handling covered commodities to rely on the information provided to them by their suppliers, if they "could not have been reasonably expected to have had knowledge of the violation." Allowing retailers and others to rely on the information provided by their suppliers is an important principle but, in this case, lowers the liability bar for retailers.

Specifically, as discussed more fully above, retailers are not subject to fines under the statute unless the Secretary determines that they have willfully violated the statute. The standard of willfulness is a higher bar to liability than the standard of negligence that is encompassed in the reasonable reliance standard utilized in the "liability shield" language. Accordingly, the regulatory provision relating to retailers should be amended to reflect the statutory standard for liability that applies to retailers under the statute.

3. Preemption

The preambles to both the proposed and interim final rules state that the federal law preempts state country of origin labeling laws that apply to the products governed by the regulations. We agree with this premise and urge USDA to reiterate this conclusion in the final rule with the following clarification. Specifically, USDA should recognize that the federal law "occupies the field" and, hence, preempts state country of origin labeling laws for all products that are in the ambit of covered commodities.

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Thus, for example, state law shouldn't be able to impose country of origin labeling requirements on covered commodities that are ingredients in processed food items or on those prepared in food service establishments. Although these are exempt and excluded, respectively, from mandatory labeling, Congress has clearly spoken and concluded that labeling shall not apply to these items. The final rule should recognize that Congress has spoken just as clearly with respect to processed and food service meat, seafood, produce and peanuts as it has to covered commodities.

G. Implementation

1. Overall Implementation

The manner in which the final rule is implemented is very important to all involved: regulated community, regulators and consumers. Although the statute took effect for seafood on September 30, 2004, the interim final rule was not published until October 5, 2004. USDA allowed for an overall effective date of April 24, 2005 and focused on outreach and compliance efforts for the succeeding six months. We encourage USDA to utilize a similar approach after the final rule is promulgated.

2. Implementation for Specific Covered Commodities

The seafood IFR was published on October 5, 2004 and only applied to frozen fish or shellfish products that were caught or harvested after December 6, 2004. The Agency properly recognized that the food supply included frozen fish and shellfish products that were caught, frozen and packaged well before the effective date and, therefore, the country of origin was unlikely to have been identified on these products. If the regulations applied to these products, untold tons of seafood products would have been excluded from the retail chain, creating shortages and artificially inflating prices for consumers.

A similar circumstance will arise when USDA publishes the final rule for all covered commodities. For example, frozen perishable agricultural commodities have a lengthy shelf life. Many such products will have been harvested and frozen well before the final rules are issued. USDA should allow these products to enter the stream of commerce and only require country of origin information on frozen produce that was harvested and processed after the final rule takes effect.

The issues related to timing for covered meat commodities are also complicated because the statute requires knowledge of the countries of birth and raising for animals that have lifecycles of 15 months or more before the products they generate enter the food supply. Although retailers encouraged their suppliers to keep these records, we are not confident that sufficient documentation exists throughout the chain to allow retailers to

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accept these products on their shelves. Given the variable lifecycles of the different livestock species, USDA should provide for an adequate transition period to ensure that retailers have accurate information to convey to consumers.

A simple way to effectuate this goal would be to follow the Food and Drug Administration's (FDA's) uniform compliance date policy, which is also adopted by AMS's sister agency within USDA, the Food Safety and Inspection Service (FSIS). Specifically, in order to provide for an orderly and economical adjustment to new labeling requirements by allowing sufficient lead time to plan for the use of existing labeling inventories and to develop new materials, FDA (which regulates the labeling for fresh and frozen produce) periodically establishes a uniform compliance date for all labeling changes that occur within a specified time period. The Agency states that this policy serves consumers' interests because the cost of multiple short-term label revisions would otherwise be passed on to consumers in the form of higher prices.

FDA's December 21, 2006 final rule states that any food labeling changes that are issued between January 1, 2007 and December 31, 2008 will become effective on January 1, 2010. 71 Fed. Reg. 76599 (Dec. 21, 2006). FSIS has endorsed this approach and has likewise designated January 1, 2010 as the uniform compliance date. 72 Fed. Reg. 9651 (Mar. 5, 2007). Accordingly, we urge AMS to use the uniform compliance date for frozen perishable agricultural commodities and meat products for the reasons noted above, if not for all covered commodities.

III. Conclusion

FMI appreciates the opportunity to provide comments on this important rulemaking proceeding. We urge USDA to consider our comments and respond to them on the record.

Sincerely,

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Vice President &
Associate General Counsel

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