September 30, 2008

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: Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts (Docket No. AMS-LS-07-0081)

Dear COOL Program Administrators,

The Food Marketing Institute[1] (FMI) is pleased to respond to the U.S. Department of Agriculture's (USDA's) Agricultural Marketing Service (AMS) request for comments on the interim final rule (IFR) published by the Agency on August 1, 2008. 73 Fed. Reg. 45106 (Aug. 1, 2008). As discussed more fully below, although we support and appreciate the significant improvements the Agency has made in the current IFR, we have concerns in the areas of labeling and recordkeeping that are discussed more fully below.

[1] Food Marketing Institute (FMI) conducts programs in public affairs, food safety, research, education and industry relations 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 and 14,000 pharmacies. Their combined annual sales volume of $680 billion represents 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 more than 50 countries. FMI's associate members include the supplier partners of its retail and wholesale members.

I. OVERVIEW

The primary goal of the grocery stores and food wholesalers that comprise FMI's membership is to provide consumers with a wide variety of fresh, affordable food products every day. FMI's data show that consumers' primary concern is with the quality, freshness and price of food products. To satisfy these demands, retailers and wholesalers source food products from around the world on a daily basis. FMI is proud of its members and the way that American consumers today can take for granted the abundant and varied food supply that is found on grocery store shelves every single day.

FMI's members also provide information to consumers on the sources of their foods. Some retailers utilize the successful state marketing programs for fresh fruits and vegetables. Others have developed their own marketing programs or feature locally grown produce when in season. Some supermarkets have programs geared specifically toward meat products showcasing products from particular states or from livestock that was produced with certain attributes. All of these programs are successful because the retailers and their suppliers worked together to understand the consumers' needs and to respond to them.

FMI supports the information our members have provided to consumers for so long. Nonetheless, the mandatory country of origin labeling law becomes effective for all covered commodities today and FMI and our members are working hard to ensure that they will be providing consumers with as much information as quickly as possible in compliance with the law.

Retailers and wholesalers are, however, limited in the information that they can provide. Our information is only as good as the information provided to us by our suppliers. As the regulation does not apply to foods produced or packaged prior to September 30, 2008, retailers and wholesalers cannot provide information on these products to consumers.

In this regard, however, we believe that USDA has correctly decided to expend the Department's enforcement resources on outreach and compliance over the next six months.[2] In light of the facts that the interim final regulation was only promulgated eight weeks ago, significant implementation issues are still unresolved, and product without origin information is in the pipeline, we appreciate the Department's enforcement approach that will focus resources on helping all segments of the chain to understand and comply with the requirements.[3]

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[2] We encourage USDA to use this time to conduct consumer outreach as well to ensure that consumers understand the purpose and limitations of the program as well as the fact that it is not intended to increase food safety.

[3] We note, however, that for the much smaller seafood country of origin labeling program, USDA provided for a 6 month effective date in the interim final rule (instead of the 8 weeks for the current IFR) and then a 6 month period of outreach and enforcement.

As an industry, grocery stores are working to coordinate with thousands of suppliers to ensure that the information will be forthcoming, as well as to prepare hundreds of thousands of employees, not to mention the development of innumerable sign kits and scale label programs that must be ready in each grocery store to provide the information to consumers. No matter how well-trained the orchestra, it still needs adequate rehearsal time before performing a new symphony. Nonetheless and despite the large magnitude of products involved, FMI's members are actively engaged in developing the necessary programs as quickly as possible.

II. COMMENTS

FMI's specific comments on the current IFR are explained below, however, several common themes are worth noting up front.

First, and foremost, the mandatory country of origin labeling law is a marketing law. FMI and its members support the provision of accurate information to consumers as required by the law. However, as USDA states in the preamble, this law is not a food safety law. All foods in the United States and offered on the shelves of American grocery stores are required to meet the same high standards for food safety, regardless of whether they are grown on the farm next door or produced in a country half way around the world. USDA should tailor its regulatory and enforcement approach accordingly.

Second, flexibility is extremely important. In order for the law to achieve the improvements that were intended for US producers, USDA must allow grocery stores and all those engaged in supplying covered commodities to implement the requirements in a flexible manner. FMI has followed the recent announcements from USDA regarding the flexibility that the Agency intends to afford producers in terms of labeling and recordkeeping, and respectfully urges the Agency to place the same premium on flexible implementation for wholesalers and retailers as well.

Third, Congressional intent regarding the level of burden this law should impose is clear. In the 2008 Farm Bill, Congress included provisions that expressly restrict USDA's ability to impact current business practices under the mandatory country of origin labeling law.[4] As USDA notes in the extensive Cost/Benefit analysis attendant to the IFR, the law will undoubtedly impose costs

[4] Indeed, in a letter to the USDA, the House Agriculture Committee Ranking Member, Bob Goodlatte stated the desire of the committee that the legislation be interpreted in a manner that '"maximizes the benefits to producers and minimizes the regulatory burdens on producers, processors, retailers and consumers.'" See letter from USDA General Counsel Marc Kesselman to The Honorable Bob Goodlatte dated May 9, 2008.

on the food production system.[5] However, USDA should take every care not to increase costs beyond those essential to implementing the law. Every sector of the food production community is stretched to the limit. Consumers will not appreciate any increased costs to food that are incurred in order to comply with a marketing law.

A. Structure

The Farm Security and Rural Investment Act of 2002 (2002 Farm Bill) amended the Agricultural Marketing Act of 1946 to require the development of a mandatory country of origin labeling program. In furtherance of the law, USDA issued voluntary guidelines in 2002 (Voluntary Guidelines), a proposed regulation in October 2003 (Proposed Rule) and an interim final rule to implement that portion of the law relative to seafood in 2004 (Seafood IFR). The underlying statute was again amended by the Food, Conservation and Energy Act of 2008 (2008 Farm Bill). Subsequently, USDA published this interim final rule (IFR) for all non-seafood covered commodities.

The Seafood IFR is currently codified in 7 CFR, Part 60. The current IFR for the remaining covered commodities is published at 7 CFR, Part 65. It will be confusing to the regulated community to continue to keep these regulations in separate parts. Moreover, the regulations for the different covered commodities have much in common, from the rules for consumer notification to the requirements for recordkeeping. Accordingly, we strongly urge USDA to promulgate a single final regulation that will apply to all covered commodities.

B. Definitions

1. *Processed Food Item*

Since it was enacted in the 2002 Farm Bill, the mandatory country of origin labeling law has had an exemption for processed food items. (Congress clearly did not intend to apply the law to all covered commodities as the law also exempts covered commodities sold at restaurants, as well as those sold from traditional butcher shops and seafood stores.) As the statute does not itself define "processed foods," USDA has worked on this definition in the various regulatory interpretations that have been issued over the past six years.

The processed food definition that USDA adopted in the Seafood IFR is simple, straightforward and provides a brightline test that retailers and others can use to understand which covered commodities are subject to the law and which are not. This definition has been in place for 4 years now and store level

[5] Indeed, as FMI reported in comments filed with USDA in 2007, the costs for implementing the Seafood IFR were significantly greater than USDA had foreseen in the regulatory assessment.

associates have been trained and understand the standard. Accordingly, FMI urged USDA to apply the Seafood IFR processed food definition to all covered commodities. USDA adopted this approach in the current IFR and we urge the Department to maintain the same definition in the final regulation.

Each time the Department amends its rules, the regulated community must reconfigure operations across the board, including training and quality assurance procedures. Each time the standards change, the likelihood of accurate store level execution decreases. Our members have invested significant resources in training and execution under the processed food standard set forth in the Seafood IFR and now in the current IFR. We strongly encourage USDA to maintain the same definition in the final rule.

Nonetheless, if USDA does amend the processed food definition, we urge the Department to include clear standards for the regulated community to use to identify the country of origin of those products accurately. For example, the current processed food definition exempts seafood stew. If retailers are required to provide a country of origin declaration for this product, will the product have a single country of origin and if so, how would that be determined? By the country of origin of the majority of the products? By the country in which the stew was made? Or will the retailer be required to identify the country of origin of each ingredient? What about sausage, which is a combination of meats and spices and the casing? USDA should also consider the potential overlap in terms of the jurisdiction of other agencies and the labeling standards that they apply for processed food products. Depending on the food, and the extent to which USDA changed the processed food definition, foods might be subject to conflicting labeling standards from Customs and Border Protection (CBP), the Food and Drug Administration (FDA), and the Food Safety and Inspection Service (FSIS).

2. *Produced*

The current IFR adds a new definition of "produced." In particular, Section 65.225 states that, in the case of a perishable agricultural commodity, peanuts, ginseng, pecans, and macadamia nuts, "produced" means "grown." As some plants may be transplanted across national borders, we urge the Department to establish a clear line and instead define "produced" as "harvested." We understand that the Agency intends for perishable agricultural commodities to have a single country of origin identity. Each perishable agricultural commodity will only have one place of harvest. Accordingly, we believe this will help to simplify the origin determination for perishable agricultural commodities.

B. Country of Origin Notification

1. Labeling Whole Muscle Cuts of Meat

The 2008 Farm Bill adopted a set of four almost entirely new standards or definitions for retailers to use to identify the country of origin of whole muscle cuts of meat. In short, new Section 282(2) provides as follows: only meat from animals that were born, raised and slaughtered in the United States may be labeled "Product of the US" (Category A); meat from an animal that was slaughtered in the United States, but may have been born and/or raised in the U.S., Mexico or Canada, may be labeled "Product of the US [and whichever other countries apply]" (Category B); meat from animals that are imported for immediate slaughter must be labeled as the country of import and the United States (Category C); and imported products must be labeled with their country of import (Category D).

At the outset, we should note that the Category system adopted by Congress is complex and confusing and neither FMI nor its members believe that it will serve consumers (or retailers) well. As this part of the law was enacted as part of the 2008 Farm Bill, which occurred after the 2007 comment period closed, neither FMI nor the rest of the regulated community had an opportunity to weigh in on the language. USDA's general counsel, however, provided an interpretation of the draft legislative language (which was subsequently enacted as written) to the House Agriculture Committee.[6]

In his letter, USDA's General Counsel offered his interpretation of the statutory language as to whether products eligible for the US Country of Origin label "must" bear that label, and consequently cannot bear a Category B label. USDA's general counsel concluded as follows: "*We do not believe that any fair reading of the statute would mandate such a result*." (emphasis added)

General Counsel Kesselman reached this conclusion by looking at the statutory language itself, which provides direction to retailers (not to packers or processors) with respect to the appropriate labeling for whole muscle cuts. He stated:

> Categories A and B provide retailers with flexibility regarding how to label their meat products. For both of these categories, the Senate-passed language uses the word "may" instead of "shall." Thus, a meat product from an animal that falls within Category A "<u>may</u>" be designated as "exclusively having a United States country of origin.... Such products must, pursuant to section 282(a)(1) bear a country of origin label, but the

[6] Letter to The Honorable Bob Goodlatte from General Counsel Marc Kesselman dated May 9, 2008.

> prescriptive language does not flow to the content of the label. (emphasis in original)

He continued:

> In our view, any attempt to read Category A as requiring that all products eligible for the US country of origin label must bear that label suffers from the fatal flaw of converting the plain statutory term "may designate" into "shall designate." (emphasis in original)

And further stated:

> Had the drafters intended a mandatory requirement that all U.S. product be segregated and labeled as such, there are numerous ways that such a preference could have been codified clearly. Given that the drafters understand the tremendous cost and burdens that would fall upon nearly ever segment of the production chain, it is unlikely that they would deliberately impose a segregation requirement on the industry by statutory indirection.

In conclusion, the general counsel stated that:

> It would be inconsistent with this overall purpose [of the Agricultural Marketing Act] to read into the statute additional mandates that would impose economic inefficiencies and disrupt the orderly production, processing, and retailing of covered commodities. Accordingly, with respect to the [meat covered commodities], it is our view that the draft legislation delineates four categories of country of origin labels in language *that affords retailers marketing flexibility in the first two categories.* (emphasis added)

However, in its recent guidance documents interpreting the whole muscle cut labeling requirements, USDA affords packers and processors flexibility that the Agency discerns from the language regarding retail labeling, but does not apply the same standard to retailers. We respectfully urge USDA to interpret the language consistently for all sectors of the chain. To interpret language about the retailers' obligations as affording the packers flexibility – but not retailers – is an incongruous result.

The discussion around the legal interpretation, however, begs the truly important question of the impact that the law will have on the marketplace and the products that will ultimately be available to consumers. Unquestionably, all whole muscle cuts of meat must meet the same high legal standards for food safety, regardless of the country of origin declaration.

However, given the highly concentrated packer community, which has been vocal in its decision to primarily produce beef products that are labeled,

"Product of the US, Canada, Mexico,"[7] the quantity of "Product of the US" beef necessary for retailers to provide that product to their customers on a consistent basis is questionable. The fact that the large majority of the U.S. herd is comprised of livestock that are born, raised and slaughtered in the United States and, thus, eligible to produce beef for the "Product of the U.S." label becomes irrelevant if the packers are not required to and do not choose to segregate livestock based on the origin of the animal throughout its lifecycle.[8]

2. Labeling Ground Meat Products

As with whole muscle cuts, the 2008 Farm Bill incorporated new standards for retailers to use to identify the country of origin for ground meat products. Specifically, retailers must identify a list of all countries of origin or a list of all reasonably possible countries of origin for the product. In the interim final rule, USDA stated that "when a raw material from a specific origin is not in a processor's inventory for more than 60 days, that country shall no longer be included as a possible country of origin." 7 CFR 65.300(h). We understand that this provision was intended to reflect the processes of commercial grinders and not to require them to change their labels simply because the market had changed and source product was more expensive from one country than another. As the statutory language that is interpreted here is directed to retailers, we understand this provision to apply to retailers as well, and respectfully request that USDA confirm the applicable standard in the final regulation.

3. Commingled Covered Commodities

In a departure from both the Proposed Rule and the Seafood IFR, the current IFR includes a new definition for "commingled covered commodity." Specifically, USDA defines commingled covered commodities as covered commodities (of the same type) presented for retail sale in a consumer package that have been prepared from raw material sources having different origins (e.g., bag of frozen strawberries). USDA states that, for these products, the country of origin must be designated in accordance with CBP marking regulations, promulgated pursuant to the Tariff Act. To the extent that this will prevent a conflict between the two laws, FMI supports this approach. As discussed more fully below, we caution, however, that USDA should not impose a different

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[7] See, e.g., Letter from J. Lochner, Tyson Fresh Meats, Inc. to Our Valued Customers, dated July 29, 2008; Powerpoint presentation from National Beef dated August 29, 2008; Letter from Herb Meischen, Cargill, to Valued Customer, dated September 8, 2008; Letter from Bruce Miller, JBS Miller Beef, dated September 11, 2008; Letter from Alfred Basuch, Sam Kane Beef Processing, dated September 25, 2008.

[8] With respect to some of the operational issues attendant to meat labeling, we note that USDA's recent guidance directs retailers to use the word "and" or a comma to separate multiple countries in the whole muscle cut designations. As this approach is consistent with the direction retailers were given under the Seafood IFR, we encourage USDA to maintain it in the final rule. Telling retailers that they must use an "and" for seafood products but an "or" or an "and/or" for meat products would be unnecessarily difficult to implement. Similarly, we encourage USDA to continue to permit flexibility in the order in which countries are listed for the various categories.

standard for "commingled covered commodities" that are packaged at store level from the standard applicable to bulk bins as such a result will cause unnecessary confusion without providing any meaningful difference in information provided to consumers.

4. Remotely Purchased Products

Consistent with the approach taken in the Seafood IFR, the current IFR provides the following with respect to remotely purchased products:

> For sales of a covered commodity in which the customer purchases a covered commodity prior to having an opportunity to observe the final package (e.g., internet sales, home delivery sales, etc), the retailer may provide the country of origin notification either on the sales vehicle or at the time the product is delivered to the consumer.

7 CFR 65.300(i).

A single internet site can serve consumers across large areas of the United States. The countries of origin of the covered commodities offered for sale on the website may vary depending on the geographical location from which the internet customer is ordering. Accordingly, the Internet site should be permitted to list all countries of origin for the products that may be sourced across the geographic regions covered. This would essentially reflect the standard for bulk bins that USDA has adopted. The site could offer a "COOL Hotline" for customers that wanted specific information but the site itself would need to reflect all reasonably possible sources for the covered commodities across the entire geographical region served. We encourage USDA to maintain the provision for remotely purchased products with this additional flexibility.

C. Markings

1. Permitted Vehicles

Unchanged by the 2008 Farm Bill, the 2002 Farm Bill provided a broad range of mechanisms that retailers may use to satisfy their obligation to inform the consumer of the country of origin of covered commodities. Specifically, Section 282(c) states as follows:

> The [country of origin] information required by subsection (a) may 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.

Each of USDA's regulatory interpretations has recognized the breadth of the statutory language and expressly authorized retailers to use a wide variety of vehicles. The final rule should maintain this statutorily granted flexibility.

Two vehicles that retailers are likely to utilize are "price look up" or PLU stickers (particularly for produce) and single signs to declare the country of origin for all products in a given department, such as the meat department. With respect to the former issue, we encourage USDA to recognize that the statute clearly allows for a label on a product to identify its country of origin and further to recognize that, in a bulk bin, not every individual item need bear labeling in order to inform the consumer of the country of origin of the covered commodity. Rather, USDA should recognize that retailers can meet their obligation if a majority of the items in a bin bear a label with origin information.

With respect to the single sign issue, we understand that USDA is concerned that a sign such as "All beef is Product of the US" might be interpreted by consumers to encompass beef products that are not covered by the statute because, for example, they are processed. In order to provide clarity, we urge USDA to provide "safe harbor" standards for language and placement in order to ensure that retailers are properly meeting their obligations.

2. Declaration

Consistent with the intended purpose of the statute, the current IFR recognizes three acceptable methods for retailers to declare country of origin: (1) a full statement (e.g., "Product of..."); (2) the country name alone (e.g., "USA"); or (3) the use of checkboxes. 7 CFR 65.400(a). We encourage USDA to retain this flexibility in the final rule in language that permits the possibility of additional methods in the future. In addition, as all of USDA's regulatory and guidance text use the full "Product of" statement with respect to meat products, we urge the Agency to clarify in its guidance that retailers may use either of the two other methods to declare the country of origin of meat products as well.

The current IFR further requires that the declaration "be legible and placed in a conspicuous location, so as to render it likely to be read and understood by a customer under normal conditions of purchase." 7 CFR 65.400(b). We agree that this approach is preferable to dictating that country of origin information be provided in a particular type size or font and encourage USDA to continue with this approach in the final regulation.

3. Bulk Containers

In the current IFR, USDA distinguishes for the first time between covered commodities that are sold in bulk containers and those that are "commingled covered commodities" sold in individual consumer packages. In previous regulatory iterations, USDA considered these products "blended." For bulk bins, the Agency states that, "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 provided all possible origins are listed." 7 CFR 65.400(d).

We agree that retailers should have the flexibility to combine products from multiple countries in the same bin. All products, regardless of the country from which they are sourced, must meet the same high standards for food safety under the United States food safety laws. Provided sufficient information is available for consumers to understand the country or countries of origin of a given covered commodity, retailers should be allowed to combine covered commodities from multiple countries in the same bulk display. The alternative would be wasteful, requiring retailers either to discard the last few remaining items as product from different countries was brought into the store or to source from only one country at a time. As U.S. producers cannot provide all covered commodities all year, such a result would not favor American producers, which is clearly the intent of the law.

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. In the current IFR, USDA states as follows:

> In general, abbreviations are not acceptable. Only those abbreviations approved for use under CBP rules, regulations, and policies, such as "U.K." for The United Kingdom of Great Britain and Northern Ireland, "Luxemb" for Luxembourg, and "U.S." for the United States are acceptable.

7 CFR 65.400(e). As discussed more fully below, we urge USDA to reconsider its position of relying on CBP's interpretation of the Tariff Act 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 retailers and importers who already face Customs' regulations on country of origin marking. In the preamble to the current IFR, USDA states that its purpose was to avoid confusing consumers. Id. at 45120. We believe that USDA seriously underestimates the American consumer if the Agency does not believe that consumers would understand that "Mex" means "Mexico" or that "Can" means "Canada" in the country of origin

context. Indeed, we expect that most consumers would be far more likely to understand these abbreviations than to know that U.K. stands for The United Kingdom of Great Britain and Northern Ireland.

Accordingly, we strongly urge USDA to reconsider its position with respect to abbreviations and permit commonly used and recognized abbreviations to suffice to inform consumers of the country of origin of covered commodities.

5. "State, Region, or Locality"

With respect to the country of origin designation for perishable agricultural commodities, ginseng, peanuts, pecans, and macadamia nuts, the 2008 Farm Bill expressly permits retailers to use the "State, region, or locality of the United States where such commodity was produced" as a means to identify the commodity's country of origin as the United States. The regulatory text of the interim final rule states that covered commodities other than the aforementioned covered commodities may not rely on State or regional designations. 7 CFR 65.400(f). The preamble text goes on to say that state or regional label designations are acceptable in lieu of country of origin for both domestic and imported products. 73 Fed. Reg. at 45120.

We support the provision to the extent that it reflects the statutory language, as well as the additional flexibility provided for state or regional labeling for imported products, if the retailer chooses to rely on the same. However, we note that USDA is silent on the use of "local" labeling and respectfully request that the final rule recognize that "local" labeling is likewise permitted by the statute. Many of our retail members source products locally and provide this information to consumers because it is meaningful to them. The statute expressly recognizes that local labeling is an acceptable way for retailers to provide origin information. Therefore, the final rule should so state as well.

D. Recordkeeping

As noted throughout these comments and USDA's interim final rule, country of origin labeling does not impact the safety of the food that is labeled. The mandatory country of origin labeling law is a marketing law and, as such, it should not impose recordkeeping burdens greater than other such laws. Not only is a food safety traceability approach not appropriate for a marketing law, the law itself prohibits USDA from using "a mandatory identification system to verify the country of origin of a covered commodity."

In terms of the legal requirements, the 2008 Farm Bill deleted the recordkeeping provision of the 2002 Farm Bill in its entirety and replaced it with three new provisions: (1) USDA *may* (but is not required) to audit any person that prepares, stores, handles or distributes a covered commodity to verify compliance with the law; (2) a person subject to such an audit *shall* provide

verification; and (3) USDA is prohibited from requiring the maintenance of records *other than those maintained in the course of the normal conduct of the business of such person*. Not only do the new statutory provisions require USDA to reconsider the appropriate recordkeeping standards for country of origin labeling, they evidence a congressional intent to minimize the impact that recordkeeping has on the entire regulated community.

Despite the new statutory construct, the recordkeeping provisions in the current IFR look remarkably similar to those in the Seafood IFR, which were promulgated pursuant to the 2002 Farm Bill provisions that are no longer in existence. Given the Congressional overhaul, USDA must likewise revise the regulatory recordkeeping requirements. Moreover, as the new statutory standards apply to all covered commodities, including seafood, the regulatory recordkeeping provisions should likewise apply to all covered commodities.[9]

1. *"Normal Conduct of Business"*

The United States food distribution system is a complex system that has been honed to increase efficiency and to ensure that the freshest possible product is delivered to stores and, therefore, to consumers on a daily basis. Although each wholesaler and retailer has its own finely tuned and detailed procedures, that depend to a varying degree on technology, following is a high level overview of customary practices to help the Agency understand the "normal conduct of business" for these entities.

Distribution centers are huge warehouses, often more than 500,000 square feet in size. They have large, established, perimeter areas with truck bays and loading docks that are used for both receiving product from suppliers during part of the 24-hour day and for staging and then loading pallets of pre-selected products that will be shipped to individual stores.

The majority of the space in the interior of the warehouse is comprised of fixed "slots," which are large bays, often 65 ft3, and stacked three or four high that are used to hold product between the time that it is received and the time that it is selected to go out to stores. Each slotting "column" has a number. The bottom, floor level slot is called a "pick slot;" the slots "stacked" above are called "reserve slots". Slotting space is limited by the physical capacity of the warehouse so slotting space is both highly prized and difficult to reconfigure or increase, without overhauling the entire physical building. A 350,000 ft2 facility has approximately 5,000 pick slots and 15,000 reserve slots. A 700,000 ft2 facility might have 12,000 pick slots with 44,000 reserve slots.

[9] As discussed at the outset, this is yet another reason why a single final regulation that addresses all covered commodities should be issued.

During the receiving portion of the day, which often occurs overnight, distribution centers receive vast quantities of products from a large number of suppliers, literally, from all over the world. Particularly in terms of produce, on any given day, a distribution center may receive a particular type of covered commodity from many different suppliers (e.g., tomatoes received from multiple local growers) or a single supplier may provide a distribution center with a particular type of covered commodity that had been sourced from multiple countries (e.g., bananas from a range of Central American countries).

The process begins when trucks pull up to the loading docks and unload large, shrink-wrapped pallets comprised of many individual cases; each case holds individual products. Each pallet has a 'license plate' that identifies the pallet and connects it to the bill of lading (B/L) that is shipped with the product by the supplier. During the receiving process, distribution center personnel evaluate the product for attributes such as freshness, quality and any other characteristic requested at the time of order and then check the product against the B/L to ensure that the correct product was received. Many distribution centers now require that the B/L identify the country of origin of the product, so this, too, is checked against the product. Discrepancies are noted on the B/L.

After the receiving process is completed satisfactorily, the pallet is typically placed into a numbered slot that corresponds to the product type, e.g., green beans, tomatoes on the vine, corn on the cob. Products are placed in the same slot by type, regardless of their country of origin or supplier. Bananas, often the single biggest seller for a retailer, are typically held in large, enclosed banana ripening bays or "rooms" until they are ready for shipment.[10] If a distribution center lacks sufficient slotting space or if the DC is receiving an unusually large quantity of a particular commodity – often from multiple different sources – that cannot adequately be accommodated in a slot, that product may be left on the receiving floor in no particular order and selected in the following shift for delivery to stores.

During the selecting shift, warehouse personnel fill orders received from stores over the previous evening. Riding special carts, selecters will travel from numbered pick slot to numbered pick slot, picking up individual cases of product and adding them to the cart, depending on the products and quantity that are needed by the store whose order is being filled. (As the floor level pick slots are emptied, the same product is lowered from the reserve slot above to replenish the pick slot.) Once all products for the store have been selected, the entire load is moved to the perimeter staging area where it is shrink-wrapped and held until it is loaded onto a truck that will deliver it to a store. Often the pallet will be accompanied by a store invoice that itemizes the products selected based on the slot from which each product was taken.

[10] Bananas are selected by ripeness and quality, rather than by their origin or the supplier.

At the store, a similar receiving process takes place. Store personnel review the product received and evaluate it against the shipping invoice, noting any discrepancies. After receiving, the store invoice is often shipped to an accounting department. Stores may also receive "direct store delivery" or DSD product that arrives at the store directly from the supplier, rather than traveling thru a distribution center. For example, local produce growers may supply stores on a DSD basis. The DSD supplier may provide an invoice directly to the store; for smaller suppliers, this invoice may be handwritten.

2. *Recordkeeping Responsibilities of Suppliers*

The current IFR requires intermediary suppliers, such as distribution centers and wholesalers, to maintain records "to establish and identify the immediate previous source and immediate subsequent recipient of a covered commodity for a period of 1 year from the date of the transaction." 7 CFR 65.500(b)(2). The terms "immediate previous source" and "immediate subsequent recipient" are statutory terms of art from the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 ("Bioterrorism Act"). The regulations adopted by the Food and Drug Administration (FDA), the agency responsible for implementing the Bioterrorism Act, interpret these terms and require entities that handle food to have important information about those that supply and receive their food products. See, 21 CFR, Subpart J, as promulgated 69 Fed. Reg. 71562 (Dec. 9, 2004). For example, the regulations require knowledge of the supplier's/recipient's name, address, telephone number, as well as the type and quantity of food received/shipped, date of receipt/shipment and information on the transporter.

With respect to the degree of specificity required for food products received and shipped under the Bioterrorism Act regulations, FDA has said that entities are responsible for the information that is "reasonably available" in the context of their current business practices. The classic example that FDA uses to describe when information is "reasonably available" is the following case of a cookie maker:

> A company that bakes cookies may source flour from five different companies rather than depend on a single company as its supplier. The flour from the five companies may be stored in one common silo before being used in the manufacture of the cookies. In this scenario, the manufacturer could identify, depending on the date the flour was received from each company and placed in the silo and when the silo was emptied, the various companies that were the sources of the flour. Under this situation, the information is not reasonably available to determine a single source of the flour used in the particular lot of cookies. The information reasonably available to the manufacturer would be the identity of all of the potential sources of the flour for each finished lot of cookies.

69 Fed. Reg. at 71597-98. Indeed, the preamble acknowledges that in many instances it may be impossible to identify the specific source of a material that is held in bulk and that multiple sourcing information is to be anticipated. FDA states that "it is not FDA's intent to mandate reengineering of longstanding existing processes." Id. at 71597.

Distribution centers hold products in "slots" that are analogous to the "silos" in the hypothetical FDA example above. Thus, the records that are "reasonably available" to warehouses and that they now keep in the normal conduct of their business to satisfy their Bioterrorism Act obligations to identify the immediate previous source and immediate subsequent recipient of products are those records that identify the source(s) of the products that are in their distribution center at a given period of time and all those entities that received that type of product over that time period. Accordingly, as the statute prohibits USDA from requiring records that are not maintained in the normal conduct of business, and these records are deemed sufficient to satisfy the Bioterrorism Act's mandate to be able to identify immediate previous source and immediate subsequent recipient of foods, USDA should likewise accept multiple sourcing records for purposes of the mandatory country of origin labeling regulatory requirement for intermediary suppliers to identify their immediate previous source and immediate subsequent recipient.[11]

New requirements outside of the normal conduct of business would impose significant costs on the industry. The options would be either to install new technology to scan each individual case (instead of the pallet) when it is received and when it is shipped or to separately slot commodities not just by type, but also by country of origin and, really, by supplier. One small to mid-size supermarket company estimated that it would incur a start-up cost of $10.8 million to purchase the software system, replace the current hardware, and purchase scanners necessary to scan inbound and outbound product at the case level. This was estimated to reduce efficiency by 50%, which would likewise reduce the number of store deliveries that could be accomplished. Annual costs were estimated at $6.5 million per year. Multiplied across the distribution sector, these costs would be significant.

Not surprisingly, the second alternative, reconfiguring the warehouse, would incur even greater costs since it would entail building new facilities. The aforementioned company roughly estimated that twice as many pick slots would be necessary for produce alone given the number of suppliers and the potential countries of origin for each.

[11] As the Department is aware, the industry, FDA and USDA are working on new programs and technologies that will increase product traceability, particularly for produce, but these programs are not yet available. FMI is pleased to be working on the Produce Traceability Initiative that is being spearheaded by the Produce Marketing Association and United Fresh Produce Association.

In terms of potential cost for such capital construction, the comments that we filed with USDA in 2003 in response to USDA's request for comments on country of origin implementation included a report prepared by one of our members on the potential costs attendant to country of origin labeling. Clearly, the regulatory structure has changed significantly over the past five years, so the report is not an accurate representation of overall costs for COL implementation; nonetheless, the estimated cost only to reconfigure the warehouse to accommodate separate slotting for produce, meat and seafood was $140 million, which illustrates the order of magnitude of costs that would be entailed if separate slotting were required. Clearly, these costs are not justified to support a marketing law that expressly prohibits USDA from requiring records that are not maintained in the normal conduct of business.

Furthermore, we urge USDA to take a flexible approach with respect to the documents themselves. For example, if the bill of lading contains an error, the customary practice is to note the discrepancy on the document. In the case of country of origin, it is possible that a distribution center will receive a pallet load of tomatoes from a packer that has marked the country of origin on the bill of lading as "US;" in the course of the receiving process, the warehouse personnel might notice that some of the individual cases are actually identified as "Mexico." (This situation is some times referred to as a "split pallet.") Rather than refusing a shipment of otherwise perfectly acceptable tomatoes, which would the waste of the product, the receiving personnel should be able to correct the document and the corrected document should suffice for USDA's purposes.

Similarly, in an effort to provide additional information to their retail customers, some wholesalers have decided to list all possible countries of origin of the covered commodities on the store invoice. For the products that are individually pre-labeled, this information is irrelevant. Nearly every other product will have country of origin information on the outside of the case. As discussed below, when the retailer receives the product, retailers should be permitted to check the country of origin for the product that is stated on the case against the country of origin listed on the store invoice and make the necessary corrections if they choose to maintain the invoice as a verification record.[12]

3. *Recordkeeping Responsibilities of Retailers*

Section 65.500(c) of the current IFR includes the following provisions for retailer recordkeeping:

> (1) Records and other documentary evidence relied upon at the point of sale to establish a covered commodity's country(ies) of origin

[12] The discussion of retailer recordkeeping responsibilities below includes a discussion of producer affidavits and their applicability to the food retail and distribution portions of the chain. To the extent that this discussion applies to intermediary suppliers as well, we respectfully incorporate it into this section of our comments.

must be provided to any duly authorized representative of USDA in accordance with Section 65.500(a)(2), and maintained for a period of 1 year from the date the origin declaration is made at retail. For pre-labeled products, the label itself is sufficient evidence on which the retailer may rely to establish the product's origin.

(2) Records that identify the covered commodity, the retail supplier, and for products that are not pre-labeled, the country of origin information, must be maintained for a period of 1 year from the date the origin declaration is made at retail.

7 CFR 65.500(c). We understand that USDA is essentially trying to accomplish two goals thru these recordkeeping requirements: (1) verify country of origin claims made at retail; and (2) establish supplier information for the product. The current language is confusing and could be read to impose burdens beyond those that we understand the Agency to intend. Accordingly, we recommend that USDA modify the final rule as discussed more fully below.

At the outset, we urge the Agency to designate the records encompassed by Section 65.500(c)(1) as "Verification Records" and the records encompassed by Section 65.500(c)(2) as "Supplier Records." The remainder of the discussion in these comments will use these terms.

a. Verification Records

i. Pre-Labeled Products

The first issue raised by the Verification Records requirement is, what is the scope of products for which retailers are required to maintain verification records? Specifically, and as the Agency stated under the Seafood IFR, "For pre-labeled products, the label itself is sufficient evidence on which the retailer may rely to establish the product's origin." That is, if the product, such as a bag of frozen shrimp packaged by the supplier, includes a country of origin declaration made by the supplier directly on the product, the retailer need not have any other information to establish or *verify* the origin claim for the product. The supplier has made the declaration directly on the product and the retailer could not possibly have a better source of verification for the retail claim; if the Agency chooses to verify the basis for the claim, the Agency has the authority to review the records of the initiating supplier directly.[13] This approach of only requiring

[13] In a minor variation on this theme, we note that some of our members may display some product that comes in as pre-labeled with store level labeling. For example, in the seafood context, retailers often use pre-labeled, pre-bagged shrimp in bulk displays. USDA accepted a reference to the other bagged shrimp product in the store as verification of the country of origin of the shrimp on bulk display. Similarly, if a retailer trims and slices produce, such as fresh strawberries, and offers them to consumers in retail-labeled packages, the retailer should be able to refer to the pre-labeled produce as the verification for the country of origin of the sliced products. We encourage USDA to recognize this process in the Agency's enforcement materials.

Verification Records for products that are not pre-labeled by the supplier makes perfect sense and we commend USDA for incorporating it into the current IFR.

Nonetheless, it begs the questions of when a product can be considered "pre-labeled" and what information, if any, beyond the country of origin information is necessary to establish that a product is "pre-labeled" and, thus, does not require the retailer to maintain Verification Records. In this regard, the preamble to the current IFR states as follows:

> Pre-labeled products are those covered commodities that are labeled for country of origin by the firm or entity responsible for making the initial claim or by a further processor or repacker (i.e., firms that receive bulk products and package the products as covered commodities in a form suitable for the retailer)... *In addition to indicating country of origin, pre-labeled products must contain sufficient supplier information to allow USDA to traceback the product to the supplier initiating the claim.*

73 Fed. Reg. at 45108 (emphasis added). See also Id. at 45114. As noted, above, the country of origin labeling law is not a food safety law and, therefore, "traceback" should not be considered one of its mandates. However, if the Agency requires information on the source of the entity making the claim in order to know to whom to turn to verify the claim, one possibility is to consider the information that is required to be on packaged foods, which was undoubtedly the source for establishing "pre-labeled" products in the seafood context.

Specifically, when USDA considered the issue in the Seafood IFR, pre-labeled products were primarily products in consumer-ready packages, such as a bag of frozen shrimp. Under the Federal Food, Drug and Cosmetic Act (FD&C Act), FDA requires packaged foods to bear certain information to identify the supplier of a product; this is typically called the "signature line" requirement.[14] In this regard, FDA's regulations require the following:

> The label of a food in packaged form shall specify conspicuously the name and place of business of the manufacturer, packer or distributor.

21 CFR 101.5(a). The regulation continues by stating that,

> The statement of the place of business shall include the street address, city, State, and ZIP code; however, the street address may be omitted if it is shown in a current city directory or telephone directory.

21 CFR 101.5(d).

[14] Note that the Food Safety and Inspection Service of USDA, one of AMS's sister agencies, has comparable requirements for meat and poultry products.

Although USDA did not reference the requirements of FDA's "signature line" regulation in the Seafood IFR, the Agency was inherently endorsing this information as sufficient to identify the supplier *since it is the only information that is required to appear on packaged seafood products with respect to the supplier*. However, given the obvious age of FDA's regulation, the advances in technology since then, and the fact that USDA is not beholden to the FDA standard for purposes of establishing which covered commodities are "pre-labeled" for the country of origin labeling law, we recommend that the Agency include the following definition in the final regulation:

> Pre-labeled. A covered commodity is pre-labeled if it or the package in which it is sold to the consumer bears a label that identifies (1) the covered commodity's country of origin [and method of production for seafood] and (2) the name and place of business of the manufacturer, packer or distributor. The place of business can be established by (a) city and state, (b) telephone number, or (c) web address that conspicuously provides either city and state or telephone number. The covered commodity need not bear place of business information for the named manufacturer, packer or distributor if the retailer can provide place of business information to USDA within 5 business days.

Any covered commodity that included this basic information, even if on a price look-up or PLU sticker, would be considered pre-labeled for purposes of the Verification Record requirement and the retailer would not be required to maintain any further records to verify the country of origin declared by the supplier.

ii. Verification Records for Non-Prelabeled Covered Commodities, Including Affidavits

The second question for Verification Records is, what records would USDA consider adequate to verify the country of origin claims made for non-pre-labeled covered commodities? For non-pre-labeled products, the retailer must make a declaration in accordance with the Marking requirements discussed above. Retailers typically receive the country of origin information for products that are not pre-labeled on the consumer package either on the outer container or the case in which product is shipped to the store. Typically the retailer uses that information to post a sign, placard, pintag, or any of a variety of other means to inform the consumer of the country of origin of the covered commodity with the origin information observed on the outer carton. Once the product is placed in the display bin, however, the retailer discards the case or outer packaging that bore the country of origin information. For basic sanitation reasons and space limitations, it is not desirable or practical for retailers to maintain the boxes in which foods are shipped after the product is put out on display for the consumer for one day, let alone for the one year currently indicated in the IFR.

Under the Seafood IFR, written before the new recordkeeping language in the 2008 Farm Bill, retailers were required to maintain records at store level to verify country of origin claims for non-pre-labeled product. In light of the 2008 Farm Bill provision that prohibits USDA from requiring the maintenance of records not kept in the normal course of business, the current IFR does not require retailers to maintain records at store level, but instead permits them to utilize records that are maintained off-site, provided that they can be retrieved within 5 business days. The IFR does not address, however, the types of records that are maintained off-site that retailers can use to satisfy their obligation.

The off-site records with country of origin information most often available to retailers are the bills of lading or other documentation that arrive at the warehouse or distribution center along with the covered commodity from the supplier (see discussion above). Accordingly, our first recommendation is to permit retailers to obtain the bill or bills of lading for the covered commodity to verify the country of origin claim.

In the alternative, USDA should accept an additional label or record provided by the supplier that travels with each case of product to the store level. Or, if country of origin information is provided on the store invoice, retailers should be permitted to use that as a verification record for non-pre-labeled product with any corrective notations during the receiving process that are necessary to accurately reflect the country of origin of the product in the store. (See discussion above.) Similarly, retailers should be permitted to maintain a store level log in which country of origin for non-pre-labeled covered commodities can be recorded.

USDA should also accept an initiating supplier's continuous affidavit to verify the country of origin claim for a non-pre-labeled covered commodity. The 2008 Farm Bill specifically recognizes the "producer affidavit" as a record that is maintained in the normal course of business in the context of the requirement for persons subject to an audit to verify the country of origin of a covered commodity. Section 282(d)(2)(A). In a recent guidance document, USDA recognized the validity of continuous producer affidavits in the context of verifying country of origin for livestock producers. See USDA, AMS, "Frequently Asked Questions" (dated September 26, 2008) (available on the AMS website). As the statutory language does not limit the use of producer affidavits to this context, USDA should apply the same logic and expressly permit retailers (or wholesalers) to rely on affidavits from their initiating suppliers regarding the countries of origin of the products they supply.

For all intents and purposes, an invoice from any initiating supplier that states the products' country of origin could be considered a producer affidavit. The additional value, particularly in the meat context, is the use of continuous affidavits as permitted in USDA's guidance document. That is, if a retailer (or wholesaler) receives meat from a packer that provides an affidavit that states that all of the meat products described in the affidavit that the packer suppliers will

qualify for a particular country of origin designation for a stated period of time, the retailer should be allowed to rely on that affidavit to satisfy the Verification Record requirement. Standing certificates of conformance will avoid surprise in the chain. The guidance document states that an additional document that ties the livestock to the affidavit must be available. Although unnecessary in the retail and wholesale context, simple invoices that demonstrate that the packer that provided the affidavit also supplied product during that time frame should suffice.

This will be particularly important in terms of the recordkeeping necessary for meat products that are prepared in the retail store. Specifically, retailers typically receive different types of primals or subprimals at store level. As a covered commodity supplied to the retailer, these primals or subprimals will have country of orgin information associated with them, often on the outer carton.

At store level, the retail butcher will open the package in which the primal was shipped, thereby disassociating the primal from the country of origin information. The primal or subprimal will then be cut into primary retail cuts, and those may further be processed into secondary retail cuts. The attached document entitled, "Beef Cuts," provides an overview of some of the different types of primary and secondary retail cuts that may be derived from each different primal and subprimal. Note, too, that some of the primary cuts and many of the secondary cuts may be derived from several different primals and subprimals.

At each step in preparing the meat cut for the customer – as the primal is cut into subprimals, that are cut into primary retail cuts, that are cut into secondary retail cuts – the product becomes farther removed from the document that associates it with a particular country of origin and the ability to establish a one-to-one correlation between any given consumer cut and its originating primal becomes increasingly difficult. One of our members estimated that any given secondary retail cut could be associated with more than 60 different purchase orders. The problem becomes exponentially more complex for ground meat.

However, in contrast to produce, meat products are generally supplied to any given retailer or wholesaler by a limited number of companies. As noted above, many of those companies have already established that they will only be providing whole muscle cuts that correspond with one or possibly two country of origin categories. Accordingly, rather than try to track a secondary cut to a primary cut to a subprimal to a primal, that could have been received over a period of several days (during which many primals would have been received), retailers and wholesalers should be permitted to rely on standing affidavits from their packer initiating suppliers that establish the country of origin of meat supplied during a time period and to establish with invoices that products were actually received from those suppliers during that time period. This system would not establish a "closed loop," but nothing in USDA's regulations or

guidance documents requires such a system to be established for any other segment of the chain. As the recordkeeping provisions are to establish that the entities are making a "good faith" effort to comply with the country of origin labeling marketing law, this approach is reasonable and consistent with the guidance that USDA has provided to other covered sectors.

iii. Maintenance Time

The third question for Verification Records is, how long must they be maintained? Under the Seafood IFR, records to verify the country of origin claim were required to be maintained at store level, but only until the product was sold. (This approach made sense, particularly in the context of pre-labeled products, where the retailer was relying on the supplier's declaration, which would be leaving the store with the consumer on the product when it was sold.) Under the current IFR, retailers are not required to maintain any records at the store itself, but Verification Records must be retained for one year after retail sale. We expect that USDA extended the maintenance requirement for Verification Records because the IFR gives retailers five business days in which to access records; the one year requirement would ensure that, even if a product was sold through at the same time that the record was requested, the retailer would still have the necessary record. However, as noted above, a retailer may rely on the outer case of a product to provide country of origin information to the consumer. Clearly, retailers cannot maintain empty cases that held food for 1 year after retail sale.

Accordingly and consistent with the Seafood IFR, we recommend that USDA amend this provision to require retailers to maintain Verification Records (for non-pre-labeled covered commodities) until the product is sold or to the extent necessary to satisfy a USDA request for verification made before the product was sold.

b. Supplier Records

The second category of records for which retailers are responsible can be considered Supplier Records. We agree with USDA's decision to remove the unique identification requirement from the Supplier Record provision as it was an unnecessarily burdensome element for a marketing regulation. Under the current IFR, retailers are required to maintain information on the supplier, covered commodity and, for non-pre-labeled products, the country of origin for one year following retail sale.

Although USDA does not use the same language in the provision that requires retailers to maintain supplier records as it does in the provision directed to intermediary suppliers, we urge USDA to ensure that the Supplier Record requirements for the country of origin labeling law for retailers are consistent with the requirements of the Bioterrorism Act recordkeeping regulations for the reasons discussed above in the context of intermediary suppliers. That is, if a

retailer received a covered commodity from multiple suppliers, the retailer may provide such information to USDA in satisfaction of its Supplier recordkeeping obligations. Establishing a single standard for Supplier Records that is consistent across the supply chain and with other regulatory requirements will facilitate efficiency.

c. Retailer Records Generally

Regardless of whether USDA chooses to adopt the rubric of Verification Records and Supplier Records, the interim final rule clearly asks retailers to maintain two different types of documentation with overlapping information; accordingly, USDA should clarify in the final regulation that the information to satisfy both requirements may be on the same or different documents, provided all of the requirements are met.

3. *General Recordkeeping Requirements*

As general requirements, the current IFR states that all records must be legible and may be maintained in either electronic or hard copy formats. USDA expressly recognizes the variation in inventory and accounting documentary systems and expressly permits various forms of documentation and records. 7 CFR 65.500(a)(1).

FMI can confirm that its members have as many different recordkeeping systems as FMI has members. Requiring a standardized system would be an unnecessary burden. Although the industry continues to move toward fully electronic systems, and some of our members use Electronic Data Invoicing or EDI, the industry is far from monolithic. And, even if retailers and wholesalers had a common system, USDA can rest assured that the supplier community has just as many different systems.

E. Enforcement

The 2008 Farm Bill significantly rewrote the liability standards for the country of origin labeling law. To give full meaning to Congressional intent, USDA must carefully review the enforcement infrastructure the Agency built for seafood under the 2002 Farm Bill and revise it to reflect the updated law before beginning enforcement of the final rule for all covered commodities.

1. *New Statutory Standard*

Under the 2002 Farm Bill, if USDA believed that a retailer was in violation of the country of origin labeling law, the Secretary was required to notify the retailer of the determination and to provide the retailer with a 30-day period during which the retailer was permitted "to take necessary steps to comply" with the law. If upon completion of the 30-day period, the Secretary determined that

the retailer willfully violated the statute, the Secretary was authorized to fine the retailer up to $10,000 for each violation. All other persons covered by the statute, including suppliers, were subject to penalties of up to $10,000 per violation per day.

The 2008 Farm Bill reduced the penalty provisions attendant to the country of origin labeling law. First, Congress applied the notice plus 30-day remediation period to all persons subject to the law. Second, Congress lowered the maximum penalty from $10,000 per violation to $1,000 per violation. Third, in addition to determining that the person "continues to willfully violate the statute with respect to the violation about which the retailer or person received notification," the Secretary must also determine that the person "has not made a good faith effort to comply." Collectively, these changes evidence clear Congressional intent that the law is not intended to be applied in a punitive fashion and the imposition of fines should be reserved only for flagrant disregard of the law.

Likewise, the liability structure and the fact that this is a marketing law, rather than a food safety law, supports the development of an enforcement infrastructure that is more focused on whether or not covered entities are making a good faith effort to comply with the law and that is less focused on the "traceback" approach evident in the Seafood IFR enforcement program.

For example, with respect to the former, the current seafood inspection programs requires inspectors to seek out and determine whether or not each and every covered seafood item in the store bears the proper labeling. Grocery stores that carry seafood, typically carry between 40 and 60 seafood items, and not all of them will be subject to the law.

Now that the law will be enforced for fresh and frozen fruits and vegetables, beef, chicken, pork, lamb and several other covered commodities, the item by item approach adopted for seafood will be unnecessarily cumbersome for USDA and time-consuming for the store that is being inspected. Rather than searching for every kumquat, ginseng root and package of goat meat, we recommend that USDA encourage their inspectors to look more holistically at whether the retailer is making a "good faith effort" to provide the required information. When the inspector looks around the produce section, do the covered commodities generally bear labeling? When the inspector checks the meat department, is country of origin information conspicuously available to consumers? Again, this is not a food safety law. To our knowledge, no other retail labeling law, let alone retail food safety law, entails this level of scrutiny. Surely, the federal government has better uses for tax payer dollars than to send out inspectors to ensure that every last covered commodity bears origin labeling. A retailer who has country of origin information for the substantial majority of its covered commodities is clearly making a "good faith effort" to comply with the law.

USDA's current inspection program requires inspectors to identify two products for which the inspector will ask the retailer for country of origin verification records. The purpose of this exercise appears to be largely to check to make sure that the retailer has the required records, but USDA also selects 2 percent of these products for "traceback" to the initiating supplier. According to a recent USDA powerpoint presentation, in fiscal year 2007, USDA inspected nearly 1700 retailers but in FY 2006 they conducted a traceback on only 17 food items involving 69 suppliers.

Literally thousands of covered commodities are subject to mandatory country of origin labeling as of today. Retailers depend on the country of origin declarations *made by the initiating suppliers* to provide accurate information to consumers. Rather than expending an inordinate amount of effort to trace 17 products back thru the chain and to walk thru 1700 grocery stores, USDA must reconfigure the enforcement program.

Following the product through the chain of custody is the least productive use of the Agency's enforcement resources. Indeed, rather than tracing products back thru the system, *USDA can go directly to the initiating suppliers for all pre-labeled covered commodities.* The statute 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." Presumably the supplier's obligation to provide accurate information to the retailer is no different than the retailer's obligation to provide accurate information to the consumer. USDA should be using its enforcement resources not only to verify that retailers are providing country of origin information but that the information the initiating suppliers are providing to consumers is accurate.

2. *Liability Shield*

All previous iterations of USDA's regulations interpreting the mandatory country of origin labeling statute have included a regulatory provision that stated that retailers and others may rely on the reasonable country of origin representations of their suppliers. This provision was often referred to as the "liability shield."

During the 2007 comment period, FMI (and perhaps others) pointed out to the Agency that the statutory standard of liability was "willfulness," which is actually a higher bar to liability than the negligence standard encompassed in the "reasonable reliance" language of the liability shield. We encouraged USDA to raise the standard of reliance accordingly. Rather than changing the standard, however, USDA deleted the provision in its entirety. See 73 Fed. Reg. at 45112.

Although not technically necessary, the liability shield was an important provision of the regulations. It gave trading partners comfort that they would not be subject to liability unfairly if they relied on the representations of their

suppliers. Accordingly, we strongly urge USDA to reinstate the liability shield in the final rule but to include the appropriate *mens rea* standard. Given the change in the liability standard as a result of the 2008 Farm Bill, USDA should consider language such as the following:

> Any retailer [or supplier] handling a covered commodity that is found to be designated incorrectly as to country of origin and/or method of production shall not be held liable for a violation of the Act by reason of the conduct of another if the retailer [or supplier] relied on the designation provided by the supplier, unless the retailer [or supplier] willfully disregarded evidence establishing that the country of origin declaration was false.

3. *Preemption*

Although the mandatory country of origin labeling law does not contain an express preemption provision, USDA correctly recognizes that State laws and other actions, such as private rights of action, are preempted by the federal statute. 73 Fed. Reg. at 45108. We encourage the Department to reiterate this observation in the final rule.

III. CONCLUSION

We appreciate the careful consideration USDA has given to the regulations implementing the mandatory country of origin labeling law over the past six years. In many respects, we believe that the current IFR builds on the improvements in the Seafood IFR. Nonetheless, given the changes in the 2008 Farm Bill to the recordkeeping and enforcement provisions, we believe that the final rule should be clarified and simplified in the respects set forth above.

We respectfully ask USDA to consider our comments on the record. If you have any questions regarding the foregoing or if we may be of assistance in any way, please do not hesitate to call on us.

Sincerely,

Deborah R. White
Senior Vice President &
Chief Legal Officer

Enclosures

Cc: Lloyd Day
Craig Morris
Erin Morris
William Sessions