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## **Proposed Country-Of-Origin (COOL) Labeling**

Presentation February 16, 2004  
at the Spring Lecture Series  
National Food Safety & Toxicology Center, Michigan State University

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### ***Background***

The Farm Security and Rural Investment Act of 2002 (more commonly known as the 2002 Farm Bill) contained new Country of Origin Labeling (COOL) requirements effective September 30, 2004. COOL requires that retailers notify their customers of the country of origin for beef, pork, and lamb, fish, shellfish, peanuts, and perishable agricultural commodities. Seafood labeling must also distinguish between “wild fish” and “farm-raised fish.”

As required by the statute, the U.S. Department of Agriculture’s Agricultural Marketing Service (AMS) on October 30, 2003 published a proposed rule to implement the mandatory country-of-origin labeling program. A copy of the proposed rule is posted on the agency’s website at <http://www.ams.usda.gov/cool/ls0304.pdf>. Although a moratorium has been placed on the effective date of COOL until 2006, AMS still must proceed with its proposed rules. The comment period has been extended until February 27, 2004.

### ***Summary of the Proposed Rule***

#### **General requirements**

Retailers must notify their customers of the country of origin for beef, lamb, and pork, farm-raised fish and shellfish, wild fish and shellfish, perishable agricultural commodities (fresh and frozen fruit and vegetables), and peanuts. In addition, the notice of country of origin for fish and shellfish must include and distinguish between wild and farm-raised fish and shellfish.

The covered commodities are excluded from mandatory COOL labeling when they are an ingredient in a processed food item. Examples of covered commodities excluded under this provision would be bacon, orange juice, mixed nuts, and vegetable party trays. Food service establishments, such as restaurants and bars, are also exempt from the requirements.

### **Definition of “Retailer”**

“Retailer” is defined as any person licensed as a retailer under the Perishable Agricultural Commodities Act of 1930 (PACA, 7 U.S.C. 499a(b)). Proposed 7 CFR. § 60.126. This definition is mandated by the 2002 Farm Bill.

AMS notes that the number of retailers impacted by this definition is considerably smaller than the total number of retailers nationwide. AMS estimates that there are 129,617 retail establishments in the U.S., but only 37,176 establishments are PACA-licensed retailers.

### **Exemption for Food Service Establishments**

Food service establishments are exempt from the new labeling requirements. Proposed 7 CFR § 60.200(b). The regulations define a “food service establishment” as “a restaurant, cafeteria, lunch room, . . . or other similar facility . . . in the business of selling food to the public.” This definition includes food service facilities located within retail establishments, such as a deli or a salad bar within a grocery store. Thus, a salad bar within a grocery store would exempt from COOL labeling, but this exemption would not extend to other parts of the store.

### **Covered Commodities**

The definition of “covered commodity” includes:

- Ground and muscle cuts of beef (including veal), lamb, and pork;
- Wild and farm-raised fish and shellfish (including fillets, steaks, nuggets, and any other flesh);
- Perishable agricultural commodities as defined by the Perishable Agricultural Commodities Act of 1930, as amended (7 U.S.C. 499a(b)); and
- Peanuts.

### **Exclusion for Processed Food Products**

The statute excludes from the definition of covered commodities a product that is an ingredient in a “processed food item.” 7 U.S.C. § 1638(2)(B). Because the statute does not define the term “processed food item,” AMS developed two-part approach for determining when a product would fall under this exclusion. If a product meets either of the following tests, it would be considered a “processed food item”:

1. A retail item derived from a covered commodity that has undergone a physical or chemical change causing the character of the product to be different from that of the covered commodity is deemed to be a processed food item. Proposed 7 CFR § 60.121(a). For example, oranges that have been squeezed and made into orange juice, a fresh leg of pork that has been cured and made into a ham, or flesh of a fish that has been restructured and made into a fish stick.
2. Retail items derived from a covered commodity that have been combined with either: (a) other covered commodities or (b) other substantive food components (e.g., chocolate or stuffing), which results in a distinct item that is not marketed as a covered commodity. Proposed 7 CFR § 60.121(b). For example, a salad mix that contains lettuce and tomatoes (but not merely bagged lettuce), peanuts in a candy bar, or a stuffed pork chop.

Note that these provisions do not automatically exclude some products that may be commonly viewed as having undergone significant processing. For example, canning, cooking, or breasting seafood alone would not invoke this exclusion.

### **Commodities of U.S. Origin**

To bear a "United States country of origin" declaration, certain criteria must be met:

- For beef, lamb, and pork, they must be derived exclusively from animals born, raised, and slaughtered in the United States. Proposed 7 CFR § 60.130(a)-(b).
- Farm-raised fish and shellfish must be derived exclusively from fish or shellfish hatched, raised, harvested, and processed in the United States. Proposed 7 CFR § 60.130(c).
- Wild fish and shellfish must be derived from fish or shellfish harvested in the waters of the United States or by a U.S. flagged vessel and processed in the United States or aboard a U.S. flagged vessel. Proposed 7 CFR § 60.130(d).
- Perishable agricultural commodities and peanuts must be derived exclusively from produce or peanuts grown in the United States. Proposed 7 CFR § 60.130(e)-(f).

The proposed rule recognizes that some products that otherwise qualify for a U.S. origin claim would not automatically lose that designation if exported for further processing. Proposed 7 CFR § 60.200(e)(2). For example, beef from an animal that is exclusively born, raised, and slaughtered in the U.S. would qualify for a U.S. country-of-origin designation if the carcass is further processed into steaks in a foreign country. Likewise, a potato that is grown in the U.S. but packaged in Canada would qualify for a U.S. claim. However, seafood products must be processed in the U.S. in order to claim U.S. origin

### **Imported Products**

Under the Tariff Act of 1930, as amended (19 U.S.C. 1304), most imported product, including foods, are required to be marked with the country of origin for the ultimate purchaser. However, the Tariff Act allows retailers to display loose produce without country of origin labeling. Under the Federal Meat Inspection Act (FMIA, 21 U.S.C. 601 *et seq.*) all meat products imported into the United States must bear country of origin labeling on the containers in which the products are shipped.

Under COOL, with imported products that will not undergo further processing in the U.S., the country of origin for covered commodities is retained (as determined by the U.S. Bureau of Customs and Border Protection at the time the product entered the United States). Proposed 7 CFR § 60.200(f).

### **Commodities Entering the U.S. During the Production Process (mixed origin)**

For beef, pork, lamb, and seafood products, the rule would establish special labeling provisions for products that are imported into the U.S. for further processing. For beef, pork, and lamb, the country of origin would be the last country in which a production step occurs (i.e., born, raised, and slaughtered) prior to entry into the U.S. Proposed 7 CFR § 60.200(g)(1). In addition, the label would have to include the production steps that occur in the U.S. For example, for an animal born and raised in Mexico that is slaughtered in the U.S. would be labeled as "Imported from Mexico, slaughtered in the U.S." While not required, the regulation allows the identification of all production steps occurring outside the U.S. if they can be substantiated. For example, a label could state: "Born

in country X, raised in country Y, slaughtered in the U.S.”

The same general approach would be applied to imported seafood products, but the proposed regulation distinguishes between “wild” and “farm-raised” seafood. Proposed 7 CFR § 60.200(g)(2)-(3). For seafood, the country-of-origin determination turns on where the product harvested and processed or – in the case of farm-raised seafood – hatched, raised, and harvested and processed. Proposed 7 CFR § 60.130(c)-(d).

### **Blended Products**

Blended items comprised entirely of the *same* commodity (e.g., ground beef or bagged lettuce) must list the countries of origin of the raw material in alphabetical order. Proposed 7 CFR § 60.200(h). For example, a bag of red and green leaf lettuce would be required to bear country-of-origin labeling, while a salad mix containing lettuce and tomatoes would not.

### **“Wild” or “Farm-Raised” Designation for Seafood**

In addition to country of origin, the labeling of covered seafood products would have to designate whether a product is a “wild fish” or “farm-raised fish.” Proposed 7 CFR § 60.200(d). To qualify as “wild fish,” the product must be “caught, taken, or harvested from non-controlled or nonselect waters or beds . . . .” Proposed 7 CFR § 60.134. “Farm-raised” is defined as product that has been “harvested in controlled or selected environments, including ocean-ranched (e.g., penned) fish and shellfish confined in managed beds . . . .” Proposed 7 CFR § 60.108.

### **Labeling Format**

The law allows the country of origin declaration to be by means of label, stamp, mark, placard, or other clear and visible means on the package or display for final consumers. The label may, for example, read “Product of USA,” “Grown in Mexico,” or simply state the name of the country, such as “USA” or “Mexico. Proposed 7 CFR 60.300(a). Country abbreviations, such as “U.K.” for the United Kingdom, are acceptable. However, flags or other symbols may not be used alone, and state or similar designations are not acceptable. Proposed 7 CFR § 60.300(e)-(f).

The proposed rule would require that the labels be “conspicuous” and placed in a location that “render[s] it likely to be read and understood by a customer . . . .” Proposed 7 CFR § 60.300(b). Note that existing labeling requirements remain in place, thus pre-approval will be necessary for country-of-origin statements on labels regulated by the Food Safety and Inspection Service (FSIS).

### **Record Keeping**

Under the proposed rule, any person supplying a covered commodity to a retailer – directly or indirectly – must maintain records to establish the country of origin and, if applicable, wild or farm-raised claims. In general, all records must be in English, maintained in either hard copy or electronic format, and available to USDA upon request. Proposed 7 CFR § 60.400(a).

All points of the supply chain before the retailer – including growers, importers, distributors, handlers, packers, and processors – must make available to the next purchaser in the supply chain information about the country of origin and, if applicable, wild or farm-raised claims, and this information must be maintained for two years. Proposed 7 CFR § 60.400(b)(1) and (3).

Suppliers that handle similar covered commodities from multiple countries (e.g., lettuce from Mexico and the U.S.) must be able to document that product is segregated and tracked in a manner that

maintains the product's identity. Proposed 7 CFR § 60.400(b)(5).

Retailers must maintain the information at the point of sale (e.g., the retail outlet) for 7 days. The retail company must maintain their records for 2 years, but they may be maintained as a central facility. The record establishing a product's country of origin must identify the supplier, the product, the country of origin information, and, if applicable, the wild or farmed raised designation. Proposed 7 CFR § 60.400(c)(2).

### **Enforcement**

The proposed rule states that enforcement action would not be taken against a retailer if it "could not have been reasonably expected" to know of a violation based on the information provided by a supplier. Proposed 7 CFR § 60.400(c)(3). A similar provision is included in the proposal to cover intermediary suppliers, such as wholesalers and other distributors. Proposed 7 CFR § 60.400(b)(2). For example, a retailer would not be held liable if their supplier provides false information and it was not possible to know of the fraud.

This summary is for educational and informational purposes only, and is not intended as legal advice. If you have any questions, please contact Neal Fortin.