

Blueprint for Maximizing the Benefits of Mandatory Country of Origin Labeling While Minimizing Costs to Producers and Unnecessary Government and Industry Regulation

Prepared by

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August 29, 2003

Introduction

R-CALF USA has conducted extensive legal research on how USDA can implement the mandatory country of origin labeling legislation (COOL Act) in a manner that maximizes the COOL Act's benefits without imposing new costs on livestock producers or subjecting producers to unnecessary government and industry regulation. The following discussion identifies the specific directives USDA must implement in order to accomplish these objectives. R-CALF USA's research reveals that USDA has sufficient authority to initiate and/or establish each of these directives in rule, but recognizes that if USDA will not voluntarily prescribe these directives, Congress may itself prescribe such directives in the form of amendments to 7 USC § 1638, 19 U.S.C. 1304, and 7 USC §§ 8301-8316. For each directive, R-CALF USA identifies the congressional authority granted to USDA to establish the directive in rule; identifies the congressional amendments needed if USDA will not exercise its authority; and provides a reference to the relevant legal research supporting each directive.

R-CALF USA, the Ranchers-Cattlemen Action Legal Fund, United Stockgrowers of America is a national, non-profit cattle association representing cattle producers in the areas of trade and marketing. R-CALF USA has thousands of individual cattle-producing members in 46 states and 50 affiliated local and state cattle and farm organizations. For more information, visit www.r-calfusa.com or call 406-252-2516.

Executive Summary

USDA should initiate and/or prescribe the following six directives to maximize the benefits of the COOL Act without imposing new costs on producers or subjecting producers to unnecessary government or industry regulation. If USDA is unwilling to voluntarily initiate and/or prescribe these directives, Congress should initiate the actions listed in bold:

Directive 1: USDA shall cooperate with the Department of Treasury to remove livestock from the list of exceptions to the general requirement that all imported products be permanently marked with a mark of origin (J-List). *If it appears that Treasury will not voluntarily amend its regulations, Congress should amend 19 U.S.C. 1304 to address specifically livestock as it has done with a number of other products.*

Directive 2: USDA shall require (either in cooperation with Treasury or independently) all imported livestock to be marked with a mark of origin no later than January 1, 2004, thereby minimizing any problems or objections associated with unmarked, imported animals in the U.S. production system prior to the effective date of the COOL Act. USDA shall also require that slaughter facilities begin forwarding origin information some time in advance of September 30, 2004 (e.g., by August 1, 2004) reflecting the normal time for product to go from slaughterhouse to retail plus sufficient time for possible inventory issues. USDA could further use the existing Mexican markings and existing Canadian ear tag indications for determining origins of the livestock in the country prior to January 1, 2004. In addition, USDA and/or Treasury could require the new origin markings to carry the full name of the importing country. *If USDA will not voluntarily exercise this authority, Congress should amend 7 USC § 1638 to start a marking requirement on a specific date and to require the identification of livestock origins and resulting meat products to begin in advance of September 30, 2004*

Directive 3: (A) USDA shall establish that a determination of country of origin shall solely be made by reference to country of origin markings on the animal at the time of slaughter or, if livestock imported for immediate slaughter are not required to be marked as to origin, by reference to the importation documents accompanying any such livestock imported for immediate slaughter. All livestock unmarked as to country of origin, which were not imported for immediate slaughter, shall be deemed to be of U.S. origin; and (B) USDA shall establish that the first point at which information must be gathered and supplied to verify country of origin of covered commodities produced from livestock shall be at the point of slaughter for livestock, not at any point earlier in the supply chain. *If USDA will not voluntarily exercise its authority, Congress should amend 7 USC § 1638 to establish that only the markings or lack of markings on livestock shall be used to determine the origin of livestock and that the point of slaughter shall be the first point at which information is to be gathered for meat derived from said livestock.*

Directive 4: USDA shall prescribe the form that persons who slaughter animals shall complete and maintain as part of a verifiable recordkeeping audit system if any meat produced from an

animal is subsequently manufactured into a covered commodity and sold at retail. The form shall reference only whether the animal was marked with a foreign marking or unmarked. *If USDA will not voluntarily exercise this authority, Congress should amend 7 USC § 1638 to establish that USDA shall prescribe the form to be completed by those who slaughter livestock.*

Directive 5: USDA shall make it unlawful for any person subject to this Act to require or request, as a condition of purchase or for any other reason, any person who produces or raises cattle, hogs, or sheep to: (a) indemnify such person from liability arising under, or related to, this Act; or (b) produce records or other documentation to verify the country of origin of any covered commodity or the country of origin of live cattle, hogs or sheep. This directive is not intended to supercede any obligations to maintain the integrity of origin markings under existing federal law. *If USDA will not voluntarily exercise this authority, Congress should amend 7 USC § 1638 to require USDA to establish a limitation on verification and liability to prevent any mischief or abuses.*

Directive 6: USDA shall establish that all muscle cuts of beef, pork and lamb, and all ground beef, pork and lamb shall be labeled with its country of origin if they are the primary ingredient in a product and regardless of whether the products are pre-cooked, fabricated, or shredded, or if water, salt, tenderizers, seasoning, or other extenders are added to the product. *If USDA will not voluntarily exercise this authority properly, Congress should amend 7 USC § 1638 to establish that USDA shall include covered commodities that are precooked or that contain additives as commodities subject to the COOL Act.*

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Directive 1

USDA shall cooperate with the Department of Treasury to remove livestock from the list of exceptions to the general requirement that all imported products be permanently marked with a mark of origin (J-List).

Authority: USDA would need to work with the Department of the Treasury and U.S. Customs Service to accomplish this change. The United States has express authority under existing trade laws (Article IX of GATT 1994) to require origin markings on all imported livestock just as it presently requires on all imported beef products and the majority of all imported consumer goods.

In lieu of cooperating with Treasury, the COOL Act grants USDA authority to “promulgate such regulations as are necessary to implement this subtitle.” 7 USC § 1638c(b). This authority is sufficiently broad to enable USDA to accomplish the objective of marking imported livestock. USDA has existing authority to regulate the importation of animals into the United States. 7 USC §§ 8301-8316. USDA rules already require the branding of all steers and spayed heifers, not for immediate slaughter, entering the United States from Mexico as part of the tuberculosis program 9 CFR Sec. 93.427(c)(1) (Cattle from Mexico). Because of health problems with cattle around the world, USDA appears to have the authority to promulgate regulations requiring all cattle imports to be marked with a mark of origin, and there are compelling health reasons to do so. Further, it appears that Canada now has an international obligation to begin permanently marking all exported livestock due to its elevated BSE risk status. The International Health Standards of the World Organization for Animal Health (OIE), Terrestrial Animal Health Code – 2003, Article 2.3.13.11, “When importing from a country or zone with a minimal BSE risk,” and Article 2.3.13.12, “When importing from a country or zone with a moderate BSE risk,” both suggest that cattle for export be identified by a permanent identification system enabling them to be traced back to the dam and herd of origin. Therefore, the permanent marking of Canadian cattle exports is now deemed internationally necessary by the OIE.

Remedy: *If the Treasury will not voluntarily amend its regulations, Congress could amend 19 U.S.C. 1304 to address specifically livestock as it has done with a number of other products. Or, alternatively, if USDA will not voluntarily exercise its existing authority, Congress could amend either 7 USC § 1638 or 7 USC §§ 8301-8316 to specifically require the markings of all imported livestock.*

Reference: For a legal analysis of the United State’s authority to require marks of origin on imported livestock, see “COOL and Marking Requirements,” research by the Law Offices of Stewart and Stewart, April 23, 2003, at http://rcalf.com/Legal%20research/legal_research.htm. For a legal analysis of the USDA’s authority to require marks of origin on imported livestock,

see “APHIS and Marking Requirements,” research by the Law Offices of Stewart and Stewart, May 6, 2003, at http://rcalf.com/Legal%20research/legal_research.htm.

Directive 2

USDA shall require (either in cooperation with Treasury or independently) all imported livestock to be marked with a mark of origin no later than January 1, 2004, thereby minimizing any problems or objections associated with unmarked, imported animals in the U.S. production system prior to the effective date of the COOL Act. USDA shall also require that slaughter facilities begin forwarding origin information some time in advance of September 30, 2004 (e.g., by August 1, 2004) reflecting the normal time for product to go from slaughterhouse to retail plus sufficient time for possible inventory issues. USDA could further use the existing Mexican markings and existing Canadian ear tag indications for determining origins of the livestock in the country prior to January 1, 2004. In addition, USDA and/or Treasury could require the new origin markings to carry the full name of the importing country.

Authority: Under Section 284 of the Farm Security and Rural Investment Act of 2002 (FSRIA), the Secretary also has the authority to write regulations necessary to implement the COOL law. 7 USC § 1638c(b) (“the Secretary shall promulgate such regulations as are necessary to implement this subtitle.”). With this authority, USDA has sufficient jurisdiction to implement this directive.

Remedy: *If USDA will not voluntarily exercise this authority, Congress should amend 7 USC § 1638 to start a marking requirement on a specific date and to require the identification of livestock origins and resulting meat products to begin in advance of September 30, 2004.*

Reference: For a legal analysis of USDA’s authority to promulgate regulations needed to implement the COOL Act, see COOL and Marking Requirements, Part III, Question 1, research by the Law Offices of Stewart and Stewart, April 23, 2003, available at http://rcalf.com/Legal%20research/legal_research.htm.

Directive 3

(A) USDA shall establish that a determination of country of origin shall solely be made by reference to country of origin marking on the animal at the time of slaughter or, if livestock imported for immediate slaughter are not required to be marked as to origin, by reference to the importation documents accompanying any such livestock imported for immediate slaughter. All livestock unmarked as to country of origin, which were not imported for immediate slaughter, shall be deemed to be of U.S. origin; and (B) USDA shall establish that the first point at which information must be gathered and supplied to verify country of origin of covered commodities produced from livestock shall be at the point of slaughter for livestock, not at any point earlier in the supply chain.

Authority: The Farm Security and Rural Investment Act of 2002 [“FSRIA”] makes very clear that the Secretary of Agriculture’s jurisdiction extends to “any person that prepares, stores, handles, or distributes a covered commodity for retail sale.” Sec. 282(d) (requirement to maintain a verifiable audit trail). Under this section, USDA “may require” any person who supplies a covered commodity for retail sale to “keep {an} audit trail that will permit the Secretary to verify compliance with this subtitle”. *Id.* Further, sec. 282 of the Act states that any person “engaged in the business of supplying a covered commodity to a retailer shall provide information to the retailer indicating the country of origin of the covered commodity.” 7 USC § 1638a(e). Under Section 284 of FSRIA, the Secretary also has the authority to write regulations necessary to implement the COOL law. 7 USC § 1638c(b) (“the Secretary shall promulgate such regulations as are necessary to implement this subtitle.”).

USDA can establish such a presumptive standard for purposes of determining whether an animal was born, raised, and slaughtered in the U.S. or imported into the U.S. pursuant to the COOL Act in the same manner USDA uses a presumptive standard for existing programs. In fact, the COOL Act clearly states that USDA may use existing models that incorporate a presumptive standard, including the National School Lunch Act. The agricultural commodity purchases by the Federal government under the National School Lunch Act and all other Federal Food assistance programs are governed by the Buy America Act which applies to all federal acquisitions. While the Buy America Act provides that an end-use product must be “produced” in the U.S. the Buy America Act does not provide a definition of what it means to have been “produced.” In providing the more specific definition of what is acceptable as “domestic” production, i.e., that no livestock imported for immediate slaughter and no imported beef products are included, USDA is using its discretionary authority to implement the “Buy America” provisions of Congress. USDA, therefore, uses a presumptive standard for implementing the National School Lunch Act established under USDA’s discretionary authority. This presumptive standard was not established by statute. USDA is, therefore, free to establish a presumptive standard for purposes of determining how to verify that an animal was born, raised, and slaughtered in the United States pursuant to the COOL Act.

In a recent report issued by The International Agricultural Trade and Policy Center, University of Florida, “Country of Origin Labeling: An Economic and Legal Analysis,” economists John VanSickle, C. Robert Taylor, and John Conner; and legal scholars Neil Harl and Roger McEowen stated:

The least cost alternative regulatory scheme that complies with existing law is to presume that all covered commodities are of U.S. origin while tracking existing marks of origin on imported products. Other options are either too expensive or likely to violate the Labeling Legislation itself; Tracking imported product labels as to country of origin while presuming other product to be that of U.S. origin complies with WTO rules and other trade laws

It is clear that USDA has the authority to establish: (A) that the determination of country of origin shall solely be made by reference to a country of origin marking on the animal, or the lack of such a marking at the time of slaughter; and (B) the precise point in the supply chain where the process of origin verification is to begin.

Remedy: *If USDA will not voluntarily exercise its authority, Congress should amend 7 USC § 1638 to establish that only the markings or lack of markings on livestock shall be used to determine the origin of livestock and that the point of slaughter shall be the first point at which information is to be gathered for meat derived from said livestock.*

Reference: For a legal analysis on how to verify origins of livestock, see “COOL and Marking Requirements,” research by the Law Offices of Stewart and Stewart, April 23, 2003, available at http://rcalf.com/Legal%20research/legal_research.htm. For a legal analysis of USDA’s authority to implement the COOL act using a marking system and presumption of domestic origin, see “COOL Implementation,” research by the Law Offices of Stewart and Stewart, Question 2, August 19, 2003, available at http://rcalf.com/Legal%20research/legal_research.htm. See also VanSickle, Taylor Conner, Harl, and McEowen, “Country of Origin Labeling: An Economic and Legal Analysis,” The International Agricultural Trade and Policy Center, University of Florida, available at <http://www.iatpc.fred.ifas.ufl.edu/publications.htm>.

Directive 4

USDA shall prescribe the form that persons who slaughter animals shall complete and maintain as part of a verifiable recordkeeping audit system if any meat produced from an animal is subsequently manufactured into a covered commodity and sold at retail. The form shall reference only whether the animal was marked with a foreign marking or unmarked.

Authority: The authorities granted by the COOL Act and described in Directives 1-3 above provide USDA the entire jurisdiction needed to implement this directive.

Remedy: *If USDA will not voluntarily exercise this authority, Congress should amend 7 USC § 1638 to establish that USDA shall prescribe the form to be completed by those who slaughter livestock.*

Reference: For a legal analysis of USDA’s authority to promulgate such regulations as are needed to implement the COOL Act, see “COOL and Marking Requirements,” Part II and III, research by the Law Offices of Stewart and Stewart, April 23, 2003, and “COOL Implementation,” Question 2 and 3, research by the Law Office of Stewart and Stewart, August 19, 2003, both at http://rcalf.com/Legal%20research/legal_research.htm.

Directive 5

USDA shall make it unlawful for any person subject to this Act to require or request, as a condition of purchase or for any other reason, any person who produces or raises cattle, hogs, or sheep to: (a) indemnify such person from liability arising under, or related to, this Act; or (b) produce records or other documentation to verify the country of origin of any covered commodity or the country of origin of live cattle, hogs or sheep. This directive is not intended to supercede any obligations to maintain the integrity of origin markings under existing federal law.

Authority: The authorities granted by the COOL Act and described in Directives 4-6 above provide USDA the entire jurisdiction needed to implement this directive.

Remedy: *If USDA will not voluntarily exercise this authority, Congress should amend 7 USC § 1638 to require USDA to establish a limitation on verification and liability to prevent any mischief or abuses.*

Reference: For a legal analysis of USDA's authority to promulgate such regulations as are needed to implement the COOL Act, see COOL and Marking Requirements, Part II and III, research by the Law Offices of Stewart and Stewart, April 23, 2003, and COOL Implementation, Question 2 and 3, research by the Law Office of Stewart and Stewart, August 19, 2003, both at http://rcalf.com/Legal%20research/legal_research.htm.

Directive 6

USDA shall establish that all muscle cuts of beef, pork and lamb, and all ground beef, pork and lamb shall be labeled with its country of origin if they are the primary ingredient in a product and regardless of whether the products are pre-cooked, fabricated, or shredded, or if water, salt, tenderizers, seasoning, or other extenders are added to the product.

Discussion:

USDA has signaled its intent to limit the scope of commodities subject to the COOL Act as revealed in its Voluntary Guidelines issued October 11, 2003. For example, USDA's Guidelines appear to allow ground beef to be excluded from labeling if water, salt, or other flavoring, seasoning, or extenders are added in the grinding process. This significantly reduces the products that should be covered by the Act and it provides an unjust means of circumventing the intent of the Act. The Agency should ensure that ground beef remains covered by the Act even if water, cereal, soy or other derivatives, other extenders, salt, sweetening agents, flavoring, spices or other seasoning is added. The addition of any one or more of these additives, enhancers, or extenders does not change the fact that the resulting product is ground beef.

USDA's guidelines also appear to greatly expand the scope of products Congress excluded from the Act. Congress said an otherwise covered commodity would be excluded from coverage only "if the item is an ingredient in a processed food item." Section 281(B). We believe this means that if a covered commodity is further processed, i.e., cooked, cured, restructured, or flavored, it will remain covered by the Act unless the covered commodity is also commingled, mixed, or incorporated with other commodities to create a distinct food item such as pizza, ravioli, soup, or TV dinners, for example. A roast remains a muscle cut of beef even if it is cooked, salted, or flavored. Therefore, a cooked, salted or flavored roast should remain covered by the Act. The Agency appropriately recognized this fact with respect to peanuts, allowing the coverage of peanuts that are shelled, roasted, salted, or flavored. Federal Register, Vol. 67, No. 198, at 63369. We believe the Agency's definition of material change should be abandoned.

R-CALF USA believes the Agency's definition of a processed food item will significantly reduce the number of food items Congress intended to be covered by the Act. R-CALF USA disagrees with the Agency's stated rationale for adopting this definition. Specifically, R-CALF USA believes the Agency was mistaken when it stated that a strict interpretation of the Act vis-à-vis the National Organic Program's definition of processing would exclude a covered commodity because "slaughtering, cutting, and chilling were examples of 'processing.'" Federal Register, Vol. 67, No. 198, at 63368. The Act clearly states that the term covered commodity does not include an item "If the item is an ingredient in a processed food item." Sec. 281(B). The fact that an item is a processed food item does not exclude the item from coverage of the Act. In the case of covered beef commodities, for example, the precursor commodity (cattle) must first be slaughtered (processed) before the covered commodities materialize. Congress said only if the item is an ingredient in a processed food item is the item excluded.

R-CALF USA suggests the Agency abandon its definitions for "ingredient," "material change," and "processed food item." Instead, the Agency should define the phrase "processed food item ingredient," as only if an otherwise covered commodity is also a "processed food item ingredient" is it excluded from the Act.

R-CALF USA suggests the following definition: "Processed food item ingredient" means a covered commodity that is commingled, mixed, or incorporated with one or more covered or non-covered commodities to create a food item distinct from any of its separate ingredients. For example, ground beef commingled with other perishable commodities and incorporated with flour (dough) to create a separate food item like pizza, ravioli, or soup would be considered a "processed food item ingredient" and exempt from the Act. A covered commodity that is cooked, cured, roasted, restructured, salted, flavored, seasoned, breaded, or otherwise enhanced does not meet the definition of a "processed food item ingredient."

Because the additions described above could be viewed as further processing of covered commodities, the Agency may wish to consider a label such as "Product of Country X that was cooked, cured, restructured, or flavored in the United States."

While the COOL Act clearly grants USDA discretionary authority to promulgate rules to implement the Act, it does not grant USDA authority to arbitrarily delimit the covered commodities Congress expressly included as covered commodities.

Remedy: *If USDA will not voluntarily exercise this authority properly, Congress should amend 7 USC § 1638 to establish that USDA shall include covered commodities that are precooked or that contain additives as commodities subject to the COOL Act.*