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Country of Origin Labeling Program
Agricultural Marketing Service - USDA
Stop 0249
1400 Independence Avenue SW, Room 2091-S
Washington, DC 20250-0249

Dear Sir or Madam:

Re: Docket No. LS-03-04: Comments on Mandatory Country of Origin Labeling of Beef, Lamb, Pork, Fish, Perishable Agricultural Commodities, and Peanuts

On behalf of our client organization the Western Organization of Resource Councils (WORC), we are submitting these comments on the Agricultural Marketing Service's (AMS) Mandatory Country of Origin Labeling Proposed Rule dated October 30, 2003, as published in the Federal Register (Proposed Rule). WORC is a network of grassroots organizations from seven states that includes 8,750 members and 48 local community groups. WORC's seven state organizations are: the Dakota Resource Council (North Dakota), Dakota Rural Action (South Dakota), the Idaho Rural Council (Idaho), the Northern Plains Resource Council (Montana), Oregon Rural Action (Oregon), the Powder River Basin Resource Council (Wyoming), and the Western Colorado Congress (Colorado). WORC is also part of the Americans for Country of Origin Labeling, a coalition that strongly supports mandatory Country of Origin Labeling (COOL) and opposed the recently enacted two-year delay of COOL.

These comments will focus on the Recordkeeping Requirements set out in Section 60.400 of the Proposed Rule. First, AMS should allow self-certification for covered commodities including meat from animals that are born, raised, and slaughtered in the United States. AMS's explanation that the COOL law does not allow self-certification is incorrect. In the alternative, AMS should create a presumption that covered commodities are Products of the United States. Under this alternative, even self-certification would not be required for the vast majority of covered commodities including animals that are born, raised, and slaughtered in the United States.

1. Self-Certification Meets the Meaning, Language, and Intent of the COOL Law Enacted by Congress.

Congress, in enacting COOL, included two provisions that addressed recordkeeping: (1) Audit Verification System in Section 282(d), and (2) Information in Section 282(e). For the Audit Verification System section Congress enacted the following:

The Secretary **may** require that any person that prepares, stores, handles, or distributes a covered commodity for retail sale maintain a verifiable recordkeeping audit trail that will permit the Secretary to verify compliance with this subtitle (including the regulations promulgated under section 284(b)).

Section 282(d) (emphasis added). The language is not "shall require," but instead is discretionary: "may require." Therefore, it is within the Secretary's discretion whether to require an audit trail. This discretion also implies that if the Secretary chooses to require an audit trail, it should be done so as to abide by the intent of Congress in enacting COOL, namely to benefit American farmers and ranchers. See, e.g., Statement of Senator Tim Johnson: "Western South Dakota cow-calf ranchers will be proud to know that the standard for "U.S. beef" under my provision will require it to come from cattle born, raised, and slaughtered in the United States, despite a last-minute campaign by opponents to allow foreign cattle to qualify as U.S. beef." 148 Cong. Rec. S 3979 (May 8, 2002); see also Statement of Senator Murray, "The farm bill mandates country-of-origin labeling for meat and fish, and fruits and vegetables. I believe this is a great idea for farmers and ranchers, but also for consumers." 148 Cong. Rec. S 3979 (May 8, 2002).

However, instead of following the intent of Congress, AMS has required an expensive and burdensome audit trail be available to USDA upon request. See Section 60.400(a)(2). In addition, AMS is requiring that suppliers, including cattle farmers and ranchers, must make records available to buyers. See Section 60.400(b)(1). The law does not preclude the use of self-certification to verify compliance with COOL on the part of farmers and ranchers, but the Proposed Rule does. In the Proposed Rule's Question and Answer section, AMS addresses the issue of self-certification, but fails to provide any reasons why self-certification would not be sufficient:

The Internal Revenue Service Essentially Uses Self-Certification, Backed Up by Selective Audits, for Those of Us Who File Income Taxes. Why Couldn't Self-Certification Work for COOL?

The COOL law requires firms or individuals that supply covered commodities to retailers to provide information indicating the product's country of origin. This information must address the production steps included in the origin claim (i.e., born, raised, and slaughtered or produced). Self-certification documents or affidavits may play a role in assuring that auditable records are available throughout the chain of custody, but the auditable records must themselves also be available to ensure credibility of country of origin labeling claims.

68 Fed. Reg. 61944. By unilaterally stating that producer self-certification is not adequate, the Secretary is acting on her own and outside the intent of Congress.

In the Information section of COOL, Congress enacted the following:

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.

Section 282(e). The language utilized by Congress did not require any specific records—or, for that matter, any records at all—from producers. Instead Congress only required the supplier to provide information to the retailer indicating the country of origin. A producer self-certification form that stated his or her cattle were born, raised and slaughtered in the United States easily meets Congress's requirement. If a rancher in North Dakota bred and raised cattle and all were subsequently slaughtered in South Dakota, there would be no question that the beef should be labeled as a "Product of the United States." By requiring burdensome paperwork requirements on American producers, the Secretary is violating the intent and spirit of COOL. As Senator Enzi from Wyoming prophetically stated during the Farm Bill floor debate:

The producers in my State do have a reason to be thankful. Country of origin labeling is a part of the bill. This is a victory that I have been working toward since I entered this body. It is my fervent hope that the forces that rose unsuccessfully to defeat this program in the farm bill do not undermine the provision in the rulemaking process during the initial, 2-year voluntary period.

148 Cong. Rec. S 3979 (May 8, 2002). Burdensome paperwork requirements and the accompanying economic cost estimates that are derived from AMS's requirements do undermine COOL and should be removed from the final rule.

Moreover, the paperwork requirements may violate Congress's explicit ban on the Secretary's use of a mandatory identification system to verify the country of origin of the covered commodity. See Section 282(f)(1). If self-certification is not available, mandatory identification may be the only way for producers to meet the requirement that they "must possess or have legal access to records that substantiate" country of origin. See Section 60.400(b)(1). This is not acceptable and is not what Congress intended.

2. Self-Certification Is Used in Other USDA Programs.

As Senator Johnson explicitly made clear on the Senate floor and in the language of the law itself (see Section 282(f)(2)), existing USDA certification programs are to be utilized so as to minimize costs and burdens on producers. Senator Johnson made the following statement regarding the use of other USDA programs in implementing COOL:

My legislation gives the Secretary discretion to work with those responsible for tracking the origin of items and for designating the country-of-origin to develop a system that meets the intent of the section in an efficient and convenient manner. I recognize that USDA must develop a system by which to verify the origin of

animals for country-of-origin labeling to be effective. The section provides the Secretary with the authority to require a verifiable record keeping audit trail to help verify origin, as well as a requirement that anyone engaged in supplying a covered commodity to a retailer must provide information indicating the origin of the covered commodity. For the retailer to know the country-of-origin of a covered commodity, and for the Secretary to enforce this section, all participants and businesses affected by this Section should cooperate to develop this verifiable record-keeping audit trail.

However, especially concerning meat labeling, it is not necessary to impose a mandatory animal identification program in order to implement country-of-origin labeling because proven models already exist within USDA to verify the country-of-origin or birth of animals for various purposes. One such model is the quality grade certification system that signifies the quality grade of certain meat cuts, such as USDA "choice," "prime," or "select". The USDA stated in a report "The Benefits/Cost Analysis of Mandatory Country of Origin Labeling" released in 2000 that the Agricultural Marketing Service, AMS, and industry could model this certification program to implement country-of-origin meat labeling. Additional models that can be applied include the existing voluntary country-of-origin labeling program for beef, which uses an affidavit to verify origin, "Certified Angus Beef" and similar programs that USDA implements to aid industry in promoting certain meat cuts for breed, the National School Lunch Program, and the Market Access Program, MAP. USDA has effectively administered these existing programs. Therefore, I intend for the Secretary to capitalize upon these existing programs rather than creating a new mandatory animal identification system in order to verify origin. The programs used by USDA were listed in the section to serve as models for the department, producers, packers, retailers, and others to ensure the proper implementation of mandatory country-of-origin labeling.

148 Cong. Rec. S 3979 (May 8, 2002). These USDA programs, in particular the Market Access Program, utilize self-certification processes by producers that USDA has accepted to certify whether a product was from the United States. AMS explains in the Question and Answer section of the Proposed Rule that these same programs cannot be used:

Why Can't USDA Use The Same System To Verify Compliance With Country of Origin Labeling That It Uses for Meat Products Under USDA's Commodity Procurement Program?

There are several reasons why the systems must be different. First, the requirements for origin are not the same. The COOL law for U.S. origin requires meat products to be from cattle, hogs, and sheep that are born, raised, and slaughtered in the United States. USDA's commodity procurement program requires meat products to come from U.S.-produced livestock. The definition of U.S.-produced livestock excludes only imported meat and meat from livestock imported for direct slaughter. The system for verifying compliance with USDA's

commodity procurement program is a "command and control" type system. USDA, through various certification or audit programs, confirms the applicable claim at the beginning of the process, then tracks and controls the movement of the product throughout the rest of the marketing chain. A similar system for COOL would require USDA to verify that livestock were born in the United States, then track and control the movement of those livestock and resulting meat products through the marketing chain to retail. However, the COOL law specifically precludes USDA from imposing this type of control.

68 Fed. Reg. 61944-45. This explanation comes up short because the existing model could be adapted to COOL by simply allowing producer self-certification that the U.S. produced livestock was born, raised and slaughtered in the United States. As the General Accounting Office recognized, existing USDA programs may serve as useful models in implementing COOL. See General Accounting Office, *Country-Of-Origin-Labeling: Opportunities for USDA and Industry to Implement Challenging Aspects of the New Law*, GAO-03-780 (Aug. 2003), available at: <http://www.gao.gov/new.items/d03780.pdf>. The exclusion of existing USDA programs adds unnecessary costs and burdens on all sectors of the livestock industry.

Senator Johnson also discussed a private self-certification program that livestock auction markets have implemented to provide assurances to meatpackers that cattle do not contract mad cow disease:

It is also my understanding that many livestock auction markets and sale barns in the United States have requested individuals selling cattle or other ruminant animals to sign affidavits verifying that the cattle were not fed mammalian parts, so as to ensure cattle buyers and customers that those cattle will not contract Bovine Spongiform Encephalopathy, BSE or mad cow disease. The Secretary is encouraged to determine if this system of tracking animals for prevention of the spread of BSE may work similarly for keeping records for country-of-origin.

148 Cong. Rec. S 3979 (May 8, 2002). Even in the wake of Secretary Veneman's December 23, 2003, announcement that BSE was detected in a dairy cow from the State of Washington, though later determined to be born in Canada, livestock auction barns still do not require hundreds of pages of documentation; they require only that cattle ranchers and farmers have on file a single affidavit attesting to the fact that they properly feed their cattle in compliance with Food and Drug Administration regulations. Congressional intent was clear that USDA was to look to existing programs that utilize self-certification when implementing COOL. See Section 282(f)(2) (listing existing certification programs). The Proposed Rule's Recordkeeping Requirements that require more than self-certification is not a sufficient explanation, is contrary to congressional intent and ignores existing USDA and private programs, to the detriment of farmers and ranchers.

3. Meatpackers Should Not Be Allowed to Pass On Liability and Fines to Farmers and Ranchers for Violations of COOL Voluntary Guidelines.

In response to the COOL Voluntary Guidelines that were published on October 11, 2003, (see 67 Fed. Reg. 63367) a number of meatpackers, including Swift & Company and IBP (now known as Tyson Fresh Meats), issued letters with onerous requirements for producers that are not part of COOL. For example, Swift & Company's letter alleges:

Producers will have to sign a legal affidavit with each load of livestock stating that there is a third-party verified audit trail in place and identifies the origin of the livestock on each load.

Letter of Swift & Company Vice President Warren Mirtsching (Feb. 3, 2003).

Likewise, IBP/Tyson Fresh Meats now requires that producers:

Provide a signed legal affidavit with each load of livestock we purchase from you stating that there is a third-party verified audit trail in place that identifies where the livestock in each load were born and raised.

Letter of IBP Vice President Bruce Bass and Vice President Gary Machan (March 2003).

These unnecessary paperwork requirements that will continue if the Proposed Rule is not changed can be eliminated if AMS allows producer self-certification.

Another provision in each of these letters may violate the COOL law, but was not addressed by AMS in the Proposed Rule—meatpacker policies attempting to shift fines and penalties onto producers.

Swift & Company's requirements state that: "If Swift & Company is issued a fine or penalty resulting from producer noncompliance, that fine will be assessed to the party responsible." Tyson Fresh Meats requires that producers "[i]ndemnify us for liability we incur that is a result of producer noncompliance."

Under Section 253 (7 U.S.C. § 1636b) the Secretary may assess civil penalties of up to \$10,000 per violation against any packer that violates COOL. It is for the Secretary, not packers, to determine if a violation of COOL has occurred. To allow packers to pass on their liability for violations of COOL would mean not only that these companies would abdicate their responsibilities under the law, but they, and not AMS, would get to decide who pays the fine. We assume that will be an easy choice for Swift & Company and Tyson Fresh Meats. Given that USDA has failed to fix the unequal bargaining power between packers and producers, producers could easily find themselves not only facing liability for the packers' conduct, but having to engage in the costly process of defending themselves in adversary proceedings in different forums. As noted above, the purpose of COOL is to benefit producers, not punish them. These provisions are contrary to Congress's intent in enacting COOL and should be condemned as contrary to public policy.

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AMS must remedy this problem in at least two ways. First, AMS should have revised the Proposed Rule to specifically allow self-certification by producers instead of the onerous paperwork requirements that would be created by the Proposed Rule. Second, AMS must make it crystal clear that companies will not be allowed to usurp AMS's role in determining who has violated COOL. AMS should clearly state that, under COOL and COOL regulations, companies cannot contractually shift civil penalties onto producers, and that any contract that attempts to do so will be considered void as against public policy.

On behalf of WORC and its member organizations, we appreciate the opportunity to offer these comments and we hope AMS makes a strong commitment to protecting farmers and ranchers through the proper implementation of COOL.

Sincerely,

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