

UNDERSTANDING HOW THE COUNTRY OF ORIGIN LABELING PROGRAM AFFECTS FARMERS

INTRODUCTION

The country of origin labeling program (COOL) is a federal law that requires retailers to inform their customers of the country of origin of certain products, called “covered commodities.” Fruits, vegetables, and meat products are examples of covered commodities.

COOL also requires suppliers of covered commodities to: (1) provide buyers with information verifying the country of origin of the supplier’s products, and (2) maintain records proving the country of origin of their products. Farmers are considered suppliers if they directly or indirectly supply covered commodities to retailers. For example, where a farmer sells a covered commodity to a packinghouse, and the packinghouse later sells the covered commodity to a retailer, the farmer is considered an indirect supplier and is therefore required to provide the packinghouse with information about the product’s country of origin and to maintain records substantiating that information. Therefore, although COOL does not generally require farmers to label their products, it does require them to provide country of origin information to the buyers of their covered commodities if those products will ultimately be sold to a retailer.

In addition, many retailers may want farmers to pre-label their products in order to ease the retailers’ burden of complying with COOL. Farmers who are deciding how to market their products will thus need to take COOL’s requirements into account.

Farmers with questions about COOL may contact the Agricultural Marketing Service (AMS) for more information by calling its farmer hotline at **202-720-4486**. Farmers may also submit e-mail inquiries about COOL to COOL@usda.gov.

WHAT IS THE COUNTRY OF ORIGIN LABELING PROGRAM?

The intent of COOL is to provide customers with country of origin information so they have that information when making purchasing decisions.¹ The COOL program strives to meet its goals by: (1) requiring farmers and other suppliers to provide country of origin information to buyers of their products if those products are classified as “covered commodities and will ultimately be sold to a “retailer”; (2) requiring retailers to clearly

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label products with country of origin information; and (3) authorizing the Secretary of the United States Department of Agriculture (USDA) to enforce COOL through investigations, notice, hearing, and imposition of fines of up to \$1,000 per offense.²

The agency authorized to enforce COOL and investigate complaints of violations is USDA's Agricultural Marketing Service (AMS). The new COOL program requirements enacted as part of the 2008 Farm Bill and the regulations implementing those requirements only apply to covered commodities produced or packaged on or after September 30, 2008.³ The final COOL program requirements described in these materials became effective on March 16, 2009.⁴

COOL is not a food safety law and does not address food safety or inspection concerns or provide any food safety or inspection requirements.⁵ There may be food safety, inspection, labeling, and processing requirements that are separate from COOL. These materials do not address food safety or inspection issues. Nor do they address the labeling requirements of other federal statutes, such as the Food, Drug, and Cosmetic Act or the Perishable Agricultural Commodities Act.

WHAT MUST BE LABELED — COOL REQUIRES THE LABELING OF ALL COVERED COMMODITIES

The regulations define covered commodities to include: (1) muscle cuts of beef, lamb, chicken, goat, and pork; (2) ground beef, ground lamb, ground chicken, ground goat, and ground pork; (3) fresh and frozen fruits and vegetables⁶; (4) peanuts; (5) macadamia nuts; (6) pecans; (7) ginseng; and (8) wild and farm-raised fish and shellfish.⁷ These materials do not address the COOL program provisions that apply to wild and farm-raised fish and shellfish.

COOL Does Not Require the Labeling of Processed Food Items

Covered commodities that are an ingredient in a "processed food item" are excluded from the country of origin labeling requirements.⁸ The regulations define "processed food items" as covered commodities that have: (1) "undergone specific processing resulting in a change in the character of the covered commodity," or (2) "been combined with at least one other covered commodity or other substantive food component (e.g., chocolate, breading, tomato sauce)."⁹

The regulations further define "processed food item" to include any covered commodity that has been: (1) cooked, including by frying, broiling, grilling, boiling, steaming, baking, roasting; (2) cured, including by salt curing, sugar curing, or drying; (3) smoked; or (4) restructured (e.g., emulsified or extruded).¹⁰ The regulations also state that the "addition of a component (such as water, salt, or sugar) that enhances or represents a further step in the preparation of the product for consumption, would not in itself result in a processed food item."¹¹

Given the COOL program's broad definition of "processed food item," a large percentage of the meat products sold in this country are likely exempt from the country of origin labeling requirement. For example, ham, bacon, and smoked cuts of meat seem to be defined as processed food items that are exempt from COOL's labeling requirements. Similarly, a roasted whole chicken would be exempt from labeling requirements but a raw whole chicken would not. In addition, although ground beef is a covered commodity that is subject to COOL,

meatloaf is considered a processed food item and is therefore exempt from COOL's requirements.¹²

COOL Does Not Require the Labeling of Combined Covered Commodities

When covered commodities of different types are mixed together, they are exempted from the labeling requirements because they are defined as “processed food items.”¹³ Mixed covered commodities generally include commodities of different types that are mixed together in one package. For example, a package of mixed frozen strawberries and frozen blueberries would be considered a processed food item under the regulations. In contrast, a package of frozen strawberries not mixed with any other type of fruit is classified as a covered commodity, not a processed food item.

To determine whether combined fruits and vegetables are a processed food item, USDA will rely on the United States Grade Standards. In those cases where the fruit and vegetables that were combined have separate United States Grade Standards, the resulting product will be defined as a processed food item exempt from COOL's labeling requirements. In those cases where the combined fruit and vegetables have the same United States Grade Standard, the product will be defined as a covered commodity, and must meet COOL's labeling requirements.¹⁴ The USDA standards for fruits and vegetables can be found on its website, and are located at:

<http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateN&navID=U.S.GradeStandards&rightNav1=U.S.GradeStandards&topNav=&leftNav=&page=FreshGradeStandardsIndex&resultType=&acct=freshgrdcert>.

Examples of Processed Food Items That Do Not Require a COOL Label:

Examples of items excluded from COOL's requirements include teriyaki-flavored pork loin; meatloaf; roasted peanuts; breaded chicken tenders; breaded fish sticks; flank steak with portabella stuffing; steakhouse sirloin kabobs with vegetables; cooked and smoked meats; blue cheese angus burgers; cured hams; bacon; corned beef briskets; prosciutto rolled in mozzarella cheese; a salad that contains iceberg and romaine lettuce; a fruit cup that contains cantaloupe, watermelon, and honeydew; mixed vegetables; and a salad mix that contains lettuce and carrots and/or salad dressing.¹⁵ Dried fruit and dried mushrooms are also considered processed food items and are exempt from COOL.¹⁶

WHO MUST LABEL — RETAILERS ARE REQUIRED TO LABEL ALL COVERED COMMODITIES

COOL's labeling requirements apply to all “retailers” who sell products that are defined as “covered commodities.”¹⁷ The regulations define “retailer” as having the meaning given that term by section 499a(b) of the Perishable Agricultural Commodities Act of 1930 (the PACA).¹⁸ For purposes of COOL, USDA states a retailer is defined as “any person engaged in the business of selling” fresh and frozen fruits and vegetables at retail, whose “invoice cost for these purchases exceeds \$230,000 during a calendar year.”¹⁹ According to USDA, the definition of retailer generally includes most grocery stores and supermarkets, but does not include retail stores such as fish markets and butcher shops, “as well as other stores that do not invoice the threshold amount of fresh produce.”²⁰

Farmers Are Generally Not Defined as Retailers

The PACA specifically states that farmers are not considered to be retailers with respect to the sale of products they raised themselves.²¹ Therefore, farmers who sell their own products directly to consumers—including at farmers’ markets, farm stands, and through community supported agriculture programs—should not be considered as retailers under COOL and should not have to comply with COOL’s labeling requirements.

Food Service Establishments Are Not Retailers

The COOL labeling requirements do not apply to products sold or served at food service establishments.²² Under the regulations, a “food service establishment” means a “restaurant, cafeteria, lunchroom, food stand, saloon, tavern, bar, lounge, or other similar facility operated as an enterprise engaged in the business of selling food to the public.” Salad bars, delicatessens, and “other food enterprises located within retail establishments that provide ready-to-eat foods” are also included in the definition of “food service establishment.”²³ Farmers who sell their products directly to these types of businesses should not have to comply with COOL’s labeling requirements.

FARMERS MUST PROVIDE INFORMATION AND KEEP RECORDS

Requirement to Provide Information

Farmers who directly or indirectly supply covered commodities to retailers must provide proof of their products’ country of origin by giving their buyers information about which countries the product has been in.²⁴ Buyers will generally need to know what countries the product was in before the farmer got the product and which countries the product has been in since the farmer got the product.

The COOL law requires farmers to provide country of origin information to a buyer of their covered commodities if the product is sold directly to a retailer; in this case, the farmer is considered a direct supplier of covered commodities. Farmers must also provide country of origin information to a non-retailer buyer if the buyer will subsequently sell the product to a retailer; in this case, the farmer is considered an indirect supplier of covered commodities. For example, if a farmer sells a covered commodity to a processing facility, packinghouse, or meat packer, and that buyer later sells the covered commodity to a retailer, the farmer would be considered an indirect supplier of covered commodities. Therefore, the farmer must provide the processing facility, packinghouse, or meat packer with country of origin information about the product being sold.²⁵ This same principle applies to farmers who sell covered commodities to any type of intermediaries in the retail supply chain.

Farmers and other suppliers can provide the required country of origin information “either on the product itself, on the master shipping container, or in a document that accompanies the product through retail sale.”²⁶

In addition, buyers may ask or require farmers and other suppliers to pre-label their products. As described above, the COOL program does not require farmers and suppliers to label their products. At the same time, it does not prohibit buyers from requiring farmers and other suppliers to pre-label products, and buyers may therefore request that farmers and other

suppliers pre-label their products.²⁷ Farmers should communicate with their buyers beforehand to determine what types of documents a buyer will want from the farmer in order to verify the country of origin of farmers' products.

Recordkeeping Requirements

Farmers who directly or indirectly supply retailers with covered commodities must also comply with COOL's recordkeeping requirements. Under these requirements, all suppliers, including farmers, must maintain records to establish and identify the source of the covered commodity and who the farmer sold the covered commodity to. These records must be maintained for at least one year from the date the product's country of origin was declared to the retailer.²⁸ Records must be provided to USDA within five days from the request of an authorized USDA representative.²⁹

Since USDA is authorized to audit farmers' records to trace back the origin of covered commodities, farmers should have an accurate recordkeeping system that can be efficiently accessed if they are audited by USDA. The regulations allow farmers to keep electronic or hard copies of their records and require that the records be legible.³⁰

Farmers Who Sell Covered Commodities Directly to Consumers or Restaurants Are Not Required to Provide Information or Keep Records

Farmers who sell covered commodities to those other than retailers are not required to comply with COOL's requirements, including the requirements to provide information and keep records. Consequently, farmers who sell directly to consumers are not subject to regulation under COOL. Additionally, because food establishments are excluded from COOL, farmers who sell covered commodities to restaurants and other food establishments are not required to comply with COOL's requirements to provide information and keep records.

Farmers Who Sell Live Animals to Processing Facilities or Meat Packers Are Not Required to Provide Information or Keep Records

Livestock, including poultry animals, is not a covered commodity. However, the meat products from those animals are covered commodities. Therefore, the packer—not the farmer—is directly responsible for complying with COOL's requirements to provide information and keep records.³¹ At the same time, because only farmers have firsthand knowledge of the origin of their animals, packers must require farmers to provide them with country of origin information for the purchased livestock. Therefore, farmers will be expected to provide packers with documentation establishing the country of origin of their livestock.

In those cases where a farmer provides animals to a processing facility for butchering and packaging, but remains responsible for selling the meat products to a retailer, the farmer is directly regulated by COOL. In that case, the farmer must comply with COOL's requirements to provide information and keep records.

WHAT TYPES OF DOCUMENTS CAN FARMERS USE TO PROVE THE COUNTRY OF ORIGIN OF THEIR PRODUCTS?

Producer Affidavits Can Be Used to Verify the Country of Origin of Covered Commodities

USDA will consider a producer affidavit as acceptable evidence of a product's country of origin as long as the affidavit: (1) is made by someone having firsthand knowledge of the origin of the covered commodity, and (2) identifies the covered commodity unique to the transaction.³² Therefore, farmers can use affidavits to prove the country of origin of the covered commodities they produce. The COOL law, however, does not prohibit buyers of covered commodities from requesting additional documentation from farmers. Thus, farmers should expect that their buyers might ask for other records in addition to a producer affidavit.

With respect to meat covered commodities, the USDA has stated that evidence sufficient to identify the animal(s) unique to a transaction can include an ear tag identification and/or other animal marking system, information such as the type and sex of the animals, the number of head involved in the transaction, the date of the transaction, and the name of the buyer.³³

USDA has not stated what type of evidence is sufficient to identify fruits and vegetables and other non-meat covered commodities unique to a transaction.

USDA has also made clear that producers may use "continuous" affidavits to prove the country of origin of livestock, provided that documentation identifying the animals unique to a particular transaction is provided for each transaction.³⁴ "Continuous" affidavits are affidavits issued by a producer or other livestock handler that are valid for an indefinite period of time until cancelled by the party issuing the affidavit.

With respect to cattle, farmers may issue affidavits based on their visual inspection of their livestock at or near the time of sale.³⁵ The visual inspection should confirm that there are no markings or other identification that show the animals are of foreign origin.³⁶ Meat packers are not permitted to use visual inspection to verify an animal's country of origin; only producers and owners selling livestock for slaughter may do so.³⁷

Business Records That Can Be Used to Verify Country of Origin Claims for Animals

Under the COOL labeling law, records kept in the "normal conduct of the business . . . including animal health papers, import or customs documents" may be used to verify an animal's country of origin.³⁸

The 2008 Farm Bill prohibits the Secretary from requiring anyone to maintain records of the country of origin "other than those maintained in the normal course of the normal conduct of the business."³⁹ Therefore, USDA cannot require a farmer to keep records other than those the farmer normally keeps for his or her business.

According to USDA, documents that can be used to assist in verifying an animal's country of origin include: birth records, receiving records, purchase records, animal health papers, sales receipts, animal inventory documents, feeding records, APHIS VS forms, segregation plans, State Brand requirements, breeding stock information, and other similar documents.⁴⁰ Other types of information that are acceptable to establish an animal's country of origin include:

tags showing an 840 Animal Identification Number, without the presence of any accompanying markings indicating the animal spent time outside of the U.S.; participation in the National Animal Identification System (NAIS); or participation in any other recognized official identification system (e.g., the official system in Canada or Mexico).⁴¹ The 2008 Farm Bill expressly prohibits the Secretary from using a “mandatory identification system to verify the country of origin of a covered commodity.”⁴² Therefore, the Secretary cannot require that farmers participate in NAIS to prove country of origin claims. Rather, NAIS is merely one potential way to prove an animal’s country of origin.

Additional examples of the types of documents that may be used to verify an animal’s country of origin are available on the AMS website, at:

<http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateN&navID=ExamplesofRecordsforCOOLverification&rightNav1=ExamplesofRecordsforCOOLverification&topNav=&leftNav=CommodityAreas&page=ExamplesofRecords&resultType=&acct=cntryoforgnbl>.

Business Records That Can Be Used to Verify Country of Origin Claims for Fruits and Vegetables

According to USDA, the following types of documents should provide sufficient information for an auditor to determine the origin of fruit and vegetable covered commodities: official inspection certificates; confirmations and memorandums of sales; harvest records; delivery tickets; weight tickets; copies of bills of sales to customers; purchase records; production and sales contracts; sales tickets; pick tickets; and ledger records of sales. Additional examples of the types of documents farmers can use to prove the country of origin of fruits and vegetables can be found on the AMS website, located at

<http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3103377>.

HOW IS THE COUNTRY OF ORIGIN DETERMINED FOR FRUITS, VEGETABLES, GINSENG, PEANUTS, PECANS, AND MACADAMIA NUTS?

Fruits, Vegetables, Ginseng, Peanuts, Pecans, and Macadamia Nuts Are Classified as Products of the United States if They Were Harvested in the United States

Products harvested in the United States may list the United States as the country of origin.⁴³

HOW IS THE COUNTRY OF ORIGIN DETERMINED FOR MEAT PRODUCTS?

Category A — Product of the United States

Meat is Generally Classified as a Product of the United States if the Animals Were Born, Raised, and Slaughtered in the United States

Beef, pork, lamb, chicken, and goat are only considered to have a United States country of origin if: (1) “the animals were exclusively born, raised, and slaughtered in

the United States”; or (2) the animals were present in the United States on or before July 15, 2008, and “remained continuously in the United States” since that time; or (3) the animals were born and raised in Alaska or Hawaii and transported for a period of not more than 60 days through Canada to the United States and were slaughtered in the United States.⁴⁴

With respect to ground meat, the regulations provide that when meat from a specific country “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.”⁴⁵ Therefore, under this regulation, processors may continuously list the United States as a source of ground meat even though the processor included meat originating from the United States in its ground meat processing on only one day out of each 60-day period.

Category B — Meat From Multiple Countries of Origin

Meat is Classified as Having Multiple Countries of Origin When it is From an Animal That Was Born, Raised, or Slaughtered in More Than One Country

Where an animal spent part of its life in the United States and another part of its life outside of the United States, that animal is defined as having multiple countries of origin. Where meat from animals exclusively from the United States is commingled with meat from other countries during production, the product may be labeled as having multiple countries of origin.⁴⁶ For example, where muscle cuts of meat having a United States origin are commingled with muscle cuts of meat from animals with a different country of origin, the meat may be defined as having multiple countries of origin, including the United States.⁴⁷ This label should not be used, however, if only meat from the United States was produced during the production day.⁴⁸

Category C — Imported for Immediate Slaughter

Muscle Cuts of Meat From Animals Imported for Immediate Slaughter Must List Both the Country From Which the Meat Was Imported and the United States as the Countries of Origin

Where the product is from an animal that was imported into the United States for immediate slaughter, the countries of origin include the country from which the animal was imported and the United States.⁴⁹ This classification applies to animals imported to the United States less than two weeks before they are slaughtered.⁵⁰

Category D — Foreign Origin

Meat From Animals That Were Born, Raised, and Slaughtered Outside of the United States is Classified With its Foreign Country of Origin

This category applies to products derived from an animal that was “not born, raised, or slaughtered in the United States.”⁵¹

CONTENT OF LABEL — REQUIREMENTS THAT APPLY TO ALL COVERED COMMODITIES

Generally, a label may declare a product's country of origin by stating where the product was harvested or produced. For example, it is sufficient for a label to state "Product of the USA," "Produce of the USA," or "Grown in Mexico."⁵² Country abbreviations may not generally be used on country of origin labels. Some abbreviations, including "U.S." or "USA" for the "United States" may be used.⁵³

According to USDA, listing a business address on the product, without a country of origin designation, is not sufficient to comply with COOL's labeling requirements. Instead, all products must contain a label that provides a specific declaration of the product's country of origin.⁵⁴

If a farmer pre-labels products, the label must list the "commodity's country of origin and the name and place of business of the manufacturer, packer, or distributor on the covered commodity itself, on the package in which it is sold to the consumer, or on the master shipping container." To identify the place of business, the label must, at a minimum, designate the city and state where the business is located.⁵⁵

Additionally, labels for covered commodities must be "consistent with other applicable Federal legal requirements." Other federal government agencies with requirements for labeling include: United States Customs and Border Protection and USDA's Food Safety and Inspection Service (FSIS) (for meat products only).⁵⁶ Farmers with questions about these requirements can contact Customs and Border Protection through its website, located at <http://www.cbp.gov>, or by phone: 202-572-8813. The FSIS can be contacted by phone at 202-205-0623 or 202-205-0279.

CONTENT OF LABEL — REQUIREMENTS THAT APPLY TO FRUITS, VEGETABLES, GINSENG, PEANUTS, PECANS, AND MACADAMIA NUTS

Products Harvested in the United States

It is sufficient for the label on non-meat covered commodities classified as a product of the United States to state "Product of the United States" or "Product of the U.S."

Alternatively, it is also sufficient for the label to designate the state, region, or locality of the United States where the commodity was grown.⁵⁷ For example, the label is sufficient if it states "Product of Minnesota," or "Product of [insert name of city or town], Minnesota." State, regional, and locality abbreviations may be used provided the abbreviation is the official United States Postal abbreviation or was approved by Customs and Border Patrol.⁵⁸

State marketing program labels such as "California Grown," "GO TEXAN," or "Jersey Fresh" may also be used to meet COOL's labeling requirements.⁵⁹ According to USDA, such programs may only be used for COOL labeling purposes if the program meets the requirements to bear a United States label; that is, the program must require that products were harvested entirely in the United States.⁶⁰

Farmers should be aware that the regulations governing the Minnesota Grown labeling program generally allow products to use the Minnesota Grown label if 80 percent or more of the product was produced in Minnesota.⁶¹ Therefore, under the Minnesota Grown program, it is possible for a product to use the Minnesota Grown label even if 20 percent or less of the product is from outside of the State of Minnesota, including outside of the United States. In contrast, COOL requires a product to have been harvested exclusively in the United States in order to be declared a product of the United States. Therefore, the Minnesota Grown program appears to use a more lenient standard than that required under COOL. Consequently, use of the Minnesota Grown label alone might not be sufficient for purposes of COOL compliance. However, using the Minnesota Grown label in combination with a label stating the product is of United States origin should be sufficient to comply with COOL.

Farmers who wish to use the Minnesota Grown label to meet the COOL labeling requirements, whose products were exclusively harvested in the United States, should contact COOL's farmer hotline to determine whether use of the Minnesota Grown label, by itself meets COOL's labeling requirements. The same holds true for other marketing programs such as "Buy Fresh Buy Local—Red River Valley, Minnesota," and "Buy Fresh Buy Local—Upper Minnesota River Valley."

Products With Multiple Countries of Origin

Where products from multiple countries are commingled, all countries of origin must be listed.⁶² For example, where products from Mexico and Chile are commingled in a bulk retail bin, the label should state "Contains product of Mexico and Chile."⁶³

CONTENT OF LABEL — REQUIREMENTS THAT APPLY TO MEAT PRODUCTS

State, regional, or locality labeling cannot be used alone for meat products. It can be used in combination with a label that provides the required country of origin information (e.g., a label stating the product is of United States origin or stating the product is of United States and Canadian origin).⁶⁴

Category A — Product of the United States

It is sufficient for the label on meat classified as a product of the United States to state "Product of the U.S."⁶⁵

Category B — Multiple Countries of Origin

The product's label must identify all of the countries in which the product was born, raised, and slaughtered as countries of origin.⁶⁶ For meat from animals born in Canada, raised in Mexico, and slaughtered in the United States, the label should state "Product of Canada, Mexico, and the United States." The same label would be used if meat from the United States was commingled with meat from Canada and Mexico during the production process. The countries of origin may be listed in any order.⁶⁷

Labels for meat with multiple countries of origin should not use the terms “and/or” in the country of origin description. Doing so makes it unclear which countries are in fact the countries of origin.⁶⁸

Labels can also contain more specific information. For example, in addition to stating the countries of origin, a label may also specify where the animal was born, raised, and processed (e.g., “Product of Canada, Mexico, and the United States; Processed in the United States,” or “Product of Canada, Mexico, and the United States; From hogs born in Canada, raised in Mexico and processed in the United States.”)⁶⁹

Category C — Imported for Immediate Slaughter

Where the product is from an animal that was imported into the United States for immediate slaughter, the product must list the country of origin as both the country from which the animal was imported and the United States.⁷⁰ It is sufficient for the label to designate the meat as “Product of Country [insert name of country from which the animal was imported] and U.S.”⁷¹

Category D — Foreign Origin

Foreign meat products should be labeled with the country of origin that is declared to United States Customs and Border Protection at the time the product enters the United States.⁷²

Additional Requirements for Ground Meat

Ground meat must be labeled with a list of all actual countries of origin or a list of all reasonably possible countries of origin of the meat.⁷³ The regulations provide “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.”⁷⁴ Therefore, under this regulation, processors may continuously list the United States as a source of the ground meat even though the processor included meat originating from the United States in its ground meat processing on only one day out of each 60-day period.

FORM OF THE LABEL

Country of origin declarations can be in many different forms, including a “placard, sign, label, sticker, band, twist tie, pin tag or other format that allows consumers to identify the country of origin.”⁷⁵ Country of origin declarations may also be in the form of a checked box on the product’s container.⁷⁶

The declaration of the country of origin “must 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.”⁷⁷ No specific font size, typeface, color, or location of country of origin claims is required by the rules.⁷⁸

For remote sales, such as Internet or home delivery sales, the retailer may provide the country of origin information “on the sales vehicle or at the time the product is delivered to the customer.”⁷⁹

COOL ENFORCEMENT

To ensure the COOL labeling requirements are complied with, the Secretary of USDA is authorized to audit any farmer, supplier, or retailer who “prepares, stores, handles, or distributes a covered commodity for retail sale” in order to “maintain a verifiable recordkeeping audit trail that will permit the Secretary to verify compliance.”⁸⁰ Anyone subject to an audit must provide the Secretary with records verifying the country of origin of covered commodities. Livestock producers who sell live animals directly to a processing facility or meat packer should not be audited for their livestock, since live animals are not considered a covered commodity.⁸¹ Because the meat products from the animals are considered a covered commodity, processing facilities and packers are subject to audits.

The Secretary is also authorized to enforce COOL’s labeling requirements through notice, hearing, and imposition of fines of up to \$1,000 per offense.⁸² Under USDA’s interpretation of the COOL law, farmers, consumers and others cannot seek to enforce the labeling requirements. Instead, complaints must be made to the Secretary, who will determine whether there are “reasonable grounds” to conduct an investigation into whether the complained of conduct violates the requirements.⁸³ Before imposing penalties for violations of the COOL program rules, the Secretary must provide retailers and suppliers with notice of the violation and a 30-day period of time in which to correct the violation.⁸⁴ After providing the required 30-day period, the Secretary can only impose a fine on a retailer or supplier if the retailer or supplier has not made a good faith effort to comply with COOL and continues to willfully violate the law.⁸⁵

Retailers and suppliers who handle covered commodities that are found to be labeled incorrectly are not liable for violating COOL if they reasonably relied on the country of origin designation provided by a retailer or supplier who handled the covered commodity earlier in the retail marketing chain. Where a retailer or supplier had reason to know the country of origin information was false and willfully disregarded that information, the retailer or supplier may still be held liable for violating COOL.⁸⁶

ENDNOTES

- ¹ 73 Fed. Reg. 45,109 (Interim Final Rule – Mandatory Country of Origin Labeling of Meat, Perishable Agricultural Commodities, Nuts, and Ginseng).
- ² 7 U.S.C. §§ 1638a, 1638b. The legality of the COOL program is being challenged in a court case filed in Washington State and in a complaint filed with the World Trade Organization. No decision has been issued concerning these challenges. To determine if these challenges result in any changes to the new COOL requirements, farmers may wish to check the USDA’s Agricultural Marketing Service (AMS) website for updates; the section of the website devoted to COOL is located at www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateM&navID=CountryofOriginLabeling&rightNav1=CountryofOriginLabeling&topNav=&leftNav=CommodityAreas&page=CountryOfOriginLabeling&acct=cntryoforgnlbl.
- ³ 74 Fed. Reg. 2,658 (Final Rule – Mandatory Country of Origin Labeling of Meat, Perishable Agricultural Commodities, Nuts, and Ginseng); 73 Fed. Reg. 45,106-45,107. Those aspects of the COOL program applicable to fish and shellfish have applied to all products covered by those

program provisions since April 4, 2005. The Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act of 2006, Pub. L. No. 109-97, 119 Stat. 2120 (November 10, 2005); 69 Fed. Reg. 59,708 (Interim Final Rule – Mandatory Country of Origin Labeling for Fish and Shellfish).

⁴ 74 Fed. Reg. 2,658.

⁵ 74 Fed. Reg. 2,679.

⁶ Specifically, COOL regulates items defined as “perishable agricultural commodities.” The regulations define “perishable agricultural commodity” as having the meaning given that term by the Perishable Agricultural Commodities Act (PACA) of 1930. Under the PACA, perishable agricultural commodity means “fresh and frozen fruits and vegetables . . . that have not been manufactured into articles of a different kind or character and includes cherries in brine.” 7 C.F.R. § 65.205. Under the PACA, fruits and vegetables that are manufactured into articles of food of a “different kind or character” are not considered perishable commodities. The PACA regulations contain a list of processing operations that may be performed on fruits and vegetables without changing their character so as to remove them from the definition of “perishable agricultural commodity.” See, 7 C.F.R. § 46.2(u) (2007). The PACA Branch of USDA’s Agricultural Marketing Service (AMS) maintains an internal list of fruits and vegetables that are considered perishable agricultural commodities. Farmers with questions about whether their product would be defined as a perishable agricultural commodity may contact the PACA Branch for more information by calling USDA’s toll-free PACA number: 800-495-7222. For more information about the PACA, farmers may also refer to FLAG’s publication, *Understanding Farmers’ Rights to Be Paid For Fruit and Vegetable Crops*, available at www.flaginc.org/topics/pubs/arts/PACAart12007.pdf.

⁷ 7 C.F.R. § 65.135.

⁸ 7 C.F.R. § 65.300(c).

⁹ 7 C.F.R. § 65.220.

¹⁰ 7 C.F.R. § 65.220.

¹¹ 7 C.F.R. § 65.220. USDA has stated that it does not consider the following processing steps to change the character of a covered commodity so as to make it a processed food item exempt from COOL’s requirements: needle tenderizing or chemically tenderizing meat products; injecting meat products with sodium phosphate or similar solutions; or adding dextrose, phosphate, beef stock, yeast or enzymatic tenderizers to a covered commodity. 74 Fed. Reg. 2,660 and 2,668.

¹² 7 C.F.R. § 65.105; 74 Fed. Reg. 2,661.

¹³ 7 C.F.R. § 65.220.

¹⁴ 74 Fed. Reg. 2660; United States Department of Agriculture, *Country of Origin Labeling (COOL) Frequently Asked Questions*, January 12, 2009, page 11, available at www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5074846 (last visited April 14, 2009).

¹⁵ 74 Fed. Reg. 2,661.

¹⁶ United States Department of Agriculture, *Country of Origin Labeling (COOL) Frequently Asked Questions*, January 12, 2009, page 4, available at www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5074846 (last visited April 14, 2009).

¹⁷ 7 U.S.C. § 1638a(a)(1).

¹⁸ 7 C.F.R. § 65.240.

- ¹⁹ United States Department of Agriculture, *Country of Origin Labeling (COOL) Frequently Asked Questions*, January 12, 2009, page 5, available at www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5074846 (last visited April 14, 2009). The PACA contains a more complicated definition of retailer than USDA provides in its materials explaining how that definition applies in the context of the COOL program. Specifically, the PACA defines “retailer” as “a person that is a dealer engaged in the business of selling any perishable agricultural commodity at retail.” 7 U.S.C. § 499a(b)(11). Under the PACA, a “dealer” means “any person engaged in the business of buying or selling” 2,000 or more pounds of perishable agricultural commodities in any given day, except that “(A) no producer shall be considered as a ‘dealer’ in respect to sales of any such commodity of his own raising; (B) no person buying any such commodity solely for sale at retail shall be considered as a ‘dealer’ until the invoice cost of his purchases of perishable agricultural commodities in any calendar year are [sic] in excess of \$230,000; and (C) no person buying any commodity other than potatoes for canning and/or processing within the State where grown shall be considered a ‘dealer’ whether or not the canned or processed product is to be shipped in interstate or foreign commerce, unless such product is frozen or packed in ice, or consists of cherries in brine.” 7 U.S.C. § 499a(b)(6). Under the PACA, a person not defined as a “dealer” may still choose to obtain a license under the PACA. While the license is in effect, that person is considered as a “dealer” for purposes of the PACA. 7 U.S.C. § 499a(b)(6). The PACA definition of a retailer appears to be broader than that used by USDA for purposes of COOL; this difference in definitions may result in the definition of retailer under COOL being expanded or in litigation about COOL’s scope.
- ²⁰ United States Department of Agriculture, *Country of Origin Labeling (COOL) Frequently Asked Questions*, January 12, 2009, page 5, available at www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5074846 (last visited April 14, 2009).
- ²¹ 7 U.S.C. § 499a(b)(6)(A).
- ²² 7 C.F.R. § 65.300(b).
- ²³ 7 C.F.R. § 65.140.
- ²⁴ 7 C.F.R. § 65.500(b)(1).
- ²⁵ 7 C.F.R. § 65.500(b)(1).
- ²⁶ 7 C.F.R. § 65.500(b)(1).
- ²⁷ United States Department of Agriculture, *Country of Origin Labeling (COOL) Frequently Asked Questions*, January 12, 2009, page 7, available at www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5074846 (last visited April 14, 2009) (stating that “[a]necdotal evidence indicates that many retailers are asking or requiring their suppliers to pre-label products with origin information.”)
- ²⁸ 7 C.F.R. § 65.500(b)(1). *See also*, United States Department of Agriculture, *Country of Origin Labeling (COOL) Frequently Asked Questions*, January 12, 2009, page 13, available at www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5074846 (last visited April 14, 2009).
- ²⁹ 7 C.F.R. § 65.500(a)(2).
- ³⁰ 7 C.F.R. § 65.500(a)(1).
- ³¹ 7 C.F.R. § 65.500(b)(1) (stating that slaughter facilities are responsible for initiating all COOL claims regarding the country of origin of meat); 74 Fed. Reg. 2,674 (stating the Secretary’s authority to perform audits ends at the slaughter facility and does not extend to the farmer because the slaughter facility is the first “handler” of the covered commodity); United States Department of Agriculture, *Country of Origin Labeling (COOL) Frequently Asked Questions*, January 12, 2009,

page 13, available at www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5074846 (last visited April 14, 2009).

³² 7 C.F.R. § 65.500(b)(1).

³³ 73 Fed. Reg. 45,111-45,112; United States Department of Agriculture, *Country of Origin Labeling (COOL) Frequently Asked Questions*, January 12, 2009, page 14, available at www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5074846 (last visited April 14, 2009).

³⁴ United States Department of Agriculture, *Country of Origin Labeling (COOL) Frequently Asked Questions*, January 12, 2009, page 14, available at www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5074846 (last visited April 14, 2009).

³⁵ 7 C.F.R. § 65.500(b)(1).

³⁶ 7 C.F.R. § 65.500(b)(1); United States Department of Agriculture, *Country of Origin Labeling (COOL) Frequently Asked Questions*, January 12, 2009, page 14, available at www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5074846 (last visited April 14, 2009).

³⁷ United States Department of Agriculture, *Country of Origin Labeling (COOL) Frequently Asked Questions*, January 12, 2009, page 14, available at www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5074846 (last visited April 14, 2009).

³⁸ 7 U.S.C. § 1638a(d)(2)(A).

³⁹ 7 U.S.C. § 1638a(d)(2)(B).

⁴⁰ See, for example, United States Department of Agriculture, *Examples of Records Useful for COOL Verification Purposes – Cattle Beef Muscle Cuts of Beef Ground Beef*, available at www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3103374 (last visited February 3, 2009).

⁴¹ 7 C.F.R. 65.500 (b)(1).

⁴² 7 U.S.C. 1638a(f)(1).

⁴³ 7 U.S.C. § 1638a(a)(4)(A); 7 C.F.R. § 65.225.

⁴⁴ 7 U.S.C. § 1638a(a)(2)(A); 7 C.F.R. § 65.260(a).

⁴⁵ 7 C.F.R. § 65.300(h).

⁴⁶ 7 C.F.R. § 65.300(e); United States Department of Agriculture, *Country of Origin Labeling (COOL) Frequently Asked Questions*, January 12, 2009, page 8, available at www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5074846 (last visited April 14, 2009).

⁴⁷ 7 C.F.R. § 65.300(e).

⁴⁸ 74 Fed. Reg. 2,670; United States Department of Agriculture, *Country of Origin Labeling (COOL) Frequently Asked Questions*, January 12, 2009, page 8, available at www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5074846 (last visited April 14, 2009).

⁴⁹ 7 U.S.C. § 1638a(a)(2)(C).

⁵⁰ 7 C.F.R. § 65.180.

⁵¹ 7 U.S.C. § 1638a(a)(2)(D).

⁵² 7 C.F.R. § 65.400(a).

- ⁵³ 7 C.F.R. § 65.400(e).
- ⁵⁴ United States Department of Agriculture, *Country of Origin Labeling (COOL) Frequently Asked Questions*, January 12, 2009, page 11, available at www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5074846 (last visited April 14, 2009).
- ⁵⁵ 7 C.F.R. § 65.218.
- ⁵⁶ United States Department of Agriculture, *Country of Origin Labeling (COOL) Frequently Asked Questions*, January 12, 2009, page 6, available at www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5074846 (last visited April 14, 2009).
- ⁵⁷ 7 U.S.C. § 1638a(a)(4)(B); 7 C.F.R. § 65.400(f).
- ⁵⁸ 7 C.F.R. § 65.400(f).
- ⁵⁹ United States Department of Agriculture, *Country of Origin Labeling (COOL) Frequently Asked Questions*, January 12, 2009, page 11, available at www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5074846 (last visited April 14, 2009).
- ⁶⁰ United States Department of Agriculture, *Country of Origin Labeling (COOL) Frequently Asked Questions*, January 12, 2009, page 11, available at www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5074846 (last visited April 14, 2009).
- ⁶¹ Minn. Rules 1556.0120, subp. 1.
- ⁶² 7 C.F.R. §§ 65.300(g) and 65.400(d).
- ⁶³ United States Department of Agriculture, *Country of Origin Labeling (COOL) Frequently Asked Questions*, January 12, 2009, page 10, available at www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5074846 (last visited April 14, 2009).
- ⁶⁴ 74 Fed. Reg. 2,673; 7 C.F.R. § 65.400(f).
- ⁶⁵ 74 Fed. Reg. 2,662; United States Department of Agriculture, *Country of Origin Labeling (COOL) Frequently Asked Questions*, January 12, 2009, page 7, available at www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5074846 (last visited April 14, 2009).
- ⁶⁶ 7 U.S.C. § 1638a(a)(2)(B).
- ⁶⁷ 7 C.F.R. § 65.300(e)(4); United States Department of Agriculture, *Country of Origin Labeling (COOL) Frequently Asked Questions*, January 12, 2009, page 8, available at www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5074846 (last visited April 14, 2009).
- ⁶⁸ 74 Fed. Reg. 2,670; United States Department of Agriculture, *Country of Origin Labeling (COOL) Frequently Asked Questions*, January 12, 2009, page 7, available at www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5074846 United States Department of Agriculture, *Country of Origin Labeling (COOL) Frequently Asked Questions*, January 12, 2009, page 7, available at www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5074846 (last visited April 14, 2009).
- ⁶⁹ 7 C.F.R. § 65.300(e)(4); United States Department of Agriculture, *Country of Origin Labeling (COOL) Frequently Asked Questions*, January 12, 2009, page 8, available at www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5074846 (last visited April 14, 2009).

- ⁷⁰ 7 U.S.C. § 1638a(a)(2)(C).
- ⁷¹ United States Department of Agriculture, *Country of Origin Labeling (COOL) Frequently Asked Questions*, January 12, 2009, page 8, available at www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5074846 (last visited April 14, 2009).
- ⁷² 7 C.F.R. § 65.300(f).
- ⁷³ 7 U.S.C. § 1638a(a)(2)(E); 7 C.F.R. § 65.300 (h).
- ⁷⁴ 7 C.F.R. § 65.300(h).
- ⁷⁵ 7 C.F.R. § 65.400(a); 7 U.S.C. § 1638A(c)(1).
- ⁷⁶ United States Department of Agriculture, *Country of Origin Labeling (COOL) Frequently Asked Questions*, January 12, 2009, page 7, available at www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5074846 (last visited April 14, 2009).
- ⁷⁷ 7 C.F.R. § 65.400(b).
- ⁷⁸ United States Department of Agriculture, *Country of Origin Labeling (COOL) Frequently Asked Questions*, January 12, 2009, page 7, available at www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5074846 (last visited April 14, 2009).
- ⁷⁹ 7 C.F.R. § 65.300(i).
- ⁸⁰ 7 U.S.C. § 1638a(d)(1).
- ⁸¹ 7 C.F.R. § 65.500(b)(1) (stating that slaughter facilities are responsible for initiating all COOL claims regarding the country of origin of meat); 74 Fed. Reg. 2,674 (stating the Secretary’s authority to perform audits ends at the slaughter facility and does not extend to the farmer because the slaughter facility is the first “handler” of the covered commodity); United States Department of Agriculture, *Country of Origin Labeling (COOL) Frequently Asked Questions*, January 12, 2009, page 13, available at www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5074846 (last visited April 14, 2009).
- ⁸² 7 U.S.C. § 1638b.
- ⁸³ 73 Fed. Reg. 45,107.
- ⁸⁴ 7 U.S.C. § 1638b(a)(2); 73 Fed. Reg. 45,109.
- ⁸⁵ 7 U.S.C. § 1638b(b); 73 Fed. Reg. 45,109.
- ⁸⁶ 7 C.F.R. §§ 65.500(b)(2); 65.500(c)(3).