

Country of Origin Labeling

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In 2007, perhaps the most notorious ongoing news story was the steady stream of contaminated imported food items reaching American ports, and the risk this poses to the American consumer. As a result, much political action has ensued to safeguard our imported food supplies, most notably with respect to our relationship with China. However, another result has been increased consumer interest in country of origin labeling, which has in turn resulted in the filing of lawsuits alleging deceptive or false country of origin labeling on food products.

Current examples

At least two lawsuits that arose out of the pet food recalls in early 2007 have advanced the claim that pet food manufactured in the United States was improperly labeled as "Made in the U.S.A." The Federal Trade Commission (FTC) maintains exclusive federal enforcement authority of "Made in the U.S.A." claims pursuant to the FTC Act. The FTC is charged with ensuring that these claims, considered advertisements, are not deceptive and has set strict standards in this regard. However, private consumers cannot initiate a lawsuit under the FTC Act if they believe a "Made in the U.S.A." claim is deceptive, since the FTC has exclusive enforcement authority of the Act's provisions. Rather, consumers must initiate lawsuits under the many state consumer-protection statutes that generally prohibit false or misleading advertising.

A point of interest arises when a state consumer-protection statute is vague as to the standards by which a "Made in the U.S.A." claim is to be judged. In these instances, plaintiff attorneys have asked state and federal courts to use the FTC's strict standards as "guidance" when deciding whether state consumer-protection statutes have been violated. The concern for food manufacturers, retailers and others responsible for country of origin labeling is this practice, for all intents and purposes, allows consumers to sue under the FTC Act.

While this litigation tactic is novel and has only been embraced by one court to date, it emphasizes the need for food manufacturers, retailers and others involved with country of origin labeling to ensure compliance with not only the FTC Act, but all federal country of origin labeling regulations.

All or virtually all

The FTC utilizes a test of "all or virtually all" to determine whether an unqualified "Made in the U.S.A." statement is deceptive. This means that all significant ingredients and processing involved with the manufacturing of the product must be of U.S. origin.

FTC has enumerated one requirement and two factors as a guide to help determine whether this standard has been met. The first requirement is that the product's final manufacture must take place within the United States. If this requirement is met, the FTC will then look at how much of the product's total manufacturing costs can be assigned to U.S. ingredients and processing, and how far removed any foreign content is from the finished product. The FTC's enforcement policy states that this determination will be made on a case-by-case basis.

It should be emphasized that final manufacture within the United States does not automatically render a food product appropriate for "Made in the U.S.A." labeling. This may seem contrary to the popular perception that a food item labeled as "Made in the U.S.A." need only be manufactured in the United States. However, as far as the FTC is concerned, final manufacture in the United States is only an initial requirement. The inquiry is much more involved.

Assuming that the final manufacture occurs within the United States, one must then look at the percentage of foreign content in the final food product. While the FTC has not elucidated a bright-line amount of

allowable foreign content, food manufacturers should proceed with caution. Often, in food manufacturing, minor ingredients add up to significant amounts. Another problem is the unavailability of some vitamins and other ingredients domestically. To date, the FTC has not made any concessions for ingredients not available domestically.

This strict approach is tempered somewhat because the FTC takes into account the costs of processing foreign ingredients, and the foreign ingredients' significance to the final food product. If the ingredient is minor and accounts for only a small amount of the manufacturing costs, a "Made in the U.S.A." label may be appropriate in the presence of a questionable amount of foreign content.

Unfortunately, the FTC does not provide advance opinions regarding compliance with its standard. Therefore, it is worth re-emphasizing that food manufacturers should be very conservative when labeling a food product as "Made in the U.S.A."

U.S. Customs standards

The U.S. Customs and Border Protection (CBP) regulates the labeling of imported goods with a country of foreign origin marking. CBP's general rule requires every article of foreign origin entering the United States to be legibly marked in a manner that indicates the article's country of origin to the ultimate purchaser--defined as the last person within the United States that receives the food item in the form in which it was imported. The country of origin of a food item is the country of manufacture, production or growth of the food item, or the last country in which the item was substantially transformed.

There are, of course, exceptions to this rule, and slight variations of CBP's analysis, depending on the type of item being imported and its originating country. For example, the North American Free Trade Agreement (NAFTA) is implicated when food items are imported from Mexico or Canada, and CBP's country of origin labeling analysis will change accordingly.

However, if a food item is grown in Brazil (or another non-NAFTA country), imported to the United States and sold to the consumer without being substantially transformed, the product must be labeled as originating from Brazil in a way that is sufficient to make the consumer aware of the food's country of origin.

Yet, if that same food item grown in Brazil is used in manufacture within the United States and considered "substantially transformed" by the manufacturing process, the CBP does not require any markings on the final food product with respect to the imported Brazilian ingredient. *U.S. v. Gibson-Thomsen Co., Inc.*, 27 C.C.P.A. 267 (1940) holds that a "substantial transformation" results in an article having a name, character or use differing from the imported article.

For example, on Dec. 28, 2006, CBP held that bananas grown, peeled, cut and frozen in Costa Rica, and then imported to the United States where they were coated in chocolate and repackaged in 40-oz. poly bags were substantially transformed in the United States. As such, they were considered a product of the United States and required no country of origin demarcation.

CBP's regulations are complex, and while the general rule is instructive, each case should be investigated individually. Thankfully, CBP offers advance rulings, and a concerned food manufacturer or importer is well-advised to take advantage of this service.

The Farm Bill

Commonly referred to as the 2002 Farm Bill, the Farm Security and Rural Investment Act is concerned with the labeling of "covered commodities" to inform consumers "at the final point of sale" of the commodities' country of origin. According to the Act, the term "covered commodity" includes:

- muscle cuts of beef, lamb, and pork;
- ground beef, ground lamb, and ground pork;
- farm-raised fish;
- wild fish;

- a perishable agricultural commodity; and
- peanuts.

However, these commodities are expressly excluded from being covered by this Act if they are used as an ingredient in a processed food item. Foodservice establishments, such as restaurants, are also exempt from the Act's labeling requirements.

To convey the country of origin and method of production information required by this Act, retailers may use any clear and visible sign on the covered commodity or on the holding unit containing the commodity at the point of final sale.

The provisions of this Act governing country of origin labeling are currently only applicable to fish and shellfish. The effective date for the other covered commodities is Sept. 30, 2008. Because of the limited scope of this Act at this time, its potential for application to state causes of action is limited. However, this does not minimize the importance of overall compliance.

Because country of origin labeling is comprised of a very complicated and sometimes overlapping regulatory scheme, food companies are often confused by the many regulations. Further complicating matters, intra-company communication must effectively relay knowledge regarding country of origin labeling laws to the persons responsible for marking the items(s) in question. Given the potential application of strict federal standards to private lawsuits, and a renewed consumer focus on country of origin labeling, every effort should be made to overcome these obstacles as soon as possible.

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Web Resources

- [2002 Farm Bill](#)
- [FDA COOL Compliance](#)
- [Presidential Initiative: Safety of Imported Food](#)
- [U.S. Customs and Border Protection—International Agreements](#)
- [COOL Revisited](#)
- [The Wide World of Food Regulations](#)