

"C.O.O.L." RULE

Joseph F. Bermudez, Esquire • 720.479.3926 • jbermudez@cozen.com
Jason D. Melichar, Esquire • 720.479.3932 • jmelichar@cozen.com
Suzanne M. Meintzer, Esquire • 720.479.3909 • smeintzer@cozen.com

On September 30, 2008, the U.S. Department of Agriculture's ("USDA") rule for mandatory country of origin labeling ("COOL") for certain covered commodities went into effect. See Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts, 73 Fed. Reg. 45106 (Aug. 1, 2008) (to be codified at 7 C.F.R. pt. 65).

The intent behind the rule is to provide consumers with additional information upon which to base their purchasing decisions—it does not provide a basis for addressing food safety. Rather, all food products, domestic and imported, must meet the safety standards of the Food and Drug Administration and the Food Safety and Inspection Rule. Nonetheless, the rule will have a significant effect upon the U.S. food industry because all retailers will be required to list the countries from which components in those covered commodities originated.

BACKGROUND

The Farm Security and Rural Investment Act of 2002 (the "2002 Farm Bill"), the 2002 Supplemental Appropriations Act, and the Food, Conservation and Energy Act of 2008 (the "2008 Farm Bill") amended the Agricultural Marketing Act of 1946 (the "1946 Act") to require retailers to notify their customers of the country of origin of covered commodities.

WHO IS IMPACTED BY THE RULE

A "retailer" is any person engaged in the business of selling perishable agricultural commodities. A retailer is required to be licensed if the invoice cost of all perishable agricultural commodities exceeds \$230,000 per year. Retail establishments such as butcher shops, which do not generally sell fruits and vegetables, do not meet the definition of "retailer."

"Covered commodities" include: muscle cuts of beef (including veal), lamb, pork, chicken, and goat; ground beef, ground lamb,

ground pork, ground chicken, and ground goat; wild and farm-raised fish and shellfish; perishable agricultural commodities; and peanuts, pecans, ginseng and macadamia nuts.

Food service establishments and processed food items are exempt from the rule. "Food service establishments" include restaurants, cafeterias, lunch rooms, bars, delis, salad bars and ready-to-eat food sold within retail establishments.

"Processed food items" include any covered commodity that has undergone a change in character, such as cooking (including frying, steaming, grilling, broiling, baking, and roasting), curing, smoking and restructuring. Freezing does cause a change in character. Processed food items" also include any covered commodity that has been combined with at least one other substantive food component (other than salt, sugar and/or water).

GENERAL LABELING REQUIREMENTS

U.S. Origin

In order to label the U.S. as the country of origin, perishable agricultural commodities must be grown in the United States. Meat products must be derived exclusively from animals: (1) born, raised and slaughtered in the United States; or (2) present in the United States on or before July 15, 2008, and once present, remained continuously.

Muscle Cut Covered Commodities from Multiple Countries of Origin that Include the United States

If an animal was born, raised, and/or slaughtered in the United States and was not imported for immediate slaughter, the origin of the resulting meat products derived from that animal may be designated as Product of the United States, Country X, and/or (as applicable) Country Y, where Country X and Country Y represent the actual or possible countries of foreign origin. If an animal was imported into the United States for

immediate slaughter, the origin of the resulting meat products derived from that animal shall be designated as Product of Country X and the United States.

Labeling Imported Covered Commodities

Imported covered commodities for which the country of origin has already been established, and for which no production steps have occurred in the United States, shall retain the country of origin as declared to U.S. Customs and Border Patrol at the time the product entered the United States.

Labeling Commingled Covered Commodities

A commingled covered commodity is a single type of covered commodity that has been prepared from raw materials having different countries of origin. Further, a commingled covered commodity does not include ground meat products. If the product contains two different types of covered commodities, the product is considered a processed food item, and therefore, is not subject to mandatory COOL.

For imported covered commodities that are commingled with covered commodities (of the same type) sourced from a different origin, such as perishable agricultural commodities, peanuts, pecans, ginseng and macadamia nuts, the declaration shall indicate the countries of origin in accordance with existing U.S. Customs and Border Patrol marking regulations.

Covered commodities imported in consumer-ready packages are currently required to bear a country of origin declaration on each individual package under the Tariff Act of 1930 (Tariff Act).

Labeling Ground Meat Covered Commodities

The declaration for ground beef, ground pork, ground lamb, ground goat, and ground chicken covered commodities shall list all countries of origin contained therein or that may be reasonably contained therein. Further, when a raw material from a specific origin is not in a processor's inventory for more than sixty days, the country shall no longer be included as a possible country of origin.

Remotely Purchased Products

For sales of a covered commodity in which the customer purchases a covered commodity prior to having an opportunity to observe the final package (e.g., Internet sales, home delivery sales, etc.) the retailer may provide the country of origin notification either on the sales vehicle or at the time the product is delivered to the consumer.

Markings

The country of origin declaration may be provided to consumers by means of a label, placard, sign, stamp, band, twist tie, pin tag, or other clear and visible sign on the covered commodity or on the package, display, holding unit, or bin containing the commodity at the final point of sale to consumers. In general, abbreviations are not acceptable. Only those abbreviations approved for use under U.S. Customs and Border Patrol rules, regulations, and policies, such as "U.K." for "The United Kingdom of Great Britain and Northern Ireland," and "U.S." for the "United States" are acceptable.

The declaration of the country of origin of a product may be in the form of a statement such as "Product of USA," "Produce of the USA," or "Grown in Mexico;" may only contain the name of the country such as "USA" or "Mexico;" or may be in the form of a check box provided it is in conformance with U.S. Customs and Border Patrol marking regulations and other Federal labeling laws. Symbols or flags alone may not be used to denote country of origin.

For domestic and imported perishable agricultural commodities, macadamia nuts, peanuts, pecans, and ginseng, State, regional, or locality label designations are acceptable in lieu of country of origin labeling.

The rule does not contain specific requirements as to the exact placement or size of the country of origin declaration. However, such declarations must be legible and conspicuous, and allow consumers to find the country(ies) of origin easily and read it without strain when making their purchases, and provided that existing Federal labeling requirements are followed.

Retailers may commingle covered commodities from more than one country of origin provided that all possible origins are listed.

Recordkeeping

The Secretary may conduct an audit of any person that prepares, stores, handles, or distributes a covered commodity for retail sale to verify compliance. As such, records maintained in the normal course of business that verify origin declarations are necessary in order to provide retailers with credible information on which to base origin declarations.

ENFORCEMENT

Only USDA will be able to initiate enforcement actions against a person found to be in violation of the law. USDA may also conduct investigations of complaints made by any person

alleging violations of these regulations when the Secretary determines that reasonable grounds for such investigation exist. Retailers and suppliers, upon being notified of the commencement of a compliance review, must make all records or other documentary evidence material to this review available to USDA representatives within five business days of receiving a request and provide any necessary facilities for such inspections.

Further, the law contains enforcement provisions for both retailers and suppliers that include civil penalties of up to \$1,000 for each violation. For retailers and persons engaged in the business of supplying a covered commodity to a retailer (suppliers), the law states that if the Secretary determines that a retailer or supplier is in violation of the Act, the Secretary must notify the retailer or supplier of the determination and provide the retailer or supplier with a thirty-day period during which the retailer or supplier may take necessary steps to comply. If upon completion of the thirty-day period the Secretary determines the retailer or supplier has: (1) not made a good faith effort to comply; and (2) continues to willfully violate the Act, after providing notice and an opportunity for a hearing, the retailer or supplier may be fined not more than \$1,000 for each violation.

COSTS AND BENEFITS

Recordkeeping Burden

The USDA estimates that the total recordkeeping costs for producers are estimated at approximately \$264 million; for handlers, processors, and wholesalers at approximately \$107 million; and for retailers at approximately \$253 million. The total recordkeeping cost for all participants in the supply chain for covered commodities is estimated at \$624 million for the first year, with subsequent maintenance costs of \$499 million per year.

Economic Impact

Benefits

The USDA acknowledges that the expected benefits from implementation of this rule are difficult to quantify. The

benefits will be small and will accrue mainly to those consumers who desire country of origin information. The rule states that several analysts have concluded that the main benefit is the welfare effect resulting from removing informational distortions associated with not knowing the origin of products. The USDA received numerous comments on previous COOL rulemaking actions, thus indicating that there clearly is interest by some consumers in the country of origin of food. The mandatory COOL program may provide additional benefits to these consumers.

Mandatory COOL does not address food safety issues.

Appropriate preventative measures and effective mechanisms to recall products in the event of contamination incidents are the means used to protect the health of the entire consuming public regardless of the form in which a product is consumed or where it is purchased. Further, foods imported into the United States must meet food safety standards equivalent to those required of products produced domestically.

Costs

First-year incremental costs for directly affected firms are estimated at \$2.5 billion, a reduction of \$1.4 billion or 36 percent from the upper range estimate presented in the proposed rule. Costs per firm are estimated at \$376 for producers, \$53,948 for intermediaries (such as handlers, importers, processors, and wholesalers), and \$235,551 for retailers.

The estimated cost to the U.S. economy in higher food prices and reduced food production in the tenth year after implementation of the rule is \$211.9 million.

For a further analysis of the issues currently facing the food industry, including insurance coverage for claims arising from contaminated food products, please contact Joe Bermudez, Jason Melichar or Suzanne Meintzer of Cozen O'Connor's Denver, Colorado office.