

September 30, 2008

Country of Origin Labeling Program
Room 2067-S; Agricultural Marketing Service
U.S. Department of Agriculture; Stop 0254
1400 Independence Avenue, SW
Washington, DC 20250-0249

RE: Docket No. AMS-LS-07-0081 Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts: Interim Final Rule: 73 *Fed. Reg.* 45106 (August 1, 2008)

The United Fresh Produce Association (United Fresh) is pleased to submit comments regarding USDA's Interim Final Rule implementing mandatory country of origin labeling for perishable agricultural commodities published on August 1, 2008.

United Fresh is the pre-eminent trade association for the produce industry in managing critical public policy issues; shaping legislative and regulatory action; providing scientific and technical leadership in food safety, quality assurance, nutrition and health; and developing educational programs and business opportunities for members to better meet consumer needs for increased consumption of fresh produce. Founded in 1904, United Fresh represents the interests of member companies from small family businesses to the largest international corporations throughout the global fresh produce supply chain, including growers, shippers, fresh-cut processors, wholesalers, distributors, retailers, foodservice operators, industry suppliers and allied associations.

While the interim rule deals with a multitude of commodities we submit comments specifically on the perishable agricultural commodity provisions of this Interim Final Rule (IFR). In particular, we will focus our comments and recommendations on the aspects of this IFR related to fresh produce and the impact it will have on our members and our ability to deliver the highest quality produce at the lowest cost to consumers.

In developing these comments on USDA's implementation of country of origin regulations, we have listened carefully to a diverse range of opinion through open industry forums including online webinars and in-person workshops in San Jose, CA; Chicago, IL; Baltimore, MD; and Washington, DC. since the publication of the IFR in August. This has allowed us to discuss and review comments from hundreds of industry members throughout the produce distribution chain. We also appreciate USDA participating in these forums and look forward to their additional outreach and education sessions.

With this background we are pleased to provide the following comments on specific aspects of the IFR:

1. Amendments in the 2008 Farm Bill

Since legislation mandating COOL became law with the 2002 Farm Bill, United Fresh has worked intently with USDA and congressional leaders to see that regulations developed to implement the law were fair, practical and cost-effective for the produce industry and

consumers. Although we had serious concerns about some specific requirements of the 2002 statute, we have worked with congressional leaders to modify the statute to achieve the goals of COOL without adding additional costs and inefficiencies such that the ends would not justify the means.

Many unworkable elements of the initial 2002 statute were amended in the 2008 Farm Bill legislation which became law on June 18, 2008 (P.L. 110-246). As a general comment, we encourage USDA and its Office of General Counsel to ensure that the clear congressional intent of these amendments is fully implemented in the final rule with no ambiguity. Specifically, we ask USDA to clearly address the following issues:

- The potential liability for retail mistakes or absence of labeling at point of purchase has been significantly reduced. After finding a retailer to be “in violation,” USDA must give the retailer 30 days to “comply” with the Act. At the end of 30 days, USDA cannot fine a retailer unless that retailer has “not made a good faith effort” and “continues to willfully violate the Act.” The final rule must be crystal clear in implementing congressional intent to provide this safe harbor in compliance.
- Similarly, suppliers who do not provide country of origin information to the retailer, as required in the Act, are held to the same terms as above – 30 days to come into compliance, with potential fines imposed only if they do not “make a good faith effort” or “continue to willfully violate the Act” by not providing country of origin information to retailers.
- USDA is also barred from requiring any new record-keeping other than normal records kept in the regular course of doing business. We have serious concerns that USDA’s interpretation of records needed to verify compliance with COOL has moved beyond this statutory directive. We believe congressional intent was clear that NO new records would be required, and USDA must not reinterpret that clear mandate from Congress.

2. Definition of Food Service Establishment (§65.140)

In general, we support the definition of food service establishment to establish that many facilities and product offerings within a retail establishment otherwise covered under the Act would be exempt from labeling requirements. With regard to produce, these would of course include salad bars, but should also include fresh fruits and vegetables offered in any ready-to-eat display designed for take-out, regardless of location within the store.

3. Definition of Processed Food Item (§65.220)

Processed food items, as defined by this regulation, are exempt from complying with this IFR. In particular, products that have undergone physical or chemical change and have a character that is different from that of a covered commodity are considered exempt from the IFR. For produce, this would include chocolate covered strawberries, a fruit smoothie or fruit yogurt, or dried apricots, for example. In addition, a retail item that is derived from a covered commodity that is combined with other covered commodities or has other substantive food components would be exempt from COOL. For example, a salad mix that contains lettuce and carrots or a salad mix that contains dressing would be exempt. A fresh-cut cantaloupe would not be exempt but a watermelon, strawberry, grape and

cantaloupe fresh-cut mix would be exempt. In particular we support USDA's further interpretation of the law that "other covered produce items" are defined by utilizing the current U.S. Grade Standards for fruits and vegetables to make distinctions between commodities. This provides a well-established regulatory framework to define which products will and will not be required to carry COO labeling. It is paramount that USDA leave as little room as possible for differing interpretation of this provision.

We understand that some have criticized USDA for a purported "exemption from COOL" for commingled covered commodities. We believe this is a misunderstanding, as in fact, imported products are not exempted from existing law requiring COOL. The preamble to the IFR clearly states:

In the case of perishable agricultural commodities, peanuts, pecans, ginseng, and macadamia nuts, for imported covered commodities that have not subsequently been substantially transformed in the United States that are commingled with imported and/or United States origin commodities, the declaration shall indicate the countries of origin for all covered commodities in accordance with CBP marking regulations (19 CFR part 134). For example, a bag of frozen peas that were sourced from France and India is currently required under CBP regulations to be marked with that origin information on the package.

Any imported commingled covered commodity remains subject to mandatory country-of-origin labeling under 19 CFR part 134, even though not subject to COOL as implemented by 7 CFR part 65. Such commingled covered commodities are already subject to mandatory country-of-origin labeling because they are not exempt from labeling under the "J" List.¹ For the produce industry, such articles as bagged salads imported into the U.S. are already subject to country-of-origin labeling. The exemption for commingled covered commodities is merely an acknowledgement that such products should not be subject to two different country-of-origin marking requirements – the Farm Bill's requirements and Customs requirements.

We also support the rule's definition of a processed food item as one in which the item has undergone a "change in the character of the covered commodity, or has been combined with at least one other covered commodity." With regard to produce, this definition appropriately exempts fresh processed products such as fruit cups and party trays derived from multiple commodities.

4. Country of Origin Notification (§65.300)

For this section we support both subsection (d) and (f) definitions of what would constitute a covered commodity of United States origin. In particular under Subsection (f) we would support the specific recognition that imported products in consumer-ready packages that comply with existing rules under U.S. Custom and Border protection requirements and requires no further labeling.

Subsection (g) Labeling of commingled covered commodities.

As with subsection (f), we support the specific recognition that imported products that are commingled but have not been substantially transformed must comply with

existing rules under current federal requirements and no further labeling is required under the IFR.

The Department's analysis (FR45118) is helpful in clarifying that the declaration of the product can indicate the several countries of origin that are represented in the overall commingled process, without being required to verify which specific countries of origin are found within each individual retail package. In the case of produce, this provision allows for a bag of whole fruit (e.g. apples and oranges) from two or more countries to simply list those countries on the package without regard to predominance of weight, which fruit is from which country, or other requirements beyond current law. In addition, fruits or vegetables that are commingled with produce from two or more countries and then repacked for retail sale can be labeled listing those two or more countries without the need to verify which products of which specific countries are included in any given retail package.

5. Markings (§65.400)

Subsection (a) – We support the IFR recognition of 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. This notification provides suppliers as well as retailers with the acceptable flexibility to utilize traditional labeling practices already in use throughout the produce distribution chain.

In addition we support the IFR's ruling that a declaration of the country of origin of a product may also be in the form of a check box, provided it is in conformance with other Federal labeling laws.

Finally, we support that the declaration of country of origin can be in the form of statement "Grown in the United States" or "Product of Mexico" or can include just the country "United States" or Mexico.

Subsection (b) and (c) – We agree with the IFR that the only requirement related to the marking is that it must be "legible" and "conspicuous" to consumers under subsection (b). We also support the IFR's ruling in subsection (c) that allows for a wide range of options for customers to apply declarations included typed, printed or handwritten information. Again, this allows the produce distribution chain the ability to utilize current labeling systems already in place on a voluntary scale and will provide produce items that are not currently labeled for COOL a cost-efficient way to readily comply with this new regulation.

Subsection (d) – We support this provision to recognize that bulk displays may contain covered commodities from two or more countries, "provided all possible origins" are listed. This is a critically important provision to allow for flexibility at retail level and important COOL information to the consumer. In the case of produce, this provision allows for a display bin of bananas to be labeled "Product of Costa Rica, Ecuador or Honduras," and be fully compliant with the rule.

In addition, for stickered products in bulk displays, USDA recognizes in the IFR that 100 % stickering is not achievable. Under the IFR USDA agrees that consumers will be able to discern COOL information if a majority of the product is labeled in these bulk displays. While retailers always have the discretion to use signs, placards or other communications to convey COO, USDA should state affirmatively that no further signage is required to comply with the Act if a majority of items in a bin bear COO stickers.

An example of this is prior to 1986 and changes to food labeling requirements, sufficient consumer information was provided by the Food and Drug Administration's handling of sulfite labeling on bunches of grapes. The FDA agreed that tags on only 50% of the grape bunches were sufficient to give notice to sulfite sensitive consumers that grapes in the display had been treated with sulfur dioxide. If the FDA found 50% product labeling sufficient even in this case of human health, we are confident that such a standard would be more than sufficient for adequate disclosure of country of origin.

Subsection (e) – We believe the Department should look carefully at the industry's ability to utilize abbreviations (country and state) in order to reduce label space that would be required to fully spell out each country of origin for each individual product. Should USDA retain its current prohibition on abbreviations in consumer information, the agency must be clear that origin information in records and paperwork can be maintained with any acceptable abbreviations. Otherwise, USDA would be mandating a new and tremendous amount of excessive and unnecessary paper work – specifically prohibited by statutory language in the 2008 Farm Bill – that would be required by suppliers.

Subsection (f) – As is now mandated under the 2008 Farm Bill we strongly support the ability to utilize labeling of a U.S. State, region or locality in which a product is produced to meet label standards as product of United State. In addition, we support the ability of state abbreviations which is standard practice in many current state labeling programs and is readily accepted identification by consumers.

5. Recordkeeping Requirements (§65.500)

Subsection (a) General

USDA has made significant steps to minimize unnecessary recordkeeping requirements. Most importantly, as stated earlier, the 2008 Farm Bill amended the statutory recordkeeping requirements to prohibit USDA from requiring anyone who handles a covered commodity from having to keep records beyond those retained in the normal course of business. This requires USDA to accept current recordkeeping practices within the industry to verify compliance with COOL.

In general, we support the support the specific recognition under (a)(1) and (a)(2) that acceptable records can come in a variety of forms, they can be maintained either electronically or hard copy, and that suppliers and retailers to have up to 5 business days to make available records verifying country of origin information to

USDA and that these records can be maintained for up to one year at any location as determined by the supplier or retailer. This is a significant change to past proposals offered by USDA and one that is a direct result of the changes in the 2008 Farm Bill. However, in public comments, USDA representatives have repeatedly gone beyond even this IFR to advise the industry of the need for significantly more extensive records than are currently maintained in order to verify COOL. We strongly urge USDA to clarify in the final rule that the statutory prohibition of any new record requirement is recognized and accepted.

Subsection (b) Responsibilities of Suppliers

(b)(1) – In general, we support the requirement that the supplier of a product to a retailer must make available COO information about that product. However, this provision should also clarify that suppliers have no requirement to offer COO information in any particular form or format, or in labeling individual products offered for sale. We encourage USDA to provide a definitive declaration that suppliers may convey COO information to retailers through any method of their choosing in order to comply with the regulation. In current trade practice, some have been confused as to whether supplier labeling of COO on the actual produce item is required, or whether multiple documents such as invoices or bills of lading must contain COO information. USDA should make clear that, in fact, COO information may be provided to the retailer in any form. Relationships in the marketplace – not the statute – will determine in what form that communication will take place, including whether individual product eventually is labeled by a supplier.

(b)(3) – We support this provision which requires importers the responsibility to verify COOL information on products imported into the United States. This provision allows for the COOL chain of information to flow from the importer of record to the retail level.

Subsection (c) Responsibilities of the Retailers

(c)(1) – As part of this provision, we also strongly support the specific recognition that retailers may rely upon pre-labeled products as “sufficient evidence” of the COOL. This is an important safe harbor for the produce and retail industries, as an increasing share of fresh produce now arrives at retail stores pre-labeled with COOL. However we are becoming increasingly concerned that the IFR, USDA’s Q&A documents, and the preamble to the IFR are not written in a way that conveys this information accurately. In turn, this is creating significant confusion amongst the impacted industry throughout the produce distribution chain. In particular, USDA must clearly define pre-labeled products to include all produce items that bear a COO declaration, regardless of any other information that may or may not be affixed directly to the produce item. In turn, USDA must then specify that additional recordkeeping at retail is not required for pre-labeled products, as the vendor who supplied the pre-labeled produce has the responsibility to verify the claim. The current speculation provided by USDA has created questions between the supplier and retail community as to what constitutes a pre-labeled product and what are the

recordkeeping requirements for a pre-labeled product. This issue should be clearly defined in the final rule.

(c)(2) – As with the areas above we support this provision as long as the issue of pre-labeled products is resolved.

Other Issues:

7. Enforcement

The effective date of the IFR is September 30, 2008. However, because there will be significant amount of product in commerce prior to the effective date, product that is grown or labeled before September 30, 2008 will be exempt. USDA has stated that for produce, product that is *harvested* prior to September 30, 2008 will be exempt from the COOL requirements. We support these provisions of the IFR.

We also support the provisions that provide for enforcement responsibilities to the U.S. Secretary of Agriculture (Secretary) and encourages the Secretary to enter into partnerships with states to assist in the administration of the program. It is particularly important that only USDA, not state partners nor individuals, is able to initiate enforcement actions against a person found to be in violation of the law. The COOL law specifically does not allow for any private right of action, and USDA must not let its own enforcement and verification steps be driven by potentially disgruntled individuals or others seeking selective enforcement against specific retailers.

We strongly support the Department's commitment that USDA alone will determine the scheduling and procedures for compliance reviews, and that only USDA will be able to initiate enforcement actions. We also urge clarification that states will not earn any "profit" from their cooperative enforcement activities, but rather simple reimbursement of costs.

8. Existing State Programs

We support the Department's interpretation that state programs that encompass commodities subject to this regulation are preempted. This is an important step as several states are now considering implementing their own COOL programs.

9. Cost of Administration

While the estimated cost to USDA that would be required to administer the IFR is undetermined, we believe it is essential that all costs to administer a program must be supported by USDA's appropriated budget, and in no way draw on user fees or take away staff time and commitment to other AMS programs for which user fees are required. The final rule should make this clear.

10. Food Safety and COOL

We strongly agree with USDA that COOL is a not a food safety law. Industry members know that produce safety is in the hands of the growers, distributors and retailers of the product. Produce can be grown safely in countries around the world; or, produce can be grown without adhering to appropriate safety standards. That is not dependent upon a country sticker on a label, but upon the commitment of the person growing that product.

With COOL information becoming much more widespread, the industry needs to help consumers understand that geography cannot become shorthand for food safety. Growers, marketers and retailers working together have the means to assure that every produce item sold in that store has been produced and distributed under good agricultural and handling practices.

11. COOL and Traceability

Congressional intent is clear that COOL was not intended to be a traceability law, but merely to provide COO information to consumers. Bottom line, USDA efforts to verify COOL accuracy on stickers, bags or signs above bulk bins cannot take on a regulatory life of their own requiring multiple new record-keeping schemes. As stated previously, Congress specifically wrote into the law that USDA cannot require retailers or suppliers to keep records "other than those kept in the normal course of business" in implementing COOL. USDA must implement COOL in a way that is true to its goal to inform consumers about where produce comes from, not create a new regulatory infrastructure.

12. Timing of Final Rule

We support USDA's intent to conduct an educational and outreach as COOL is implemented in the industry. During this period, we urge USDA to also conduct multiple trial compliance audits with retailers around the country as a way of ensuring consistency in interpretation among state partners and USDA itself. In this way, all stakeholders including USDA can gain real experience with implementing COOL efficiently and consistently while finalizing a rule that will govern market dynamics for years to come. In addition, we would support the Department's efforts to finalize this rule expeditiously as to provide certainty to the impacted industry groups that will be required to comply with this law. Since the IFR was published, we have already seen how even its precise language can be interpreted differently by different people, within USDA and out. This effort needs to be finalized with a final rule while USDA continues to gather additional clarifying information and published on USDA's website as FAQs.

We hope that these comments are useful in improving this rule. Should you have any questions or matters that need clarification, we would be happy to expand on these comments either in writing or in person.

Sincerely,



Thomas E. Stenzel
President and CEO

Endnotes:

¹ The Tariff Act of 1930 authorizes a series of exceptions to the labeling requirements, such as articles that are incapable of being marked or where the cost would be "economically prohibitive." The "J List," so named for section 1304(a)(3)(J) of the statute, empowered Customs to exempt classes of items that were "imported in substantial quantities during the five-year period immediately preceding January 1, 1937, and were not required

during such period to be marked to indicate their origin.” Fruits and vegetables in bulk were exempted as “natural products” pursuant to this authority. 19 C.F.R. § 134.33. Packaged fruits and vegetables are not “J-List exempt.”