



Country of Origin Labeling Implementation: What Can We Expect?¹

The Current Situation

The 2002 law requiring retailers to use country of origin labeling (COL) to inform their customers of the country of origin of a broad range of “covered commodities” becomes fully effective on September 30, 2008.² Retailers and wholesalers want to implement the law in a timely fashion, but the rules for doing so have yet to be written and may not be for months to come.

Why not? Congress is actively considering amendments to the 2002 law in the ongoing Farm Bill process, which is unlikely to conclude until well into the spring, and perhaps much later. The U.S. Department of Agriculture (USDA), which is charged with writing the rules that will allow retailers and others to implement the law, cannot issue regulations until Congress finishes its work on the statute itself. Rulewriting could take several months after the pending Farm Bill passes, although we believe that USDA will expedite this process to the greatest extent possible.

Against this backdrop, FMI members have asked us for guidance on how best to prepare for the September 30 implementation date. This document summarizes what we know and what we can reasonably surmise about country of origin labeling implementation so that our members can begin preparing. It is prepared in a Q&A format that reflects the questions we most commonly receive from members on this issue. Some practical steps that retailers and wholesalers can start taking in advance of the rules are identified at the end of the memorandum.

Please note, however, that, until USDA issues regulations, we will not know for sure what will be required. This document should be used for informational purposes only to give companies a feel for the way in which

¹ Deborah White, Senior Vice President & Chief Legal Officer, Food Marketing Institute (Feb. 2008). The materials contained herein represent the opinions of the author. Nothing contained herein is to be considered rendering legal advice. © 2008 The Food Marketing Institute. All rights reserved.

² The provision under consideration here is found in the Agricultural Marketing Act of 1946 as amended by the Farm Security and Rural Investment Act of 2002 (2002 Farm Bill). See 7 U.S.C. 1621, *et seq.* This paper does not address any other federal or state country of origin labeling laws.

the law may need to be implemented, but companies should not rely solely on this memorandum for making capital decisions, nor should this memorandum be considered legal advice.

How do we figure out where USDA might go in its final rules?

Although final rules are not expected from USDA for many months, we can look to the Agency's previous interpretations of the current statute for guidance. The most useful documents are the proposed rule for all covered commodities that the Agency issued in October 2003 and the interim final rule (IFR) for seafood that USDA promulgated in October 2004.³ Although the Agency's last discussion of how meat, produce and peanuts would be regulated is in the October 2003 document, USDA seems satisfied with the regulatory framework in the October 2004 seafood IFR and has built inspection and enforcement systems around this rule.⁴ Therefore, it is reasonable to expect (although clearly not certain) that the Agency will follow the principles that underlie the seafood IFR when they issue their rules on all covered commodities.⁵

In terms of the potential statutory changes, the House and the Senate both passed very similar revisions to the current COL law in their versions of the Farm Bill. Accordingly, although we cannot be certain until the legislative process is complete whether the 2002 law will be amended and, if so, what changes will be made, we can consider the changes that are currently on the table as indicators of how the final statute is likely to read.⁶ The tea leaves here are more difficult to read since (1) we cannot be certain of the final statutory language and (2) USDA has never interpreted it. Nonetheless, we can still make some educated guesses based on the proposed statutory language and how USDA has interpreted the original statute in the past.

³ See 68 Fed. Reg. 61944 (Oct. 30, 2003) and 69 Fed. Reg. 59708 (Oct. 5, 2004).

⁴ Last summer, USDA reopened the comment period for both the 2003 proposed and 2004 interim final rules, giving FMI and others the opportunity to tell USDA what worked and what didn't work in the Agency's rules. We have noted our comments where appropriate in this document.

⁵ Based on the manner in which USDA has issued regulations on this subject in the past and the extremely short time frame between issuance of USDA's rule and the implementation date, we expect USDA to publish an interim final rule for all covered commodities with an opportunity to comment. This will provide some immediate certainty to the regulated community but give us the opportunity to ask USDA to change aspects that don't work well during implementation.

⁶ A committee of Members from both houses of Congress must confer to decide on the substance of a single final bill that will be presented to both full houses for consideration; if passed by both, the bill will be sent to the President for signature. In addition, to resolving the substance of the Farm Bill, which is typically thousands of pages long and addresses hundreds of agricultural policy issues, Congress must come up with and pass a means to pay for all of the changes in the Farm Bill, which likewise must be signed by the President. Thus, this process could take several months to complete.

What foods are subject to the COL law?

The current law requires retailers to provide country of origin information for the following foods, which are known as “covered commodities” under the statute:

- * **beef, pork, and lamb, both whole muscle cuts and ground product** [generally referred to as “meat” in this memo];
- * **“perishable agricultural commodities;”**⁷
- * **seafood;**⁸ and
- * **peanuts.**

The pending Farm Bills would add to that list, but we won’t know whether some or all of the following will become covered commodities until Congress finishes its work; **chicken, goat, and macadamia nuts** are each included in one or more of the pending bills. No other foods are currently under consideration so, even though chicken may become a covered commodity, neither turkey or duck is expected to be added. And, even though macadamia nuts may join peanuts, the law is not expected to apply to almonds, pecans or any other type of nut.⁹

What foods will not be subject to the COL law?

The current law includes two important exemptions or exclusions from coverage: (1) foods that are sold through “food service” and (2) foods that are “processed.”

Food service exemption. Although intended to exempt foods sold from restaurants, we were successful in convincing USDA that the exemption should also apply to restaurant foods sold at retail stores. So, under USDA’s current interpretation, food sold at salad bars or store delis is not subject to the COL requirements. We have asked USDA to extend this logic to foods sold through meal preparation services that are offered at some retail stores.

Processed food exclusion. The original statute excludes covered commodities that are “ingredients in processed foods” from the country of origin labeling law. The law does not, however, define the term “processed” and this

⁷ “Perishable agricultural commodity” (PAC) is a term of art that is defined in the Perishable Agricultural Commodity Act (PACA) as “fresh and frozen fruits and vegetables of every kind and character that have not been manufactured into articles of food of a different kind or character and includes cherries in brine,” or, more simply, fresh or frozen produce.

⁸ Please note that “method of production” information must accompany country of origin information for all covered seafood products. Method of production will either be “wild caught” or “farm-raised.” For simplicity, this paper does not expressly reference method of production throughout the text.

⁹ There are, however, no guarantees. Changes to the list of covered commodities have been made in past conferences and could conceivably occur this time around, too.

definition was heavily debated through the various regulatory iterations that USDA has issued over the past several years. At this point, the seafood IFR considers a food to be processed if it meets one of the following two standards: (1) it has been **combined** with another substantive food ingredient; **or** (2) it has undergone **specific processing** sufficient to change the character of the covered commodity.

Virtually any combination of two or more foods will render a food “processed” under the first prong. Specifically, a seafood medley of two or more different types of seafood is considered “processed,” as is seafood marinated in a sauce or stuffed with other ingredients; simply adding water, salt or sugar is not, in and of itself, currently a sufficient basis to consider an otherwise covered commodity “processed.”

The seafood IFR gives several examples of specific processes that the agency considers sufficient to change the character of an otherwise covered commodity. These include cooking, roasting, curing, smoking, and restructuring. Freezing, however, is NOT considered processing, so frozen uncooked shrimp are covered commodities subject to labeling (although frozen cooked shrimp are not), and frozen blueberries are likely to be considered covered commodities (although a frozen mixture of blueberries and strawberries is not under the discussion on blends in the preceding paragraph).

Through the comment process, FMI has asked USDA to utilize this definition of “processed food” for all covered commodities and to recognize its logical extension for certain foods. For example, now that USDA considers cooking to be a process for purposes of seafood, we recommended that USDA also consider roasted peanuts to be “processed.” In addition, we noted that retailers and wholesalers perform a significant number of “value-added” services to foods that should be sufficient to render those foods “processed.” For example, trimming, coring and cutting a pineapple does as much or more to change the character and utility of whole fruit as boiling shrimp. We will not know, however, whether USDA will adopt this line of thinking until the agency issues its regulation.

How do I identify the country of origin of covered foods?

The answer to this question is difficult to predict in the absence of rulemaking; however, the exact designation shouldn't be as important to retailers and wholesalers from an implementation perspective. That is, suppliers are required to provide an accurate country of origin designation to downstream parties, such as retailers and wholesalers, who are then obligated to pass that same determination on to their customers. Accordingly, at this point, retailers and wholesalers should focus more on how they will obtain and convey country of origin information than on how the country of origin of a specific covered commodity will be defined. Nonetheless, this is an area on which we receive

questions so following is a brief summary of the current and potential law/regulations in this area.

The original 2002 law sets forth tests that must be met before a covered commodity may be designated as a product of the U.S.; the law is silent, however, with respect to the manner in which covered commodities that do not meet the statutory U.S. standard should be identified. The most complicated standards are for beef, pork and lamb. To qualify for a U.S. country of origin designation, these products must be from animals that were born, raised and slaughtered exclusively in the United States.¹⁰ Seafood will be considered product of the U.S. if it was caught in U.S. waters or if a U.S. flag flies on the vessel regardless of the waters in which the seafood was caught; the ensuing primary processing stages must also occur in the U.S. or aboard a U.S.-flagged vessel.¹¹ Produce and peanuts are considered products of the U.S. if they are “exclusively produced” in the U.S.

The pending Farm Bills add one additional basis upon which a product can qualify for a U.S. designation, as well as standards for identifying country of origin for foods that do not meet one of the U.S. definitions. Specifically, meat from animals that were present in the U.S. prior to January 1, 2008 (and, in the case of the Senate bill, haven’t left this country since that time) will likewise qualify for a U.S. designation. Meat from animals that may have passed through multiple countries over their lifecycles may be identified as products of all of these countries.¹² In addition, the bills would allow for a list of all or all reasonably possible countries of origin for ground beef, pork, lamb (chicken or goat) to satisfy the requirement to identify the country of origin of ground products.

Can I use state labeling?

Under the current statute, USDA does not consider identification of a state to be sufficient to identify the food’s country of origin. As USDA explained in the preambles to its various regulatory pronouncements, trade law would require the agency to consider state labeling for other countries to be sufficient if the agency accepted state labeling in the United States.

However, the bills that have passed the House and Senate would each allow state labeling to be used in lieu of U.S. country of origin, but only for perishable agricultural commodities; under the current bill language, all other covered commodities cannot be identified by *state* of origin, but must be identified by *country* of origin.

¹⁰ Cattle from Alaska and Hawaii are permitted to travel briefly through Canada without losing their U.S. designation.

¹¹ Farm-raised fish must be hatched, raised, harvested and processed in the U.S.

¹² The bills have a separate provision allowing meat from animals that are imported for immediate slaughter to be identified as product of the country of import and the United States.

What types of labels or signs do I need to post?

The original statute and USDA's original regulatory interpretations provide substantial flexibility in terms of how country of origin information is provided to consumers; neither of the pending bills would amend this section. Accordingly, we can be reasonably certain that USDA will continue to allow a broad range of labels and signs, including placards, signs, labels, stickers, bands, twist ties, or pin tags.

If I choose to use stickers to identify the country of origin of a covered commodity in a bulk bin, must each individual item bear a sticker?

For obvious reasons, USDA did not address bulk bin stickering efficacy in the seafood IFR, and the agency did not address the issue in the October 2003 proposed rule for all covered commodities. FMI has asked USDA to consider a covered commodity to bear country of origin labeling if the majority of the items in a bin are stickered.

Can I abbreviate country names?

The seafood IFR (and the proposed rule before it) permit the use of abbreviations and variant spellings that “unmistakably indicate” the country of origin of the covered commodity. Both documents cite “U.K” as an acceptable abbreviation for “The United Kingdom of Great Britain and Northern Ireland.” In practice, however, USDA has concluded that U.K. and U.S.A. (or U.S.) are the only acceptable abbreviations based on a single determination from the US Customs and Border Protection agency’s interpretation of a different statute.

Through the comment process, we have asked USDA to reconsider this position in the final rule for all covered commodities and to allow all reasonable abbreviations to be used. Otherwise, retailers may be faced with extremely long country of origin declarations for some covered commodities.

Do I have to use a “Product of....” statement?

The 2003 proposed rule expressly stated that the country of origin of a product could be identified simply by stating the name of the originating country. The seafood IFR omitted this provision without explanation and included other sections that seem to require the phrase “product of...”

Through the comment process, FMI asked USDA to recognize the country of origin labeling that is already taking place on “price look up” stickers without a declaratory statement. Since consumers understand the meaning of the country

name standing alone in that context, we asked USDA to permit retailers to identify country of origin -- at least for labels with small surface areas -- without a full "product of..." statement. This is a minor area of uncertainty that we hope will be resolved reasonably in the final rule.

Can covered commodities from different countries be displayed in the same bulk bin?

USDA's position on this issue has evolved over time as evidenced in the different interpretations the agency has given through the rulemaking process. Although the 2003 proposed rule would require strict segregation, the 2004 IFR expressly permits covered commodities with different countries of origin to be displayed in the same bin, provided that the sign indicates the countries from which the seafood is reasonably expected to derive. That is, retailers cannot simply post a sign that lists all countries from which shrimp may be sourced, but they can commingle shrimp from two or more countries in a single bin with a sign that lists the countries from which those particular shrimp were sourced, as evidenced by records maintained at store level. Accordingly, we expect USDA will continue to allow commingled covered commodities, with the same caveat regarding signage, under the final rule, but we must await the final rule for a definitive answer.

Can covered commodities be stored in the same warehouse slot or do they need to be separately slotted based on country of origin?

Although neither the proposed nor the interim final rules address this issue directly, USDA has not required wholesalers to hold their seafood in separate slots based on country of origin. Wholesalers have an obligation to provide retailers with country of origin information (see below), but that information may be conveyed on the box, on an invoice, or on any other mutually agreed upon method. Retailers and wholesalers should discuss the ways in which information will be conveyed.

What information must suppliers provide to retailers?

The statute expressly requires anyone engaged in the business of supplying a covered commodity to a retailer to provide information to the retailer indicating the country of origin of the covered commodity. The pending bills would not amend this provision.

The seafood IFR interprets this provision as requiring suppliers to make information about the country of origin of covered commodities available to buyers. The information may be provided in a wide variety of methods such as on the product, the master shipping container or in a document that accompanies

the product through retail sale provided, in this last case, that the document identifies the product, its country of origin, and a unique identifier, such as a lot code number or pack date.

What types of records will retailers need to keep?

Recordkeeping is one of the most controversial areas of the law and forthcoming regulations. Although we will not know the final requirements until rules are issued, we can make some reasonable predictions here, too, based on the current statutory language, the bills under consideration, and USDA's interpretation of the current statute, particularly in the seafood IFR.

Specifically, the current law authorizes USDA to require persons who handle covered commodities to maintain a "verifiable recordkeeping audit trail that will permit the Secretary to verify compliance." USDA interpreted this provision through multiple guidance documents and notices culminating in the recordkeeping requirements in the seafood IFR.

The pending bills would strike this specific statutory provision and replace it with multiple paragraphs that are likely to be interpreted by USDA as authorizing recordkeeping quite similar to the system established under the current statute. Specifically, the pending language allows USDA to audit facilities to verify compliance and *requires* persons subject to such an audit to verify the country of origin of covered commodities. Although the pending language would prohibit USDA from requiring a person that handles a covered commodity to maintain records other than those maintained in the normal conduct of business, USDA may very well interpret this provision as restricting the agency's ability to require entirely new documents, but allowing the agency to require the maintenance of country of origin information on one of the documents kept in the normal course of business, e.g., an invoice.

Regardless, the fact that the pending language clearly requires those who are audited to verify the country of origin of covered commodities means that all those engaged in the business of handling covered commodities will need to maintain some type of records as a matter of fact, if not law so that they can provide the required verification. Given USDA's apparent satisfaction with the IFR recordkeeping standards, we believe that USDA is likely to include similar recordkeeping provisions in the final regulation, regardless of whether the language in the pending bills actually becomes law.

Thus, with the foregoing caveats and qualifications, we expect USDA to include recordkeeping for retailers in the final rule that is likely to require stores to do the following:

- At store level: for bulk products, maintain the documentation upon which the retailer relied to post country of origin until the product is sold. No additional store level documentation is likely to be required for pre-packaged covered commodities pre-labeled by the supplier with country of origin.
- At store or corporate headquarters: maintain “chain of custody” records to identify the immediate previous source of the covered commodity; under the IFR, this record must be kept for one year after sale and it must identify the name and address of the supplier, as well as a means to identify the product unique to the transaction, such as a lot code number or pack date.

What records will wholesalers need to keep?

As discussed in the previous section, despite the presence of language in the pending bills that purports to change the recordkeeping requirements, at this point, we expect USDA’s final rule to include provisions very similar to those that are in the current seafood IFR. The IFR includes separate recordkeeping requirements for suppliers, and distinguishes between suppliers that are responsible for initiating a claim (such as an upstream processor) and “intermediary suppliers” that simply handle a covered commodity whose country of origin has already been designated. Under most circumstances, wholesalers performing their traditional functions would be considered intermediary suppliers.

Under the IFR, intermediary suppliers are required to maintain records to identify the immediate previous source (if applicable) and immediate subsequent recipient of a covered commodity in a way that identifies the product unique to that transaction by means of a lot number or other unique identifier; these records must be maintained for a period of one year following the date of the transaction. With the caveats above, we believe it is reasonable to expect USDA to include a similar requirement in the final rule.

How will USDA audit my facility?

The current law requires USDA to partner with states with enforcement infrastructure to assist in the administration of the law; neither pending bill would amend this section. To date, USDA has entered into memoranda of understanding (MOU) with the majority of states to conduct inspections of retailers and other facilities; inspection reports prepared by the state inspectors are sent to USDA headquarters for evaluation. If USDA determines that an error occurred at the inspected facility, the agency will send the party a letter informing them of the same and providing an opportunity to remedy the situation. Typically, the letters seek a response within 30 days.

What is the enforcement standard against which my facility will be judged?

Under the current law, the enforcement standard depends on the type of entity that is being inspected. If USDA believes that a retailer is in violation of the statute, USDA must notify the retailer and provide a 30-day remediation period. If the agency then determines that the retailer has “willfully violated” the statute, the retailer is subject to fines of up to \$10,000 per violation.

The standard for non-retailers under the current statute is more stringent. Specifically, non-retailers are not entitled to notice or an opportunity to cure any problems. Moreover, non-retailers are subject to penalties of up to \$10,000 per violation *per day* and USDA does not need to make a finding that the non-retailer “willfully” violated the statute.

The pending bills would (1) bring all persons subject to the law under a single enforcement standard comparable to the one established for retailers, (2) lower the penalties to \$1,000 per violation, and (3) provide that anyone who is making a “good faith effort” to comply with the law would not be subject to penalties.

Although USDA has not addressed overall enforcement in the proposed or interim final seafood rules, the agency has included a provision familiarly known as the “liability shield” in both. Under this provision, a recipient of a covered commodity that is incorrectly designated for country of origin at the time of receipt will not be held liable for a violation of the statute if the recipient could not have reasonably expected to have knowledge of the incorrect designation. We would expect USDA to include such a provision in its next rulemaking as well.

What should my company be doing to prepare?

Although providing guidance in the absence of a final statute or law is difficult at best and something that FMI will rarely do, since retailers and wholesalers must comply with the law in less than eight months, we are making the following suggestions for your consideration. *Each company should independently consider these suggestions in light of their own individual practices, including the types and cycles of contracts and whether they typically include provisions for indemnification or audits before choosing a course of action.*

1. **Pull together a team involving the relevant disciplines in your company.** Different companies have assigned these responsibilities to different people, but you will at least want people from each of the covered commodity areas plus people who can help think through the operational and technological issues. Be

sure to include those with firsthand experience in developing and implementing your seafood COL program.

2. **Review your program for seafood country of origin labeling.** What worked well? What didn't work? What pieces can you use for some or all of the other covered commodities? In particular, what systems did you use at store level to maintain the integrity of the product? What recordkeeping systems did you use? How did you get information from suppliers? Are the same types of systems appropriate or do differences in supply chain practices, scale, type of product, etc, necessitate different systems for the additional covered commodities?
3. **Identify any other programs that you are currently using to provide origin information to consumers.** Are you providing *country* of origin or *state* or *locality* of origin? How do you get the information? What works/doesn't work at store level?
4. **Identify all covered commodities that you are likely to sell in your store or hold in your warehouse.** You may decide to exclude from your list those that are most likely to be considered processed (e.g., Salisbury steak frozen dinner) but include those that USDA may include in the final rule (e.g., cut fresh fruit products).
5. **Consider the mechanisms you will want to use to provide country of origin for different covered commodities.** For example, will you want stickers on fresh fruits? Twist ties on some fresh vegetables? Pre-printed information on bags of frozen vegetables? Pin tags for cuts of steak displayed in bulk? Scale labels for overwrapped products offered in self-service counters?
6. **Pull together a list of all suppliers** from whom you will receive covered commodities -- assume that the commodities that may be added as a result of the pending Farm Bill process will be.
7. **Figure out what you will need from your suppliers in order to comply.** Consider the different types of suppliers (e.g., direct store delivery, large corporation, independent farm), the types of information you will need from each, and whether you will need different systems.
8. **Talk to your suppliers.** Ask them whether they are prepared for the law to take effect. Let them know that you plan to comply. If you need information -- e.g., labels, signs or records -- delivered to you in a certain format, let them know and ask them to plan to have

the information to you in time for you to be able to incorporate it into your program before the law takes effect.

9. **Keep in touch with FMI.** We will do our best to answer your questions and help you with implementation. And, we can try to serve as a clearinghouse for the successful implementation strategies that you and your colleagues develop to the extent people are willing to share them.

How will we know what to do next?

FMI will continue to provide our members with information as the situation unfolds. Depending on the development, we may hold webinars or regional seminars and/or issue written guidance or bulletins. Please contact Susan Arena at sarena@fmi.org if you would like to be added to the **Federal Register Update email list**, which we will use to alert our members by email about any changes in the law or the regulations.