



# Country of Origin Labeling: What You Need to Know

by Elizabeth B. Fawell

**S**tarting September 30, 2008, food retailers will be required to notify consumers of the country of origin of beef (including veal), lamb, pork, chicken, goat meat, peanuts, pecans, macadamia nuts, perishable agricultural commodities (fruits and vegetables) and ginseng sold in their stores. Seafood is already required to bear or be accompanied by country of origin labeling (COOL), but with the impending expansion of COOL to many other products, retailers and their suppliers face a host of issues regarding the law's implementation. If you are a food retailer or a supplier of any of the above commodities, here is what you need to know about COOL.

## Background

The Farm Security and Rural Investment Act of 2002 (2002 Farm Bill) amended the Agricultural Marketing Act (the Act) to require retailers, beginning September 30, 2004, to inform their customers of the country of origin of certain commodities at the point of sale. In October 2003, the United States Department of Agriculture's (USDA's) Agricultural Marketing Service (AMS) published a proposed rule for mandatory COOL for all covered commodities.

Through subsequent legislation, however, Congress delayed the applicability of mandatory COOL for all covered commodities, except fish and shellfish, until September 30 this year. AMS issued an interim final rule governing COOL for seafood that became effective in April 2005 (the seafood rule).

Subsequently, the 2008 Farm Bill, signed into law this past June, contained a number of provisions affecting COOL requirements, including expanding the commodities covered, defining when certain commodities are of U.S. origin, and modifying the law's recordkeeping and penalty provisions. On August 1, AMS published an interim final rule governing COOL for all covered commodities except seafood. The rule incorporates changes made to the Act by the 2008 Farm Bill. In addition, the agency made other modifications to the 2003 proposed rule such that this interim final rule closely tracks the seafood rule. The interim final rule for all other commodities does not affect the regulatory requirements for fish and shellfish, but enforcement of the seafood rule will be consistent with the statute as amended by the 2008 Farm Bill. Based on the Act and the AMS regulations, here are basic fundamentals of USDA's COOL requirements.

## Covered Commodities and Entities

Not all foods, or all retailers, are required to comply with COOL. The covered commodities required to bear or be accompanied by COOL are beef (including veal), lamb, pork, chicken, goat meat, peanuts, pecans, macadamia nuts, perishable agricultural commodities, and ginseng. Fish and shellfish already are required to bear or be accompanied by COOL and method production information. Of note, covered commodities are excluded from COOL requirements if they are served at a food service establishment, or if they meet the "processed food" exemption.

Only retailers are required to provide country of origin information to consumers. (Any person that supplies covered commodities to a retailer, nonetheless, must provide information to the retailer regarding country of origin). The term "retailer" is limited to those persons



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licensed as retailers under the Perishable Agricultural Commodities Act (PACA). Therefore, only those retailers engaged in the business of selling perishable agricultural commodities fall under the COOL rules. As a result, specialty stores such as butcher shops that do not sell fruits and vegetables are not required to provide country of origin labeling. In addition, the Act exempts food service establishments, including restaurants, cafeterias, lunch rooms, food stands, saloons, bars, lounges, taverns, or other similar enterprises, from COOL requirements.

Covered commodities are exempt from COOL if the commodity “is an ingredient in a processed food item.” Accordingly, the definition of a “processed food item” is of great interest to many food companies. A “processed food item” means a retail item that has undergone specific processing resulting in a change in the character of the covered commodity, or that has been combined with at least one other covered commodity or other substantive food component (e.g., chocolate, breading, tomato sauce), except 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.

Specific processing that is considered by AMS to result in a change of character includes cooking (e.g. frying, broiling, grilling, boiling, steaming, baking, roasting), curing (e.g. salt curing, sugar curing, drying), smoking (hot or cold), and restructuring (e.g. emulsifying and extruding). The following examples fall under the processed food exemption: meatloaf; meatballs; fabricated steak; breaded veal cutlets; corned beef; sausage; breaded chicken tenders; teriyaki pork loin; a salad mix that contains

lettuce and a dressing packet; a salad mix that contains lettuce and carrots; a fruit cup that contains melons, bananas, and strawberries; a bag of mixed vegetables that contains peas and carrots; and roasted peanuts.

Notably, freezing is not considered to be processing sufficient to change the character of a product, nor would the preparation of fruits and vegetables by peeling, coring or chopping, if the processing merely prepares the product for consumption (e.g., peeling, coring and slicing a pineapple).

## Determining Country of Origin

Country of origin labeling is, of course, just that: the identification of the country of origin for a given product. Importantly, there is no presumption of United States origin — even domestically produced covered commodities must comply with COOL requirements.

*Beef, pork, lamb, chicken, and goat:* Covered meat commodities may only be designated as having U.S. origin if the commodity is derived from an animal that is (1) exclusively born, raised, and slaughtered in the U.S.; (2) born and raised in Alaska or Hawaii and transported for a period of not more than 60 days through Canada to the U.S. and slaughtered in the U.S.; or (3) present in the U.S. on or before July 15, 2008.

When a meat product has multiple countries of origin, including the U.S., retailers may designate such products as being from all of the countries in which the animal may have been born, raised, or slaughtered (e.g., “Product of the United States, Country X, and Country Y, where Country X and Country Y represent the actual or possible countries of foreign origin). When the meat product is from animals imported for immediate slaughter, the country of origin is both

the country from which the animal was imported and the United States (i.e., “Product of Country X and the United States”). In either case, the country of origin declaration may include more specific information regarding the production steps (e.g., raised in the United States and slaughtered in Country X) provided records to substantiate those claims are maintained and the claims are consistent with other applicable federal requirements. Products from animals not born, raised, or slaughtered in the United States must retain their country of origin, as declared to U.S. Customs and Border Protection (CBP) at the time the product entered the United States, through retail sale.

Ground meat products must list all countries of origin or “all reasonably possible” countries of origin. In determining what is considered reasonable, AMS regulations provide that when raw material from a specific origin is not in a processor’s inventory for more than 60 days, that country should not be listed as a possible country of origin.

*Perishable Agricultural Commodities, Ginseng, Peanuts, Pecans and Macadamia Nuts:* These commodities may only be designated as having U.S. origin if they are exclusively produced (grown) in the United States.

When these commodities are imported, and no production steps occur in the United States, they must retain their country of origin, as declared to Customs and Border Protection (CBP) at the time the product entered the United States, through retail sale. Likewise, when one of these commodities from one country is commingled with same commodity but from a different country of origin and presented for sale in a retail package (e.g. a bag of frozen peas), the country of origin must be indicated in accordance with

CBP requirements. If the retail product contains two different types of covered commodities (e.g., peas and carrots) it is considered a processed food item and is not subject to mandatory COOL.

## Method of Notification

Notably, mandatory COOL does not require a “label,” it only requires “labeling.” Country of origin information can be provided to consumers by means of a label, placard, pin tag, sticker, band, twist tie, or other clear and visible sign on the covered commodity, or on the package, display, holding unit, or bin containing the covered commodity. There are no requirements for the exact placement and size of the country of origin, but such declarations must be “conspicuous” so that they made be read and understood by consumers under normal conditions of purchase.

If the covered commodity is already individually labeled for retail sale regarding country of origin, the retailer is not required to provide any additional information. AMS regulations permit bulk containers used at retail to contain covered commodities from more than one origin or method of production so long as all possible origins or methods are listed in the declaration statement. In addition, for sales of covered commodities made prior to a customer’s viewing of the retail package (i.e. Internet or home delivery sales), retailers may convey country of origin and method of production information either on the sales vehicle or at the time the product is delivered to the customer.

The country of origin declaration may be in the form of a statement such as “Product of 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 the declaration complies with CBP

marking regulations (which in certain circumstances require the country of origin marking to be preceded by “Product of” or similar language). State, regional, or locality label designations (e.g., Idaho potato) are also acceptable for perishable agricultural commodities, macadamia nuts, peanuts, pecans, and ginseng.

Additionally, only those abbreviations approved for used under CBP policies, such as “U.K.” for “The United Kingdom of Great Britain and Northern Ireland,” are acceptable. Further, the adjectival form of the name of a country may be used provided it does not appear with other words so as to refer to a kind or species of product. Symbols or flags alone may not be used to convey country of origin information.

## Recordkeeping Requirements

Although only retailers are required to notify consumers of the country of origin of covered commodities, each link in the supply chain of a covered commodity faces some type of COOL recordkeeping requirement. Upon request, suppliers and retailers must make available to USDA representatives records maintained in the normal course of business that verify a country of origin claim. Records must be provided within 5 business days of the request and may be maintained at any location.

*Suppliers.* Any person engaged in the business of supplying a covered commodity to a retailer, whether directly or indirectly, must make available information to the subsequent purchaser about the country of origin of the covered commodity. This information may be provided either on the product itself, on the master shipping container, or in a document that accompanies the product through retail sale provided it identifies the product and its country of origin.

Further, these suppliers must maintain records to establish and identify the immediate previous source (if applicable) and immediate subsequent recipient of a covered commodity for a period of one year from the date of the transaction.

In addition, the initial supplier of a covered commodity — which in the case of meat products is the slaughter facility — must possess or have legal access to the records necessary to substantiate country of origin information. For imported commodities, the importer of record, as determined by CBP, must ensure that records provide clear product tracking from the U.S. port of entry to the immediate subsequent recipient and accurately reflect the country of origin as identified in the relevant CBP entry documents and information systems. Importers must maintain these records for a period of one year from the date of the transaction.

*Retailers.* Records and other documentary evidence relied upon at the point of sale by retailers to establish a country of origin claim must be maintained for one year from the date the origin declaration is made at retail. For covered commodities sold in pre-labeled consumer-ready packages, the record must identify the covered commodity and the supplier. For products that are pre-labeled with the origin information on the shipping container (or other outer containers), the label itself is sufficient evidence on which the retailer may rely to establish the product’s origin at the point of sale. In this case, retailers must still maintain a record identifying the covered commodity and the retail supplier. In addition, to allow substantiation of the origin claim, the retailer must either maintain the pre-labeled shipping container at the retail store for as long as the product is on hand, or ensure the origin information

is included in the records identifying the covered commodity and the supplier. For products that are not pre-labeled, the retailer must maintain records that identify the covered commodity, the supplier, and the origin information.

## Enforcement

Importantly, COOL requirements will not apply to covered commodities produced or packaged before September 30. This will allow time for covered commodities that are already in the chain of commerce and for which no origin information is known or has been provided to clear the system. In addition, during the six month period following the effective date, AMS will allocate its enforcement resources toward conducting industry outreach and education programs regarding the rule.

Also of note, the 2008 Farm Bill made several modifications to the Act with respect to fines and penalties. First, the Act now treats retailers and suppliers in the same manner. Second, fines may only be imposed against retailers or suppliers if, after notification and a 30-day compliance period, a determination is made that the retailer or supplier (1) has not made a good faith effort to comply and (2) continues to willfully violate the law. After providing notice and an opportunity for a hearing, a retailer or supplier may be fined not more than \$1,000 for each violation. The 2008 Farm Bill reduced this fine from \$10,000.

## Conclusion

Beyond the existing COOL provisions, the food industry also should be aware that, in the current environment,

concerns over the safety of imported food could lead to additional country of origin labeling requirements. In fact, draft legislation circulated last spring by Congressman John Dingell (D-Michigan) would impose country of origin labeling requirements for processed foods. Under Congressman Dingell's legislation, not only would finished foods need to identify the country where final processing occurs, but manufacturers would be required to identify the country of origin of each ingredient in the food on the manufacturer's website.

At present, complying with mandatory COOL is of greatest concern. As retailers and their suppliers work to ensure they are in compliance with COOL requirements, the foregoing should remind them of the basic outlines of the COOL law.  $\Delta$



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