Final Rule on COOL Should Maintain/Expand
Flexibility Reflected in Interim Final Rule and USDA Guidance

The regime for COOL established in the 2008 Farm Bill creates four separate labels for muscle cut commodities of various meats: U.S. origin, multiple countries of origin, imported for immediate slaughter and foreign origin. These have been designated Category A, B, C and D labels, respectively, and these terms will be used throughout this paper.

The Canadian Pork Council ("CPC") believes the Final Rule on COOL should reflect the following *vis-à-vis* the use of these four labels: (1) maintenance of the existing flexibility to use a B label on covered commodities derived from A animals when A and B origin animals are commingled during a production day; (2) establishment of the same flexibility for use of a B label on covered commodities derived from C animals as now exists for use of a B label on products derived from A animals and a C label on products derived from B animals; and (3) expansion of the existing flexibility to use a C label on covered commodities derived from B animals by eliminating the requirement of commingling. Following a discussion of the appropriate context for considering these proposals for the Final Rule, the justification for each is addressed in turn.

A. Contextual Overview: History of the Legislation

The COOL provisions in the 2008 Farm Bill and Interim Final Rule must be interpreted in their proper context – as the culmination of a 7-year evolution that began with the 2002 Farm Bill provisions requiring mandatory COOL by September 2004, followed by the publication of guidelines for voluntary COOL in 2002, proposed implementing regulations for mandatory COOL in 2003, an interim rule for fish and shellfish in 2004, several years of delay as Congress deferred the date of implementation (except for fish and shellfish), and multiple requests for comments by USDA throughout this entire period. Although the formal legislative history of the COOL related provisions of the 2008 Farm Bill is scant, the USDA's evolving approach to implementing COOL over the 2002-2008 period, and the numerous comments those approaches elicited from interested parties, provide important background to understanding the ultimate statutory compromise reflected in the 2008 Farm Bill, which was designed in part to minimize the costs that processors and packers in the meat trade must bear in order to comply with their COOL obligations.

The COOL provisions of the 2002 Farm Bill required retailers to inform consumers of the country of origin of certain "covered commodities," but largely left to USDA the task of defining how products should be labeled and what tracking and recordkeeping requirements would be imposed. The only definition the statute provided with respect to labeling was for "United States Country of Origin" (*i.e.*, animals must be born, raised and slaughtered in the U.S.). Congress left entirely to USDA the task of defining how products derived from mixed-origin animals and blended products (*e.g.* ground meats) should be labeled. Similarly, the only statutory guidance with respect to tracking and recordkeeping was the authorization that the USDA Secretary "may require any person that prepares, stores, handles or distributes a covered commodity for retail sale [to] maintain a verifiable recordkeeping audit trail."

In both the 2002 Voluntary Guidelines and the Proposed Rule, USDA interpreted the 2002 Farm Bill as requiring segregation at each step of the production/marketing process, so that country of origin could be tracked from farm to market.[1] This was reflected in both the label definitions USDA proposed, and in the tracking/recordkeeping requirements it imposed. For example, both the Voluntary Guidelines and Proposed Rule required the label for covered commodities derived from mixed-origin animals to identify the country in which the animal was born and in which each subsequent stage of processing occurred.[2] Similarly detailed information was required for labeling blended or commingled products, such as ground meats.[3] Consistent with these detailed labeling requirements, the Voluntary Guidelines and Proposed Rule each imposed recordkeeping obligations requiring the segregation and tracking of all animals/products from farm to market.[4] USDA explicitly recognized that the greatest burdens in this regard would fall on the livestock processing and slaughtering segments of the industry.[5]

During the numerous opportunities USDA provided for interested parties to comment on its approach to implementing COOL, one of the chief criticisms was the cost and burden associated with the segregation, tracking and recordkeeping requirements of USDA's approach,

---

[1] *See e.g.,* Proposed Rule, 68 FR 61944, 61956 (Oct. 30, 2003) (noting that capital and operational costs to comply with proposed rule could include the need by firms "to modify their production, storage, distribution, and handling systems ***to enable country of origin information to be tracked and maintained from start to finish***") (emphasis added).

[2] *See* Voluntary Guidelines, 67 FR 63367, 63373-63374 (Oct. 11, 2002) (§ 1. G., requiring products derived from animals with multiple countries of origin including the United States to bear label "From Country X, cattle Raised and Slaughtered in the United States," or, "Born and Raised in Country X and Raised and Slaughtered in the United States"); Proposed Rule, 68 FR at 61983 (§60.200 (g), requiring labels for products derived from animals that enter the U.S. during the production process to state "imported from country X" and "shall include the production step(s) occurring in the United States").

[3] *See* Voluntary Guidelines, 67 FR at 63374 (labels for blended or commingled products "shall indicate the country of origin information of each constituent or component covered commodity raw material source . . . by order of prominence by weight"); Proposed Rule, 68 Fed. Reg. at 61983 (§60.200 (h), labels for blended or commingled products "shall list alphabetically the countries of origin . . . for all raw materials contained therein").

[4] *See* Voluntary Guidelines, 67 FR at 63375 (§ 3.E., "When similar covered commodities may be present from more than one country or different production regimes, a verifiable segregation plan must be in place"); Proposed Rule, 68 Fed. Reg. at 61983 (§60.400 (b)(5) ("Each supplier that handles similar covered commodities from more than one country must be able to document that the origin of a product was separately tracked, while in their control, during any production and packaging processes to demonstrate that the identity of a product was maintained").

[5] Proposed Rule, 68 FR at 61980 ("livestock processing and slaughtering enterprises will experience a more intensive recordkeeping burden. These enterprises disassemble carcasses into many individual cuts, each of which must maintain its country of origin identity. In addition, businesses that produce ground beef, lamb, and pork may commingle product from multiple origins, requiring careful tracking and recordkeeping to substantiate the country of origin information provided to retailers").

particularly as it affected the livestock production and processing sectors.[6] The COOL amendments in the 2008 Farm Bill were designed to ameliorate some of those concerns. The 2008 Farm Bill COOL amendments had their origin in H.R. 2419, and resulted from a compromise engineered by House Agriculture Committee Chairman Peterson, who in light of the "increasingly contentious" issue of COOL, had requested that "various interested parties discuss opportunities to resolve issues of division."[7] The result of this effort was "general agreement on aspects of the law which could be modified to achieve the goals of . . . [COOL] in a manner which minimizes the cost of compliance on livestock producers and the meat trade."[8] One way in which Congress achieved the goal of minimizing the cost of COOL compliance was to provide far greater flexibility in labeling than was reflected in the Proposed Rule, particularly for products derived from animals with multiple countries of origin including the United States and blended/commingled products. As the legislative history notes, the use of the word "may" in the language establishing the Category B label "is to provide flexibility to packers when working with livestock from multiple countries of origin."[9]

The Interim Final Rule reflects this understanding of Congress' intent, as the following excerpts from the USDA commentary make clear:

- "with regard to . . . segregation, this interim final rule provides flexibility in how products of multiple origin can be labeled. Thus, the costs associated with labeling products of multiple origin will likely be less than the upper range estimate in the PRIA as the proposed rule did not contain this flexibility." 73 Fed. Reg. at 45124.

- "the need to segregate animals will be limited to those suppliers that want to provide more specific origin information." *Id.* at 45123.

- "some segregation will still occur in order to provide the marketplace with product strictly of United States origin." *Id.* at 45133.

---

[6] USDA received thousands of comments in response to the ten separate opportunities it provided for comment between 2002 and 2007 relating to implementation of COOL. *See* Final Interim Rule, 73 FR 45106, 45108, (Aug. 1, 2008) (summarizing history of comment periods). Among domestic interested parties in the livestock sector voicing concern about the costs and burdens associated with the Voluntary Guidelines and Proposed Rule were the American Meat Institute, National Cattlemen's Beef Association, Livestock Marketing Association, National Pork Producers Council, Meat Industry Association and others. Comments are available on the USDA AMS website.

[7] 153 Cong. Rec. E1681 (daily ed. Aug. 2, 2007); H.R. Rep. No. 110-256, Pt. 1 (2007). *See also*, Matthew Enis, *Industry Groups Work Out COOL Plan*, Supermarket News, July 30, 2007, at 23 (discussing COOL compromise); *As Peterson Engineers Compromise on Meat Labeling*, Congress Daily July 20, 2007 (same); Dan Looker, *Peterson looks for consensus on COOL*, Agriculture Online (June 7, 2007), http://www.agriculture.com (discussing Chairman Peterson's effort to engage COOL opponents and proponents in livestock sector to reach consensus on amendments to COOL).

[8] 153 Cong. Rec. E1681 (daily ed. Aug. 2, 2007); H.R. Rep. No. 110-256, Pt. 1 (2007).

[9] S. Rep. No. 110-220, at 198 (2007).

- "the purpose of the COOL law is to provide for a retail labeling program for covered commodities—not to impose economic inefficiencies and disrupt the orderly production, processing, and retailing of covered commodities. Therefore, in this interim rule, the provision to separately track the product has been removed." *Id.* at 45117 (referring to requirements for blended or commingled products).

Consistent with Congress' intent to liberalize the tracking and segregation requirements reflected in the Proposed Rule, the 2008 Farm Bill prohibits the USDA from requiring an entity that "prepares, stores, handles or distributes" covered commodities from maintaining a record of the country of origin of a covered commodity, other than those records maintained in the ordinary course of business." 7 U.S.C. § 1638a(d)(2)(B) (as amended). The COOL provisions in the 2008 Farm Bill must be read against this background of Congress' desire to minimize the costs and burdens of compliance with COOL, particularly for those in the livestock producing and processing sector.

B. CPC's Views on the Content of the Final Rule

1. The Final Rule Should Maintain the Flexibility to Use a Category B Label on Covered Commodities Derived from Category A Animals

The Interim Final Rule allows processors and packers complete flexibility to label meat from animals of US origin (Category A) in the same manner as they label meat from animals of mixed origin (Category B). USDA's September 26 guidance substantially curtailed that flexibility by limiting the use of a Category B label on Category A product to the situation where commingling of A and B origin animals occurs on a single production day. Although CPC would prefer even additional flexibility than this, at a minimum it is critical that the Final Rule impose no further constraints on the use of a Category B label for Category A origin products beyond those imposed by the September 26 guidance.

2. The Final Rule Should Establish the Flexibility to Use a Category B Label on Covered Commodities Derived from Category C Animals

The Final Rule, as interpreted by USDA, permits the use of a Category B label when A and B origin animals are commingled in a production day, and a Category C label when B and C origin animals are commingled. As noted below, there should be no limitation on the use of a C label on B product. Furthermore, by analogy to the rationale that permits A product to carry a B label when commingled with B product on a production day, C product should be allowed to carry a B label when B and C animals are commingled on a production day. We understand that USDA has raised issues with this position. We believe that this interpretation is consistent with the greater flexibility Congress intended to create with the 2008 Farm Bill amendments so as to minimize the costs of compliance with COOL.

First, a product from a C category animal meets the affirmative criteria in the statute for a B label. As the USDA General Counsel noted in his May 9, 2008 letter to Congressman Goodlatte, Category B "can be used only for meat derived from animals that are *born, raised, **or** slaughtered* in the U.S. Products that are neither born, nor raised, nor slaughtered in the U.S. are

not eligible for categories A and B." Animals imported for immediate slaughter meet the affirmative portion of this statutory definition for use of a B label.

Second, USDA has already interpreted the statute as permitting the use of a B label on products derived from A animals, notwithstanding language in the statute that seemingly reserves B labels for products derived from animals that are "not" exclusively of US origin. CPC asks only that USDA be consistent and apply the same logic to interpret the statute as permitting the use of a B label on C product, notwithstanding similar language that seemingly reserves B labels for animals "not" imported for immediate slaughter.

Third, it is not an obstacle to this parallel interpretation that the statute uses the mandatory phrase "shall designate" with respect to Category C labels, while using the discretionary phrase "may designate" with respect to Category A and B labels. As USDA has indicated in its September 26 web guidance, notwithstanding the "may designate" language, there is ***no*** discretion to use a B label on A origin product when "***solely*** U.S. origin meat was produced during a production day." Rather, discretion exists to use a B label on A origin product ***only*** when "U.S. and mixed origin animals are commingled during a production day." In other words, even though the Category A portion of the statute uses the phrase "may designate," USDA has interpreted the statute to mean "shall designate" when a production run contains exclusively U.S. origin animals. Thus, use of the A label is mandatory in certain circumstances, and discretionary in others. This is a sensible reading of the statute.

The same logic should be applied to the interpretation of the statutory language governing the use of Category C labels, *i.e.*, although the phrase "shall designate" must be read to require a Category C label when a production run contains ***solely*** C category animals, nothing in the statute ***compels*** the use of a C label when such animals are commingled with A or B origin animals on a production day. To the contrary, in that situation, it is ***not*** the case that the covered commodities resulting from such a production run would be "derived from an animal imported into the United States for immediate slaughter," as the statute requires. The covered commodities might be derived from such animals, but they might be derived from B origin animals as well. Accordingly, in the situation where B and C animals are commingled, use of a C label should be considered discretionary, just as the use of an A label is considered discretionary when A and B animals are commingled. This outcome is fully consistent with Congress' intent, noted above, that the discretionary nature of the Category B label was designed "to provide flexibility to packers when working with livestock from multiple countries of origin."[10]

Fourth, permitting the use of a B label when B and C category animals are commingled in a production day is consistent with other provisions of the statute and regulations addressing situations where covered commodities potentially have multiple countries of origin. For example, the ***only*** obligation the 2008 Farm Bill imposed for both muscle cuts of meat of mixed origin and for ground meats is that labels list all of the actual or possible countries of origin. There is no requirement whatsoever that the label either list the countries of origin in any

[10] S. Rep. No. 110-220, at 198 (2007).

particular order or identify the location of specific processing steps.[11] Congress expressly replaced the far more specific labeling requirements in the Proposed Rule for these categories with an approach that clearly was designed to afford greater flexibility in labeling so as to minimize the costs of compliance with COOL. The labeling flexibility Congress created for products derived from animals of multiple countries of origin (including the United States) is consistent with the lack of any overarching obligation under the 2008 Farm Bill provisions to segregate and separately track all animals/product throughout the supply chain. Both the Interim Final Rule and the Interim Rule for Fish and Shellfish reflect this Congressional policy when dealing with express instances of commingling.[12] Consistent with this approach, when B and C animals are commingled in a production day, it should make no difference whether the covered commodities derived from those animals are labeled "*Product of Canada and the United States*" or "*Product of the United States and Canada*." Congress would have had no basis for requiring the use of one label over the other in this context, because there is no absolutely no basis for distinguishing between their content. Output of the commingled inventory would include products derived from animals "born, raised or slaughtered" in the United States – the threshold requirement for a Category B label – without any basis for knowing or assuming that either U.S. or Canadian "origin" predominated.

For all of these reasons, the statute should be interpreted to permit the use of a Category B label for covered commodities derived from a commingled inventory of B and C animals. It is the only outcome consistent with Congress' intention to allow greater flexibility when labeling product derived from animals of mixed origin, and to avoid burdensome segregation and tracking requirements, as reflected in the absence of any statutory requirement to list countries of origin in any particular order or to identify the location of specific processing steps when commingling is involved.

3. The Final Rule Should Expand the Flexibility to Use a Category C Label on Covered Commodities Derived from Category B Animals

The Interim Final Rule does not expressly address the circumstances where it is permissible to use a Category C label on covered commodities derived from Category B animals of mixed origin. The USDA September 19 and 26 guidance, however, makes clear that it is appropriate to use a Category C label on Category B product, while suggesting that such use may be limited to situations where there is commingling of Category B and C origin animals/product.

---

[11] *See*, 7 U.S.C. § 1638a(2)(b) (multiple countries of origin for muscle cuts of meat – "may designate the country of origin of such covered commodity as all of the countries in which the animal may have been born, raised, or slaughtered"); § 1638a(2)(E) (ground meat – "a list of all countries of origin . . . or a list of all reasonably possible countries of origin").

[12] *See*, Interim Final Rule, 7 CFR § 65.300(g) (commingled covered commodities – "the declaration shall include the countries of origin in accordance with existing Federal legal requirements"); 65.300(h) (ground meat – "the declaration . . . shall list all countries of origin contained therein or that may be reasonably contained therein."); Interim Rule for Fish and Shellfish, 7 CFR § 60.200 (h) (commingling of the same covered commodity) – (1) "the declaration shall indicate the countries of origin for covered commodities in accordance with existing Federal regulations"; (2) "the declaration shall indicate the countries of origin contained therein or that may be contained therein.").

CPC believes this limitation is unwarranted and that additional flexibility should be permitted because the statute imposes no requirement that the countries of origin in a Category B label be listed in any particular order.

The 2008 Farm Bill provides that in cases where a covered commodity has multiple countries of origin, the retailer "may designate the country of origin of such covered commodity as all of the countries in which the animal may have been born, raised, or slaughtered." H.R. 6124, § 11002. If Congress had considered it important that countries of origin in this category be listed in a specific order (*e.g.*, according to where the animal was born, raised, or slaughtered), it could have specified that a particular order be followed. Instead, Congress provided for the broadest possible flexibility in allowing Category B labels to list "all of the countries in which the animal may have been born, raised, or slaughtered," without any concern whatsoever about the order in which the countries should be listed.

Because the statute imposes no requirement that a particular order be followed under Category B, covered commodities derived from animals of both U.S. and Canadian origin lawfully may be labeled Product of Canada and the United States ***or*** Product of the United States and Canada. To the extent the Interim Final Rule suggests otherwise (*e.g.*, by listing the United States first in its examples), the Final Rule should clarify that this is not the case. In addition, the Final Rule and/or appropriate USDA guidance should eliminate the reference to the need for commingling before use of a Category C label on B product is authorized, since such a requirement is inconsistent with the statute.