Volume 14 | Number 9 Article 1

5-2-2003

Country of Origin Labeling

Roger A. McEowen
Iowa State University

Agricultural Law Press
Publisher/Editor
Robert P. Achenbach, Jr.
Contributing Editor
Dr. Neil E. Harl, Esq.
* * * *

Issue Contents

Agricultural Law Digest

Volume 14, No 9 May 2, 2003 ISSN 1051-2780

COUNTRY OF ORIGIN LABELING

— Roger A. McEowen*

The Country of Origin Labeling (COOL) provisions in the 2002 Farm Bill[1] require, beginning September 30, 2004, that *retail* sellers of several food commodities inform consumers of certain product's country of origin.[2] As required by the statute,[3] the USDA promulgated guidelines in the fall of 2002 designed to assist retailers and their suppliers in facilitating voluntary labeling.[4] By September 30, 2004, however, the USDA is to have in place regulations implementing mandatory COOL.[5] COOL raises important questions concerning what commodities are covered, how the labeling requirement is satisfied, and anticipated costs and benefits.

"Covered commodities"

"Covered commodities" are defined by statute as beef, pork, and lamb in the form of whole muscle cuts and ground meat, fish (farm-raised or wild), peanuts, fruits and vegetables.[6] Covered commodities must be exclusively produced and processed within the United States to be deemed of U.S. origin.[7] Retailers of these statutorily defined commodities will be required to inform consumers as to country of origin.[8] Farmers, ranchers, growers and fisherman are not specified as a "covered entity" by the text of the statutory language and, as a result, are not within the purview of the statute,[9] because they do not prepare, store handle or distribute the relevant covered commodities.[10]

Satisfying the statutory requirement

The COOL legislation regulates private-actor conduct through an information requirement and a verification requirement.[11] The information requirement mandates that retailers inform consumers as to country of origin of a covered commodity. The method by which consumers are to be notified is through a "label, stamp, mark, placard," or other type of signage that is "clear and visible" at the point of sale.[12] Retailers are exempt if they purchase for sale at retail less than $230,000 per year of fruits and vegetables or of all covered commodities.[13] Food service establishments, such as restaurants and cafeterias, are exempted from the information requirement.[14]

The statute also contains a verification requirement specifying that "any person in the business of supplying a covered commodity to a retailer shall provide information to the retailer indicating the country of origin of the covered commodity."[15] Thus, the statutory language clearly imposes a duty only on direct suppliers to retailers rather than on all upstream suppliers.[16]

Importantly, the verification requirement merely vests *discretionary* authority in the Secretary of Agriculture to require handlers, processors or distributors of covered commodities to maintain a verifiable recordkeeping audit trail.[17] The Secretary is

* Associate Professor of Agricultural Economics and Extension Specialist, Agricultural Law and Policy, Kansas State University, Manhattan, Kansas. Member of Kansas and Nebraska Bars.

Agricultural Law Digest is published by the Agricultural Law Press, P.O. Box 50703, Eugene, OR 97405 (ph 541-302-1958), bimonthly except June and December. Annual subscription $110 ($90 by e-mail). http://www.agrilawpress.com Printed with soy ink on recycled paper.

statutorily prohibited from imposing a *mandatory* identification system to verify country of origin.[18] However, it appears from the USDA guidelines[19] that the Secretary fully intends to require such an audit trail.

COOL enforcement mechanisms

Retailers that "willfully" violate the law are subject to a fine of up to $10,000 per violation.[20] However, the fine may not be assessed unless the Secretary has provided the retailer with a notice of a suspected violation and a 30 day opportunity to correct the problem.[21] In practice, this means that a retailer is not to be held liable for negligent violations, or innocent mistakes. For covered entities that are not retailers, the enforcement provisions contained in the Livestock Mandatory Reporting Act of 1999 apply.[22] The Secretary must consider several factors before issuing a fine including "the gravity of the offense, the size of the business involved, and the effect of the penalty on the ability" to continue in business.[23] Though the standard for issuing a fine differs here from the retailer standard, it appears likely that the Secretary will require a finding akin to willfulness before levying a fine. There appears to be no legitimate reason to treat different (by type) covered entities in an inconsistent manner under the enforcement regime.

COOL costs – the recordkeeping burden

If the USDA promulgates final rules implementing mandatory COOL that specify that the verification requirement be met via an audit trail, the lack of competitive agricultural markets (particularly in livestock) creates the potential for the COOL requirements to be pushed downstream to individual producers.[24] However, it is unlikely that any additional producer recordkeeping will be needed to establish origin beyond the records that producers maintain presently. While the USDA guidelines require records to be maintained for two years,[25] it seems unlikely that additional records would need to be maintained beyond those maintained presently for tax, animal health, livestock births, animal and feed purchases, sales, and inventory purposes.[26]

The recordkeeping burden for handlers can also be expected to be minimal. All importers are required presently to maintain records on the country of origin of imported products pursuant to existing customs regulations. The dominant food handling firms (packers, processors, wholesalers and distributors) are the ones most likely to procure from multiple sources, including U.S. and foreign origin. It is these dominant firms that the recordkeeping burden will affect the most.[27]

While retailers are required to provide information to consumers as to the country of origin of covered commodities,[28] retailers currently maintain detailed records as to purchases and sales that can be expected reasonably to satisfy auditors charged with verifying labeling claims.

It appears unlikely that mandatory COOL will require an elaborate new system of recordkeeping in light of the volume of information that buyers and sellers share presently. Information concerning a product's origin can be placed on a bill of lading, invoice, affidavit or on any standardized form, and can be incorporated into information that is presently maintained for other purposes. Implementation of mandatory COOL could also be aided by the USDA utilizing a presumption of U.S. origin designed to focus a monitoring system only on products that are required to pass through customs, instead of on all products, including those of U.S. origin.

COOL benefits

A study regarding consumer willingness to pay for beef labeled as to country of origin was conducted by researchers at Colorado State University and the University of Nebraska-Lincoln and released on March 20, 2003.[29] Entitled "Country of Origin Labeling of Beef Products: U.S. Consumers' Perceptions," the study surveyed consumers to determine their willingness to pay for meat labeled as U.S. origin. The researchers found that the vast majority of consumers (73 percent) in Denver and Chicago were willing to pay an 11 percent premium for steak and a 24 percent premium for hamburger that is labeled as to country of origin. An actual auction determined that consumers were willing to pay an average of 19 percent more for steak labeled "Guaranteed USA: Born and raised in the U.S."[30] Those results indicate that COOL could bring substantial benefits to the agricultural sector in general, and the livestock sector in particular.

FOOTNOTES

1 H.R. 2646, Farm Security and Rural Investment Act of 2002, May 13, 2002, Pub. L. No. 107-171, Title X, Subtitle I, 116 Stat. 533-535, § 10816, *amending* 7 U.S.C. § 1621 *et.seq.*

2 7 U.S.C. § 1638a.

3 7 U.S.C. § 1638c(a).

4 67 Fed. Reg. 63367 (Oct. 11, 2002).

5 7 U.S.C. § 1638c(b).

6 7 U.S.C. § 1638(1)-(9).

7 7 U.S.C. § 1638a(a)(2).

8 7 U.S.C. sec. 1638a.

9 When Congress intends to regulate or affect producers, it so specifies. For example, 7 U.S.C. § 2302(b) defines "producers" as "a person engaged in the production of agricultural products as a farmer, planter, rancher, dairyman, fruit, vegetable, or nut grower."

10 While producers are not directly covered by the COOL provision for purposes of direct regulation, the Secretary could ensure that producers specify the country of origin of their commodities by requiring that covered entities who procure covered commodities directly from producers require information as to country of origin as a condition of purchase or transfer of ownership. To the extent producers are vertically integrated so as to also be a processor, handler, storer or distributor, the producer would be subject to direct regulation.

11 7 U.S.C. §§ 1638a(c)(1); (d).

12 7 U.S.C. § 1638a(c)(1).

13 7 U.S.C. § 1638(6) defines retailers according to the definition set forth in the Perishable Agricultural Commodities Act of 1930 (7 U.S.C. § 499a(b)). That provision defines a retailer as a person that is a dealer engaged in the business of selling any perishable agricultural commodity at retail. A "dealer" is exempt if its annual invoice cost of purchases of perishable

agricultural commodities is $230,000 or less. 7 U.S.C. § 499a(b)(6).

[14] 7 U.S.C. § 1638a(b).

[15] 7 U.S.C. § 1638a(e).

[16] The rationale for the statutory construct is clear in that only direct suppliers have knowledge of the retailer that will purchase their product. Other upstream suppliers do not have such knowledge.

[17] The statute provides that, "The Secretary may require that any entity that prepares, stores, handles, or distributes a covered commodity for retail sale maintain a verifiable recordkeeping audit trail that will permit the Secretary to verify compliance with this subtitle." 7 U.S.C. § 1638a(d). The definition of "verifiable recordkeeping audit trail" is left to the Secretary's discretion.

[18] 7 U.S.C. § 1638a(f)(1).

[19] 67 Fed. Reg. 63367 at 63374-63375 (Oct. 11, 2002).

[20] 7 U.S.C. § 1638b(c).

[21] 7 U.S.C. § 1638b(b).

[22] 7 U.S.C. § 1638b(a) refers to the enforcement provisions of section 7 U.S.C. § 1636b.

[23] 7 U.S.C. § 1636b(a)(3).

[24] Remember, the statute bars the Secretary from imposing a mandatory identification system to verify country of origin of a covered commodity. 7 U.S.C. § 1638a(e).

[25] 67 Fed. Reg. 63367 at 63374 (Oct. 11, 2002).

[26] The same point can be made with respect to growers of fresh produce. Fresh produce growers maintain the same records as livestock producers as well as any extra documentation required under the Perishable Agricultural Commodities Act. 7 U.S.C. §§ 499a *et. seq*. Also, origin is not as complex of an issue to determine as compared to the intricacies of the tax code. As such, the recordkeeping burden for producers and growers (excluding fisherman and fish farmers) likely to be imposed by mandatory COOL can be expected to be nominal.

[27] Because the bulk of the recordkeeping burden falls on those firms with the highest degree of market power, it is to be anticipated that those firms (and their supporting organizations) would object most vociferously to the COOL legislation. However, the recordkeeping burden can be expected reasonably to be minimized by several factors. For example, cattle imported from Mexico are branded and tagged, and fat cattle imported from Canada are shipped in sealed trucks which are opened only at the packing plant. Also, current rules require that meat to be utilized for government use (schools and military) be segregated.

[28] 7 U.S.C. § 1638a(a)(1).

[29] Umberger, Feuz, Calkins, and Sitz, "Country of Origin Labeling of Beef Products: U.S. Consumers' Perceptions," Presented at the 2003 FAMPS Conference: "Emerging Roles For Food Labels: Inform, Protect, Persuade," Washington, DC March 20-21, 2003, available online at http://dare.agsci.colostate.edu/extension/cool.pdf.

[30] The primary drivers of these results were consumers' food safety concerns, preferences for labeling source and origin information, desires to support U.S. producers, and beliefs that U.S. beef was of higher quality.

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr

BANKRUPTCY

GENERAL

EXEMPTIONS.

EARNED INCOME CREDIT. The Chapter 7 debtor claimed an exemption, under Minn. Stat § 550.37, in state and federal income tax refunds to the extent the refunds were based on the federal earned income credit and the Minnesota working family credit. The state exemption applied to "All relief based on need, and the earnings or salary of a person who is a recipient of relief based on need . . ." The court held that the refund was exempt to the extent it was based on the federal EIC and the Minnesota working family credit. ***In re* Tomczyk, 2003-1 U.S. Tax Cas. (CCH) ¶ 50,384 (Bankr. D. Minn. 2003)**.

CHAPTER 12

PLAN. The debtor farmed leased and owned land and had a portion of each type of land in CRP. The debtor's Chapter 12 plan provided two alternatives: (1) place all of the land in the next CRP sign-up or (2) continue farming the land and placing the same portion in CRP. The plan decreased the interest rate on secured loans and increased the term of the loans. The plan proposed to pay an amount equal to the fair market value of all collateral which was personal property and required the secured creditor to release the lien on the personal property. The court denied confirmation of the plan because (1) the CRP payments were too speculative because the next CRP program had not yet started; (2) the historical income from the farming operations did not support the plan's projected income; (3) the reduced rate and extended term were not consistent with market conditions for agricultural loans; and (4) the debtor could not sever the security interest in the personal property from the secured loans. The court acknowledged that the debtor had some equity in the