AN EXAMINATION OF WHETHER U.S. COUNTRY OF ORIGIN LABELING LEGISLATION PLAYS A ROLE IN PROTECTING CONSUMERS FROM CONTAMINATED FOOD

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INTRODUCTION

Growing numbers of consumers have concerns about the safety of the U.S. food supply.[1] A series of nationwide food recalls has heightened consumers' awareness of the complexity and increasingly global scale of food supply chains and weakened their confidence in government and industry food safety oversight. These public health scares have not been isolated to a particular geographic region or food item, but rather have spanned the food sector. The contaminated food items range from E. coli-tainted Californian spinach, to salmonella-spoiled U.S. peanuts and Mexican jalapeño peppers, to various melamine-adulterated Chinese food products. As consumers search for ways to guard against contaminated food, interest in knowing the source of their food at point of purchase has grown.[2] Media coverage of food recalls has further fueled this interest by suggesting that retail-level food origin labeling will help make the U.S. food supply safer for consumers.[3]

This growing consumer interest in food safety has played a prominent role

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1. CONSUMER REPORTS NAT'L RESEARCH CTR., FOOD-LABELING POLL 2008 (2008), *available at* http://www.greenerchoices.org/pdf/foodpoll2008.pdf.

2. Chris Jones, *Food Safety Worries Makes Consumers Label-Savvy*, FOOD NAVIGATOR-USA, Mar. 28, 2008, http://www.foodnavigator-usa.com/financial-industry/food-safety-worries-makes-consumers-label-savvy.

3. *See, e.g.*, Editorial, *Origins of Our Food*, N.Y. TIMES, July 4, 2007, at 16; *Lou Dobbs Tonight* (CNN television broadcast Oct. 28, 2008) (transcript available at http://transcripts.cnn.com/transcripts/0810/28/ldt.01.html).

in the recent federal implementation of a measure that extends pre-existing origin labeling requirements to previously exempt food and agricultural products. The legislation and corresponding regulation, primarily referred to by its acronym, COOL (country-of-origin labeling), do not have food safety and public health as objectives, but instead aim to fulfill a marketing objective. The stated purpose of the regulation is to provide point of purchase country-of-origin information to consumers in order to aid their buying decisions.[4] Despite the insistence of the U.S. government that COOL is not a food safety measure,[5] many consumers remain concerned about food safety and quality standards outside the United States and consequently would like to use information about the origins of their food to inform their purchasing decisions.

In light of this background, it is important to examine whether consumers can effectively use COOL information to reduce their risk of consuming contaminated food. It is also important to consider a separate, but closely related question of whether government and industry can use the verification system underpinning the country-of-origin labeling requirements to facilitate the trace-back of a contaminated food item to its source.

This Article addresses these two questions by first providing an overview of the statutory and regulatory authority governing origin requirements for food products in the United States. Parts I and II examine the primary legislation in place prior to the implementation of the U.S. COOL legislation, and Part III outlines the details of the COOL regulatory regime. An in-depth understanding of the coverage and the specific requirements of these regulatory measures is crucial to examining their potential role, or lack thereof, in food safety risk mitigation. Part IV then considers the extent to which COOL could be used to help safeguard consumers from contaminated and adulterated food. This discussion draws on the preceding overview to illustrate some of the limitations of the current regulatory framework in serving this broader purpose. The Article concludes with thoughts on potential linkages between existing country-of-origin labeling traceability requirements and food safety traceability legislation potentially on the horizon.

I. U.S. COUNTRY-OF-ORIGIN REQUIREMENTS PRIOR TO COOL

Prior to the implementation of the U.S. COOL legislation, various statutes and regulations governed the provision of food origin information.[6] This Part

4. Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts, 74 Fed. Reg. 2658, 2670 (Jan. 15, 2009) (to be codified at 7 C.F.R. pts. 60, 65) [hereinafter Final Rule].

5. Mandatory Country of Origin Labeling of Beef, Lamb, Pork, Fish, Perishable Agricultural Commodities, and Peanuts, 68 Fed. Reg. 61,944, 61,945 (proposed Oct. 30, 2003) (to be codified at 7 C.F.R. pt. 60).

6. *See* Wendy A. Johnecheck, Political, Economic, and International Legal Aspects

will focus on the primary legislation regulating country-of-origin requirements for agriculture products in the pre-COOL period: the Smoot-Hawley Tariff Act of 1930 (Tariff Act).[7] Under this Act, the Bureau of Customs and Border Protection (CBP) is the agency responsible for administering country-of-origin marking requirements for all imported items.[8] The Tariff Act mandates that all imported products be marked with their originating country information, and that the information remains with an article until it reaches an *ultimate purchaser*.[9] In the case of goods imported in consumer-ready packages destined for retail outlets, the implementation of this legislation is relatively straightforward as the marking is affixed to the package and present upon entry into the United States. Examples of such agricultural products are canned ham, packaged steak, bagged frozen vegetables, canned fruits and vegetables, and olive oil.

For other products, however, the definition of the term *ultimate purchaser* determines the extent to which marks of origin need to be maintained throughout the supply chain. Since this term is not defined in the Tariff Act, CBP has promulgated regulations interpreting it to mean the last person who will receive the article in its imported form. The regulation provides further explanation by stating that when an imported article is used in a manufacturing process, the manufacturer is considered the *ultimate purchaser* if the process results in a substantial transformation of the item. However, if the manufacturing process "leaves the identity of the imported article intact," the ultimate purchaser is the consumer who uses the product after such minimal processing.[10]

This regulation fails to resolve both the ambiguity surrounding the determination of what entity constitutes the *ultimate purchaser*, and

of the U.S. Country of Origin Labeling Regulation (June 2009) (forthcoming Ph.D dissertation, Tufts University) (on file with author) (discussing the statutory and regulatory authority governing origin requirements for food products in the U.S. Many of these measures were instituted to either protect producers from unfair competition and/or to protect consumers from fraud.).

7. The 1930 Tariff Act delegates the authority to the Department of Treasury, which has in turn delegated its implementation to the Bureau of Customs and Border Protection (CBP). The CBP was previously the U.S. Customs Service until 2003, when it was transferred to the Department of Homeland Security. The Department of Homeland Security is the intermediate agency found between the Department of Treasury and CBP. Throughout the entirety of this Article, CBP will be used to discuss customs activities regardless of whether they occurred before or after the transition from the U.S. Customs Service to CBP.

8. 19 U.S.C. § 1304 (2006); *see* Johnecheck, *supra* note 6, at 184; Robert F. Ruyak, *The United States Country of Origin Marking Requirements: The Application of a Non-Tariff Trade Barrier*, 6 LAW & POL'Y INT'L BUS. 485 (1974) (discussing the history of marks of origin statutes in the United States); David Silverstein, *Country-of-Origin Marking Requirements Under Section 304 of the Tariff Act: An Importer's Map Through the Maze*, 25 AM. BUS. L.J. 285 (1987).

9. 19 U.S.C. § 1304(a) (2006).

10. 19 C.F.R. § 134.1(d) (2009).

subsequently how far along the supply chain country-of-origin markings are required. Instead, it introduces an equally nebulous concept, that of *substantial transformation.* The *substantial transformation* standard has evolved based on a series of federal court decisions dating from as early as 1908.[11] The present day understanding of this standard is that it constitutes a process by which an article is changed into a new item by taking on a new name, character, or use.[12]

Based on the authority delegated to the CBP under the Tariff Act, the determination of whether an imported good is deemed to be substantially changed by a U.S. processor is often decided on a case-by-case basis. If CBP rulings determine that a product qualifies as being substantially transformed by a U.S. processor, the manufacturer is then considered the *ultimate* purchaser and the *new* product does not need to be marked with originating country information. In such cases, the original imported article is not required to be marked individually at the border. However, the containers carrying the imported good must be marked with the originating country information until the good reaches the U.S. processor.[13]

The Tariff Act includes other exceptions to the individual product marking requirements. These exceptions are primarily based on the nature of the product or conditions of importation.[14] The "J-list," so-called for the statutory sub-section title, stands out amongst these exceptions because it provides exemption from marking requirements to individual items, rather than basing exemption on specified criteria.[15] The list is comprised of over eighty items, amongst which livestock and natural products, such as vegetables, fruits, nuts, berries, live or dead animals, and fish or birds are included.[16] Many of the J-list exempted agricultural products are now covered by the COOL regulation.

Although these products are exempt from the general Tariff Act marking requirements, certain marking rules still apply. For example, containers holding imported J-list items are required to be marked with the country-of-origin

11. *See* Uniform Rules of Origin for Imported Merchandise, 73 Fed. Reg. 43,885, 43,386 (proposed July 15, 2008) (to be codified at 19 C.F.R. pts. 4, 7, 10, 102, 134, 177) (discussing cases that have informed current understanding of substantial transformation standard); Silverstein, *supra* note 8, at 292-99 (providing an overview of the applicable court cases).

12. 19 C.F.R. § 134.35(a) (2009).

13. *Id*; *see* Silverstein, *supra* note 8, at 290-91 (including a discussion of the case law interpreting the provisions found in 19 U.S.C. §§ 1304(a)(3), (d), and (h) that permit containers to be marked with country-of-origin information in lieu of marking individual items). It should also be noted that NAFTA marking rules exempt containers from these origin-marking requirements in cases where goods from NAFTA countries will undergo further processing in the U.S., and thus become deemed a product of the U.S. *See* 19 C.F.R. § 143.35(b) (2009).

14. 19 U.S.C. § 1304(a)(3)–(k) (2006); *see* Ruyak, *supra* note 8, at 500-09 (including a thorough discussion of all of these exceptions).

15. 19 U.S.C. § 1304(a)(3)(j) (2006).

16. 19 C.F.R. § 134.33 (2009) (providing full list of exempted products).

information until they reach the ultimate purchaser.[17] In the case of fresh produce, such as Mexican avocados or New Zealand apples, the *ultimate purchaser* is often the consumer at a retail store, and therefore origin information has to be maintained on their container at least until the product reaches the retail store. In this setting, CBP has ruled that when fresh produce is taken out of its container and placed in a bin or display case, there is no obligation to provide country-of-origin information.[18] If imported fresh produce, such as a Mexican tomato, has been packaged or re-packed in a retail container, however, the container must identify the originating country, notwithstanding the J-list individual marking exemption.[19] As one can see from these examples, the J-list exemption does not provide full immunity from the general marking requirements of the Tariff Act for many imported agricultural products.

II. LEGISLATIVE INTENT OF THE 1930 TARIFF ACT ORIGIN LABELING REQUIREMENTS

The congressional intent behind the inclusion of country-of-origin marking requirements within the original tariff legislation is not entirely clear. It may be that the requirements were necessary as part of administering customs duties. Court decisions have determined that the congressional intent behind such requirements was consumer oriented, in that the markings would allow consumers to "buy or refuse to buy" goods depending on their preferences.[20] Furthermore, Congress recognized that many consumers prefer "United States" goods, and sought to "confer an advantage on domestic producers of competing goods."[21] It is important to note that, similar to the COOL measure, the original statute governing country-of-origin marking requirements in the U.S. was not instituted on food safety grounds.

The underlying rationale behind creating the J-list of exemptions, however, is particularly hard to pin down. According to Ruyak, "the reasons for granting exception for these items are probably as varied as the listing itself."[22] A Congressional Research Service memo examining the basis for including

17. 19 C.F.R. § 134.22(a) (2009).

18. U.S. Cust. Priv. Ltr. Rul. HQ 733798 (1991) cites the interpretation from U.S. Cust. Priv. Ltr. Rul. HQ 722992 (1983) that determined that fresh produce sold at the retail-level in open bins or display racks did not need to be marked with country-of-origin information because bins did not constitute "containers" within the meaning of 19 U.S.C. § 1304 (2006).

19. *Id.* at 5 (ruling that "[s]uch marking is to be done by the importer or the subsequent purchaser/repacker as the circumstances require in accordance with 19 C.F.R. § 134.25").

20. United States v. Friedlaender & Co., 27 C.C.P.A. 297, 302 (C.C.P.A. 1940) (noting that the rationale behind such marking requirements could also relate to their role in carrying out standard customs administrative duties).

21. United States v. Ury, 106 F.2d 28, 29 (2d Cir. 1939).

22. Ruyak, *supra* note 8, at 507.

livestock on the J-list notes that one explanation relates to the difficulty of affixing individual marks to livestock.[23] This rationale would apply to the other agricultural products exempted under the J-list as well.

III. THE COOL LABELING REGIME

The COOL statute—introduced initially in the Farm Security and Rural Investment Act of 2002 (2002 Farm Bill)[24] and then subsequently revised in the Food, Conservation, and Energy Act of 2008 (2008 Farm Bill)[25] amends the Agricultural Marketing Act of 1946 (AMA)[26] to require retailers to notify consumers of the country of origin for specified domestic and imported food and agricultural products. The rules for the labeling program are administered by the United States Department of Agriculture, Agricultural Marketing Service (USDA AMS) and went into effect on March 16, 2009.

The law stipulates that only retailers licensed under the Perishable Agricultural Commodities Act (PACA) of 1930[27] are required to provide country-of-origin information to consumers.[28] Firms that purchase more than $230,000 worth of perishable agricultural commodities within a calendar year fall within the scope of this requirement.[29] USDA AMS estimates that PACA licensed retailers account for approximately seventy-six percent of retail sales of covered commodities.[30] This criterion exempts any shops (butcher shops, small retail stores, fish and farmers' markets, etc.) that either do not purchase fresh or frozen fruits and vegetables, or that have invoice costs from these purchases totaling below the $230,000 cutoff. Food service establishments, such as restaurants, cafeterias, salad bars, and delicatessens are also exempt from the law.[31]

A. Covered Commodities

Products covered by the COOL measure include muscle and ground cuts of meat (beef, lamb, chicken, goat, and pork), fish and shellfish, fresh and frozen fruit and vegetables, ginseng, and various nut commodities (peanuts,

23. Memorandum from Geoffrey Becker, Cong. Research Serv., to undisclosed congressional office (Feb. 22, 2005) (on file with author) (explaining origins of the J-List and why livestock were included in the list of exceptions).

24. Pub. L. No. 107-171, § 10816 (codified as amended at 7 U.S.C. § 1638 (2006)).

25. Pub. L. No. 110–234. § 11002, 122 Stat. 923.

26. 7 U.S.C. § 1638 (2006).

27. 7 U.S.C. § 499 (2006).

28. 7 C.F.R. § 60.124 (2009) (including fish and shellfish); 7 C.F.R. § 60.200 (2009); 7 C.F.R. § 65.240 (2009); 7 C.F.R. § 65.300 (2009) (including other covered commodities).

29. 7 U.S.C. § 499a(b)(6)(B) (2006) (requiring that all retailers are licensed once their annual invoiced purchases of perishable agricultural commodities exceed $230,000).

30. Final Rule, *supra* note 4, at 2686.

31. *See* 7 C.F.R. § 65.300(b) (2009).

macadamia nuts, and pecans).[32] Covered commodities that are included as ingredients in a processed food item are exempt from origin labeling requirements. USDA AMS has defined a processed food item as a retail item derived from a covered commodity that either: (1) undergoes processing resulting in a change in character from the original item, (2) is combined with at least one other covered commodity, or (3) is combined with another substantive food component.[33] In order to operationalize the use of these criteria, AMS provided examples of activities that would meet each of the conditions. They also prepared an illustrative list of products that would satisfy the exemption requirements.[34] Table 1 presents this information. The examples illustrate the challenges involved in both deciding and applying the developed criteria, and the seemingly arbitrary outcomes that at times result. For example, one must ask, how is it that a bag of pre-washed romaine lettuce must carry origin information, while a bag of pre-washed iceberg and romaine lettuce does not?

Despite considerable effort by USDA AMS to develop criteria that would provide clear guidelines on whether a product is deemed to be processed or not, the agency still had to consider the processed state of some products on an individual basis. Ground meat products, for instance, were included in the original statute as a covered commodity;[35] however, it was unclear whether the scope of ground beef included "hamburger" and/or "beef patties." USDA fielded various comments in this regard, and subsequently concluded that under the COOL regulation, "hamburger" is defined as ground beef[36] on the grounds that consumers perceive the products similarly, and the items usually appear side-by-side in the fresh or frozen meat case. Further, the regulatory standards of identification were virtually identical.[37] In contrast, USDA concluded that beef ground and marketed under the standard of identity defined as "beef

32. The rules pertaining to fish and shellfish are codified in 7 C.F.R. § 60 (2009), whereas the rules for the other commodities are found in 7 C.F.R. § 65 (2009). The fish and shellfish regulation also includes a requirement to provide information as to whether the fish and shellfish product is wild or farm-raised.

33. 7 C.F.R. §§ 60.119, 60.200(c), 65.220, 65.300(c) (2009).

34. U.S. DEP'T OF AGRIC., COUNTRY OF ORIGIN LABELING (COOL) FREQUENTLY ASKED QUESTIONS (2009), *available at* http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5074846.

35. The intentional inclusion of ground beef in the statute as a covered commodity removed the potential controversy resulting from applying the specified criteria and thus having to determine whether ground meat products qualified as having undergone a process that resulted in a change of character in the product.

36. 7 C.F.R. § 65.155 (2009).

37. *Compare* Final Rule, *supra* note 4, at 2666, *with* 9 C.F.R. § 319.15(a)-(b) (2009). The identity standards for ground beef provide that the product consists of "chopped fresh and/or frozen beef with or without seasoning and without the addition of beef fat as such, and containing no more than 30 percent fat, and containing no added water, phosphates, binders, or extenders." § 319.15(a) (2009). The standard for hamburger is the same except that it allows for the addition of fat. § 319.15(b) (2009).

patties" is exempt from COOL requirements, because such products may be combined with other products, such as binders, extenders, and/or beef variety meats (e.g., beef heart and tongue meat). In this regard, they noted that tracking the beef variety meats by originating country would be overly burdensome on industry.[38] Further, they noted that consumers do not perceive "beef patties" as directly substitutable with beef that is ground and marketed as "ground beef" or "hamburger."[39]

TABLE 1: ACTIVITIES QUALIFYING AS TRANSFORMATIONAL PROCESSING STEPS UNDER COOL

PROCESSING ACTIVITY	PROCESSED ITEMS EXCLUDED FROM COOL REQUIREMENTS
Criterion I: Changing the character of a covered commodity	
Cooking (Frying, Broiling, Grilling, Boiling, Steaming, Baking, Roasting)	Roasted Nuts, Shrimp Cocktail, Canned Tomatoes
Curing (Salt or sugar curing, Drying)	Dried Fruit, Dried Mushrooms
Smoking (Hot or Cold)	Smoked Salmon
Restructuring (Emulsifying, Extruding)	Fish Sticks, Hash Brown Potato, Chicken Nuggets
Criterion II: Combined with Other Covered Commodity	
Use U.S.-grade standards to determine whether "other" covered commodity is deemed a separate product (e.g., Do green and red peppers qualify as the same grade standard? – Yes.)	Fruit Medley Salad Mix (Iceberg And Romaine), Frozen Seafood Medley Salad Mix Containing Lettuce and Carrots, Frozen Mixed Vegetable Medley
Criterion III: Combined with Other Substantive Food Component	
Excludes Water, Salt and Sugar[40] Includes Breading, Chocolate, Salad Dressing, Tomato Sauce	Breaded Chicken Tenders, Breaded Shrimp, Teriyaki Flavored Pork Loin, Marinated Chicken Breasts

In considering whether country-of-origin information is useful for either

38. 9 C.F.R. § 319.15(c) (2009).

39. Final Rule, *supra* note 4, at 2666.

40. In order for an article to constitute an "other substantive food component," its addition to a COOL covered commodity needs to result in a change to the character of the covered commodity. *See* 7 C.F.R. § 65.220 (2009).

government or consumers as an objective means of reducing exposure to contaminated food, the overall coverage of the regulation is a critical factor. The implementation of the U.S. COOL legislation—with its general exemption for non-PACA licensed retailers and food service establishments, and further exemption of the wide array of processed products from the COOL requirements—confirms that the COOL regulation was not intended by USDA AMS to be used as a food safety risk mitigation strategy. Along similar lines, none of the three criteria for determining whether a given item is processed or not, and therefore exempt from COOL, assess the food safety risk of a particular product. Further, the agency's explanation of why "beef patties" are exempt from the requirements demonstrates that factors such as consumer perception and burden on industry—not factors such as risk of E. coli contamination—were used as core indicators for determining coverage of the agreement. The preceding discussion also illustrates that many products of high food safety risk concern to both government and consumers alike (e.g., bagged lettuce and beef patties) are not bound by the requirements of the COOL measure. These exemptions will be important to keep in mind for the discussion in Part IV, which examines the use of country-of-origin information in reducing the risk of consuming contaminated food.

B. Definitions for Conferring Origin

Mandating point-of-purchase origin labeling on agri-food products requires the existence of corresponding rules for determining origin, formally referred to as "rules of origin." The COOL regulation establishes separate standards for fish and shellfish, meat commodities, and a category of products including perishable agricultural commodities (PACs), nut commodities, and ginseng. The COOL rules of origin developed for each of these categories draw extensively on pre-existing administrative decisions and regulations promulgated by CBP under the authority of the 1930 Tariff Act.[41] Thus, this Part will discuss the rules of origin established for these goods under the COOL rule in light of the already existing 1930 Tariff Act requirements. As the ultimate purpose of this Article is to consider the potential utility of the COOL regulation in food safety risk mitigation, this Part will limit its discussion of the rules of origin to two categories of goods: (1) PACs, nuts, and ginseng, and (2) meat products.[42]

1. Perishable Agricultural Commodities, Nut Commodities, and Ginseng

The rules of origin for PACs, nut products, and ginseng permit the use of

41. 19 U.S.C. § 1304 (2006).

42. *See* Johnecheck, *supra* note 6, ch. 2 (discussing rules of origin for fish and shellfish).

U.S. origin claims on products that are grown and harvested in the United States.[43] For imported products, the label must list the country where the item is produced as determined by CBP at the border. For commingled products,[44] the retailer must display originating country information as required by existing federal regulations.[45]

The relevant federal regulations for determining the origin of imported and commingled commodities are the CBP rules promulgated under the 1930 Tariff Act. These regulations mandate that when imported goods originate from a single country, the originating country is the country where the goods have been manufactured or grown.[46] For processed products or products containing articles sourced from more than one country, the CBP relies primarily on the "substantial transformation" standard for determining origin.[47] The country where the good is shown to be substantially transformed—based on whether the good has a new name, character, or use—is considered the country of origin.

Various court decisions and CBP administrative rulings are also relevant to the determination of origin for PACs, nuts, and ginseng. For example, CBP has ruled that the process of blanching, cutting, and freezing does not qualify as a substantial change. Similarly, the act of combining and packaging or repacking different products also does not *substantially* alter a product. For any COOL covered commodities (PACs, nuts, and ginseng) that undergo any of these activities, the origin of the product would be deemed the country where the product was originally grown or produced. Thus, if a processor imports bulk frozen vegetables from Mexico and packages them in the U.S., it needs to mark "Product of Mexico" on the package. And, if a product contains goods from separate countries (e.g., peas from Mexico, Guatemala, and the U.S.), then the manufacturer must provide information on all originating countries.[48] In both of these examples, pursuant to the CBP regulations for marking requirements, origin information for these imported products needs to be provided until they reach their final purchaser: the retail consumer.

43. 7 C.F.R. §§ 65.260(b), .300(d) (2009).

44. Commingled products are defined as COOL covered commodities of the same type offered for retail sale in a consumer package that have been prepared in the U.S. from items having different sources of national origin. 7 C.F.R. § 65.125 (2009).

45. 7 C.F.R. § 65.300(g) (2009).

46. 19 C.F.R. § 134.1(b) (2009).

47. The rules of origin discussed here are those applied to non-NAFTA countries. Distinct rules of origin have been adopted under the North American Free Trade Agreement Act and apply to goods imported from Mexico and Canada. These rules prescribe that the origin of a processed product is determined by whether or not a shift in tariff classification occurs as part of the manufacturing process. This approach is referred to as the "tariff classification" method. *See* 19 C.F.R. § 102 (2009).

48. U.S. Cust. Priv. Ltr. Rul. HQ 735085, at 5 (June 4, 1993) (noting that in order to determine "the extent that such foreign materials are insignificant, or would have no influence on the purchasing decision, Customs applies a 'common sense' approach to require marking only of those articles which are of more than *de minimis* significance").

In some instances, PACs, nut products, and ginseng are exempt from COOL requirements because they qualify as processed products under the regulation, but are still subject to CBP marking requirements. For example, while a mixed vegetable medley (with broccoli from Mexico, water chestnuts from China, peas from Guatemala, and carrots from the U.S.) is required to be labeled with all importing country information under CBP regulations, it is considered a processed food item under the COOL regulation, and thus exempt from COOL regulations.

Furthermore, CBP has determined that the activities of salting, blending, roasting, and canning nuts do not qualify as a substantial transformation.[49] Thus, while these goods are required to be labeled with importing country information at the retail level under the 1930 Tariff Act, the COOL law does not apply. This also means that salted or canned U.S. grown nuts fall outside the coverage of both laws.

2. Meat Products

Under the COOL statute, ground and muscle cuts of meat have distinct origin labeling requirements. For the purpose of determining origin for muscle cuts of meat, products are separated into four groups, which in regulatory circles are referred to as the A, B, C, and D categories. USDA AMS uses these identifiers to establish the origin information that a meat product may declare at the retail level, and thus these terms will be utilized throughout this Article.

The A category refers to U.S. origin products and requires that muscle cuts of meat are derived from cattle born, raised, and slaughtered in the United States. Meat products from animals born and raised in Alaska and Hawaii can also be deemed U.S. products if their period of transport through Canada remains under sixty days. Additionally, products from animals present in the United States prior to July 15, 2008, automatically qualify as a U.S. good.[50]

The B category includes muscle cuts of meat derived from animals with production stages occurring in different countries. More specifically, these animals are born in a non-U.S. country (Country X or Country Y), and are raised and slaughtered in the United States. Furthermore, this category includes an explicit prohibition against animals that have only been present in the United States for less than two weeks prior to being slaughtered—the so-called

49. *See, e.g.*, T.D. 85-158, 50 Fed. Reg. 37,842-901 (Sept. 18, 1985) (stating that roasting, salting, and/or blending of pistachio nuts was not deemed a substantial transformation of the raw pistachios into a new article of commerce). CBP has subsequently issued similar rulings for other nut products. *See* U.S. Cust. Priv. Ltr. Rul. HQ 730058 (June 2, 1987) (pecans nuts); U.S. Cust. Priv. Ltr. Rul. NY N008056 (Mar. 16, 2007) (cashews); U.S. Cust. Priv. Ltr. Rul. NY I83434 (July 22, 2002) (peanuts, cashews, pistachios and almonds).

50. 7 C.F.R. §§ 65.260(a), .300(d) (2009).

"imported for immediate slaughter" prohibition.[51]

The C category refers to muscle cuts of meat derived from animals imported into the U.S. for immediate slaughter, or more specifically animals that have been present in the U.S. for less than two weeks before arriving at a U.S. processing facility. The D category is composed of meat products derived from animals exclusively born, raised, and slaughtered in a non-U.S. country (Country X). The originating country of the imported product must be based on the origin designation determined by CBP at the border.[52]

As prescribed in the statute, each of the four categories are directly associated with a unique consumer label.[53] The labels derived from these four categories are listed in Table 2. During the rulemaking process, USDA AMS also created additional labeling categories encompassing situations in which meat products derived from category A and B animals are commingled during a production day. The label associated with the resulting product is "Product of U.S., Country X, Country Y." Similarly, the products derived from a combination of category B and C animals commingled during a production day are also eligible to use this label. This label also corresponds to all category B products (products derived from animals that are born in Country X, and raised and slaughtered in the U.S.). In effect, processors and retailers can use this combination label for all products—excluding products deemed to be exclusively imported products—if the commingling described above occurs during the same production day.

TABLE 2: COUNTRY-OF-ORIGIN LABELING FOR MUSCLE CUTS OF MEAT COMMODITIES[54]

CATEGORY	PRODUCTION STAGE	ACCEPTABLE LABELING TERM	REGULATORY TEXT CITATION
A	Born, raised, and slaughtered in U.S.	Product of U.S.	7 C.F.R. § 65.260(a)(1)
B	Born in Country X or Country Y, raised and slaughtered in U.S.	Product of U.S., Country X, Country Y (listed in any order)	7 C.F.R. § 65.300(e)(1)
C	Born and raised in Country X, slaughtered in U.S.	Product of Country X and U.S.	7 C.F.R. § 65.300(e)(3)

51. 7 C.F.R. § 65.180 (2009).

52. 7 C.F.R. § 65.300(f) (2009).

53. Food Conservation and Energy Act of 2008, Pub. L. No. 110-234, § 11002(2), 122 Stat. 923, 1352-53.

54. U.S. DEP'T OF AGRIC., COOL LABELING TABLES (2009), *available at* http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5074845.

D	Born, raised, and slaughtered in Country X	Product of Country X	7 C.F.R. § 65.300(f)
A+B = B		Product of U.S., Country X, Country Y (listed in any order)	7 C.F.R. § 65.300(e)(2)
B+C = B		Product of U.S., Country X, Country Y (listed in any order)	7 C.F.R. § 65.300(e)(4)

For ground meat products, the retail label "shall list all countries of origin contained therein or that may be reasonably contained therein."[55] In order for a processor to declare a country as an originating country of a ground meat product, raw material from that country must have been present in their inventory within a sixty-day period of the origin declaration.[56] Subsequent to the establishment of the final rule, the USDA Secretary sent a letter to industry representatives requesting that processors voluntarily limit this period to ten days.[57]

The difficulty of providing country-of-origin information on ground beef products stems from the fact that processors often mix trimmings (meat cuts and fat remaining from primal cuts of meat) from various sources—all with varying fat content—together in order to produce ground beef products with the desired fat to meat ratio. For example, trimmings from U.S. corn-fed beef, with relatively high fat content, are often mixed with low-fat trimmings from Uruguayan grass-fed beef. The COOL rule for ground beef minimizes the impact on this practice by allowing processors to use a general label for all the potential sources of beef during any sixty-day period. This also means that the countries displayed on the retail label may not list the actual originating source of the beef in any given package.

C. Nature of the Marking Requirements

Under the regulation, retailers are required to provide country-of-origin information in one of the following forms: placard, sign, label, sticker, band,

55. 7 C.F.R. § 65.300(h) (2009).

56. *Id.*

57. Letter from Thomas J. Vilsack, U.S. Sec'y of Agric., to Industry Representative (Feb. 20, 2009), *available at* http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5075457.

twist tie, pin tag, or other means that allows consumers to identify the origin of the product.[58] Also, products from more than one country can be presented in display cases or bins, provided that all originating country information is listed somewhere near the container.[59] Note that this latter allowance would not provide consumers with the opportunity to differentiate products by originating country, which weakens the potential utility of supplying such information to consumers. Finally, the country-of-origin information can appear on either the front or back of the product, and the rule does not provide for any specifications with regard to size or ease of consumer access to the information. This is in contrast to the 1930 Tariff Act marking requirements and other food labeling requirements, which explicitly establish size and location requirements, or at the very least express that the information "shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit."[60]

D. COOL Record-Keeping Requirements

While the preceding Subparts focused on the information appearing on the consumer label, this Subpart examines the record-keeping requirements for maintaining such information throughout the supply chain. Both are crucial components to the effectiveness and credibility of any consumer label, regardless of whether food safety is an intended objective or not. Under the COOL regulation, suppliers along the production chain are required to provide country-of-origin information to their buyers. This information can be located on the product (pre-packaged), on the shipping container, or in a document accompanying the product, such as a producer affidavit. Both retailers and suppliers are required to keep origin information for a period of up to one year from the date of transaction. Suppliers must store records of the preceding supplier (if applicable) and buyer of the covered commodity.[61] Given the complexity of the meat supply chain, an illustrative overview of the beef production system and how origin information may be maintained throughout the supply chain is presented below.

1. Maintaining Origin Information Throughout the Beef Supply Chain

The primary beef production system in the U.S. consists of three major components: producers (cow-calf operators, backgrounders/stockers, and feedlot owners); intermediaries (packers and processors); and retailers. Cow-calf operators raise cattle until weaning age at about nine months (400-650 lbs).

58. 7 C.F.R. §§ 60.300(a), 65.400(a) (2009).
59. 7 C.F.R. §§ 60.300(d), 65.400(d) (2009).
60. 19 U.S.C. § 1304(a) (2006).
61. 7 C.F.R. §§ 60.400(b)(3), 65.500(c)(4) (2009).

Backgrounding operations graze calves on enriched pastures with a goal of developing muscle and weight. Animals transfer to feedlot operators (or finishing operations) at between 400-640 lbs and are typically grain-fed until they reach slaughter weights (1,100-1,350 lbs) at eighteen to twenty-two months of age. At slaughter weight, these animals are brought to slaughter/meatpacking facilities, processed, and boxed in vacuum packaged bags to be sold to retailers and other distributors. USDA quality and grade inspection occurs at these facilities. A firm may consist of a single segment of the supply chain or may include combinations of the entities described above. For example, ranchers often own cow-calf and backgrounding operations, and packing facilities and feedlots may be owned by the same entity.

In addition to U.S. born and raised cattle that follow the supply chain described, the U.S. imports live cattle from both Canada and Mexico. Live cattle from Canada include feeder cattle (cattle destined for U.S. backgrounding or feedlot operations), cattle destined for immediate slaughter and replacement herd cattle. Cattle imported from Mexico include feeder cattle that are finished by U.S. backgrounders or feedlot operators before heading to slaughter facilities. In 2007, the U.S. imported about six percent of the cattle entering feedlots, with two-thirds of these cattle coming from Mexico and the remainder from Canada. In the same year, about two percent of the total number of cattle processed in the U.S. were animals imported from Canada for direct slaughter.[62]

The number of times that cattle change ownership prior to slaughter presents numerous challenges for maintaining origin information throughout the supply chain. In the case of all meat products, the packer or processing facility is responsible for initiating origin claims. These claims can be substantiated through devices corresponding to an officially recognized identification system (e.g., the U.S. 840 Animal Identification Number device, ear tags, etc.) or through producer affidavits.

Producer affidavits verifying the origin of an animal can be used by the slaughter facility or the livestock supplier, when the individual making the claim is the producer or owner prior to the sale, and the affidavit identifies the animal(s) specific to the transaction. Producer affidavits identifying U.S. origin animals may be supported through visual appraisal, provided that foreign origin markings are not found on the animal (e.g., "CAN" or "M"). This permitted use of visual inspection as a means of origin identification effectively eliminates all recordkeeping requirements for U.S. producers.

A standardized producer affidavit allows for origin information of cattle to be identified by group. For example, a group of cattle being sold from a feedlot to a packer may be solely of U.S. origin and identified by a single affidavit.

62. U.S. INT'L TRADE COMM'N, USITC INVESTIGATION NO. 332-488, GLOBAL BEEF TRADE: EFFECTS OF ANIMAL HEALTH, SANITARY, FOOD SAFETY, AND OTHER MEASURES ON U.S. BEEF EXPORTS 3-3 to 3-4 (2008).

Conversely, a group may be of both U.S. and Mexican origin and also identified by a single affidavit stating the dual national origin of the group lot. In the case of the former, the packer, distributor, and retailer must segregate and maintain this information throughout the supply chain in order for the products to be labeled with U.S. origin claims. In the case of the latter, the packer, distributor, and retailer must label the meat as "Product of U.S. and Mexico."

IV. COUNTRY-OF-ORIGIN LABELING AND FOOD SAFETY

The preceding overview of the U.S. statutory and regulatory structure governing country-of-origin labeling requirements provides the information necessary to evaluate whether origin labeling as currently implemented can play a direct role in making the U.S. food supply safer. Consumers are interested in utilizing country-of-origin information in order to reduce their risk of consuming contaminated food. Furthermore, there is a related but distinctly separate question as to whether the current verification system underpinning the country-of-origin labeling requirements can be used to aid government and industry in tracing contaminated food to its source. These questions are considered in turn below.

A. Consumer Food Safety and COOL

Consumer demand for country-of-origin information stems from a variety of often interconnected factors: concern about food safety, support for U.S. producers, national pride, and support for local and regional food economies, amongst others. While consumers may seek to use origin labeling in various ways that indirectly affect the safety of their food supply,[63] the focus here is limited to evaluating whether consumers can effectively use country-level origin labeling information as a tool for individual food safety risk mitigation. As highlighted in the preceding overview of the COOL regulation, product coverage of the regulation, the information appearing on the label, and the nature of the markings all influence the utility of such information to consumers, regardless of their intended use for such information. Thus, the discussion in this Part proceeds, bearing in mind the limitations described

63. For example, the use of origin labeling to support direct purchases from local producers may have both personal and broader public health benefits. This statement is not to suggest that the medium and small-scale local production has better food safety records than large-scale production. It is to acknowledge, however, that smaller scale production, for a variety of reasons, has lower use of pesticides, little to no sub-therapeutic use of antibiotics in animal and fish feed, and shorter supply chains, which minimizes the time that food-borne pathogens can enter the food supply. Also, in the case of a food-borne illness outbreak, the scale of impact is generally more limited and trace-back to the contaminated source is more direct since supply chains are shorter and less complex.

above with regard to these factors.

First, in the case of a food-borne illness outbreak or food recall in which regulatory or industry officials have successfully narrowed down the source of the contamination to products from a single country or region, consumers could use an origin label to avoid a given product from a particular country. This behavior has already been seen in response to recent food recalls. This consumer strategy represents a broad-based approach to avoiding potentially contaminated food, but in some instances, this use of country-of-origin labeling could reduce an individual's risk of consuming contaminated food.

Governments generally tend to avoid linking country-level geographic information to potential sources of contamination during food recalls. This is not only because of the spillover effects on all producers of the contaminated product within a particular country during the recall period, but also because of the potential long-term economic impacts on the affected sector as well as other products from the targeted country. During the July 2008 salmonella outbreak, however, the U.S. government did use this approach, and officially recommended that consumers avoid eating tomatoes, serrano peppers, and jalapeño peppers from specified states, regions, and countries.[64] The targeted geographic areas changed as the search for the source of the food contamination narrowed.

The second, and more proactive, way in which consumers could use country-of-origin information to reduce the risk of consuming contaminated food is through basing their purchase decisions on a country's safety record for a given food item. In order to use this approach effectively, consumers need to be highly informed about the food production and regulatory systems of various countries. However, resources providing information on various elements of food safety and quality of food by origin (e.g., food-borne pathogens, pesticide residues) are limited, and those that exist have their shortcomings.

An example of such a resource is the U.S. Food and Drug Administration's database cataloging violations of U.S. pesticide residue limits by food product and country. Results from these monitoring efforts show that from 2004-2006 pesticide residue violation rates for imported fresh produce were more than three times that of domestic violation rates (5.6% compared to 1.6%). Furthermore, seven countries have violation rates of over eight percent, with Spain, at twenty-two percent, having the greatest portion of their tested produce samples exceeding accepted U.S. pesticide residue thresholds. During this same time period, however, importing countries had a lower percentage of pesticide residue violations on products such as carrots and nectarines than that of U.S. producers.[65]

64. Salmonella Saintpaul Outbreak, U.S. FOOD & DRUG ADMIN., Aug. 28, 2008, http://www.fda.gov/NewsEvents/PublicHealthFocus/ucm179116.htm.

65. U.S. FOOD & DRUG ADMIN., PESTICIDE RESIDUE MONITORING PROGRAM FISCAL

These results are not statistically representative as they are drawn from a monitoring system that disproportionately tests goods from countries with a historic record of residue violations. Nonetheless, the reported findings underscore that countries have varying food safety records with respect to produce imports, despite bilateral equivalency agreements and government efforts to ensure that imported products meet U.S. food safety standards. Many consumers and consumer advocates point to such findings as a rationale for providing point of purchase country-of-origin labels, and in some cases for using origin information in a blanket fashion to preferentially purchase domestic fresh produce over imported products.[66]

While the data do support the broad premise that the avoidance of imported produce may reduce personal consumption of pesticide residues, it is important to recognize that such an imprecise use of country-of-origin information for food safety purposes has negative spillover effects on producing countries and regions with good safety records. Furthermore, as the data highlight, purchasing only domestic products will not entirely reduce a consumer's risk of consuming pesticide-contaminated products as U.S. grown produce at times also violates government residue limits. A more accurate systematic approach would be to treat each product dataset individually and to select from the 'safest' country available, or to avoid certain products from high-risk countries.

Furthermore, even where food safety inspection information is readily accessible to consumers, the broader context surrounding the data needs to be understood in order to accurately assess the relative risk of consuming contaminated food. For example, the reporting of fourteen cases of Bovine Spongiform Encephalopathy (BSE) in Canadian cattle relative to three U.S. reported cases has been misconstrued as evidence that consuming Canadian beef products presents a higher food safety risk than consuming U.S. beef products. However, a more precise assessment reveals that the U.S. and Canadian production systems are similar in structure and are largely integrated, and it is quite probable that the discrepancy in BSE cases reported between the two countries is a function of the relatively enhanced Canadian surveillance system, which randomly tests more at-risk cattle than the United States despite slaughtering fewer animals.[67]

YEAR 2004-2006 (2006), *available at* http://www.fda.gov/Food/FoodSafety/FoodContaminantsAdulteration/Pesticides/ResidueMonitoringReports/ucm125183.htm.

66. Letter from various COOL coalition members to the United States Trade Representative (Mar. 13, 2009), *available at* http://www.r-calfusa.com/COOL/090313-coalition_letter.pdf.

67. The number of slaughtered cattle tested for BSE during the period of September 1, 2006 to May 26, 2009 in the U.S. was 122,272 compared to Canada at 139,232. Canadian Food Inspection Agency, BSE Enhanced Surveillance Program, Sample Status and Testing Results (Dec. 24, 2009), http://www.inspection.gc.ca/english/anima/heasan/disemala/bseesb/surv/surve.shtml#col2; U.S. Dep't of Agric., BSE Ongoing Surveillance Program: Monthly Test Results (Dec. 31, 2009), http://www.aphis.usda.gov/newsroom/hot_issues/bse/surveillance/

This example illustrates the level of knowledge that consumers or their advocates must have about various features of the food system in addition to information on a particular product's food safety record in order to objectively utilize country-of-origin signaling for food safety purposes. It also illustrates the potential value to consumers of transparent, credible, and readily accessible public information on the safety records of food by country and or region. This information could play a critical role in helping consumers to target their purchases based on documented product performance.

B. COOL and Traceability

Traceability systems that are structured to allow investigators to trace and remove contaminated food items from the food supply can also double as a verification system used to maintain country-of-origin information along the supply chain. The opposite does not hold. In the U.S., the country-of-origin labeling requirements discussed above are not set up to facilitate the trace-back of food.[68] A simplified example using the earlier overview on how origin information is maintained in the beef supply chain will be used here to illustrate the limitations of the U.S. COOL origin requirements for this purpose.

In this example, a U.S. rancher owns a cow-calf and a backgrounding operation. This rancher only raises cattle that are born in the U.S. Once a group of these cattle have developed adequate muscle and weight, the rancher sells fifty head to the closest finishing operation (feedlot). During the transfer, the rancher verifies that all the animals are of U.S. origin, and provides a single producer affidavit for all fifty animals.[69] At the finishing operation these animals are mixed with feeder cattle imported from Canada. After reaching slaughter weight, this mixed group of animals is sold to a processing facility. During the transfer of ownership, the feedlot owner completes a consolidated affidavit that identifies this particular group of animals as being of mixed U.S. and Canadian origin. These animals are slaughtered, and processed into retail-ready packages designating them as 'Product of U.S. and Canada.' On the same day, this processing plant slaughters animals from other finishing operations, processes them and similarly affixes a mixed origin label.

ongoing_surv_results.shtml; *see* Frank Ackerman & Wendy A. Johnecheck, *Mad Cows and Computer Models: The U.S. Response to BSE*, 18 NEW SOLUTIONS 146, 149 (2008) (discussing portion of U.S. slaughter cattle tested for BSE relative to other countries).

68. Other countries have made efforts to link consumer labeling information to food safety traceability systems. *See, e.g.*, ALAN LYNE ET AL., SCOTTISH GOV'T SOC. RESEARCH, PIG MEAT LABELING IN SCOTLAND: UNDERSTANDING INDUSTRY PRACTICE AND CONSUMER AWARENESS (2009), *available at* http://www.scotland.gov.uk/Resource/Doc/261554/0078246.pdf.

69. In addition to country-of-origin information and the number of cattle involved, the producer affidavit also may include information, such as the date of transaction, the name of the purchaser, and the type and sex of the animal(s). *See* U.S. DEP'T OF AGRIC., *supra* note 34, at 14.

In the event of a food-borne illness outbreak associated with one of these retail products, the presence of origin information could assist government and industry efforts to narrow down the source of contamination to meat products derived from the U.S. and Canada. In this particular example, it could also help narrow down the source to processors that use mixed labels, or if used in conjunction with other information (e.g., place of retail purchase), an investigator may be able to identify a specific processing plant. If there is a need to trace the source of contamination beyond the processing plant, however, the country-of-origin information will not provide any additional information that an investigator could use to link the product to a particular finishing, backgrounding, or cow-calf operation.

The lack of traceability capacity illustrated here is consistent with COOL's stated purpose. In fact, the COOL statute explicitly prohibits the required development of a comprehensive traceability system as a means of maintaining origin information along the supply chain.[70] Unless additional efforts are made by industry to explicitly link a thorough traceability system to the verification system utilized for maintaining country-of-origin information, which in some cases is occurring, country-of-origin labeling information will not facilitate the full trace-back of a contaminated food to its source. Nevertheless, where industry groups, particularly in the perishable agriculture sector, have chosen to institute food safety trace-back verification systems, they can and are being used as a means of maintaining country-of-origin information along the supply chain.[71]

CONCLUSION

The desire for consumers to use country-of-origin information to safeguard against contaminated food reflects broad and systemic concerns about the safety of the U.S. food supply. However, consumer use of country-of-origin information to further individual food safety objectives is constrained by such factors as product coverage of the regulation, the information appearing on the label, and the nature of the marking requirements. It is also limited by the level of consumer knowledge of the food safety records of various countries. Given this scenario, transparent and credible public information on safety records by country and item would allow consumers to more accurately direct their food purchases in order to avoid contaminated food, and may also help restore consumer confidence in the food supply.

COOL in its current form can only play a limited role in tracing a

70. Farm Security and Rural Investment Act of 2002 § 10816, 7 U.S.C. §§ 282(f)(1), 1638a.

71. *See* Interview with U.S. Gov. Official, in D.C. (Aug. 6, 2008) (discussing implementation of COOL and links with other traceability and verification systems); *see also* Telephone Interview with Produce Trade Assoc. Employee (Oct. 6, 2008) (discussing implementation of COOL and links with other traceability and verification systems).

contaminated product to its source. While the COOL measure does not facilitate trace-back, the more comprehensive traceability requirements currently under discussion in the U.S. Congress[72] could provide the underlying structure needed to provide retail-level origin labeling information. Efforts to ensure that government regulations for these separate systems are integrated—or at the very least can be implemented in a compatible manner—should not be overlooked. This would effectively reduce the supply chain costs of COOL implementation, as provision of consumer information at the retail level would be able to exploit the broader and more costly traceability systems. It would also allow government oversight and enforcement of these measures to be combined.

72. *See, e.g.*, Food Safety Enhancement Act of 2009, H.R. 2749, 111th Cong. (2009).