THE STORY OF COOL

THE SAGA CONTINUES

By J. Dudley Butler

COUNTRY OF ORIGIN LABELING

"It is the right thing to do."

History of COOL

Country of Origin Labeling or "COOL" requires beef retailers to inform consumers as to where the cattle from which beef is produced were born, raised and slaughtered. This simple matter is controversial because cattle and beef from the U.S. generally costs more than cattle and beef from other countries. Thus, for beef packers that buy cattle and sell beef, it is advantageous to be able to buy cheaper cattle born or raised in other countries and sell the beef under the same label as U.S. beef. Based on the packers extraordinary efforts to dilute, delay and defeat COOL, it must be very profitable to keep consumers from knowing where their beef comes from. The history of COOL reveals the persistence of the packers in opposing this simple rule of disclosing the origin of beef.

In 2002, Congress amended the Agricultural Marketing Act of 1946 ("Act"), to require retailers to notify their customers of the country of origin of covered commodities at the final point of sale. The Act directed retailers to designate covered commodities that are meat, such as beef, as "United States country of origin" only if the animals from which the meat was derived were "exclusively born, raised, and slaughtered in the United States." The amendment did not speak to covered products derived from animals born, raised, or slaughtered outside of the United States.

In 2008, Congress again amended the Act by adding three additional country of origin designations: multiple countries of origin, imported for immediate slaughter, and foreign countries of origin. The amendments also detailed criteria for designating a covered commodity in each of the four country of origin categories.

In order for the country of origin to be designated as the United States, the product derived from the slaughtering of an animal must be (i) exclusively born, raised, and slaughtered in the United States; (ii) born and raised in Alaska or Hawaii and transported for a period of not more than 60 days through Canada to the United States and slaughtered in the United States; or (iii) present in the United States on or before July 15, 2008, and then remain there continuously after.

If the product is derived from an animal that is not born, raised, or slaughtered in the United States the retailer must designate a country other than the United States as the country of origin.

The 2008 amendments require retailers to use multiple countries of origin when the animal from which the meat was derived is (i) not exclusively born, raised, and slaughtered in the United States; (ii) born, raised, or slaughtered in the United States, and (iii) not imported into the United States for immediate slaughter.

The 2008 amendments also require retailers to designate the country of origin as (i) the country from which the animal was imported, and (ii) the United States if the animal is imported into the United States for immediate slaughter.

Finally, the 2008 amendments address ground meats differently. Retailers must designate these products by listing either (i) "all countries of origin" of such products, or (ii) "all reasonably possible countries of origin."

Regulations Implementing the Agricultural Marketing Act of 1946

The United States Department of Agriculture ("USDA") did not meet the Sept. 30,

2004 deadline that Congress established for the implementation of the 2002 COOL law. Instead, the implementation of COOL followed a twisted and precarious path marked by obstruction and stops and starts that lasted approximately seven years. Initially, and missing Congress' statutory deadline to do so by Sept. 30, 2002, the Agricultural Marketing Service ("AMS") published guidelines for an interim voluntary country of origin labeling program on Oct. 11, 2002, providing the public with 180 days to comment. *See* 67 Fed. Reg. 63,367. The AMS then published a notice regarding AMS' estimate of the burden associated with recordkeeping requirements for COOL on Nov. 21, 2002 and provided the public with a 60-day comment period. *See* 74 Fed. Reg. 2,658 (citing 67 Fed. Reg. 70,205). This 60-day comment period was later extended by AMS for an additional 30 days. *See id.* (citing 68 Fed. Reg. 3,006).

Under the George W. Bush Administration the USDA made clear its disdain for the newly enacted COOL law. In April and June, 2003, the USDA Under-Secretary and USDA Deputy Under Secretary for Marketing and Regulatory Programs, respectively, testified before the U.S. Senate Agriculture Committee and the U.S. House Committee on Agriculture, respectively, that:

> "Mr. Chairman, as you may know, the Office of Management and Budget's Statement of Administration Policy on S.1731, the *Agriculture, Conservation, and Rural Enhancement Act of 2001*, found the provision requiring mandatory country of Origin labeling highly objectionable. The Administration's position and the reasons for that position have not changed. We feel these new requirements will not have a positive effect overall and that the unintended consequences on producers and the distribution chain could be significant."

Testimony by Wm. Hawks, Apr. 22, 2003 before the Senate and by Charles Lambert, June 26, 2003, before the House.

It was not until Oct. 30, 2003, approximately one-year prior to the congressionally

imposed implementation deadline, that AMS published a proposed rule to implement COOL ("2003 Proposed Rule"). *See* 68 Fed. Reg. 61,944. This proposed rule was accompanied by a 60-day comment period that was later extended to 120 days. *See* 74 Fed. Reg. 2,658 (citing 68 Fed. Reg. 71,039). It is important to note that AMS in the 2003 Proposed Rule did not provide for the use of a label that identifies more than one country of origin when the beef is exclusively from cattle born raised and slaughtered in the U.S. Specifically, it does not permit a mixed-country label on meat derived from animals exclusively born, raised, and slaughtered in the United States even if such meat is commingled with foreign meat during a packer's "production day." *See* 68 Fed. Reg. 61,944 *et seq*. (the 2003 Proposed Rule does not include the term "production day.").

Parallel in time with AMS' publication of the 2003 Proposed Rule, the U.S. House of Representatives Committee on Appropriations ("Committee") sought to delay COOL. The Committee's efforts culminated in the FY 2004 Consolidated Appropriations Act (Pub. L. 108-199) ("2004 Appropriations Act") that delayed the implementation of COOL for all covered commodities except fish and shellfish until Sept. 30, 2006. *See id*.

Thus, while no covered commodities were required to be labeled prior to Congress' Sept. 30, 2004 deadline, AMS proceeded to implement COOL for fish and shellfish in an interim final rule published Oct. 5, 2004 that was accompanied by a 90-day public comment period. *See* 69 Fed. Reg. 59,708. Mandatory COOL for fish and shellfish subsequently took effect on April 4, 2005 (*see id*.), but mandatory COOL for all other commodities remained in limbo.

Following the implementation of mandatory COOL for fish and shellfish, AMS reopened the rule's comment period twice, first on Nov. 27, 2006 to reexamine costs and

benefits and second on June 20, 2007 to reexamine all aspects of the fish and shellfish COOL rule. *See* 74 Fed. Reg. 2,658.

Prospects that mandatory COOL would be fully implemented soon after the 2004 Appropriations Act's ban on COOL for meat expired on Sept. 30, 2006 were thwarted when the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act of 2006 (Pub. L. 109–97) ("2006 Appropriations Act") further delayed the implementation of mandatory COOL for meat and all other commodities except fish and shellfish until Sept. 30, 2008. *See id.*

On Feb. 1, 2007, one of AMS' highest ranking officials responsible for implementing COOL, Barry L. Carpenter, began his new career as the chief executive officer of National Meat Association, one of the plaintiffs in the current COOL litigation. *See*, *e.g.*, Country of Origin Labeling, Barry L. Carpenter, Deputy Administrator, Livestock and Seed Program, available at http://pdic.tamu.edu/farmpolicy/carpenterpres.pdf

On June 20, 2007, the same day that AMS reopened the comment period on the COOL rule for fish and shellfish already in effect since April 4, 2005, AMS also reopened the comment period for the 2003 Proposed Rule for 60 days. *See* 72 Fed. Reg. 33,917. The new comment period for mandatory COOL for meat expired on Aug. 20, 2008. *See id.*

On Aug. 1, 2008, one-month before the scheduled lifting of the 2006 Appropriations Act's prohibition, AMS published an interim final rule ("2008 Interim Final Rule") for meat and all other covered commodities except for fish and shellfish, which were already being labeled. *See* 73 Fed. Reg. 45,106. The effective date for the 2008 Interim Final Rule, along with the deadline for public comment, was Sept. 30, 2008. *See id.*

Again, it is important to note that AMS did not make any allowance in the 2008

Interim Final Rule for the use of a mixed-country label on meat derived from animals exclusively born, raised, and slaughtered in the United States if such meat is commingled with foreign meat during a packer's "production day." *See* 73 Fed. Reg. 45,106 *et seq*. (the 2008 Interim Final Rule does not include the term "production day."). Prior to the expiration of the comment period for the 2008 Interim Final Rule, however, the AMS issued on Sept. 26, 2008 a question and answer document that, for the first time, expressly stated that commingling during a production day would allow meat derived exclusively from animals born, raised, and slaughtered in the United States to be labeled with a mixed-origin label:

> If meat covered commodities derived from U.S. and mixed origin animals are commingled during a production day, the resulting product may carry the mixed origin claim (e.g., Product of U.S., Canada, and Mexico). Thus, it is not permissible to label meat derived from livestock of U.S. origin with a mixed origin label if solely U.S. origin meat was produced during the production day.

Country of Origin Labeling (COOL) Frequently Asked Questions, AMS, at 7-8 (Sept. 26, 2008) (emphasis in original omitted), available at http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5071922.

After the public comment period on the 2008 Interim Final Rule had long expired, and just days before the newly elected President of the United States, Barack Obama, was to take his oath of office, on Jan. 7, 2009, the U.S. Ambassador to the World Trade Organization ("WTO"), Peter Allgeier, and the Canadian Ambassador to the WTO, John Gero, exchanged letters in which Canadian Ambassador Gero requested that U.S. Ambassador Allgeier include three specific elements in the yet-to-be-published final COOL rule. In return for U.S. Ambassador Allgeier's agreement to include the three requested

elements in the upcoming final COOL rule, Canadian Ambassador Gero was to agree to not request the establishment of a dispute panel at the WTO for a period of at least eight months following the publication of the final COOL rule.

The three elements requested to be included in the final COOL rule by Canadian Ambassador Gero and included in the agreement between the Ambassadors were:

1. maintaining the flexibility to use a Category B label [for meat with multiple countries of origin] on covered commodities derived from Category A animals [animals of United States origin] when Category A animals and Category B animals are commingled during a single production day;
2. expanding the flexibility to use a Category C label [for meat from animals imported for immediate slaughter] on covered commodities derived from Category B animals, without any requirement that there must be commingling between B and C animals; and
3. establishing the flexibility to use a Category B label on covered commodities derived from Category C animals when Category B animals and Category C animals are commingled during a single production day.

Following the quid pro quo agreement between the U.S. and Canadian ambassadors, and just days before the 2009 presidential inauguration, the AMS published a final rule on Jan. 15, 2009 addressing country of origin labeling requirements ("2009 Final Rule"). *See* 74 Fed. Reg. 2,658.

The 2009 Final Rule set forth four country of origin designations:

(A) Product of the United States ("A Label"),

(B) "Product of the United States, Country X, and (as applicable) Country Y" ("B

Label”),

(C) "Product of Country X and the United States" (“C Label”), and

(D) "Product of Country X" (“D Label”).

Although, the 2003 Proposed Rule and the 2008 Interim Final Rule said nothing about using a mixed-country of origin label on beef from animals born raise and slaughtered exclusively in the U.S. when such domestic beef is commingled with foreign beef, this allowance suddenly appears in the 2009 Final Rule. There was no notice or opportunity for comment. This surprising new provision in the 2009 Final Rule expressly allowed the use of the B Label on meat from animals eligible for the A Label if they are commingled during a production day with meat from animals born or raised in a foreign country, but not with meat from animals imported for immediate slaughter. *See id.* This allowance satisfied the first element of the Canadian ambassador’s request discussed above.

Also, the 2009 Final Rule allowed meat eligible for the B Label that is commingled during a production day with C Label meat, which is meat derived from animals imported for immediate slaughter, to be labeled with the B Label. *See id.* This allowance satisfied the third element of the Canadian ambassador’s request discussed above.

In Addition, the 2009 Final Rule inexplicably allowed all B Label meat, including when the B Label is applied to commingled A Label meat, as well as B Label meat that is commingled with C Label meat to bear a label listing the countries in any order (*see id.*), thus satisfying the last of the three elements that the Canadian ambassador requested of the United States in return for his country’s delay in establishing a dispute panel with which to challenge U.S. country of origin labeling at the WTO.

The only mix-match of origin label configurations the AMS did not expressly allow is

the commingling of A Label meat with C Label meat, but then the Canadian ambassador did not request this particular concession.

Compelled by the adverse WTO action described below, on March 12, 2013 the AMS issued a proposed rule to modify the 2009 Final Rule and established a comment deadline of April 11, 2013. *See* 74 Fed. Reg. 15,645. Principally, the proposed rule (i) eliminated the comingling allowances discussed above that allowed meat from animals exclusively born, raised, and slaughtered in the United States to be labeled as if it were a product of multiple origins, and (ii) required labels to list the country where each of the three productions steps – born, raised, and slaughtered – had occurred for the animal from which the meat was derived.

The AMS then issued a final rule on May 24, 2013, which essentially incorporated the modifications in the proposed rule ("Final COOL Rule"). *See* 78 Fed. Reg. 31,367 *et seq*. It is this Final COOL Rule that is the subject of the current litigation.

Dispute Settlement Proceedings at the WTO

Although the United States met each of the three elements requested by Canada under the agreement discussed above whereby Canada would wait at least eight months before pursuing its complaint at the WTO, within less than four months, on May 7, 2009, Canada and Mexico both filed actions against the United States in the WTO, alleging that the United States' country of origin statutory and regulatory scheme was inconsistent with the United States' obligations under various WTO agreements. *See* 74 Fed. Reg. 24,060.

Ultimately, on June 29, 2012, the WTO Appellate Body concluded that the United States' COOL program was inconsistent with WTO requirements and stated that the COOL program "does not impose labelling requirements for meat that provide consumers with origin

information *commensurate* with the type of origin information that upstream livestock producers and processors are required to maintain and transmit."

The WTO Appellate Body stated that the information conveyed to consumers is less detailed, and [] often less accurate under the 2009 rule and this was a direct result of the 2009 rule's requirement that labels "list the country or countries of origin" without "requir[ing] the labels to mention where an animal was born, raised, and slaughtered. The WTO Appellate Body further stated that commingling allowed retailers to label meat as "mixed origin when in fact it is exclusively U.S. origin, or that it has three countries of origin when in fact it has only one or two." *See also* paragraph 349 of the Appellate Body Report. On Dec. 4, 2012, the WTO arbitrator ordered the United States to comply with the WTO Appellate Body decision by May 23, 2013.

The Final COOL Rule published on May 24, 2013, but made effective on May 23, 2013 addresses all the concerns delineated in the ruling of the WTO Dispute Settlement Body by:

1. Requiring origin designations for covered products derived from animals slaughtered in the United States to specify the country in which each of the production steps of birth, raising, and slaughter of the animal occurred. *See* 78 Fed. Reg. 31,367.
2. Eliminating the allowance for commingling of products of different origins. *See id.*

Country-of-Origin (COOL) Labeling Implementation Timeline A Recalcitrant Administration and Congress Delayed COOL for More Than Six Years

October 11, 2002: AMS published voluntary guidelines for COOL (country-of-Origin Labeling) (67 FR 63367) providing a 180-day comment period.

November 21, 2002: AMS published a notice requesting emergency approval of a new information collection (67 FR 70205) providing a 60-day comment period on AMS' burden estimates associated with the recordkeeping requirements as required by the Paperwork Reduction Act of 1995 (PRA).

January 22, 2003: AMS published a notice extending the comment period for the request for emergency approval of a new information collection (68 FR 3006) an additional 30 days.

October 30, 2003: AMS published a proposed rule for mandatory COOL (68 FR 61944) providing a 60-day comment period.

The FY 2004 Consolidated Appropriations Act (Pub. L. 108–199) delayed the applicability of mandatory COOL for all covered commodities except wild and farm-raised fish and shellfish until September 30, 2006.

The Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act of 2006 (Pub. L. 109–97) further delayed the applicability of mandatory COOL for all covered commodities except wild and farm-raised fish and shellfish until September 30, 2008.

October 5, 2004: AMS published an interim final rule with request for comments for the mandatory COOL program for fish and shellfish (69 FR 59708) providing a 90-day comment period. AMS stated it was requesting comments due to the changes the agency made as a result of comments received and the costs associated with this rule.

November 27, 2006: AMS reopened the interim final rule's comment period for 90 days (71 FR 68431) to request comments regarding the costs and benefits for the interim final rule.

June 20, 2007: AMS reopened the comment period for fish and shellfish (72 FR 33851) for 60 days and specifically sought comments on the general aspects of the interim final rule for fish and shellfish.

June 20, 2007: AMS simultaneously reopened a 60-day comment period for the 2003 proposed rule published Oct. 5, 2003 (72 FR 33917) and specifically requested comments on all aspects of the proposed rule.

August 1, 2008: AMS published the interim final rule (73 FR 45106) for the remaining covered commodities (not including fish and shellfish).

January 15, 2009: AMS published the final COOL rule (74 FR 2658) that established March 16, 2009, as the effective date for the final COOL rule.

March 12, 2013: AMS published a proposed COOL rule (78 FR 15645) to amend the Jan. 15, 2009 final COOL rule and provided a 30-day comment period, until April 11, 2013

May 23, 2013: AMS published a final COOL rule (78 FR 31367) that retroactively established May 23, 2013 as the effective date; but, that further stated the agency would engage in education and outreach for six-moths, thus establishing November 23, 2013 as the date after which the final rule would be enforced.

COOL Opponent Propaganda

Often Used Scare Tactics

"Beware of unintended consequences" is a phrase used by industry trade groups to discourage reforms that would dare attempt to limit the reach and profit-making potential of multinational meatpacking companies. The phrase is typically associated with projections of astronomical price increases for consumers and devastating price decreases for livestock producers. But, that phrase wasn't used in the mid-90s when the multinational meatpackers themselves wanted to change public policy to increase their profit-making potential.

Case-in-point: In the mid-90s multinational meatpackers advocated that the country-of-origin for meat should be the country where the product was last substantially transformed. They succeeded.

And so it is today that under World Trade Organization (WTO) rules a meatpacker can import a 12-year-old cow from Mexico or Canada, immediately slaughter it in a U.S. packing plant, and label the resulting beef for export as a "Product of the USA." Additionally, this beef would be eligible for a U.S. Department of Agriculture (USDA) quality grade stamp, such as USDA Prime, USDA Choice, or USDA Select. Similarly, Canada can import live cattle from a foreign country – say Columbia – immediately slaughter the animal in Canada, and then export the resulting beef to the United States as a "Product of Canada."

Now, consider the consequences for U.S. livestock producers: Multinational meatpackers can use a USA label along with a USDA quality grade stamp – both of which reflect the good image and reputation of independent U.S. livestock producers – to sell beef in foreign markets, even though the beef is produced from animals that were not born on U.S. soil nor raised or fed by any U.S. farmer or rancher. If such foreign-origin beef is sold in the domestic market, it would still bear USDA quality and inspection markings that erroneously suggest it is of U.S. origin.

The consequences for consumers are even more dubious: After the hypothetical meat product from the Columbian animal bearing a Canadian-origin label crosses the U.S. border, the Canadian label can be lawfully removed when the meat is repackaged by a U.S. processor or retailer, leaving nothing on the package other than a "U.S. Inspected . . ." label that would lead most consumers to believe the meat must be of U.S. origin.

Congress sought to end this confusion regarding the true origins of meat sold in the domestic market – the market over which Congress and not the WTO has jurisdiction – by passing the mandatory country-of-origin labeling (COOL) law in 2002. The multinational meatpackers' unintended consequences mantra – replete with projections of untenable consumer price increases and deep discounts on livestock – effectively delayed the proper implementation and enforcement of COOL for longer than a decade.

On May 23, 2013, however, the USDA issued a final rule describing how and when it would implement COOL in the domestic market. The final rule ensures that only meat from livestock born, raised, and slaughtered in the United States will receive a USA label and that meat from domestic livestock will not be mislabeled with a multiple-country label. The final rule accomplishes this by requiring meat from animals slaughtered in the U.S. to be labeled as to where the animal was born, where it was raised, and where it was slaughtered.

To give the domestic marketplace time to incorporate the new requirements, the USDA indicated the final rule would not have full force and effect until November 23, 2013. After that date, meat from the 12-year-old cow used in the example above will be required to bear a label stating "Born and Raised in Canada (or Mexico), Slaughtered in the United States."

And how would multinational meatpackers respond to the new labeling regime that ends marketplace confusion by informing consumers of the country or countries where the animal

from which meat was derived was born, raised, and slaughtered? Well, they sued, of course, and told a U.S. district court that the unintended consequences included a violation of their First Amendment rights to free speech. They stated they disagree with speech that informs consumers as to the country or countries where an animal was born, raised, and slaughtered. After all, they argued, there is no difference between USA-produced beef and beef from animals born and raised in foreign lands: "In short, beef is beef, whether the cattle were born in Montana, Manitoba, or Mazatlán," asserted the National Cattlemen's Beef Association (NCBA), the National Pork Producers Council (NPPC), four meatpacker trade groups, and three foreign livestock trade groups in their lawsuit filed against COOL.

The U.S. district court was unpersuaded by the meatpacker trade groups' anguishing mantra of unintended consequences and flatly rejected, in a thoughtfully worded 76-page opinion, not only their First Amendment claim but also their assertion that they would all suffer irreparable injury if the final rule were fully implemented on November 23.

Unwilling to yield to the district court's rejection, the meatpacker trade groups immediately appealed. They argued the final rule should be blocked because it benefits domestic livestock producers. COOL supporters find this argument bizarre because they had asked Congress to pass COOL for this precise reason – to benefit U.S. farmers and ranchers. Soon thereafter, the appeals court handed the meatpacker trade groups yet another defeat by refusing to schedule a hearing on the appeal before November 23 – the day that irreparable injuries would supposedly begin.

After two resounding defeats by the judicial branch of government, the meatpacker trade groups turned their focus toward the long-delayed 2013 Farm Bill. They presumably hoped the grid-locked Congress would be either distracted enough or naïve enough to fall for their

exhausting, unintended consequences mantra and block the implementation of the final rule, an outcome the more probative courts have so far rejected.

How far the meatpacker trade groups will go to prevent U.S. livestock producers from differentiating their U.S. product in their own U.S. marketplace and U.S. consumers from knowing where their meat was produced is not known. However, the fact that they have been fighting COOL since 2002 suggests they have considerable resources dedicated to its ultimate destruction.

COOL Deals with Retailers

Nowhere in the COOL statute does it compel anyone other than retailers to speak. The COOL rule does not compel anyone other than retailers to speak.

The COOL statute is a labeling statute. It requires **retailers and only retailers** to label certain products. COOL requires retailers to pass on information that is already reported by others in the chain of commerce under other laws or regulatory schemes. This information is non-ideological and uncontroversial. Any labeling by packers is done as a service to their retail customers and not because it is required by COOL. The passing on of the origin information can be done in numerous ways. *See, e.g.*, 74 Fed. Reg. 2,707 ("This information [about the country(ies) of origin] may be provided either on the product itself, on the master shipping container, or in a document that accompanies the product through retail sale."). How to pass on origin information is the choice of the packer. *See*, http://www.meatami.com/sites/countryoforiginlabel.org/ht/d/sp/i/34491/pid/34491

Retailers are also allowed to use placards instead of labels at the meat counter to inform consumers of the information required by COOL.

Packers Must Segregate Based on Each Animal's Owner With or Without COOL

COOL does not require animals to be segregated. COOL does not deal with live animals. It deals with the sale of commodities such as beef and pork at the retail level. It does restrict comingling of retail products so as to accurately inform the consumer of where the animal from which the retail product was derived was born, raised and slaughtered. However, segregation is commonplace in the cattle industry.

Segregation of livestock prior to and after slaughter is essential and cannot be avoided when the purpose of slaughtering animals evolves from a subsistence exercise to that of an economic endeavor.

One of the more obvious reasons that a packer engaged in the economic endeavor of animal slaughter would need to segregate livestock is to distinguish the owner of each head of livestock to be slaughtered so the packer would know to whom to send the check representing payment for the animal after it is killed and based on the animal's carcass weight and grade. This type of livestock purchase arrangement, *i.e.*, whereby the financial settlement between the packer and the livestock owner does not occur until after the packer slaughters the animal and weighs and evaluates the resulting carcass, is commonplace and is known as "carcass-based" purchasing. The U.S. Department of Agriculture ("USDA") explains:

> In a "carcass-based" purchase, the price is quoted and the final payment is determined based on each animal's hot weight, which is the weight of the carcass after it has been slaughtered and eviscerated. Carcass-based purchase methods often involve schedules of premiums or discounts based on animal quality and other features, such as time of delivery and number of animals in the transaction.
>
> 2012 Annual Report, Packers and Stockyards Program, U.S. Department of Agriculture Grain Inspection, Packers and Stockyards Administration, at 36,

available at http://www.gipsa.usda.gov/Publications/psp/ar/2012_psp_annual_report.pdf.

The majority (approximately 60%) of all cattle purchased by packers that are required to report to the USDA Packers and Stockyards Program ("P&SP") are purchased on a carcass basis and carcass-based purchases are the predominant method used by packers to purchase hogs. *Id*, at 36-37. Therefore, with or without COOL, packers must continue segregating the majority of all their cattle purchases and hog purchases based on each animal's (both cattle and hogs) owner in order to finalize the purchase transactions for those livestock.

Additionally the opponents of COOL would like people to think that all cattle are the same. They are not. This is one of the reasons that cattle have been segregated for years. Segregation of cattle did not start with COOL.

In fact, the segregation of cattle for purposes other than separating them based on their ownership is also a common practice in the industry. For example, imported cattle are already segregated with unique origin identifiers as cattle entering the U. S. from Canada are required to be tattooed and/or are branded with a "CAN," and cattle from Mexico are required to be tattooed and/or are branded with an "M". Some of the additional reasons that packers already segregate cattle include:

- Branded programs such as "All Natural". "Organic" and "Certified Angus Beef".
- Export eligibility
- National School Lunch Program
- Department of Defense Prime Vendor Program
- Age and source verified programs
- USDA quality grading
- Payment on Grade and Yield basis,
- Illness
- Size
- Weight
- Breed vs. Cross Breed,
- Brahman influence,

- Gainability
- Sex.
- Quarantine (Mexico) – Check for Brucellosis, Tuberculosis and spay Heifers.

The opponents of COOL use the term commingling as a synonym for segregation. Nothing could be further from the truth. Meat is commingled. Cattle are segregated. The COOL statute does not allow commingling of covered retail products. Therefore the COOL Rule must not allow comingling so that the consumer is accurately informed of where the animal from which the retail product was derived was born, raised and slaughtered. Commingling breeds consumer confusion and deception. The use of commingling is factually misleading, legally illegitimate, and rhetorically repulsive. The Secretary of Agriculture under the previous administration overreached in his interpretation of the statute by allowing commingling. Secretary Vilsack was acting within the scope of his authority when he issued the current COOL regulation by righting the previous wrong and striking down the allowance of commingling. Additionally, it is reasonable to interpret that 7 U.S.C.S. § 1638a(a)(1) includes a separate duty to inform consumers of the production steps to preserve the four different labeling categories for meat. The Courts should embrace the actions of the Secretary since they have historically given deference to such actions of the Secretary when dealing with matters such a COOL. *See, e.g., NRA of Am., Inc. v. Reno*, 216 F.3d 122, 136 (D.C. Cir. 2000).

The terms "born," "raised," and "slaughtered" are very significant to the intent of the COOL statute. This deliberative listing of production steps demonstrates that Congress believed that these steps were integral to defining a product's origin. Indeed, one of the main impetuses for the law was to prevent consumers from being misled into believing that imported-animal products, which were processed in the United States and thus received USDA inspection and

grade labels[1] or USDA's prior voluntary "Product of the U.S.A." labels[2] were from the United States. *See, e.g.*, 148 Cong. Rec. S3979 (May 8, 2002) (statement of Sen. sponsor Tim Johnson) ("Well-funded opponents of country-of-origin labeling . . . like to import cheap meat and other products into the United States and camouflage those products as "Made in the USA". . .); 145 Cong. Rec. S2038 (Feb. 25, 1999) (statement of Sen. Feingold) (stating that the only guidance consumers have without COOL "is misleading at best-since many of us would assume that a steak that carries a USDA inspection and grade label is U.S. produced. But in many cases, this couldn't be farther from the truth.")

Before the WTO the United States argued that preventing this exact type of consumer confusion was its main interest with COOL.[3] (*See* slip op. at 16 n.14 (citing Panel Reports, United States – Certain Country of Origin Labelling (COOL) Requirements, WT/DS384/R, WT/DS386/R, adopted 18 November 2011 "Panel reports", located at http://www.wto.org/english/news_e/news11_e/384_386r_e.htm, at ¶ 7.665.)

Even after the 2002 COOL statute was passed in an attempt to eliminate some of this confusion, USDA thought it necessary to prevent the opposite type of consumer confusion that could result from labeling a product as imported when it was processed in the United States. So, in its 2003 proposed rules, USDA mandated the labeling of U.S. production steps for meat from animals not born, raised, and slaughtered in the United States, and allowed the voluntary labeling of production steps taking place elsewhere. 68 Fed. Reg. 61,944, 61,949 (Oct. 30, 2003) ("AMS

1 These are affixed on the majority of beef derived from cattle slaughtered in the United States
2 Prior to COOL, these were applicable to meat products that only had minimal processing in the United States.
3 It is perhaps not surprising that years later Plaintiff-Appellants would indicate that what they really want is a scheme that would return consumers to the days prior to any COOL labels whatsoever, as they sought a scheme that would allow all products processed in the United States to be labeled as product of the United States and would have removed any mixed origin labels for product. See AMI comments, (Jan. 8. 2010) available at http://www.meatami.com/ht/a/GetDocumentAction/i/56354 at 5.

recognizes that to label products of an animal that was only born in country X, but raised and slaughtered in the United States solely as 'Product of country X' does not reference the significant production steps that occurred in the United States.")

When Congress passed the 2008 amendments to the COOL law designating three additional country-of-origin designations – multiple countries of origin, imported for immediate slaughter, and foreign countries of origin – and USDA did not finalize any proposed production-step labeling, the resulting consumer confusion from not knowing the location of production steps for particular meat products again became manifest.

As recognized by the WTO, under the prior B- and C-category rules, a shelf with the label of "Product of X, Y" leaves consumers mistakenly believing that the shelf contains product from both countries. (*See* Panel Reports at ¶ 7.700.) When such labels are affixed on a product with a single piece of meat, it is even more vexing, as consumers would need knowledge of the labeling scheme to not be confused. (*Id.*) Even then, such consumers would likely be misled, as the prior rules allowed retailers to label the countries of origin for all B-labeled products to be listed in any order. This means that product labeled "Product of Mexico, United States" as an example, could just as equally be B-labeled product as it could be C-labeled product. (*See* Panel Reports at ¶ 7.100.)

Layered on top of this confusion is that the prior rules allowed so-called "commingling," so that A- and C-category product receives a B-label, so long as any of it contains even a scintilla of meat derived from a B-category animals. When this occurs, there is no way for the consumer to know where the product is from. (*See* Panel Reports at ¶ 7.100.) Therefore, preventing consumer confusion about the location of production steps for meat products was not only one of the original purposes behind the COOL statute, the failure of USDA's prior rules to address this

type of confusion after the 2008 COOL statute's amendments was one of the major reasons that the WTO found such rules to be defective.

Notwithstanding all the wailing and gnashing of teeth, Packers have very sophisticated and computerized tracking systems that allow them to track meat throughout their plants, freezers and shipping facilities. This is done to ensure proper payment, customer satisfaction, quality control and proper delivery of goods and services.[4]

Do Consumers Have Rights?

There are simple questions that must be answered here. First, do consumers have the right to know where their food comes from? Congress has responded with a resounding yes to this question many times. Second, is it important for consumers to be informed so that they can make intelligent decisions when purchasing products? Again Congress has responded with a resounding yes to this question many times. Third, did Congress determine that it was an important part of the COOL statute for consumers to know where their raw meat products were born, raised and slaughtered? Is it not in the public interest to tell the truth about a product? Is it not in the public interest to allow the public to make informed and intelligent decision about what they eat and what they feed their families? Obviously, the answer is yes, again and again.

[4] The RFID system enables a meat hook to complete the automatic documentation of an animal, from birth to an individual packaged meat product, ready to be sold at a supermarket. The plant can not only track individual animals, but also record important information about each carcass, like its weight and grade, which can be tied to billing and sales systems. http://www.xerafy.com/blog/wheres-the-beef-rfid-tracking-within-slaughterhouses/

Maybe the most amazing part of this story is the fact that every pound of beef needs to be tracked from steer to box and package, all without ever stopping for more than a few hours or days for the slowest movers. This kind of sophistication would draw attention in any distribution operation, especially one in a cooler. Implicit in this part of the story is the information system. Besides tracking the product throughout the facility, the plant IT manages the inventory management of every by-product from hides to bone. http://www.cisco-eagle.com/case-studies/Excel-Beef-Dodge-City-KS

The opponents of COOL want the Court and/or Congress to disregard all of the above and allow them to deceive the public through tricks and chicanery like commingling and other deceptive practices. In support of their position, they draw an analogy to the most notorious recent example of an industry misleading consumers – tobacco.

Opponents of COOL rely on a cigarette labeling case in which *R. J. Reynolds* challenges a rule that would have compelled it to print disturbing graphic images on its cigarette packages, the purpose of which was to prevent people from buying the product. There is simply no comparison between COOL and the cigarette labeling law and there is certainly no meaningful comparison between beef and cigarettes.[5] Tobacco products are probably the most regulated product on the planet and rightfully so due to their known cancer-causing affects. However, the COOL rule does not compel anyone to place graphic and repulsive images on a package of beef or pork. All the COOL rule does is provide the consumer with reasonable, non-graphic, non-ideological and uncontroversial information. There can be no question that this is in the best interest of the public. The COOL rule does not alter the range of permissible production practices. It simply implements the requirement that meat, however processed, bear the appropriate label reflecting applicable origin information. Consumers should be allowed to purchase products based on their particular choices such as the

5 The differences between the rule in R. J. REYNOLDS CASE and COOL makes the comparison meaningless. Reynolds involved a Warning label, and a normative message that one should not smoke, while COOL requires a simple statement of objective facts. In Reynolds the government created graphic depictions designed to scare and disgust consumers in order to enhance the normative message that one should not smoke. Moreover, the situation and history of the tobacco industry is unique, involving an addictive, cancer-causing, non-food product and companies with a long history of packaging regulations.

COOL, in contrast to the rule in Reynolds, requires factual and uncontroversial information. The information is needed to correct the deception and confusion create by the 2009 COOL Rule which added the concept of commingling without notice or opportunity for comment. COOL is mandated by statute. The Final Rule was written specifically to comply with the WTO ruling. Unlike the Reynolds rule, the labeling requirement is imposed on the retailers, and the packers are not compelled to label the product. The labels merely pass along information from farmers and ranchers. If the packers choose to place labels on the packages, it is providing that service to the retailers voluntarily. The packers already maintain the information, and the only change would be that the information would be passed along to the consumer.

breed of cattle, prior food sources, history of disease problems in certain countries, lower yield and lower beef quality just to name a few. [6]

Even the R. J. Reynold's Case Supports the COOL Rule

COOL meets the test described in the R.J. Reynolds case. The Court explained that what matters in a District Court's review of First Amendment claims under *Zauderer* is that "the government shows that, absent a warning, there is a self-evident – or at least 'potentially real' – danger that an advertisement will mislead consumers." *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1214 (D.C. Cir. 2012) (citation omitted). No more is needed when the possibility of deception is self-evident. *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 251 (2010); *Spirit Airlines, Inc. v. U.S. DOT*, 687 F.3d 403, 413 (D.C. Cir. 2012)). *See Anheuser-Busch v. Schmoke*, 63 F.3d 1305, 1311 (4th Cir. 1995) (stating that for a facial challenge, the government's burden is met where it appears to the court that the government "could reasonably have believed, based on data, studies, history, or common sense," that the measure would directly advance the government's interest.) Generally courts "will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transp., Inc. v. Arkansas-Best Freight Sys.*, Inc., 419 U.S. 281, 286 (1974).

The Final COOL Rule's purpose is to "ensure label information more accurately reflects the origin of muscle cut covered commodities in accordance with the intent of the statute while complying with U.S. WTO obligations." 78 Fed. Reg. at 31,375. Preventing consumer confusion and deception has always been a central purpose behind the COOL statute, as expressed in its language and history. Such confusion stems from not knowing where meat is

6 Canada has a history of problems with Bovine Spongiform Encephalopathy (Mad Cow Disease) and Mexico has a history of problems with Bovine Tuberculosis and Brucellosis.

from or the related information of where the cattle were born and raised. Moreover, such consumer misinformation was a central reason for the WTO finding that the USDA's prior label scheme was inadequate. The USDA finalized the Final COOL Rule to address the WTO-found deficiencies and plainly addressed areas of concern to prevent the same type of confusion. Eliminating this confusion is precisely what the Final COOL Rule did by mandating the production steps in its labeling.

Looking first at the statutory language, specifically the provisions that have not been significantly altered since the statute's inception, retailers are required to designate covered meat commodities from the United States, only if the animals from which they were derived were "exclusively born, raised, and slaughtered in the United States." *See* Farm Security and Rural Investment Act of 2002, Pub. L. 107-171, 10816, 116 Stat. 134, 534-36. Prior rules did not dictate in what manner production steps were to be addressed on the labels. They were authorized to voluntarily include details regarding productions steps. 73 Fed. Reg. at 45,110, 45,112 (Aug. 1, 2008)("[T]he origin declaration *may* include more specific information related to production steps." (emphasis added)). The retailers not only did not include such information voluntarily, they used labels that created confusion in this regard. The Final COOL Rule sought to address the resulting confusion. To the extent that the test in *R.J. Reynolds* is relevant here, COOL passes the test.

The Final COOL Rule Passes the Tests of Zauderer and Central Hudson

The relevant test to be applied to COOL are set forth in *Zauderer* and *Central Hudson*. To survive the *Zauderer* test, the Final COOL Rule need only be "reasonably related" to the government's interest in preventing consumer deception. *Spirit Airlines, Inc*, 687 F.3d at 414

(citing *Milavetz*, 559 U.S. at 250; *Zauderer*, 471 U.S. at 651). While this standard is not satisfied by mere speculation or conjecture, restrictions can be "based solely on history, consensus, and 'simple common sense.'" *Lorillard Tobacco Co.*, 533 U.S. at 555 (quoting *Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618 (1995)). The right of a commercial speaker not to divulge accurate information regarding his services is not a fundamental right. 471 U.S. at 65.

The COOL Rule serves a substantial government interest in correcting past deceptive practices. The avoidance of misleading and deceptive advertising through a remedial measure designed to correct the misleading prior labeling, which, as explained above, is the purpose of the Final COOL rule,[7] is also a substantial interest under *Central Hudson*, regardless of whether these past historic statements were made in bad faith. *See Novartis Corp. v. FTC*, 223 F.3d 783, 789 (D.C. Cir. 2000); *Warner-Lambert Co. v. FTC*, 562 F.2d 749, 763 (D.C. Cir. 1977) ("[G]ood faith . . . is irrelevant to the need for corrective advertising in general.")

Additionally the USDA view that it was acting in accordance with the WTO ruling is an additional reason that the rule directly advances the government's interest. As Judge Wilkins recently penned persuasively in finding that a country of origin labeling scheme for diamonds met the *Central Hudson*'s second prong:

> As the Supreme Court recently made clear, in this context, conclusions must often be based on informed judgment rather than concrete evidence, and that reality affects what we may reasonably insist on from the Government. . . . . Further, while concerns of national security and foreign relations do not warrant abdication of the judicial role, and

7 This is not the only substantial government interest that the U.S. government has in COOL, although it was the only one discussed by the District Court below with the preliminary injunction. One of the main impetuses was to prevent consolidation. See, e.g., 148 Cong. Rec. H2022, 2035 (May 2, 2002) (statement of Rep. Thune) ("This farm bill will enhance producer competition . . . .") It is also aimed at consumer safety. See, e.g., 150 Cong Rec S614, 634 (Feb. 4, 2004) (statement of Sen. Daschle) ("That is what we are talking about, improving upon an already good meat safety system. That, too, is a good reason why country-of-origin labeling ought to be law today.") While USDA has repeatedly asserted that the COOL program is not a safety program, such an admission might be perceived as a tacit admission that its other regulatory programs are inadequate. But consumers rely on COOL both as a proxy for safety and quality, just as Congress intended. See 68 Fed. Reg.at 61,953 ("[C]onsumer surveys also indicate that consumers may desire COOL . . . because it represents to them a proxy for product safety or quality . . . .")

> while the Court does not defer to the Government's reading of the First Amendment, even when such interests are at stake, the Court must nevertheless recognize that when it comes to collecting evidence and drawing factual inferences in this area, the lack of competence on the part of courts is marked. Indeed, judicial review is particularly deferential in areas at the intersection of national security, foreign policy, and administrative law.

Nat'l Ass'n of Mfrs. v. SEC, 2013 U.S. Dist. LEXIS 102616, 107-08 (internal quotation marks and citations omitted). Because the USDA was operating in this context, it was entitled to exercise the informed judgment of the executive branch to craft rules that would meet the WTO ruling.

The final requirement under *Central Hudson* is that the restriction on commercial speech be "'no more broad or no more expansive than necessary to serve its substantial interests.'" *Nat'l Cable & Telecomms. Ass'n v. FCC*, 555 F.3d 996, 1002 (D.C. Cir. 2009) (quoting *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 476 (1989)). As the 10th Circuit has remarked, "First Amendment challenges based on under- inclusiveness face an uphill battle in the commercial speech context. As a general rule, the First Amendment does not require that the government regulate all aspects of a problem before it can make progress on any front." *Mainstream Mktg. Servs*, 358 F.3d at 1238-1239. "'Within the bounds of the general protection provided by the Constitution to commercial speech, we allow room for legislative judgments.'" *Id.* (quoting *United States v. Edge Broad. Co.*, 509 U.S. 418, 434 (1993)).

Indeed, under-inclusiveness is relevant "only if it renders the regulatory framework so irrational that it fails materially to advance the aims that it was purportedly designed to further." *Id.* at 1238-39; *see also Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995); *Central Hudson*, 447 U.S. at 564. In fact, the WTO rejected arguments advanced by Mexico and Canada claiming these exceptions demonstrated protectionism. (See: Panel Reports ¶¶ 7.684-85 ("Some of such exceptions might be justifiable for practical reasons and simply facilitate the implementation of

the measure at issue . . . . We also consider that the scope of the COOL measure is broad enough to cover a significant range of food products and entities handling these products.”))

Therefore, whether it is under *Zauderer* or *Central Hudson*, the Final COOL Rule passes First Amendment scrutiny both because it demonstrates a sufficient government interest of preventing consumer deception and because it is sufficiently tailored to do so. But most importantly, providing consumers with appropriate information that prevents confusion and deception and assists them in making intelligent decisions is ***the right thing to do***.