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The Birth Place of Food Products: Do You Know Where Your Food Comes From?

by

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NEWS

The Birth Place of Food Products: Do You Know Where Your Food Comes From?

By Jacquelyn Trussell*

I. Introduction

Where's the beef? The public may never know the answer to that question or to any other question concerning the origin of many different food products, including meat, peanuts, fresh fruits, and vegetables.¹ This is because Congress has delayed the effect of the country-of-origin labeling regulation, otherwise known as "COOL," for two years.²

The desirability of COOL has been the cause of considerable debate. Most consumers seem to be in favor of COOL, in contrast to producers who are largely opposed to the regulation. Both sides in the debate have strong arguments in their favor, resulting in Congress' contradictory behavior. Thus, COOL's future will depend on which side is more persuasive.

II. Background

COOL was introduced in the 2002 Farm Bill, which amended the 1946 Agricultural Marketing Act ("AMA").³ The United States

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¹ Cindy Skrzycki, *Now, You May Never Know Where That Broccoli Has Been*, WASH. POST, Feb. 3, 2004, at E01, available at 2004 WL 55835489.

² Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, 118 Stat. 3 (2004).

³ See The Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, 116 Stat. 134 (2002). See also *U.S. farmers want COOL, 82 percent of American consumers request it. . .*, ABERDEEN AM. NEWS, Jan. 30, 2004, at 94,

Department of Agriculture (“USDA”) introduced COOL as a voluntary provision⁴ that was to become mandatory in September 2004.⁵ The regulation requires “a retailer of a covered commodity” to inform consumers, “at the final point of sale of the covered commodity to consumers, of the country of origin of the covered commodity.”⁶ Covered commodities include beef, lamb, pork, fish, and perishable agricultural commodities such as peanuts.⁷

However, there are significant exemptions to COOL. For example, if a covered commodity is merely an ingredient of a processed food item, then the country-of-origin labeling requirement is not applicable.⁸ The basis for this exemption is what has become known as the “stir fry” argument.⁹ Proponents of this argument claim that there could be 216 possible combinations of the origin of the products in a bag of mixed vegetables.¹⁰ As a result, the argument goes, it would be unreasonable to require retailers of processed food items to adhere to the country-of-origin labeling requirement.¹¹ Also, COOL does not cover poultry products or food service establishments.¹² These two exemptions are interesting, because Americans spend 46% of their food dollars outside the home, and chicken happens to be America’s most popular meat.¹³ Thus, the effectiveness of COOL is significantly limited by its own exemptions.

Nevertheless, COOL’s effectiveness is bolstered by the significant penalties it imposes upon violators. The penalty for violating the regulation is a fine that could be as much as \$10,000.¹⁴ Thus, multiple violations of COOL could quickly become costly.

available at 2004 WL 57199030 [hereinafter *U.S. farmers want COOL*].

⁴ Country of Origin Labeling, 7 U.S.C. § 1638c (2004).

⁵ 7 U.S.C. § 1638d.

⁶ 7 U.S.C. § 1638a.

⁷ *Id.*

⁸ 7 U.S.C. § 1638.

⁹ Skrzycki, *supra* note 1.

¹⁰ *Id.*

¹¹ *Id.*

¹² 7 U.S.C. § 1638a.

¹³ Scott Kilman, *Grocers, Meatpackers Fight Law to Label Origin of Food Products*, WALL. ST. J., June 26, 2003, at B1, available at 2003 WL-WSJ 3972150.

¹⁴ 7 U.S.C. § 1638b.

III. Recent Legislation

Opponents of COOL have delayed the scheduled September 2004 implementation of the USDA's rule.¹⁵ On January 23, 2004, Congress passed an omnibus appropriations bill, which unbeknownst to many, included a provision amending the AMA.¹⁶ This provision, Section 749 of Division A, Title VII, of the AMA, had the effect of delaying the mandatory application of COOL for all products covered under that law, except for "'farm-raised fish' and 'wild fish'" until September 2006.¹⁷ Although this legislation delayed the implementation of COOL, "the law still requires USDA to issue by September 2004 regulations for eventual COOL implementation."¹⁸

The recent amendment to COOL is a result of the opposition that it has faced. Opponents of COOL consider the two-year delay of the mandatory implementation of the regulation as the first step in having the regulation repealed.¹⁹ The delay was achieved through a combination of lobbying, white papers, polling, and high-level meetings.²⁰ Aiding these actions was a USDA analysis, which found that the benefits of COOL's implementation would be negligible.²¹ The Office of Information and Regulatory Affairs also submitted a letter, which stated that "the rule is one of the most burdensome rules to be reviewed by this administration."²²

Proponents of COOL, however, are furious over not only the two-year delay, but also the surreptitious manner in which the delay was achieved. The amendment to COOL "was added in the dead of night without negotiation."²³ As a result, several proponents, including Senator Minority Leader Thomas A. Daschle, are very upset about this action.²⁴ In fact, in a letter to the White House,

¹⁵ Skrzycki, *supra* note 1.

¹⁶ Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, 118 Stat. 3 (2004) (codified at 16 U.S.C. 1638d).

¹⁷ *Id.*

¹⁸ *U.S. farmers want COOL*, *supra* note 3.

¹⁹ Skrzycki, *supra* note 1.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ Cindy Skrzycki, *Now, You May Never Know Where That Broccoli Has*

Senator Daschle chastised the Bush administration for its involvement in the amendment.²⁵ Senator Daschle argued in the letter that “[t]he American people deserve to know where their food comes from and those of us who know the importance of labeling law will be back very soon to force the administration to uphold and implement the law.”²⁶ The House responded to Senator Daschle’s arguments when it introduced a bill on January 27, 2004.²⁷ This bill sought to repeal the amendment that enacted the two-year delay in the implementation of COOL.²⁸ However, at this time, neither the House nor the Senate has voted on this bill.

IV. Opinions about COOL

The reaction to COOL has been diverse. The regulation has sharply divided Americans into one group that argues that COOL is too burdensome and costly and another group that believes that COOL will improve demand for United States labeled products and protect consumers.²⁹ The actions of Congress are indicative of this sharp divide among Americans. Since the enactment of COOL in 2002, members of Congress have debated whether or not the regulation should remain, as evidenced by its recent amendment to COOL³⁰ and the House’s proposal of a bill that seeks to repeal the amendment.³¹ As of now, it is not clear whether the supporters or the opponents of COOL will successfully sway congressional opinion, but a lot depends on the strength of each side’s arguments.

A. Arguments and Viewpoints from Supporters of COOL

Those in favor of the regulation point out that country-of-

Been, WASH. POST, Feb. 3, 2004, at E01, *available at* 2004 WL 55835489.

²⁵ *Id.*

²⁶ *Id.*

²⁷ H.R. 3732, 108th Cong. (2004).

²⁸ *Id.*

²⁹ Rod Smith, *COOL called North American issue that will change both sides of border*, FEEDSTUFFS, June 2, 2003, *available at* <http://www.countryoforiginlabel.org/PressCenter/COOL%20-%20Meyer.htm> (last visited Mar. 17, 2004).

³⁰ Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, 118 Stat. 3 (2004).

³¹ H.R. 3732, 108th Cong. (2004).

origin labeling is not a new idea and in fact has existed long before the recent food contamination scares.³² Several states have already implemented their own programs for country-of-origin labeling.³³ For example, Alabama, Arkansas, Mississippi, and Louisiana have origin labeling requirements for certain seafood products whereas other states, such as Wyoming, Idaho, North Dakota, South Dakota, and Kansas have origin labeling requirements for particular meat products.³⁴

Furthermore, the overwhelming majority of farmers and ranchers are in favor of the regulation and would like to see it implemented.³⁵ COOL is beneficial for this group because it would allow consumers to select products based on their preferences for the country of origin,³⁶ and allow American farmers and ranchers to benefit from a consumer's desire to support United States producers.³⁷ In turn, COOL would enable United States ranchers and growers to compete with imports.³⁸ Of course, this result would only occur if consumers prefer domestic products to imports.

Additionally, the recent mad cow scare caused dozens of countries to close their markets to United States beef products, including two of America's biggest customers, Japan and Mexico.³⁹ Because the foreign beef trade was worth approximately \$3.2 billion in 2003 prior to the scare, ranchers are looking to COOL as a way to repair the damage wrought by the infected cattle that originated from Canada.⁴⁰ COOL would allow American ranchers to distance

³² *The Reasons We Need Mandatory Country of Origin Labeling of Fruits and Vegetables*, at <http://www.americanforlabeling.org/resources/reason.htm> (last visited Mar. 17, 2004) [hereinafter American for Labeling].

³³ Mandatory Country of Origin Labeling of Beef, Lamb, Pork, Fish, Perishable Agricultural Commodities, and Peanuts, 68 Fed. Reg. 61,944 (Oct. 30, 2003).

³⁴ *Id.*

³⁵ Skrzycki, *supra* note 1.

³⁶ Mandatory Country of Origin Labeling of Beef, Lamb, Pork, Fish, Perishable Agricultural Commodities, and Peanuts, 68 Fed. Reg. at 61,944.

³⁷ *Id.*

³⁸ David Rogers, *Business Gets White House Budget Aid*, WALL ST. J., Jan. 23, 2004, at A4, available at 2004 WL-WSJ 56917944.

³⁹ *Mad cow could widen the split in cattle industry*, ABERDEEN AM. NEWS, Feb. 13, 2004, at 9, available at 2004 WL 57200724.

⁴⁰ *Id.*

themselves from the Canadian industry and bring cattle prices up to the prices in 2003.⁴¹ The implementation of labeling requirements would also inspire confidence in products from the U.S.⁴²

Similarly, 82% of American consumers also embraced COOL,⁴³ as a consumer-right-to-know and food safety issue.⁴⁴ Each year, 76 million Americans contract food-borne diseases and five thousand of them die.⁴⁵ Because of the recent outbreaks of mad cow disease from cows that originated in Canada,⁴⁶ salmonella from cantaloupes from Mexico,⁴⁷ and Hepatitis A from scallions from Mexico,⁴⁸ consumers are looking to COOL as a way to protect themselves from consuming contaminated products.⁴⁹ Thus, the country-of-origin label becomes a representation of product safety and quality and of desirable environmental or labor practices rather than just the origin of the product.⁵⁰

Additionally, COOL would give consumers the ability to make informed decisions about the food they eat,⁵¹ an ability they

⁴¹ *Id.*

⁴² *U.S. farmers want COOL, supra* note 3.

⁴³ *Id.*; see also *NFU Unveils National Consumer Poll*, at http://www.nfu.org/newsroom_news_release.cfm?id=115 (Jan. 19, 2004) [hereinafter *NFU Consumer Poll*].

⁴⁴ Rod Smith, *House unit withholds COOL funds; ag committee chair calls for hearing*, FEEDSTUFFS, June 23, 2003, available at <http://www.countryoforiginlabel.org/PressCenter/Feedstuff062303-COOL03.htm> (last visited Mar. 17, 2004).

⁴⁵ Chris Waldrop, *A Mandatory Animal Identification System Capable of Tracing Animals Back to the Farm of Origin Is Essential to Protect Public and Animal Health*, CONSUMER FED'N OF AM., Jan. 23, 2004, available at www.consumerfed.org/012304animalid.html (last visited Mar. 17, 2004).

⁴⁶ Rogers, *supra* note 38.

⁴⁷ Kilman, *supra* note 13.

⁴⁸ Chris Waldrop, *Statement of CFA's Carol Tucker Foreman on Country of Origin Labeling*, CONSUMER FED'N OF AM., Jan. 20, 2004, available at www.consumerfed.org/012104cfa_daschle_statement.html (last visited Mar. 17, 2004).

⁴⁹ *Id.*

⁵⁰ *Mandatory Country of Origin Labeling of Beef, Lamb, Pork, Fish, Perishable Agricultural Commodities, and Peanuts*, 68 Fed. Reg. 61,944 (Oct. 30, 2003).

⁵¹ Chris Waldrop, *CFA Supports Country of Origin Labeling for Food*, CONSUMER FED'N OF AM., Jan. 6, 2004, available at

have with most other consumer goods like cars and electronics.⁵² For over 70 years, the United States has required other countries to place a label of origination on imported consumer goods.⁵³ Even fruits and vegetables are subject to certain country-of-origin labeling requirements.⁵⁴ Imported containers of fruits and vegetables in their natural state must have labels.⁵⁵ Once the products are removed from the shipping containers, however, labels of origin are no longer required.⁵⁶ Consumers want to be able to make an informed decision about the products they eat based on where and how they were grown.⁵⁷ Strong evidence of the consumers' desires comes from the fact that 81% of American consumers are willing to pay more for this privilege.⁵⁸

B. Arguments and Viewpoints from Opponents of COOL

In contrast, opponents to COOL, which include the Food Marketing Institute, individual beef and pork producers, packers, and processors, supermarkets and meat industry groups, find that the benefits of the legislation are far outweighed by its costs.⁵⁹ Because producers will only benefit if COOL increases demand enough to cover producers' costs of labeling, many producers oppose this regulation.⁶⁰ For this group, there has been no objective study demonstrating that consumers will not only demand more products subject to the COOL requirement but also pay enough to offset the

http://www.consumerfed.org/010604cfa_COOL_statement.html (last visited Mar. 17, 2004).

⁵² Waldrop, *supra* note 48.

⁵³ American for Labeling, *supra* note 32.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Marlene Lucas, *Poll: Most Americans Support Country-of-Origin Food Labels, as Do Farmers*, GAZETTE, Jan. 20, 2004, available at 2004 WL 59932569; NFU Consumer Poll, *supra* note 43.

⁵⁹ Smith, *supra* note 44.

⁶⁰ Mandatory Country of Origin Labeling of Beef, Lamb, Pork, Fish, Perishable Agricultural Commodities, and Peanuts, 68 Fed. Reg. 61,944 (Oct. 30, 2003).

costs created in complying with the law.⁶¹ The fact that the market has not provided origin labels is strong evidence that consumers have not demanded them and will not pay higher prices for them.⁶²

The ability to offset costs is a serious concern because the estimated cost of implementing COOL in the first year is between \$582 million and \$3.9 billion.⁶³ This figure takes into account both the costs of record keeping and the costs associated with the modification of production, storage, distribution, and handling systems necessary to enable country-of-origin information to be tracked and maintained from start to finish.⁶⁴ It is the cost of modification that is of particular concern to producers. Meatpackers argue that complying with COOL would require extensive modifications of slaughter plants to prevent animals of different nationalities from mingling at a cost of tens of millions of dollars per plant.⁶⁵ Certain producers are also concerned about the costs associated with the complicated record keeping bureaucracy.⁶⁶ For example, “[a] package of hamburger would probably have to list the nationality of the contents in order of weight”⁶⁷ and include not only the country where the cow was born but also the country where the cow was raised and slaughtered, which can often be different.⁶⁸

To offset the increase in the cost of production, the demand for covered commodities would have to increase by one to five percent.⁶⁹ However, the USDA suggests that such an increase is unlikely because in the short term, producers will cover the costs

⁶¹ Smith, *supra* note 29.

⁶² Rod Smith, *Funding or no funding, beef and pork must have origin label under COOL*, FEEDSTUFFS, July 14, 2003, available at <http://www.countryoforiginlabel.org/PressCenter/Feedstuff071403-COOL01.htm> (last visited Mar. 17, 2004).

⁶³ Mandatory Country of Origin Labeling of Beef, Lamb, Pork, Fish, Perishable Agricultural Commodities, and Peanuts, 68 Fed. Reg. at 61,944.

⁶⁴ *Id.*

⁶⁵ Kilman, *supra* note 13.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Smith, *supra* note 62.

⁶⁹ Transcript of Remarks from a Technical Background Briefing for the Press on USDA's Proposed Rule on Mandatory Country-of-Origin Labeling (Oct. 27, 2003), available at <http://www.ams.usda.gov/cool/presstranscript.htm> (last visited Mar. 17, 2004).

associated with conforming to COOL requirements by increasing consumer prices or lowering prices paid to suppliers.⁷⁰ Either way, producers are bound to suffer, particularly in light of the fact that United States trading partners have long opposed mandatory country-of-origin labeling.⁷¹ They view the labeling requirement as a trade barrier,⁷² despite the fact that most United States trading partners have their own country-of-origin labeling requirements.⁷³ In fact, the Canadian government particularly wants Congress to repeal COOL because Canada exports millions of cattle and pigs to the United States every year.⁷⁴ Thus, in addition to domestic concerns regarding demand, United States food producers are worried that, once COOL is implemented, trading partners will retaliate, hindering foreign trade and driving up costs.⁷⁵

V. Conclusion

The legitimate and persuasive arguments for and against COOL have created a standoff. Thus, the result of the appropriations bill delaying the implementation of COOL has yet to be seen. Potentially, it could signal that Congress intends to repeal the regulation in its entirety, as so many producers are hoping. However, this amendment could also be COOL's savior. By delaying the implementation of COOL for two years, the amendment gives legislators additional time to create a system that will satisfy both consumers and producers.⁷⁶ Supporting this conclusion is a review of history, which shows that the food industry also opposed nutrition labeling using many of the same arguments that the opponents to COOL have used.⁷⁷ Nevertheless, nutrition labeling is used by

⁷⁰ Mandatory Country of Origin Labeling of Beef, Lamb, Pork, Fish, Perishable Agricultural Commodities, and Peanuts, 68 Fed. Reg. 61,944 (Oct. 30, 2003).

⁷¹ Int'l Trade, at <http://www.countryoforiginlabel.org/internationaltrade.htm> (last visited Mar. 17, 2004) [hereinafter International Trade].

⁷² *Id.*

⁷³ *U.S. farmers want COOL*, *supra* note 3.

⁷⁴ Kilman, *supra* note 13.

⁷⁵ International Trade, *supra* note 71.

⁷⁶ *Cattle Industry Annual Convention*, ABERDEEN AM. NEWS, Feb. 13, 2004, at 6, available at 2004 WL 57200723.

⁷⁷ Waldrop, *supra* note 48.

millions of consumers today and more significantly is supported by the same industry that had originally opposed it.⁷⁸ Therefore, the mere fact that the Bush administration seems to be leaning toward a repeal of COOL is not conclusive. Thus, it is still possible that Congress will respond to the desires of consumers rather, than the efforts of the food industry's lobbyists, and implement COOL.

⁷⁸ *Id.*