

Food Marketing Institute

Country of Origin Labeling Update (7.22.2009)

Frozen Fruits & Vegetables

Somewhat surprisingly, the issue that has engendered the greatest number of questions concerns frozen fruits and vegetables. It seems that a fair amount of frozen fruits and vegetables that are already in stores and warehouses do not bear country of origin labeling. Questions have been raised regarding whose “fault” this is and who is required to rectify the situation. Below is an overview of the law and how it applies in this case.

In brief, for covered commodities produced or packaged after September 30, 2008, retailers are responsible for providing the information to consumers, and suppliers are legally obligated to provide the necessary information to retailers. We encourage you to contact your suppliers to obtain the necessary documentation: i.e., confirmation that affirms unlabeled products in your possession were produced prior to September 30, 2008 or, if not, what the correct country of origin is and how that information will be provided to consumers.

The analysis starts with the Tariff Act, which requires *suppliers* of many products, including imported frozen fruits and vegetables, to label their products with the countries from which the product was imported; the Tariff Act does not apply to goods or foods produced domestically.

The Agricultural Marketing Act (“AMA”) amendments that gave us the most recent country of origin labeling requirements (“COOL”) require all covered commodities, including frozen fruits and vegetables, to bear labeling regarding their country of origin, regardless of whether the foods were produced domestically or whether they were imported. The difference, however, is that the AMA COOL statute requires *retailers* to inform consumers of the country of origin of all covered commodities, including frozen fruits and vegetables. Thus, the failure to provide country of origin information for frozen fruits and vegetables of domestic origin is a problem for retailers under the AMA COOL requirements.

However, the AMA COOL law also requires suppliers to inform retailers of the country of origin of covered commodities, including frozen produce. Thus, even though retailers have the obligation to inform consumers, suppliers have a legal obligation to inform retailers.

The interim final rule (“IFR”) stated that the COOL requirements would only apply to covered commodities that were “produced or packaged” after September 30, 2008. Although the final rule is silent on the matter, USDA has advised that the Agency will honor the September 30, 2008 IFR standard. Thus, country of origin labeling is not

required for covered commodities, including frozen fruits and vegetables that would otherwise be covered, if those commodities were “produced¹ or packaged” prior to September 30, 2008.

Over the past several weeks, we have heard from many retailers who have been cited during COOL inspections for failing to provide information on the country of origin of frozen fruits and vegetables. To avoid further citations, we encourage you to work with your suppliers -- both branded and private label suppliers -- to obtain further information about the products that you have on hand.

- If your supplier can inform you that the products that you have were produced or packaged *on or before September 30, 2008*, these products are not subject to the COOL requirements and you can advise USDA accordingly. USDA has stated that a blanket letter that connects the products on hand to the letter (e.g., “best if used by” date or lot code) would suffice.
- If your supplier informs you that the products were produced or packaged after September 30, 2008, then the products are subject to COOL and the law requires retailers to inform consumers of the country of origin of those products at the time of sale. If your supplier can provide you with that information, you can post it at store level or sticker the bags or boxes accordingly.

As noted above, it is essential to work with your suppliers -- both branded and private label -- to ensure that (1) you know when the products were produced and, therefore, whether or not they are subject to COOL and (2) if they are subject to the law, that you have the information necessary to meet your legal obligation to inform consumers of the country of origin of those covered commodities.

Some inspectors have apparently told retailers to simply hand write a sign with the country of origin information and post that in the store. While handwritten signs are acceptable, the retailer needs a reasonable basis to identify the country of origin of the product.

In sum, this is a problem with an expiration date, so to speak. That is, eventually all of the pre-September 30, 2008 product will work its way out of the system. Until then, however, retailers remain responsible for informing consumers of the country of origin of post-September 30, 2008 product and suppliers are responsible for informing retailers regarding the country of origin of that product.

Potatoes

Frozen potato products have raised additional concerns. Specifically, potatoes, both fresh and frozen, are subject to unique rules and regulations under the Perishable

¹ In the case of perishable agricultural commodities, including frozen fruits and vegetables, “produced” means grown or harvested.

Agricultural Commodities Act. Moreover, although many frozen potato products, such as hash browns, are considered “processed” under COOL and, therefore, not subject to the COOL requirements, French fries are not considered processed because they are only partially blanched or fried. These products are subject to COOL. We recommend that you work with your frozen French fry suppliers to ensure that country of origin information is provided for all such products.

What Else Is Happening in the Field?

Overall, retailers seem to be doing well, both according to the reports that we have received from members and from the feedback we have received from USDA. In addition to the issues discussed above regarding frozen fruits and vegetables in general, and potatoes in particular, the following issues have been brought to our attention:

- General challenges with getting all covered commodities in the produce section to bear labeling, particularly during the summer when many stores are sourcing locally. Recommend reinforcing with your store personnel that these items must have country of origin information posted if the items are not individually labeled and asking your store personnel to ask suppliers to write the country of origin of the product on the invoice.
- The regulations do not require 100% product stickering in order to effectively meet your obligation to inform consumers of the country of origin of a type of product. The regulations are silent with respect to the percentage but USDA has advised that a “reasonable consumer” should be able to determine the country of origin of the product.
- Inspectors will ask for records to verify country of origin for one type of product from each of the following 5 categories: (1) fresh and frozen fruits and the covered nuts; (2) fresh and frozen vegetables and ginseng; (3) seafood; (4) beef, veal, pork; and (5) chicken, goat and lamb. If the product is pre-labeled by the supplier with the country of origin of the covered commodity, as well as the name and location of the supplier, then nothing further needs to be provided to verify the country of origin declared. Otherwise, you will have 5 business days to provide a record verifying the country of origin of the covered commodity. This record should be sent to the state inspector, NOT to USDA headquarters.

The Dangers of “Belts & Suspenders” Labeling

In many cases, using both belts and suspenders can give added assurance and protection. However, in the case of country of origin labeling for bulk bins of produce, this approach can present a regulatory challenge.

Specifically, increasing numbers of fresh produce items bear country of origin labels, such as a PLU sticker on an apple that identifies the apple’s country of origin. The potential regulatory danger arises when retailers place country of origin on signs

above bins of items that may also be stickered with country of origin information. If the country or countries on the sign don't match the country or countries on the stickers, you are likely to be cited for that mismatch if you are inspected for country of origin compliance.

Stores may have very good reasons for posting signs above bins of pre-stickered produce. For example, a retailer might decide that signs contribute to a certain "look" in the produce department or provide a marketing advantage. Clearly, that is the retailer's prerogative. We simply recommend that you consider the potential regulatory ramifications if both belts and suspenders (or signs and stickers) will be present in a particular area of your store.

10 Tips for Handling Country of Origin Labeling Inspections

1. Make sure that you understand the country of origin labeling requirements and that you have a good program to ensure that all required information is present.
 - Start with store level labeling: make sure that you have country of origin information for all covered commodities.
2. Identify a “key contact” for your company and e-mail that person’s name and contact information to USDA (cool@usda.gov).
 - Your key contact should be someone who is knowledgeable about COOL requirements and about your company’s systems and records.
 - USDA will send any follow up information regarding store inspections to your company’s key contact.
 - Registering a “key contact” with USDA will help your company centralize communications with USDA and will help your company have a better overall picture of where you are doing well and where there’s room for improvement.
3. When the inspector arrives, ask to see the inspector’s government-issued photo identification. Encourage your store manager² to meet with the inspector at the “opening meeting” that the inspector will hold.
 - Carefully review the information provided by the inspector at the opening meeting, including the store information provided on the inspection form to make sure that it is accurate.
 - Ask the inspector to include the information for your store’s “key contact” if it is not already on the form.
 - Ask the inspector to identify the 5 types of items for which he will be seeking records so you can start the internal process moving to make records available for those products if they are at the store.
4. Consider sending an assistant store manager to do a quick “run thru” of the store to look for any “stupid mistakes” that can be fixed before the store inspection begins.
 - Clearly, you won’t be able to implement a new country of origin labeling program in the 10 minutes that it takes the USDA inspector to meet with your store manager to explain the inspection process during the opening meeting, however, you may spot a sign that has fallen down or some other minor error that can be readily corrected.
5. Encourage your store manager to accompany the inspector during the store review. The inspector should not take photographs but will look throughout the

² We have used “store manager” throughout, but fully recognize that a store manager will not always be available. Nonetheless, we encourage you to ensure that relatively high ranking store personnel are involved throughout this process.

- store for all covered commodities and the country of origin information that should accompany them.
- Help the inspector find the information s/he's looking for
 - Ask polite questions if you don't understand what the inspector is doing
6. Encourage your store manager to meet with the inspector during the "closing meeting" after the store review has been completed.
 - Keep the checklist provided during the closing meeting.
 - Review the checklist with the inspector and understand any comments or concerns expressed by the inspector.
 - By the end of the meeting, the store manager should have a good understanding of any follow up for which the store is responsible.
 - If records are needed for any product, the store manager should record as much information as will be necessary to allow the company to produce the necessary record.
 - The store manager may pull a sample of products that were questioned so that you will have any additional information that your company might need to respond to a USDA letter (e.g., lot code, PLU number, etc).
 7. Store manager should send the inspection checklist as well as any other information and observations to the key contact ASAP.
 - Flag any outstanding information on records that must be provided to the inspector within 5 business days.
 8. Key contact should review checklist and all materials received to determine follow up.
 - Records must be provided within 5 business days of inspection directly to the state inspector, NOT to USDA headquarters.
 - Keep it simple. If you need to supply a record that supports the fact that you were selling string beans from the United States, provide the record.
 - Keep a copy of anything that is sent to the inspector
 9. Implement appropriate changes and record those changes.
 - No findings are official until USDA has reviewed the inspection report and written to the store accordingly. However, if your store was cited for something that is clearly your responsibility, such as failing to identify the country of origin of a covered commodity, go ahead and make sure that the information is posted.
 - Keep a record of those changes so that you can respond to USDA after you receive a letter identifying problems.
 10. Respond to USDA within 30 days of a letter informing you of any errors in your country of origin labeling program.
 - Explain the corrective actions or changes that you have made and when you made them.
 - Retain copies of all correspondence with USDA and any attachments submitted.