What You Need To Know Now
About Complying With Country of Origin Labeling Rule

Third Edition, Revised August 21, 2008

Dear Produce Industry Member:

This White Paper has been prepared by the United Fresh Produce Association to assist industry members in understanding and preparing to comply with country of origin labeling (COOL) rules that will go into effect in the United States on September 30, 2008. This is the *third edition* of the "What You Need to Know Now About Complying with Country of Origin Labeling Rule" White Paper; it supersedes previous editions published on May 21 and March 14, 2008. This third edition includes a detailed analysis of the USDA interim final rule which was published in the *Federal Register* on August 1, 2008.

We believe it is critical that all supply chain partners work together to understand the USDA rule and take steps to reduce total supply chain cost and minimize potential for market disruption. United Fresh is offering several COOL outreach education sessions in addition to this document:

- **Listen to a webcast** co-hosted with 15 other produce association partners on August 8 to address these important new regulations.

- **Attend a COOL workshop** September 11 in conjunction with our annual Washington Public Policy Conference. This workshop will give you the latest (real-time) information on the new COOL requirements from federal administration officials and your business partners prior to its effective date.

We will continue to publish updates to this document as details change. In addition the very latest information will be posted on our website at www.unitedfresh.org for our members. I also want to point out that while country of origin labeling for produce is part of a larger labeling law for meat and other products, this White Paper deals only with the specific implications for produce. If you have questions that are not answered here, please contact me at rguenther@unitedfresh.org or 202-303-3400.

Sincerely,

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Senior Vice President, Public Policy

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Background

Country of origin labeling of fresh produce – also known as COOL – has been discussed for many years throughout the produce industry. Surveys indicate that more than 50 percent of fresh produce offered for sale in retail grocery stores today are labeled with country of origin on packaging or PLU stickers. And, many retailers provide country of origin information on in-store signage. But, beginning September 30, 2008, all fresh produce sold in retail stores in the United States must comply with a mandatory COOL rule. This White Paper has been prepared to help industry members understand the facts about COOL and how to comply with the law. Members of United Fresh Produce Association are also invited to consult with the association's legal staff on specific questions.

Key Features of the USDA COOL Interim Final Rule

- **Timing** – The USDA Interim Final Rule (IFR) goes into effect **September 30, 2008**. In addition the IFR does not apply to covered commodities produced or packaged before September 30, 2008. For produce, this means product that is *harvested* before September 30 will not be required to comply with new COOL regulations. Finally, USDA has indicated there will be a six-month education and outreach program regarding the provisions and requirements of the rule following the September 30 effective date. Industry should work diligently to comply with the regulation during this period, but it is unlikely that USDA will be inspecting individual retail stores for compliance while its focus is on education.

- **Comment Period** – USDA has provided a 60 day comment period for the IFR. United Fresh will prepare comments to USDA on the IFR and welcomes your feedback so that we can fully represent United Fresh members' views.

- **Definitions of Retailers and Food Service** – Only "retailers" as defined under the Perishable Agricultural Commodities Act (PACA) are covered by the law. Food service establishments are exempt from the country of origin labeling requirements. Food service includes salad bars and delicatessens operated at retail stores.

- **Covered Commodities** – The 2002 and 2008 Farm Bills together provide for the following list of covered commodities to which country of origin labeling applies: whole muscle cuts and ground beef, pork, lamb, chicken and goat meat; perishable agricultural commodities; fresh and frozen fish and shellfish; and peanuts, pecans, macadamia nuts and ginseng. Under the rule, perishable agricultural commodities include fresh and frozen fruits and vegetables.

- **Country of Origin Designation** – Perishable agricultural commodities may only be declared Product of the U.S. if they are "exclusively produced" in the United States. USDA defines "produced" as "grown." In addition, the IFR permits state, regional or local labeling in lieu of country of origin for perishable agricultural commodities of U.S. origin. United Fresh worked extensively with congressional leaders to incorporate this provision in the 2008 final law. The USDA has expanded this provision (to be consistent with current U.S. trade obligations) to permit the use of state, regional or local labeling for imported products as well. Finally, imported covered commodities retain the origin as declared to U.S. Customs and Border Protection (CBP) at the time the product enters the United States.

- **Processed Food Items** – Processed food items are exempt from the COOL requirements. The IFR states that all covered commodities will be considered "processed" if they have either "undergone specific processing resulting in a change in the character of the covered commodity" or "been combined with at least one other covered commodity or substantive food component." Examples include fruit medley, mixed vegetables and a salad mix that contains lettuce and carrots and/or salad dressing.

- **Commingled Covered Commodities** – A commingled covered commodity is a single type of covered commodity presented for retail sale in a consumer package that has been prepared from raw material sources having different origins, e.g., a bag of frozen strawberries that were sourced from the U.S. and Mexico. The IFR will permit such products to be labeled with a single declaration that identifies *all* of the countries of origin of the source products.

- **Stickering Products –** The IFR also addresses the issue of stickering efficacy for commingled products. In the IFR, USDA agrees that stickering efficacy "is not 100%" and also "agrees that consumers would likely be able to discern the country of origin if the majority of items were labeled." However, as part of the IFR, USDA "encourages retailers to use placards and other signage as a way to more clearly indicate information to consumers as to the origin of the covered commodity" and states that it will address the issue of preponderance of stickering in its compliance and enforcement procedures.

- **Markings –** The IFR states that USDA will permit country of origin declaration to be provided to consumers by a variety of means including a label, placard, sign, stamp, band twist tie, pin tag or other clear and visible sign on the covered commodity or on the package, display, holding unit or bin. USDA also states that the rule does not contain specific requirements as to the exact placement or size of the country of origin declaration but rather states that the declaration must be legible and conspicuous. In addition, country of origin can be provided in three ways: (1) a statement (e.g., produce of the U.S.); (2) country name only (e.g., U.S.); or (3) use of a checkbox. Finally, the IFR states that it will only allow accept country abbreviations for the U.S., U.K., and Luxem. USDA has further stated that state abbreviations (i.e., CA, FL, TX, or NY) are not sufficient for COOL labeling requirements.

- **Recordkeeping –** Another major provision United Fresh pushed through the 2008 Farm Bill was an amendment to the statute that prohibits USDA from requiring anyone handling a covered commodity from keeping records beyond those retained in the

normal course of business. The IFR addresses this issue in several ways. First, the IFR removes the requirement for retailers to retain records at store level and expressly states that records may be maintained at any location. Second, the IFR states that retailers and suppliers shall be given a "reasonable time period" to retrieve records. Under the IFR, retailers and suppliers have within "5 business days" of a request to either send records to USDA electronically or by fax. The retailer and supplier are required to maintain records for a period of 1 year from the date that the origin declaration was made at retail.

For suppliers, the IFR states that for pre-labeled products, the label itself is sufficient evidence on which a retailer may rely to establish the product's country of origin. In addition, the suppliers are required to maintain a record of the immediate previous source and the immediate subsequent recipient of the product that is pre-labeled with country of origin. For non pre-labeled products, these records must indentify the country of origin of the products. The supplier must maintain records that identify the covered commodity for a period of 1 year from the date the origin declaration was made at retail.

For an imported covered commodity, the importer of record as determined by CBP must ensure that records: provide clear product tracking from the United States port of entry to the immediate subsequent recipient and accurately reflect the country(ies) of origin of the item as identified in relevant CBP entry documents and information systems; and maintain such records for a period of 1 year from the date of the transaction.

- **Enforcement** – USDA is the only agency that is able to initiate enforcement actions against a person found to be in violation of the law. Specifically, the IFR notes that the USDA must determine that the retailer or supplier has not made a good faith effort to comply with the law. In addition, the IFR allows for a 30-day period in which retailers and suppliers may take the necessary corrective action after receiving notice of a nonconformance. Finally, civil penalties are limited to $1,000 for each violation.

Major Provisions for COOL Interim Final Rule

The following analysis is based on our professional assessment and evaluation of congressional intent through the 2002 and 2008 laws, the COOL Interim Final Rule (IFR), and current discussions with both congressional leaders and USDA staff.

The opinions provided here are offered in good faith to help produce industry members begin to comply with the IFR. However, it is the responsibility of all companies to verify for themselves the specific actions they should take, and United Fresh Produce Association does not assume any responsibility for individual company compliance with applicable laws and regulations. We recommend that readers of this document consult with their own legal advisors to be sure that their own procedures meet with applicable requirements.

Background

Since legislation mandating COOL became law with the 2002 Farm Bill, United Fresh has worked intensely with USDA and congressional leaders to see that regulations developed to implement the law were fair, practical and cost-effective for the produce industry. Because of concerns about the regulatory burden of the 2002 law, the effective date of this law, originally due to go into effect September 30, 2004, has been delayed twice by Congress

until September 30, 2008. Concurrently, all stakeholders in the COOL debate in Congress reached agreement on important revisions to the 2002 law. These revisions are contained in the 2008 Farm Bill legislation which became law on June 18, 2008 (P.L. 110-246). They include the following:

- The potential liability for retail mistakes or absence of labeling at point of purchase has been significantly reduced. After finding a retailer to be "in violation," USDA must give the retailer 30 days to "comply" with the Act. At the end of 30 days, USDA cannot fine a retailer unless that retailer has "not made a good faith effort" and "continues to willfully violate the Act." This significantly eases the potential liability for retailers.

- Suppliers who do not provide country of origin information to the retailer, as required in the Act, are held to the same terms as above – 30 days to come into compliance, with potential fines imposed only if they do not "make a good faith effort" or "continue to willfully violate the Act" by not providing country of origin information to retailers.

- Retailers will not be liable for misinformation provided by suppliers.

- All proposed fines on either retailers or suppliers who are found to be "willfully violating" the Act are subject to a hearing before USDA, and are limited to $1,000 for each violation.

- USDA is barred from requiring any new record-keeping other than normal records kept in the regular course of doing business.

- A new specific provision will allow labeling of a U.S. State, region or locality in which a product is produced to meet label standards as product of U.S. Therefore, a descriptor such as Minnesota Grown or Pride of New York would be sufficient labeling to comply with the law.

USDA incorporated these changes into their Interim Final Rule, which was published in the *Federal Register* on August 1, 2008. Below is further analysis of the major provisions contained in the Interim Final Rule.

Record Keeping Requirements

USDA has made significant steps to minimize unnecessary recordkeeping requirements. Most importantly, the 2008 Farm Bill amended the statutory recordkeeping requirements to prohibit USDA from requiring anyone who handles a covered commodity from keeping records beyond those retained in the normal course of business. This provided USDA an opportunity to look at current practices of recordkeeping within the industry and apply similar requirements for COOL. There are several key components to the record keeping requirements for both retailers and suppliers.

First, any person engaged in the business of supplying a covered commodity to a retailer, whether directly or indirectly, must maintain records to establish and identify the immediate previous source (if applicable) and immediate subsequent recipient of a covered commodity for a period of 1 year from the date of the transaction. In addition, under the IFR, records

that indentify the covered commodity, the supplier, and for products not pre-labeled, the country of origin information must also be maintained for 1 year. This is an improvement from original iterations of this rule that would require record keeping for 2 years.

In addition, the IFR states that under this interim final rule, upon request by USDA representatives, suppliers and retailers subject to this record keeping requirement shall make available to USDA representatives, records maintained in the normal course of business that verify an origin claim. Such records shall be provided within 5 business days of the request.

Also, the regulation allows flexibility by allowing for electronic and hard copy formats. This can be done either by electronically transferring records via computer when requested by USDA or facsimiles of paper documents. These documents can also be stored at a central location for retailers and suppliers. Therefore, the requirement in previous versions of the proposed rules that required individual records to be maintained at retail level has been removed.

Under the section for pre-labeled products, the label itself is sufficient evidence on which a retailer may rely to establish a products origin. Pre-labeled products are those covered commodities that are labeled for country of origin by the firm or entity responsible for making the initial claim or by a further processor or repacker (i.e., firms that receive bulk products and package the products as covered commodities in a form suitable for the retailer). The country of origin information of pre-labeled covered commodities must be legibly printed on the shipping container, immediate container or consumer ready package. In addition to indicating country of origin information, pre-labeled products must contain sufficient supplier information to allow USDA to traceback the product to the supplier initiating the claim.

Bulk Produce Displays

Under the IFR, the USDA provides further flexibility for bulk bin displays (e.g., display case, shipper, bin, carton, and barrel). In particular, the rule allows for retailers to present product to consumers in bulk displays a covered commodity from more than one country of origin provided all possible origins are listed. Further, the IFR allows for a supplier providing a covered commodity in bulk containers such as a bin, barrel, or carton to display COOL information including commodities from different origin as long as all possible origins are listed on container. For stickered products in bulk displays, USDA recognizes in the IFR that 100 % stickering is not achievable. In addition, USDA agrees that consumers will be able to discern COOL information if a majority of the product is labeled in these bulk displays. Finally, USDA encourages retailers to use placards and other signage in bulk displays to clearly indicate COOL information to consumers.

Processed Food Items

Processed food items, as defined by this regulation, are exempt from complying with this IFR. In particular, products that have undergone physical or chemical change and have a character that is different from that of a covered commodity are considered exempt from the IFR. For produce, this would include chocolate covered strawberries, a fruit smoothie or fruit yogurt, or dried apricots, for example. In addition, a retail item that is derived from a covered commodity that is combined with other covered commodities or has other

substantive food components would be exempt from COOL. For example, a salad mix that contains lettuce and carrots or a salad mix that contains dressing would be exempt. A fresh-cut cantaloupe would not be exempt but a watermelon, strawberry, grape and cantaloupe fresh-cut mix would be exempt.

Enforcement

The effective date of the IFR is September 30, 2008. However, because there will be significant amount of product in commerce prior to the effective date, product that is grown or labeled before September 30, 2008 will be exempt. USDA has stated that for produce, product that is *harvested* prior to September 30, 2008 will be exempt from the COOL requirements. USDA will be conducting outreach and education programs for six months following the September 30, 2008 implementation date.

The law gives enforcement responsibilities to the U.S. Secretary of Agriculture (Secretary) and encourages the Secretary to enter into partnerships with states to assist in the administration of the program. The law provides for a 30-day period in which retailers and suppliers may take the necessary corrective action after receiving notice of a nonconformance. The Secretary can impose a civil penalty up to $1,000 per incident only if the retailer or supplier has not made a good faith effort to comply, and only after the Secretary provides notice and an opportunity for a hearing. Further, the law is clear that the retailer or supplier is not subject to fines unless the Secretary determines they have willfully violated the statute related to false information about COOL. Only USDA is able to initiate enforcement actions against a person found to be in violation of the law. The COOL law does not allow for any private right of action.

Markings/Labeling Requirements

In general, under this Interim Final Rule, the country of origin declaration may be provided to consumers by means of a label, placard, sign, stamp, band, twist tie, pin tag, or other clear and visible sign on the covered commodity or on the package, display, holding unit or bin containing the commodity at the final point of sale to consumers. The IFR does not contain specific requirements as to the exact placement or size of the country of origin declaration. However, such declarations must be legible and conspicuous, and allow consumers to easily find and read the country(ies) of origin without a strain when making their purchases. Only those abbreviations approved for use under CBP rules, regulations, and policies, such as ‘‘U.K.’’ for ‘‘The United Kingdom of Great Britain and Northern Ireland,’’ ‘‘Luxemb’’ for Luxembourg, and ‘‘U.S.’’ or “USA” for the ‘‘United States’’ are acceptable. However, USDA has indicated that state abbreviations (i.e., CA, FL, TX, or NY) will not be acceptable under the COOL requirements.

According to the IFR, the declaration of the country of origin of a product may also be in the form of a check box, provided it is in conformance with other Federal labeling laws. In addition, the 2008 Farm Bill law expressly authorizes the use of state, regional or locality label designations in lieu of country of origin for produce. The IFR states that this applies to both domestic and imported produce. However, symbols or flags alone may not be used to denote country of origin. Finally, the declaration of the product country of origin may be in the form of a statement such as ‘‘Product of USA,’’ ‘‘Produce of the USA’’ or ‘‘Grown in Mexico’’; may only contain the name of the country such as ‘‘USA’’ or ‘‘Mexico’’.

Under this Interim Final Rule, an imported covered commodity for which origin has already been established and for which no production steps have occurred in the United States shall retain its origin as declared to U.S. Customs and Border Protection (CBP) at the time the product enters the United States, through to retail sale. Covered commodities imported in consumer-ready packages are currently required to bear a country of origin declaration on each individual package under the Tariff Act of 1930 (Tariff Act). This interim final rule does not change these requirements. In the case of imported covered commodities that have not been substantially transformed in the United States and that are commingled with other imported product and/or United States origin commodities, the declaration shall indicate the countries of origin for all covered commodities in accordance with CBP marking regulations. For example, a clamshell of tomatoes that includes tomatoes from both Mexico and the United States is currently required under CBP regulations to be marked with both countries of origin on the package.

Recommendations for United Fresh Members

Now that the COOL Interim Final Rule has been published by USDA, it is important that all industry partners begin taking action to comply with the regulation. However, with the current requirements under the Interim Final Rule that produce grown (harvested) or labeled prior to September 30, 2008 is exempt from the IFR and with a six-month phase-in period for education and outreach by USDA that will limit the enforcement liability, companies should begin to reach out to their industry partners so that systems and practices can be implemented that do not disrupt the orderly marketing of fresh produce. We also offer the following general industry guidance at this time:

Suppliers:

- Look at your own systems for complying with mandatory COOL and begin to engage with your supply chain partners on how you can best work together in this effort.

- You will need to provide country of origin information about your products to retailers. Have systems in place that allow you to know the country of origin of all your items that are covered in the IFR. Remember that misrepresenting the geographic origin of a produce is already a PACA violation, so you must be accurate in your representation.

- How can you convey this information accurately and most efficiently? You should talk with your retail partners about their requests and advise them on the lowest cost, most efficient means you can offer.

- The IFR has now set a standard for pre-labeled products as sufficient evidence for COOL at retail level. Where this works for your business, we recommend adding country of origin to packaging/labels at your next opportunity.

- There are no specific regulations on size of type, font, color, etc. The standard is under the IFR is “legible and conspicuous.”

- Remember that country of origin can be expressed as a statement ("Product of Canada") a place ("Canada"), or by a check box These all show good faith and is now acceptable under the COOL IFR.

- U.S. state labels are now clearly permitted under the COOL IFR. Therefore, continuing to label "Washington Apples" or "Grown in California" would show a good faith effort to comply with COOL.

- For unpackaged and un-stickered bulk commodities that are displayed in retail bins, a placard or sign will be necessary for point of sale compliance. While most retailers will likely address this issue in their own merchandising schemes (adding country of origin in their own signage styles), commodity boards might want to consider whether some retailers would accept promotional POS materials with country of origin. Talk with your retailers about the least costly and disruptive means to address bulk commodities. If retailers ask for signs to be included in each box of bulk produce, this is not required under the law and should be considered a business request. Make sure your retail partners understand that if the product will be displayed in bulk, such as potatoes, then one sign in the retail bulk display will meet the COOL requirements.

- Packaged products that contain two or more different covered commodities are exempt from the current COOL requirements.

Retailers:

- Look at your own systems for complying with mandatory COOL and begin to engage with your supply chain partners on how you can best work together in this effort. With the actual threat of fines for non-compliance minimal and current enforcement action six-months after the effective date, this will allow you and your suppliers time to get this right for marketplace efficiency without fear of sudden liability.

- While retailers still have the burden of compliance at point of sale, changes passed in the 2008 Farm Bill and incorporated in the IFR fundamentally change the nature of this law with regard to potential liability. With these changes, any retailer that complies with COOL should never face a fine. That greatly reduces the need for unduly complex or severe business requirements that impose needless costs on your supply chain, which are eventually passed back along in the cost of goods.

- As you look at COOL compliance, consider total supply chain efficiencies together with your suppliers. What would be the most efficient, lowest cost way for suppliers to advise you of country of origin? How do you weigh the cost/sales benefits of prepackaged produce labeled with country of origin vs. bulk displays in your own merchandising format? Can you implement country of origin in ways that help you boost customer satisfaction and sales?

- If you ask your suppliers to provide prelabeled or prepackaged produce with country of origin, take care to not be more prescriptive than the law about things like type size, font and nomenclature.

- Take a similar approach with pre-stickered commodities that make their way into bulk displays, for example, a bulk apple display of mostly PLU labeled fruit. There's no need for you to require 100 % stickering for country of origin.

Middle-Industry Brokers/Wholesalers/Distributors:

- Look at your own systems for complying with mandatory COOL and begin to engage with your supply chain partners on how you can best work together in this effort.

- In your case, you will need to deal with COOL coming and going. Your suppliers must be able to provide you with the country of origin of products you source from them, and you must be able to carry that information forward to retailers you sell. Make sure you develop internal systems to forward accurate information from your suppliers to retailers, as required by the law and now the COOL IFR.

- One bit of good news – you are not liable for inaccurate information provided to you by your suppliers. Just like retailers, you are able to rely upon the information provided to you by suppliers. But all trading partners should remember that providing false information about country of origin is a violation under PACA and could subject a company to fines and even the loss of their PACA license.

Conclusion

Bottom line – COOL was debated for a very long time, but we must now comply with this law and regulation. It is important to carefully study exactly what is required and how to implement those requirements with the least market disruption and minimum costs necessary. Implementing COOL in 2008 promises to be a challenge, but a much less onerous one than what would have been required in 2002.

Working together our total supply chain can begin to roll out COOL efficiently and successfully.

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