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Rachel Edelstein, Assistant Administrator
Office of Policy and Program Development
Food Safety and Inspection Service
U.S. Department of Agriculture
1400 Independence Ave., S.W.
Room 350-E, Jamie L. Whitten Building
Washington, D.C. 20250

Electronically filed at www.regulations.gov

Re: **Voluntary Labeling of FSIS-Regulated Products with U.S.-Origin Claims (Docket No. FSIS–2022–0015).**

Dear. Ms. Edelstein:

The National Pork Producers Council (NPPC) submits the following comments on the proposed rule on the voluntary labeling of FSIS-regulated products with U.S.-origin claims.

NPPC represents 42 affiliated state pork associations, working to ensure the U.S. pork industry remains a consistent and responsible supplier of high-quality pork to domestic and international markets. Through public-policy outreach, NPPC fights for reasonable legislation and regulations, develops revenue and market opportunities, and protects the livelihoods of America's more than 66,000 pork producers.

The U.S. pork industry is a significant contributor to the economic activity of U.S. agriculture and the broader U.S. economy, generating roughly $57 billion in GDP through the annual marketing of about 140 million hogs. To produce those hogs, pork producers use more than 1.6 billion bushels of corn and 10.5 million tons of soybean meal.

Economists at NPPC and Iowa State University estimated that in 2021 the U.S. pork industry was directly responsible for creating more than 366,000 full-time-equivalent jobs in pork production and generated roughly 122,000 jobs throughout all of agriculture. In addition, the pork sector was responsible for 138,000 jobs in meatpacking and processing and 399,000 jobs in professional services such as financial services, insurance and real estate.

Most importantly, U.S pork producers in 2022 produced nearly 2.7 million metric tons – more than 27 billion pounds of pork, and exported 6.3 billion pounds – of safe, wholesome, and nutritious meat protein to consumers worldwide.

Today is a challenging time in the U.S. pork industry. This year, hog producers are losing an average of $40 per head on each hog marketed. While hog prices have moderated significantly since 2022, current losses are largely because of record-high production costs that have increased by as much as 50 percent in the past year. These losses are putting a pinch on the pork industry, and this economic reality may force producers to exit the industry and drive consolidation at the farm-level.

Producers are also reeling from the Supreme Court's decision in support of California's unscientific and arbitrary housing requirements impacting all fresh pork sold in the state. Producers nationwide must now spend tens of millions to comply with this new standard, since California, which has no pork production, constitutes 13 percent of the domestic fresh pork market. Finally, the voluntary Product of U.S. label proposed by the US Department of Agriculture (and the subject of this comment) would add costs and complexities throughout the pork production and supply chain, as well as the supply chains of other commodities, and could negatively affect the relationships of the United States with its trading partners.

U.S. Pork Industry Relies on Trade

Trade is critically important to America's pork producers, who annually export about a quarter of their total production to more than 100 countries. The pork industry exported nearly $7.7 billion of pork in 2022. Those exports equated to about $61, or 25 percent, in value for each hog that was marketed last year, supported 155,000 American jobs and contributed more than $14.5 billion to the U.S. economy, according to Iowa State University economists. Through March of this year, U.S. pork producers shipped $1.96 billion worth of product to foreign destinations compared with about $1.71 billion by the same point last year, more than a 14 percent increase.

Among the U.S. pork industry's top export markets are Canada and Mexico, both of which send livestock to the United States to be raised, slaughtered, and processed. U.S. pork producers, for example, purchased roughly 4.4 million weaner/feeder pigs from Canada for finishing in the United States in 2020, and American meatpackers bought an additional 800,000 Canadian pigs for processing in U.S. plants in the same year. (Weaners are about 8 weeks old; hogs reach market weight in about 6 months.)

The pork industries in the United States, Canada, and Mexico are highly integrated as a result of the 1994 North American Free Trade Agreement and its successor, the U.S.-Mexico-Canada Agreement (USMCA), both of which eliminated tariffs on pork traded in North America. In 2022, Mexico was the No. 1 export destination for U.S. pork and Canada was No. 4. (Mexico was U.S. beef's No. 4 export market and Canada was No. 5.)

Any law, regulation, or administrative action that upsets that symbiotic relationship among the three countries likely would be challenged. That is what happened in December 2008, when Canada and Mexico initiated separate World Trade Organization (WTO) dispute settlement cases against the United States over its Mandatory Country-of-Origin Labeling (MCOOL) rule. (The cases were combined in May 2010 because of the similarity of the claims.) Both countries stated they were not challenging MCOOL, as such, but were arguing that its requirements acted as protectionist trade barriers that distorted competition between imported and domestic meat products.

A major complaint involved the "Product of the United States" label for animals born, raised, and slaughtered in the United States. Canada and Mexico argued this unfairly denied the use of that label for products from animals that were exported to the United States at a young age and subsequently raised and slaughtered there. Mexico, for example, pointed out that 70 percent of the weight and value of its feeder cattle sent to the United States was added in the United States.

After the WTO in 2012 ruled that MCOOL violated the international Technical Barriers to Trade Agreement and authorized Canada and Mexico to retaliate against more than $2 billion of U.S. goods, including pork, FSIS amended the MCOOL regulations in 2013, making the new rule, some argued, even more complicated. That, too, was challenged, and in late 2015, Congress repealed MCOOL for muscle cuts of pork and beef and ground pork and beef. (See attachment.)

Now, FSIS proposes to again impose the born, raised, slaughtered – and processed – in the United States criteria for labels that bear the claim "Product of USA" or "Made in the USA." Meat products from live animals imported into the United States for feeding or immediate slaughter no longer could make such a label claim. Minimally processed product could use a qualified U.S.- origin claim, such as "sliced and packaged in the United States using imported pork."

Rule Likely Violates WTO, USMCA Technical Barriers to Trade

NPPC fails to see a distinction between the 2009 (original) or 2013 (amended) MCOOL rule and the proposed rule, which, while billed as voluntary, will have the effect of being mandatory since it will create a strong incentive for producers to prefer domestic animals to imported ones so they can use the "Product of USA" and "Made in the USA" claims. The use of labels to identify the origin of meat and meat products is a normal condition of competition; therefore, to compete effectively, producers must use such labels.

That would have a detrimental impact on imports of live animals, potentially triggering U.S. trading partners, specifically Canada and Mexico, to challenge the rule under the WTO's Technical Barriers to Trade Agreement or the USMCA's chapter on technical barriers, according to an analysis of the FSIS proposal conducted for NPPC. To be legal under WTO or USMCA, technical trade regulations must treat imported products as favorably as "like" products of national origin.

But the proposed rule is not even-handed in its treatment of animals born, raised, slaughtered, and processed in the United States compared with those imported into the United States and slaughtered and processed here.

If the rule were challenged by Canada and/or Mexico at the WTO or through USMCA and found to be inconsistent with U.S. obligations under the technical barriers provisions, there would be a risk of retaliation against U.S. pork (among other agricultural and non-agricultural products) unless the United States resolved the inconsistency.

The loss of the Mexican and Canadian pork markets, which in 2022 took $2.9 billion of U.S. pork, would result in the loss of thousands of agricultural and non-farm jobs. Economist Dermot Hayes, with Iowa

State University, a decade ago estimated the effect of Canada's and Mexico's $2 billion in retaliation would cost the United States 17,000 jobs.

Proof that retaliation is no idle threat is Mexico's March 2009 imposition of tariffs ranging from 5-25 percent on 89 U.S. products, including apples, pork, and wine, valued at $2.4 billion. A NAFTA dispute panel approved the retaliation in response to the United States canceling a cross-border trucking program. Particularly hard hit was the U.S. potato industry, which saw immediate losses in market share in Mexico, with Canadian potato farmers filling the void, and plummeting prices for U.S. growers. The retaliation ended in July 2011.

Other Problems with Product of U.S. Label

Beyond the speculative but highly probable retaliatory tariffs from Canada and Mexico, there are more concrete reasons to jettison or completely rewrite the proposed labeling rule.

Like its mandatory predecessor, the amended "Product of USA" imparts no useful health or safety information to consumers, and no health or safety rationale has been advanced by USDA, because there is none. Imported meat products are already subject to the same strict sanitary requirements that are applied to domestically produced meat and must be labeled as "imported." Live animals must pass veterinary inspections before being allowed into the United States.

The proposed rule also would not be effective in educating consumers about the country of origin of meat or processed products. USDA's own 2022 survey revealed 47 percent of participants incorrectly supposed the current "Product of USA" claim on labels means meat came from animals born, raised, slaughtered, and processed in the United States. In fact, only 16 percent of consumers identified the correct definition for the "Product of USA" labeling claim, and another 21 percent did not know the meaning of the claim.

These findings suggest that even if the proposed rule is adopted and the "Product of USA" label only used meat derived from animals born in the United States, more than 50 percent of U.S. consumers still will not know the meaning of the label.

Given that, and the fact that at best only 31 percent of the same survey's respondents even noticed the "Product of USA" label, it seems unlikely the rule will fulfill its stated objectives of resolving consumer confusion surrounding current voluntary label claims and ensuring consumers understand where their food comes from.

That is consistent with USDA's 2015 analysis of MCOOL, which found "there was little to no evidence of a measurable increase in consumer demand for beef or pork as a result of COOL requirements" and "little evidence that consumers would be likely to increase their purchases of food items bearing U.S.-origin labels." Similarly, a 2013 analysis found "no identifiable increase in demand," suggesting that implementation of the 2009 MCOOL resulted in a net economic welfare loss. Said the study's authors, "Our findings are in line with a variety of studies suggesting MCOOL impacts are unlikely to be significant."

Pointedly, country of origin just isn't that important to most consumers. According to Kansas State University College of Agriculture's "Meat Demand Monitor," in a ranking of 12 factors consumers use in purchasing meat, product origin is No. 11, ahead only of "environmental impact." (The most important factors are taste, freshness, safety, and price.)

Additionally, "Product of USA" would impose costs on processors that undoubtedly would be passed onto consumers, and there would be additional costs associated with the record-keeping the proposed rule would require from entities using "Product of USA" or "Made in the USA" labels.

Nearly 15 years ago, USDA's regulatory impact analysis estimated the initial cost of complying with the 2009 MCOOL at $2.6 billion for all covered commodities, with subsequent annual costs of about $300,000 for livestock producers, wholesalers and processors, and retailers combined. Even the amended rule would have cost the pork, beef, and poultry industries between $53 million and $192 million in adjustment costs, according to USDA's 2015 economic analysis. Additional discounted economic welfare losses over the first 10 years of the 2013 rule would have been $494 million for the beef industry and $403 million for the pork industry.

Another, significant expense for the pork and beef industries would be segregating animals not born in the United States but imported here, the meat from which under the proposed rule could not be labeled as "Product of USA" or "Made in the USA."

For many pork producers in the upper Midwest who import feeder pigs from Canada, this makes no sense. (As previously mentioned, 4.4 million Canadian feeder pigs were imported into the United States in 2020; about a million beef cattle move from Mexico to U.S. feed lots annually.) Pork producers buy animals to fill out their finishing barns, ensuring they have full loads to go to the packing plant and meeting their contractual obligations to packers.

Under the proposed rule, though, "Canadian" pigs would need to be segregated in barns, on trucks taking them to the packing plant, in the lairage of the plant, and in the processing line. During the time the 2009 MCOOL rule was in effect, some pork packing plants would process Canadian-born pigs only on designated days. This also required shutting down processing lines for some period, and it meant packers were discounting pigs from Canada. Some packers refused to take Canadian-born hogs.

Furthermore, meat bound for export must be labeled Product of the USA under current regulations. Changing the labeling rule also would require segregation of finished products from live animals imported into the United States, and those products could not be exported from the United States.

Again, the proposed rule would treat meat from foreign-born animals less favorably than meat from domestic animals and likely would have a detrimental effect on the trade and prices of foreign-born animals. A 2011 study from a graduate student at Texas A&M University found that MCOOL reduced the trade of live hogs between the United States and Canada by nearly 38 percent, with trade in feeder pigs reduced by more than 24 percent. (No doubt this is why Canada filed its WTO dispute.)

The irony for Canadian feeder pigs is that once on a U.S. farm, those 8-week-old animals spend about four months, or two-thirds of their life, eating U.S.-grown corn and soybean meal to reach market weight – around 285 lbs. – before being harvested in a USDA-inspected packing plant.

How are they not a "Product of USA"?

At least one commenter has pointed out that the proposed rule is necessary to comply with the Tariff Act, which requires country-of-origin labeling on imported meat unless a domestic entity "transforms it into a product with different characteristics and uses."

Currently, while imported meat must show the country of origin, meat from live animals exported to the United States, which undergo a substantial transformation, does not. Indeed, U.S. Customs and Border Protection (CBP) rulings specifically addressing the origin of meat establish that harvesting an animal is a substantial transformation that confers origin on the carcass.

Additionally, relevant international norms designate origin based on harvest. Codex Standard 1-1985, General Standard for the Labeling of Pre-Packaged Foods, prescribes that processing confers origin if it changes the "nature" of the product. This is essentially the same as CBP's substantial transformation standard where harvest confers origin.

The existing rule for voluntary labeling reflects the results of the "substantial transformation" test, which allows a U.S. country of origin label for meat products made from an animal born, raised, slaughtered, and processed in the United States and a meat product made from an imported animal that is slaughtered and processed in the United States.

Under the proposed rule, though, only meat from animals born, raised, slaughtered, and processed in the United States could be labeled "Product of USA" or "Made in the USA." Animals born outside the United States, then imported here would require segregation throughout production chain, with accompanying increased costs of handling. The change in the conditions of competition for foreign-born animals that FSIS's proposed rule would bring about thus distinguishes it from Canadian and Mexican guidelines, discriminates against imports, and, therefore, violates the WTO's Article 2.1, Technical Barriers to Trade Agreement.

Conclusion

The proposed "Product of USA" rule would significantly increase costs for livestock producers at a time when they are struggling economically. The added costs of segregating animals and maintaining records to demonstrate compliance with the rule would do little, if anything, to address consumer confusion about the origin of products. Indeed, the one certain outcome for consumers would be increased prices to feed their families, price hikes that many American families cannot afford. Finally, the regulation would strain the relationships between the United States and its trading partners, particularly Canada and Mexico, and likely result in formal WTO and USMCA disputes being filed against the United States, with a possibility of tariff retaliation against U.S. goods, particularly agricultural products.

For the reasons cited, NPPC requests that USDA not move forward with the amended “Product of USA” rule as proposed.

Respectfully submitted,

Bryan Humphreys
CEO
National Pork Producers Council

WTO Summary of Key Findings of the Dispute Settlement Panel, the Appellate Body and the Compliance Panel

Summary of key findings of the initial dispute settlement panel report, November 18, 2011:

This dispute concerns: (i) the U.S. statutory provisions and implementing regulations setting out the United States mandatory country of origin labeling regime for beef and pork ("COOL measure"); as well as (ii) a letter issued by the U.S. Secretary of Agriculture Vilsack on the implementation of the COOL measure ("Vilsack letter").

The Panel determined that the COOL measure is a technical regulation under the TBT Agreement and that it is inconsistent with the United States' WTO obligations. In particular, the Panel found that the COOL measure violates Article 2.1 of the TBT Agreement by according less favorable treatment to imported Canadian cattle and hogs than to like domestic products. The Panel also found that the COOL measure does not fulfill its legitimate objective of providing consumers with information on origin, and therefore violates Article 2.2 of the TBT Agreement.

As regards the Vilsack letter, the Panel found that the letter's "suggestions for voluntary action" went beyond certain obligations under the COOL measure and that the letter, therefore, constitutes unreasonable administration of the COOL measure in violation of Article X:3(a) of the GATT 1994. The Panel refrained from reviewing the Vilsack letter under the TBT Agreement, as it found that this letter is not a technical regulation under that agreement.

In light of the above findings of violation, the Panel did not consider it necessary to rule on the claims under Article III:4 of the GATT 1994 (national treatment) or on the non-violation claims under Article XXIII:1(b) of the GATT 1994.

Summary of key findings of the Appellate Body Regarding the U.S Appeal of the Panel Report:

The appeal concerned primarily the COOL measure (the US statutory provisions and implementing regulations setting out the United States' mandatory country of origin labeling regime for beef and pork), and the Panel's findings that this measure is inconsistent with Articles 2.1 and 2.2 of the TBT Agreement. The United States appealed both findings. Canada appealed certain aspects of the Panel's analysis under Article 2.2 and requested the Appellate Body to complete the legal analysis in the event that it reversed the Panel's finding under Article 2.2. Canada also raised conditional appeals with respect to the COOL measure under Articles III:4 and XXIII:1(b) of the GATT 1994. Although Canada originally also sought to have the Appellate Body make certain rulings with respect to the Vilsack letter, it withdrew the requests following the assertion by the United States that the measure had been withdrawn.

The Appellate Body upheld, albeit for different reasons, the Panel's finding that the COOL measure violates Article of the TBT Agreement by according less favorable treatment to imported Canadian cattle and hogs than to like domestic cattle and hogs. The Appellate Body reversed the Panel's finding that the COOL measure violates Article of the TBT Agreement because it does not fulfill its legitimate objective of providing consumers with information on origin, and was unable to complete the legal analysis and determine whether the COOL measure is more trade restrictive than necessary to meet its objective.

In its analysis under Article 2.1 of the TBT Agreement, the Appellate Body agreed with the Panel that the COOL measure has a detrimental impact on imported livestock because its recordkeeping and verification requirements create an incentive for processors to use exclusively domestic livestock and a disincentive against using like imported livestock. The Appellate Body found, however, that the Panel's analysis was incomplete because the Panel did not go on to consider whether this de facto detrimental impact stems exclusively from a legitimate regulatory distinction, in which case it would not violate Article 2.1.

In its own analysis, the Appellate Body found that the COOL measure lacks even-handedness because its recordkeeping and verification requirements impose a disproportionate burden on upstream producers and processors of livestock as compared to the information conveyed to consumers through the mandatory labeling requirements for meat sold at the retail level. That is, although a large amount of information must be tracked and transmitted by upstream producers for purposes of providing consumers with information on origin, only a small amount of this information is actually communicated to consumers in an understandable or accurate manner, including because a considerable proportion of meat sold in the United States is not subject to the COOL measure's labeling requirements at all. Accordingly, the detrimental impact on imported livestock cannot be said to stem exclusively from a legitimate regulatory distinction and instead reflects discrimination in violation of Article 2.1. For these reasons, the Appellate Body upheld the Panel's finding under Article 2.1.

In its analysis under Article 2.2 of the TBT Agreement, the Appellate Body found that the Panel properly identified the objective of the COOL measure as being "to provide consumer information on origin" and did not err in concluding that this is a "legitimate" objective. The Appellate Body found, however, that the Panel erred in its interpretation and application of Article 2.2. This was because the Panel appeared to have considered, incorrectly, that a measure could be consistent with Article 2.2 only if it fulfilled its objective completely or exceeded some minimum level of fulfillment, and to have ignored its own findings, which demonstrated that the COOL measure does contribute, at least to some extent, to achieving its objective. The Appellate Body, therefore, reversed the Panel's finding that the COOL measure is inconsistent with Article 2.2 but was unable to determine whether the COOL measure is more trade restrictive than necessary to fulfill a legitimate objective within the meaning of Article 2.2. As the conditions on which Canada's appeals with respect to Articles III:4 and XXIII:1(b) of the GATT 1994 were made were not satisfied, the Appellate Body made no findings under these provisions.

At its meeting on 23 July 2012, the DSB adopted the Appellate Body report and the panel report, as modified by the Appellate Body report.

Findings of the Compliance Panel with Respect to the Challenge by Canada and Mexico that the Revised U.S, Cool Regulation Complies with the Dispute Settlement Body Recommendations:

The compliance panel found that the amended COOL measure violates Article 2.1 of the TBT Agreement because it accords to Canadian and Mexican livestock less favorable treatment than that accorded to like U.S. livestock. In particular, the compliance panel concluded that the amended COOL measure increases the original COOL measure's detrimental impact on the competitive opportunities of imported livestock in the U.S. market because it necessitates increased segregation of meat and livestock according to origin; entails a higher recordkeeping burden; and increases the original COOL measure's incentive to choose domestic over imported livestock. Further, the compliance panel found that the detrimental impact caused by the amended COOL measure does not stem exclusively from legitimate regulatory distinctions. In this regard, the compliance panel followed the approach of the Appellate Body in the original dispute by taking into account the amended COOL measure's increased recordkeeping burden, new potential for label inaccuracy, and continued exemption of a large proportion of relevant products. These considerations confirmed that, as with the original COOL measure, the detrimental impact caused by the amended COOL measure's labeling and recordkeeping rules could not be explained by the need to convey to consumers information regarding the countries where livestock were born, raised, and slaughtered.

The compliance panel determined the complainants had not made a *prima facie* case that the amended COOL measure is more trade restrictive than necessary within the meaning of Article 2.2 of the TBT Agreement. In reaching this conclusion, the compliance panel found that the amended COOL measure makes a considerable but, given the exemptions from coverage, necessarily partial contribution to its objective of providing consumer information on origin.

The compliance panel further found that the amended COOL measure had increased the “considerable degree of trade-restrictiveness” found in the original dispute. The compliance panel also assessed the risks non-fulfillment of the objective would create in terms of consumer interest in, and willingness to pay for, different types of country-of-origin information. Additionally, the compliance panel reviewed four alternative measures proposed by the complainants and concluded that either they would not make an equivalent contribution to the relevant objective as the amended COOL measure would, or they were not adequately identified so as to enable meaningful comparison with the amended COOL measure. As a result, the compliance panel was not able to conclude that the amended COOL measure is more trade restrictive than necessary in light of the proposed alternative measures. The compliance panel found that the amended COOL measure violates Article III:4 of the GATT 1994 based on its finding that the amended COOL measure increases the original COOL measure’s detrimental impact on the competitive opportunities of imported livestock in comparison with like U.S. products. In this regard, the compliance panel relied on the same considerations that informed its finding of detrimental impact under Article 2.1 of the TBT Agreement. However, consistent with Appellate Body jurisprudence, it was not necessary in order to find a violation under Article III:4 of the GATT 1994 for the compliance panel to determine whether the detrimental impact stemmed exclusively from legitimate regulatory distinctions.