Organization for Competitive Markets

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Public Comments on the Federal Trade Commission's "Made in the USA" Labeling Rule

by Ben Gotschall

Introduction

For 22 years, Organization for Competitive Markets (OCM) has worked to promote transparent, fair, and truly competitive agricultural and food markets. OCM is committed to the establishment of competitive markets for the exchange of goods and products used in agriculture and produced by farmers and ranchers throughout the United States. OCM maintains that true competition reduces the need for economic regulations. The responsible role of government in the agricultural economy is to be a regulator and enforcer of those rules necessary to assure that markets are fair, honest, accessible, and competitive.

Consolidation and globalization in the food industry have reached a point where the top four firms in almost every sector have acquired abusive levels of power. This corporate control has allowed the top firms to reap record profits, paying lower prices to the farmers who produce our food and charging higher prices to consumers of that food. The U.S. is losing farmers at an alarming rate, agricultural jobs and wages are drying up, and rural communities are being hollowed out. These problems can be mitigated by reining in corporations and their economic power, enabling U.S. farmers and ranchers to compete in fair and open markets.

Fair and transparent labeling for agricultural products, especially for meat and poultry, have been on of the main goals of our organization for several years, with a specific focus

on Country of Origin Labeling (COOL) of imported meat and poultry. To maintain both their lock on the marketplace and their unjust share of the retail price of agricultural goods, industrial agriculture interests have blocked transparency in the marketplace by denying U.S. producers the ability to differentiate their products from those of multi-national industrial agriculture corporations. This not only diminishes U.S. producers' ability to access the market with their own agricultural goods, but also it prevents the producers from obtaining a fair and just price for their products.

This tactic also flies in the face of consumer demands for transparency in their food system. U.S. consumers are demanding to know where their food comes from and where and how it is processed. Labeling provides consumers with important information for their marketplace choices. Labeling helps guide consumers who want to buy from U.S. family farmers and ranchers rather than from industrial multinational corporations that commingle meat products from several foreign countries.

It is with this perspective in mind that OCM submits the following comments on the Federal Trade Commission (FTC) Notice of Proposed Rulemaking (NPRM) on "Made in the USA" (MUSA) labeling claims.

The Made in the USA rule is inconsistent with existing federal regulation.

OCM understands that the FTC's NPRM is not intended to "supersede, alter, or affect any other federal or state statute or regulation relating to country-of-origin labels, except to the extent that a state country-of-origin statute, regulation, order, or interpretation is inconsistent with the NPRM."[1]

OCM believes that imported meat products bearing the "Product of USA" claim are making unqualified claims that *are* inconsistent with the NPRM. The NPRM gives three criteria by which to judge the consistency and qualification of a MUSA label claim:

1. Final assembly or processing of the product occurs in the United States,
2. all significant processing that goes into the product occurs in the United States, and
3. all or virtually all ingredients or components of the product are made and sourced in the United States.[2]

[1] Federal Trade Commission. "Made in the USA Labeling Rule." 15 July 2020. Available: https://beta.regulations.gov/document/FTC-2020-0056-0001.
[2] Ibid.

In the absence of COOL standards since 2015,[3] the United States Department of Agriculture (USDA) has allowed imported meat *not* sourced in the United States that has neither been processed nor processed in the United States to be labeled as "Product of the USA."

According to the USDA Agricultural Marketing Service (AMS), processed foods are excluded from COOL requirements. This is inconsistent with the NPRM criteria #1 and #2, which specifically require that processing either be done in the United States or be subject to labeling identifying where the product was processed. However, USDA does not consider meat muscle cuts or ground meat to be a processed food by its own definition:

> A processed food item is defined as a covered commodity that has undergone specific processing resulting in a change in the character of the covered commodity, or that has been combined with at least one other covered commodity or other substantive food component. Specific processing that results in a change in the character of the covered commodity includes cooking (e.g., frying, broiling, grilling, boiling, steaming, baking, roasting), curing (e.g., salt curing, sugar curing, drying), smoking (hot or cold), and restructuring (e.g., emulsifying and extruding).[4]

Therefore, meat muscle cuts and ground meat would not be considered a processed food and should not be excluded from COOL requirements. The fact that meat muscle cuts and ground meats are excluded from COOL requirements would mean that these products, obtained from non-domestic sources, labeled as a "Product of the USA," would be inconsistent with the NPRM's criteria for MUSA labeling.

USDA, in doing away with COOL for *some* meat products, was able to skirt this inconsistency by establishing an AMS rule that had simply removed certain types of meat from the definition of what it terms a "covered commodity" in the regulatory language:

> The definitions of beef (§ 65.110), ground beef (§ 65.155), ground pork (§ 65.175), and pork (§ 65.215) are removed from the regulation. The definition of the term covered commodity (§ 65.135(a)(1) and (2)) is amended to remove references to beef, pork, ground beef, and ground pork. The definitions of production step

[3] United States Congress. "H.R. 2393: Country of Origin Labeling Amendments Act of 2015," 10 June 2015. Available: https://www.govtrack.us/congress/votes/114-2015/h333.
[4] United States Department of Agriculture, Agricultural Marketing Service. "Country of Origin Labeling (COOL) Frequently Asked Questions." Available: https://www.ams.usda.gov/sites/default/files/media/FAQs%20for%20Consumers%20-%20English.pdf.

> (§ 65.230), raised (§ 65.235) and United States country of origin (§ 65.260(a)) are amended to remove references to beef and pork.[5]

This elimination of the definition of certain types of meat products establishes even more inconsistency, since other types of meat were, by definition, included in the regulatory language. Labeling of ground lamb, ground goat, and ground chicken was retained by the AMS rule, with language stating, "The declaration for ground lamb, ground goat, and ground chicken covered commodities shall list all countries of origin contained therein or that may be reasonably contained therein."[6] The purpose of this inconsistency is not clear from the language of the rule.

These inconsistencies within federal regulations for COOL have caused significant damage to domestic beef and pork producers and have eliminated transparency for consumers. AMS openly acknowledges that "the costs of this rule are the loss in benefits to consumers who desired such country of origin information for muscle cut beef and pork, and ground beef and pork products sold at retail."[7] While AMS estimated that the benefits of the elimination of COOL for beef and pork would be as much as $1.8 billion, mostly in the form of cost avoidance, the elimination of COOL has not benefitted American farmers and ranchers. The cost savings have been realized mostly by the upstream firms in the food supply chain, while cattle and pork producers have seen prices actually decline.

This suppression of prices paid to producers in the absence of COOL is one that has been acknowledged by the beef packers themselves. In a memorandum to the Minnesota U.S. District Court regarding an antitrust lawsuit filed against them, the "Big Four" meatpacking companies (Tyson Foods, Inc.; JBS S.A.; Cargill, Inc.; and National Beef Packing Company, LLC), argued that

> In 2016, Congress repealed the Mandatory Country of Origin Labeling rule for beef . . . When the rule was in place, domestic feedlots could charge higher prices than foreign feedlots because of the premium paid for domestic beef . . . After the rule was repealed, foreign beef no longer had to be labelled as such, which spurred additional imports and caused domestic cattle prices to fall.[8]

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[5] United States Department of Agriculture, Agriculture Marketing Service. "Removal of Mandatory Country of Origin Labeling Requirements for Beef and Pork Muscle Cuts, Ground Beef, and Ground Pork," 2 March 2016. Available: https://www.federalregister.gov/d/2016-04609/p-11

[6] USDA, AMS. "Removal of COOL Requirements," Available: https://www.federalregister.gov/d/2016-04609/p-85.

[7] Ibid. Available: https://www.federalregister.gov/d/2016-04609/p-17.

[8] United States District Court, Minnesota. "Memorandum of Law in Support of Defendants' Joint Motion to Dismiss the Consolidated Amended Class Action Complaint." Case 0:19-cv-01222-JRT-HB, Document 103, filed 13 September 2019, pp.30-1. Available: http://oklahomafarmreport.com/wire/news/2019/09/media/04832_BeefPackerAntitrustResponseSept2019.pdf.

This admission of the downward effect on producer prices caused by the repeal of COOL shows that the cost savings benefit of removing COOL were not realized across the industry. In fact, the removal of COOL harmed U.S. producers and consumers alike by suppressing prices paid for domestic cattle while at the same time increasing retail prices for products that were labeled inconsistently and without transparency. [9]

Competitive Harm caused by inconsistency of Country of Origin Labeling

One of the biggest shortcomings of agricultural antitrust regulation, particularly that of the USDA's most recent proposed rule, "Undue and Unreasonable Preferences and Advantages Under the Packers and Stockyards Act," is its failure to properly clarify characteristics of actions that would constitute competitive harm. In fact, according to the current version of the Packers and Stockyards Act rules, a producer who is alleging harm caused by the action of a packer must show how that the action caused competitive harm across the entire industry. OCM has argued that requiring a producer to prove industry-wide competitive harm is itself a form of competitive harm.[10] OCM believes, however, that the labeling of imported meat as "Product of the USA" in the absence of COOL is perhaps the only case of an anti-competitive behavior that definitively *does* cause industry-wide competitive harm.

Labeling imported beef as a "Product of the USA" constitutes harm to *all* domestic beef producers, because it potentially displaces, undercuts, and weakens the demand for *any* domestic beef on the retail shelf at any given time. Because there is no differentiation between imported beef and domestic product, there is no way to determine which domestic producers are being potentially harmed; therefore, any domestic producer can be potentially harmed at any time.

Clearly this ambiguity in the marketplace favors those firms having the ability to import beef and pork products into the United States, at the expense of those which do not. When domestic beef and cattle prices are higher than prices for imports, firms with foreign assets or importation arrangements can undercut domestic prices to secure sales or sell lower-cost products for a higher margin. Domestic firms without the ability to manipulate their supply costs with the aid of imported products are not only unable to realistically

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[9] United States Department of Agriculture, Economic Research Service. "Historical monthly price spread data for beef, pork, broilers," Updated 28 February 2020. Available: https://www.ers.usda.gov/webdocs/DataFiles/52160/history.xls?v=3334.3.

[10] Gotschall, Ben. "Public Comments on the Proposed Rule: Undue and Unreasonable Preferences and Advantages Under the Packers and Stockyards Act." Organization for Competitive Markets, 12 March 2020, p.4. Available: https://competitivemarkets.com/wp-content/uploads/2020/03/OCM-Public-Comments-on-Undue-Preference-Rule-3-12-20.pdf.

compete with suppressed prices caused by imports, but they are also unable to differentiate their products in the marketplace in a way that would explain seeming price premiums. The lack of a consistent, transparent country of origin labeling standard causes competitive harm to these firms, and, by extension, to their suppliers.

Conclusion

OCM believes that it is in the best interests of U.S. consumers and U.S. independent farmers and ranchers that Country of Origin Labeling be reinstated for all types of meat products in the U.S. In the absence of such labeling requirements, the standards for commerce of certain types of meat products such as beef and pork are inconsistent with the standards for other types of meat such as goat and lamb.

The criteria set forth by the Federal Trade Commission's Notice of Proposed Rulemaking on Made in the USA Labeling are straightforward, common sense standards that we feel are adequate to address the issues facing producers and consumers alike who deserve truth and transparency in the marketplace. The criteria in the NPRM should be enforced, with penalties for violations sufficient to discourage infractions. Only with consistent country of origin labeling standards across all sectors will any "Made in the USA" claim be effective in establishing fair trade, producer protection, and consumer confidence.