Consumers Union's Comments on
US Department of Agriculture (USDA) Agricultural Marketing Service (AMS)
Interim Final Rule on Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts
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Summary

Consumers Union[1] (CU) welcomes the opportunity to comment on USDA's Interim Final rule for mandatory country of origin labeling (COOL) for beef, pork, lamb, chicken, goat meat, perishable agricultural commodities, peanuts, pecans, ginseng, and macadamia nuts. We continue to believe that this COOL should cover as many items as possible as it is clear that consumers desire to know where there food is coming from. Indeed, when Congress passed the 2002 Farm Bill, it was clear that COOL was meant to be for consumer information purposes. Consequently, we think that COOL labeling should be as expansive as possible. While we applaud the USDA for finally implementing COOL and for adding chicken, goat meat, pecans, ginseng and macadamia nuts, we are concerned that USDA has listened more to the retail food industry, which does not want COOL, than to consumers and has come up with an interim final rule that appears to minimize the number of items covered under mandatory

[1] *Consumers Union, publisher of Consumer Reports, is an expert, independent nonprofit organization whose mission is to work for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves. To achieve this mission, we test, inform, and protect. To maintain our independence and impartiality, Consumers Union accepts no outside advertising, no free test samples, and has no agenda other than the interests of consumers. Consumers Union supports itself through the sale of our information products and services, individual contributions, and a few noncommercial grants. Some 4.5 million people subscribe to Consumer Reports, with another 2.5 million subscribing online.*

COOL. In particular, we believe that USDA's overly expansive definition of "processing," which comes from the 2004 interim final rule for fish and shellfish and which would exclude large number of items from mandatory COOL should not be used. We urge USDA/AMS to make case by case rules for what is defined as "processed" and to be conservative in terms of allowing exemptions for such items. Mixtures, such as fruit salad, should also not be exempted.

The basic problem is that the definitions of "retailer" and "processed food item" in the interim final rule are so broad as to exclude a large number of retail products from mandatory COOL. In fact, the definition of retailer excludes fish markets! AMS has no control over the definition of "retailer," which is spelled out in the law (Public Law 107-1712). However, AMS did define "processed food item" in a way that was overly broad and lead to the exemption of many retail items from mandatory COOL.

In addition, USDA/AMS interim final rule, along with the recently revised *Country of Origin Labeling (COOL), Frequently Asked Questions, COOL Implementation: Legislative History and Status of Rulemaking*, dated September 26, 2008, appears to allow meat processors to label meat that is exclusively of U.S. origin with a mixed origin label e.g., "Product of the United States, Canada, and Mexico." We feel that this proposal undermines Congress' intent for COOL. We strongly believe that cattle that are exclusively born, raised and slaughtered in the US should be labeled at "Product of US" and not allow a mixed origin label.

Background

There are two basic arguments for COOL. First, recent studies have found that consumers overwhelmingly desire COOL and believe they have a right to know such information. For example, a poll of 1,000+ people conducted by Consumers Union in early June, 2007, found that 92% thought that imported food should be labeled as to its country of origin[2]. Another poll from 2007, conducted for Food and Water Watch, found that 82% of 1000 people polled in early March, 2007, supported mandatory COOL[3]. Most recently, a poll of more than 4,500 people, conducted in mid-July, 2007 by Zogby Interactive, found that 88% of those polled said all retail food should have COOL. More importantly, some "94% believe that consumers have a *right* to know the country of origin of

[2] At http://greenerchoices.org/products.cfm?product=crfood&pcat=food
[3] At http://www.foodandwaterwatch.org/press/releases/food-labeling-82-percent-support-cool-article03252007

the foods they purchase."[4] Thus it is clear from these polls that an overwhelming majority of consumers want their foods to have COOL.

Second, COOL can also serve as a risk management measure. Developing countries such as China, India, or Mexico which may not have as stringent food safety regulations and/or have not implemented/enforced those regulations as rigorously as the US, may export hazardous food products. COOL could allow consumers to avoid such food items as the need arose. For example, in 2003, there was an outbreak of hepatitis that killed 3 people and sickened more than 600 people and was linked to green onions from Mexico[5]. Since there was no required COOL for fruits and vegetables in 2003, concerned consumers had to refrain from buying all green onions for a while. If COOL had been in effect, consumers could have simply avoided green onion from Mexico. This past spring, there was an outbreak of *E. coli* 0157:H7 linked to tomatoes and/or jalapeño peppers. Eventually, they found jalapeño pepper from Mexico that tested positive for *E. coli* 0157:H7. If COOL had been in place, consumers could simply have avoided jalapeño peppers from Mexico only. In June, 2007, FDA announced that they would detain imports of all farm-raised shrimp, catfish, basa, dace (type of carp) and eel from China until they can be shown to be free of residues of four drugs unapproved for use in farm-raised seafood; three of the drugs (gentian violet, nitrofuran and malachite green) have been shown to be carcinogenic in animal studies[6]. Although FDA did not issue a recall for these farm-raised Chinese seafood imports, consumers that are concerned about consuming such products could potentially avoid them as COOL for fish and shellfish was implemented for large retailers in 2004.

Consumers agree that COOL can serve as a risk management measures. The Zogy Interactive poll—conducted in mid-July, 2007—found that 90% of those polled "believe knowing the country of origin will allow consumers to make safer food choices."[7]

We are concerned that certain clauses in the law mandating COOL allow many products to be excluded. The law stated that, for purposes of COOL, the terms "retailer" and "processed agricultural commodity" should "*have the*

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[4] At http://www.zogby.com/news/ReadNews.dbm?ID=1345

[5] Wheeler, C, Vogt, TM, Armstrong, GL, Vaughan, G, Weltman, A, Nainan, OV, Dato, V, Xia, G, Waller, K, Amon, J, Lee, TM, Highbaugh-Battle, A, Hembree, C, Evenson, S, Ruta, MA, Williams, IT, Fiore, AE and BP Bell. 2005. An outbreak of hepatitis A associated with green onions. *The New England Journal of Medicine*, 353: 890-897.

[6] http://www.fda.gov/bbs/topics/NEWS/2007/NEW01660.html

[7] At http://www.zogby.com/news/ReadNews.dbm?ID=1345

meanings given the terms in section 1(b) of the Perishable Agricultural Commodities Act [PACA] of 1930." As AMS noted, "Under PACA, a retailer is any person who is a dealer engaged in the business of selling any perishable agricultural commodity solely at retail when the invoice cost of all purchases of produce exceeds $230,000 during a calendar year. This definition excludes butcher shops, fish markets, and small grocery stores that sell fruits and vegetables at a level below this dollar volume threshold or do not sell any fruits and vegetables at all" (68 FR 61946, October 30, 2003). Unfortunately, this definition of retailer does not conform to what the average consumer thinks of as a retailer. It completely excludes stores that do not sell fruits and vegetables, such as a large fish market, even though fish are supposed to be covered. It also excludes meat markets and small green grocers and convenience stores. As AMS notes, this definition would exclude about 25% of the sales of covered commodities: "supermarkets, warehouse clubs and superstores represent the retailers as defined by PACA, and these retailers are estimated to account for 75.6% of retail sales of covered commodities" (73 FR 149, pg. 45132). To compensate for these significant exclusions, we urge USDA to resolve any ambiguities in a way so as to maximize the number of food items with mandatory COOL.

Perhaps the most important ambiguity in the law concerns a "processed food item." The law (Public Law 107-1712) explicitly exempted covered commodities from COOL if they were "an ingredient in a processed food item," but did not define what was meant by "processed food item." We urge USDA/AMS to make case by case rules for what is defined as "processed" and to be conservative in terms of allowing exemptions for such items. In particular, we do not think that AMS should use the definition of "processed food item" as laid out in the 2004 interim final rule for COOL for fish and shellfish.

Processed Food Item

In the 2004 interim final rule for COOL for fish and shellfish, USDA used a two-step approach and defined a "processed food item" as a retail food item "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 components (e.g. breading, tomato sauce)," and then gave examples of the types of processing (e.g. cooking, curing, smoking and restructuring) that would cause a product to be considered a "processed food item" (69 FR 59708; October 5, 2004).

CU believes that the definition of "processed food item" used in the interim final rule for fish and shellfish is too broad and results in the exclusion of too many products. A year before the interim final rule for fish and shellfish, USDA published a proposed rule for COOL for all covered commodities (68 FR 61944 et seq; October 30, 2003), that defined processed food more narrowly, but used the same basic two-part definition of "processed food item" as was ultimately used in the interim final rule. However, in the earlier proposed rule, AMS made clear that "a change in the character of the covered commodity" meant that the food item had "undergone a physical or chemical change *such that they no longer retain the characteristics of the covered commodity thus consumers would not use the items in the same manner as they would the covered commodities"* italics added (68 FR 61946, October 30, 2003). AMS made clear that cooking, canning and breading would *not* be considered as forms of processing that would change the characteristics of the covered commodity enough to cause consumers to use it in a different way than usual, while restructuring, smoking and curing would: "All fish and shellfish, whether chilled, frozen, raw, **cooked, breaded or canned** would be subject to these regulations unless they are an ingredient in a processed food item. . . . restructured shrimp or fish sticks and smoked and cured products would be considered processed food items because they no longer retain the characteristics of the covered commodity and thus consumers would not use them in the same manner as they would the covered commodity" bold added (68 FR 61948, October 30, 2003). In addition, USDA considered breading, seasonings and preservatives to be "non-substantial" ingredients that, by themselves do not constitute making a food item a "processed food item." By the time the interim final rule was published a year later, USDA weakened their own proposed definition of "processed food item" so that cooking, canning or breading would turn a fish or shellfish into a "processed food item."

USDA's decision to use the definition of "processed food item" from the interim final rule for fish and shellfish causes too many products—including cooked or roast meat, seasoned and roasted peanuts, and breaded perishable agricultural commodities— to be exempt from COOL. For example, roasted peanuts are exempt from COOL labeling because "roasting" is a form of cooking. However, as AMS noted in 2003, "the vast majority of peanuts sold at retail are shelled, roasted and salted. AMS believes these products were intended to be covered by the law" (68 FR 61948). In the present interim final rule, AMS notes that use of the proposed definition of "processed food item" will mean that 95% of all peanuts, pecan and macadamia nuts will be exempted from COOL: "We assume that no more than 5 percent of the sales of peanuts at subject retailers are sold as green or raw peanuts. Therefore, the initial estimates of the volume of

peanuts affected by this rule are reduced to 5 percent of the amounts estimated in the PRIA. Macadamia nuts and pecans have been included with peanuts." (73 FR 45131). By excluding 95% of all peanuts, pecan and macadamia nuts from this COOL means that USDA has not followed the intent of the law. We agree with AMS' views from 2003 and feel that all shelled, roasted and salted peanuts, pecans and macadamia nuts should be labeled as to country of origin.

In addition, in 2003, AMS stated that "As this is a retail labeling law, to help guide AMS in determining how to define a 'processed food item,' AMS viewed the scope of covered commodities in the context of how these products are marketed at the retail level" (68 FR 61946). We strongly agree with this approach of considering how the products are sold at retail level so as not to exclude too many products as Congress clearly intended for most covered commodities to be included. As AMS noted, "interpret[ing] the law as only applying to green peanuts would result in the exclusion of most peanuts sold at retail. Similarly, to exclude canned fish would result in the exclusion of a large share of the fish products sold at retail" (68 FR 61946). So, the definition of "processed food item" should differ between the various covered commodities—e.g. muscle cuts of meat (beef, lamb, and pork), chicken, goat meat, ground meat, perishable agricultural commodities, and peanuts, pecans, ginseng and macadamia nuts—and should not be based on the definition of "processed food item" from the 2004 interim final rule on fish and shellfish.

We believe that the major components of AMS' definition of processed food item (i.e. change in character and/or combined with other substantive components) are applicable, with some modification, to muscle cuts of meat (beef, lamb, and pork), chicken, goat meat, ground meat, perishable agricultural commodities, and peanuts, pecans, ginseng and macadamia nuts. The first part of the definition—a change in character—is fine, as long as AMS makes it clear that the change in character is such that a consumer "would not use the items in the same manner as they would the original commodity". Thus, as per the proposed 2003 COOL rule, all forms of cooking (e.g., frying, broiling, grilling, boiling, steaming, baking, roasting), as well as canning should not constitute a change in character.

The second part of the definition—combined with other substantive components—is also fine, as long as AMS clearly defines what is meant by "substantive components." As in the 2003 proposed COOL rule, breading, seasonings, preservatives would not be considered "substantive components." Also, we do not think that a simple mixture of covered items should be

considered as "substantive component." Thus, a bag of salad greens should not be considered to be a "processed food item" simply because it contains a mixture of covered items (e.g. the various individual salad greens would all be considered covered items).

Meat—muscle cuts and ground product

By combining the notions of consideration of how the products are sold at retail, along with the two step approach to defining "processed food item" with an overarching view toward maximizing the number of food items that will require COOL, we suggest the following. For muscle cuts of beef, lamb, pork, chicken and goat, chilling, freezing, cooking, seasoning or breading should not constitute a method of processing and so should be covered by COOL. In addition, we also support the position laid out in the 2003 proposed COOL, that "needle-tenderized steaks; fully-cooked entrees containing beef pot roast with gravy; seasoned, vacuum-packaged pork loins; and water-enhanced case ready steaks, chops, and roasts . . . would not be considered processed food items" (68 FR 61947). We would go beyond the 2003 AMS proposed COOL rule in a number of areas. We would support the alternative proposal in the 2003 COOL proposed rule which states "that a covered commodity that is further processed (i.e. cured, restructured, etc.) should not be excluded unless the covered commodity is mixed with other commodities such as a pizza or TV dinner" (68 FR 61947). We think this stance is justified on the basis of how consumers perceive cured items. If we exempted restructured and cured products from COOL, this would mean that no bacon, hams nor corned beef briskets would be labeled. Congress clearly stated that pork was included in COOL, but exempting bacon and hams would exclude a significant portion of the pork market.

Fresh and frozen fruits and vegetables

Under the law, "perishable agricultural commodity" is defined as in paragraph 1(b) in PACA of 1930, which includes "any of the following, whether or not frozen or packed in ice: Fresh fruits and vegetables of every kind and character; and includes cherries in brine as defined by the Secretary in accordance with trade usages." Accordingly, cooked and canned fruits and vegetables are not considered "perishable agricultural commodities" and so would be exempt from mandatory COOL. Although we would like to see cooked and canned fruits and vegetables labeled as to country of origin, we realize that the law is explicit in its definition of "perishable agricultural

commodity" and, thus there is no opportunity for AMS to require such country of origin labeling.

Although cooked and canned fruits and vegetables have already been exempted from COOL by definition, that leaves the question of what kinds of processing would also be exempted from COOL. We disagree with AMS that oranges squeezed into orange juice or apples mashed and made into apple sauce constitute a processed food item that no longer retains the characteristic of the covered commodity and so should be exempt from COOL. The definition of "perishable agricultural commodity" already exempts canned or cooked fruits and vegetables from mandatory COOL. However, we would like to see orange juice included as a covered commodity as orange juice represents a major component of orange consumption in the US.

As for mixtures of a perishable agricultural commodity and "non-substantive components" we agree with AMS that "products such as strawberries packaged with sugar, a preservative, or other flavoring" would not be considered "processed food items" because sugar, preservatives and flavorings are considered to be "non-substantive components." Thus, for perishable agricultural commodities, AMS should explicitly list sugar, preservatives and flavorings as "non-substantive components." We do agree with AMS that combination of a perishable agricultural commodity combined with a "substantive food component" that results in a distinct retail item should be considered a processed food item. Thus, a frozen prepared pie containing frozen apple slices would be exempt from COOL. Baked fruit pies would also be exempt from mandatory COOL because the fruits have been cooked and so don't fit the definition of perishable agricultural commodity. However, we disagree with AMS that a simple mixture of perishable agricultural commodities would constitute a "processed food item." A bag of salad greens containing romaine lettuce, red leaf lettuce and arugula should not be exempt from mandatory COOL, nor should a fruit cup containing cantaloupe, honeydew, and watermelon or a vegetable tray containing both carrots and celery. Since the retailer will have country of origin information on all these perishable agricultural commodities, they could easily add such information to the labels.

Peanuts, pecans, macadamia nuts

AMS' use of the definition of "processed food item" that is used in the interim final rule for COOL for fish and shellfish—which includes all forms of cooking, including roasting—for peanuts, pecans and macadamia nuts that

would mean that virtually all peanuts would be exempt from mandatory COOL. As previously stated, AMS notes that use of the proposed definition of "processed food item" in the present interim final rule will mean that 95% of all peanuts, pecan and macadamia nuts will be exempted from COOL. As AMS noted in their 2003 proposed rule on COOL, "Because the vast majority of peanuts sold at retail are shelled, roasted, and salted, AMS believe these products were intended to be covered by the law" (68 FR 61948). We strongly agree with AMS' argument from 2003 that shelled and/or roasted and/or canned peanuts sold at retail do not have characteristics that are different from a covered commodity and so should not be exempted. We also agree with AMS in their 2003 proposed rule on COOL that oil, salt and other flavorings are "non-substantive" ingredients. In the interest of maximizing information for consumers, we would argue that peanut butter should be labeled as to country of origin, as this is a major way that peanuts are consumed in the US, especially by children. To exclude this product from mandatory COOL would be excluding a significant portion of peanut, pecan and macadamia products from such labeling.

In addition, as discussed in the section "Country of Origin Notification" below, AMS states that the labeling and notification requirements that were proposed in the 2004 interim final rule on COOL for fish and shellfish (e.g. §60.200(f),(g))—and based on US Customs and Border Protection definition of country of origin and "substantial transformation" which is used in lieu of "processing"—will be used for meat (beef, pork, lamb), perishable agricultural commodities, and peanuts. We agree with this approach and note that the US Customs and Border Protection definition of "substantial transformation" would functionally be used to define "processing." We note that in a series of decisions, the US Customs and Border Protection (CBP) determined that roasting of pistachios, pecan nuts and coffee beans did not constitute "substantial transformation" in a series of decisions from 1985, 1987, and 1988, respectively[8]. As noted in a discussion of whether cooking shrimp results in a "substantial transformation," "Customs concluded that the physical and commercial changes which occur in the pistachio nuts as a result of roasting are not significant and that the identity and use of the pistachio nuts remains intact. The decision states that roasting appears to be, like picking, sorting, and bagging, simply one of several processing steps to which all pistachio nuts are subjected, no one of which alters or limits the intended or potential commercial use. See also HQ 730058, June 2, 1987 (roasting of pecan nuts is not a substantial transformation)"[9]. IF

[8] discussed in document at http://rulings.cbp.gov/detail.asp?ru=731763
[9] http://rulings.cbp.gov/detail.asp?ru=731763

CPB feels that roasting of pistachio and pecan nuts is not a substantial transformation, then, since sections §60.200(f),(g) of the interim final rule on COOL for fish and shellfish use "substantial transformation" as a synonym for "processing," AMS must decide that roasting of peanuts is not a form of processing and so should not be exempt from the COOL requirement.

Country of Origin Identification

Another important issue is how to determine the country of origin for covered commodities. The law (Public Law 107-1712) states that to get a US country of origin label, meat (e.g. beef, lamb, pork, chicken and goat) products must come from animals exclusively born, raised and slaughtered in the US; farmed fish must be hatched, raised, harvested and processed in the US, while wild fish must be harvested and processed in US, a territory of the US, or a State including the waters thereof; and perishable agricultural commodities and peanuts must be exclusively produced in the US[10]. We support this portion of the law.

The 2008 Farm Bill contains provisions on labeling of covered meat products of multiple countries of origin. In the AMS interim final rule, "if an animal was born, raised, and/or slaughtered in the United States . . . the origin of the resulting meat products derived from that animal may be designated as Product of The United States, Country X, and/or (as applicable) Country Y, where Country X and Country Y represent the actual or possible countries of foreign origin" (73 FR 45110). Further AMS-issued guidance on September 11, 2008 states, *"Q. Can a retailer, like a meat packer, declare the origin of meat products derived from livestock born, raised, and slaughtered in the United States (i.e., Product of USA) as a mixed origin label such as Product of the United States, Canada, and Mexico? A. Yes. Retailers are permitted to market U.S. produced meat products under a mixed origin label declaration."* Allowing meat products derived from animals exclusively born, raised and slaughtered in the US to have a mixed origin label declaration goes against the will of Congress on COOL. AMS issued an updated guidance *Country of Origin Labeling (COOL), Frequently Asked Questions, COOL Implementation: Legislative History and Status of Rulemaking*, dated September 26, 2008[11], appears to allow meat processors to label meat that is exclusively of U.S. origin with a mixed origin label e.g., "Product of the United States, Canada, and Mexico." In this

[10] http://www.ams.usda.gov/cool/subtitled.htm
[11] http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5071922

updated guidance, AMS will allow the mixed origin label if a single cow from Canada and/or Mexico is processed along with cattle born, raised and slaughtered in the US. We are concerned as some packers have said that they will label all their meat products from the US with a mixed origin label (or North American label). We firmly believe that meat from animals exclusively born, raised and slaughtered in the US should be labeled as "Product of US" and not have a mixed origin label. Thus, we urge AMS to expressly prohibit the use of a mixed or North American label on meat products derived from animals that are exclusively born, raised, and slaughtered in the United States

In the 2003 proposed rule on COOL, AMS proposed requiring either labeling of the production steps that happened in the US or other countries, or a simplified label that would state where the product was imported from, followed by the production steps performed in the US. Thus, a farm-raised fish that was hatched, raised, and harvested in country X and processed in the US could be labeled as "Imported from country X, processed in the US." A farm-raised fish that was hatched, raised and harvested in the US but processed in country X, would be labeled either "Product of country X" or "Product of country X, born, raised and harvested in the US."

In the 2004 interim final rule on COOL for fish and shellfish, AMS simplified provisions that dealt with "labeling imported products that have not undergone substantial transformation in the United States," and "labeling imported products that have subsequently been substantially transformed in the United States," (e.g. §60.200(f),(g), respectively). The basic simplification was that only the information of where the product was imported from and whether it was processed in the US would be on the label, so that information on where all the production steps occurred doesn't need to be on the label. Thus, if a product had not undergone a "substantial transformation" (as defined by US Customs and Border Protection), then the product's country of origin would simply be the origin declared to the US Customs and Border Protection. If the product had been imported from country X and had been "substantially transformed" in the US, it would simply be labeled "From [country X], processed in the United States." If the product had been hatched, raised, and harvested in the US, but was processed (e.g. undergoes substantial transformation) in country X, it would simply be labeled "From country X."

Consumers Union believes that the simplified labeling provision laid out in the 2004 interim final rule, based on US Customs and Border Protection definition of country of origin and "substantial transformation" which is used in

lieu of "processing" (e.g. §60.200(f),(g)) would be acceptable to use for COOL for muscle cuts of meat (beef, lamb, and pork), chicken, goat meat, ground meat, perishable agricultural commodities, and peanuts, pecans, ginseng and macadamia nuts.

In defining country of origin for blended or mixed products in the voluntary COOL guidelines published in 2002 (67 FR 63367) AMS proposed requiring country of origin for each raw material source of the mixed or blended retail item by order of predominance by weight. AMS did this because it recognized that it would be misleading to consumers if a blended or mixed product (bagged lettuce, bag of shrimp) listed US ahead of other countries if only a small percentage of the covered commodity had US as country of origin. Thus if a bag of lettuce contained 5% lettuce that was exclusively produced in the US and 95% of the lettuce came from Mexico, it would be misleading if the country of origin was listed as: US, Mexico. By the time of the 2003 proposed rule on COOL, AMS had weakened this provision further to simply say that the country of origin declaration for mixed or blended products comprised of the same covered commodity would list alphabetically all the countries of origin for all the raw materials. We oppose an alphabetical listing.

By the time of the 2004 interim final rule on COOL for fish and shellfish, AMS had weakened/simplified the country of origin labeling provision for blended or commingled products comprised of the same covered commodity (such as a bag of shrimp) from more than one country of origin even further. In the 2004 interim final rule on COOL, AMS stated that the declaration on such a bag of shrimp could either list "the countries of origin contained therein *or that may be contained therein*" italics added.

AMS has taken this simplified approach for labeling country of origin for blended or commingled products from more than one country of origin contained in the interim final rule on COOL for fish and shellfish (e.g. §60.200(h)) and applied it to beef, pork, lamb, chicken, goat meat, perishable agricultural commodities, peanuts, pecans, ginseng, and macadamia nuts. We disagree with AMS on this. Ideally we would prefer that companies label the actual country of origin for each of the commingled covered commodities, and that they would list the percentage for each of the countries of origin. A bag of shrimp which consists of 95% shrimp from country X and 5% from US and a bag of shrimp consisting of 95% shrimp from US and 5% from country X, would be labeled the same under the interim final rule, while consumers may view a big difference between the two products. Alternatively, we could support the position which

AMS proposed in the voluntary COOL guidelines published in 2002 (67 FR 63367) which required country of origin for each raw material source of the mixed or blended retail item by order of predominance by weight.

Since AMS has decided to utilize the approach for blended or commingled products laid out in the 2004 interim final rule on COOL (e.g. §60.200(h)), we would like to raise one point that is ambiguous in §60.200(h). This section states that "When the retail product contains imported covered commodities that have subsequently undergone substantial transformation in the United States commingled with other imported covered commodities that subsequently undergone substantial transformation in the United States) and/or US origin covered commodities, the declaration shall indicate the countries of origin contained therein or that may be contained therein" (69 FR 59711). It is unclear whether in such a commingled commodity whether an imported covered commodity that is "substantially transformed" in the US could also list the US as a country of origin. On the one hand, CBP considers the country where the product undergoes "substantial transformation" to be the country of origin. On the other hand, section §60.200(g) of the 2004 interim final rule for COOL for fish and shellfish clearly states that an imported product that was imported from country X and "substantially transformed" in the US cannot list the US as a country of origin; such a product must be labeled "From [country X], processed in the United States." We think that AMS should make it very clear that in the case of blended or commingled products, listing US as one of the countries of origin should only be allowed for US origin covered commodities, as defined in the law (Public Law 107-1712). US country of origin should not be permitted if the product is only "substantially transformed" in the US; in such blended cases AMS should follow the rule as laid out in §60.200(g), e.g. such products could only say that the product was "processed in the US." Thus, a bag of shrimp consisting of shrimps that were imported from country X and country Y and that were substantially transformed in the US, should be labeled "From country X, country Y and processed in the United States."

Remotely purchased products

AMS notes that consumers are increasingly purchasing products over the internet or for home delivery before they have a chance to look at the final package. In the 2002 proposed rule for the voluntary COOL (67 FR 63367), AMS stated that consumers should be made aware of the country of origin for a covered commodity before the internet or phone purchase is made. However, by

the time of the 2003 proposed rule on mandatory COOL, AMS weakened this requirement so that the retailer must provide country of origin information at the time the product is delivered to the consumer. At that point, the consumer has already purchased the product and could use the COOL information only to decide whether to return it or not. We therefore believe the COOL information must be provided prior to the internet or phone purchase. We agree with the position laid out in the voluntary COOL proposal and think that consumers should be notified of the country of origin of the covered commodity before the purchase is made. In response to the 2002 voluntary COOL proposed rule, numerous commenters said that this would be almost impossible and impractical to do since this information changes rapidly depending on the location of the warehouse. To accommodate this concern, we would agree that the country of origin or the possible country(ies) of origins could be listed on the sales vehicle (i.e. internet site, home delivery catalog, etc.) as part of the information describing the covered commodity for sale.