April 8, 2003

The Honorable Bill T. Hawks
Under Secretary for Marketing and Regulatory Programs
United States Department of Agriculture
1401 Independence Avenue, S.W.
Washington, D.C. 20250

Re: Country of Origin Labeling Regulations under the Farm Security and Rural Investment Act of 2002

Dear Mr. Secretary:

This submission presents comments addressing the future country of origin labeling regulations of the U.S. Department of Agriculture (the "USDA"), in response to the USDA's invitation for public comment upon its publication of voluntary country of origin labeling guidelines. *Establishment of Guidelines for the Interim Voluntary Country of Origin Labeling of Beef, Lamb, Pork, Fish, Perishable Agricultural Commodities, and Peanuts under the Authority of the Agricultural Marketing Act of 1946*, 67 Fed. Reg. 63,367 (Oct. 11, 2002) (the "Guidelines").

This comment submission is made jointly on behalf of three major associations that collectively represent a substantial portion of the food manufacturing and processing industry in the United States. The associations (in alphabetical order) are as follows: the American Frozen Food Institute ("AFFI"), the Grocery Manufacturers of America ("GMA"), and the National Food Processors Association ("NFPA").

AFFI is the national trade organization that has represented the interests of the frozen food industry for more than 60 years. Its 525 members account for more than 90 percent of the frozen food production in the United States and represent all sectors of the frozen food industry supply chain, including manufacturing, distribution, supply, and packaging.

GMA is the world's largest association of food, beverage and consumer product companies. With U.S. sales of more than $460 billion, GMA members employ more than 2.5 million workers in all 50 states. The organization applies legal, scientific and political expertise from its member companies to vital food, nutrition and public policy issues affecting the industry. Led by a board of 42 Chief Executive Officers, GMA speaks for food and consumer product manufacturers and

sales agencies at the state, federal and international levels on legislative and regulatory issues. The association also leads efforts to increase productivity, efficiency and growth in the food, beverage and consumer products industry.

NFPA is the voice of the $500 billion food processing industry on scientific and public policy issues involving food safety, nutrition, technical and regulatory matters and consumer affairs. NFPA's members process and package fruits, vegetables, meat, fish, and specialty food and beverage products using a variety of technologies including canning, freezing, refrigeration, dehydration, and aseptic manufacturing.

AFFI, NFPA and GMA urge the USDA to reconsider the approaches it has taken in the Guidelines, which, if issued as binding regulations, would be administratively unsound and in some respects legally impermissible. The Guidelines would "over-regulate" by prescribing country of origin labeling rules for products already required to display such labeling, creating the prospect of duplicative, confusing, and even conflicting regulations.

In implementing its country of origin labeling regulations, USDA should adhere to the fundamental principle of regulating only where necessary and to the extent necessary to effectuate the statutory purpose. The Guidelines, however, fail to achieve this objective. Instead, these Guidelines reflect an overly-expansive interpretation of the regulatory authority granted to the USDA by the Congress.

As you know, Congress enacted the new country of origin labeling provisions as part of the Farm Security and Rural Investment Act of 2002 (the "Farm Bill"). Specifically, Congress added a new subtitle, "Subtitle D—Country of Origin Labeling," to the Agricultural Marketing Act of 1946 ("Subtitle D"). USDA's failure to confine its regulations to the scope of the Subtitle D requirements will impose burdensome and needless regulatory requirements on U.S. producers of processed food products.

AFFI, GMA and NFPA have included in this submission six recommended changes to USDA's voluntary Guidelines that USDA should adopt in promulgating any binding regulations. The first two recommendations address changes that are essential to achieving conformity with the statutory provisions of Subtitle D. The remaining four changes are needed to better effectuate the congressional intent behind Subtitle D and are also needed to ensure that any future regulations do not impose unnecessary and unjustified regulatory burdens. Specifically, in developing implementing regulations, USDA should:

(1) Provide that mixed processed food products are outside the scope of Subtitle D, as required by section 281(2)(B) of that statute;

(2) Delete from the implementing regulations the requirement in the Guidelines to display the country where processing occurred;

(3) Exclude from the scope of its implementing regulations all frozen produce;

(4) Exclude from the scope of its implementing regulations all frozen seafood;

(5) Delete from the implementing regulations the requirement in the Guidelines that multiple countries of origin be listed in the order of predominance by weight; and

(6) Define the scope of the implementing regulations to apply to in-shell peanuts but not peanuts that are shelled and roasted.

These recommendations are discussed in detail below.

A. Recommendation 1: USDA Must Provide that Mixed Processed Food Products (Including Frozen Mixed Produce Products) Are Outside the Scope of Subtitle D

USDA's current approach to the country of origin labeling of mixed processed food products is flatly inconsistent with Subtitle D and an illustration of USDA's overly broad interpretation of its statutory authority. This class of products includes mixed frozen produce products and other mixed processed food products, such as mixed nuts and other mixed snack food products containing peanuts.

Although Subtitle D includes, among the covered commodities, peanuts and "perishable agricultural commodities" as defined in the Perishable Agricultural Commodities Act of 1930 (which includes both fresh and frozen produce), Subtitle D expressly *excludes* from its scope any covered commodity that is "an ingredient in a processed food item." 1/ In addressing mixed frozen produce products and other

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1/ Subtitle D, section 281(2)(B) ("*EXCLUSIONS.--The term 'covered commodity' does not include an item described in subparagraph (A) if the item is an ingredient in a processed food item*").

mixed processed food products in its voluntary guidelines, USDA has exceeded its regulatory authority by adopting an impermissibly narrow interpretation of this exclusion.

Specifically, USDA has interpreted the "ingredient in a processed food item" exclusion to apply only where: (1) the processed food item is a combination of ingredients including the covered commodity, but the identity of the processed food item is different from that of the covered commodity; or (2) the covered commodity has undergone a "material change" so that its character is substantially different from that of the covered commodity. 2/ The preamble to the Guidelines states that the exclusion does not apply to "mixed or blended products where the individual constituents can be separately identified," giving as an example "mixed vegetables such as peas and carrots." 3/

The USDA interpretation contravenes the plain meaning of the statutory exclusion. Frozen produce is, of necessity, a processed food item: its preparation typically requires precise cutting and blending of raw vegetables, steam blanching, and freezing by a technically sophisticated process that achieves the characteristics demanded by the consumer. The individual vegetables or fruits in a frozen mixed produce product are, beyond question, "ingredients." Peanuts in mixed nut products and other mixed snack food products also have undergone processing (including, necessarily, shelling and roasting) and, therefore, also fall within the statutory exclusion.

Concerning the example cited in the preamble to the guidelines, a produce mixture consisting of frozen peas and carrots has a different commercial identity from peas and from carrots (whether fresh or frozen). The fact that vegetables such as the peas and carrots under consideration can be "separately identified" is irrelevant and does not place the finished product outside the statutory exclusion applying to ingredients in processed food items. The controlling fact is that both the peas and the carrots are ingredients in a processed food item.

Congress unambiguously has provided that the class of processed food products (frozen or otherwise) in which covered commodities are ingredients is beyond the scope of Subtitle D. Therefore, USDA may not address this class of

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2/ 67 Fed. Reg. at 63,368, 63,369.

3/ *Id.*

products in its implementing regulations without exceeding the regulatory authority delegated to it by statute.

For similar reasons, the USDA should not proceed with its intention, as announced in the Guidelines, to apply the Subtitle D program to "bagged salads." 4/ A bagged salad is, by definition, a product offered for retail sale in a container. As such, it already is subject to the country of origin labeling requirement provided for under the tariff laws. As discussed below in these comments as they pertain to Recommendation 3, the USDA should not extend the new country of origin labeling requirement to products already subject to country of origin labeling requirements under other laws. Also, a bagged salad is a processed product made by cutting and blending produce ingredients, and for this reason also the USDA should provide that such products are excluded from its regulations implementing Subtitle D.

In informal discussions with industry representatives, USDA officials have proposed an approach under which mixed produce products would be subject to a set of country of origin labeling rules under Subtitle D that would dispense with the requirement in the current Guidelines to display the country where processing occurred and also dispense with the requirement in the Guidelines that multiple countries of origin be listed in the order of predominance by weight. AFFI, GMA and NFPA believe that such an approach would be decidedly superior to the approach in the current Guidelines. We appreciate that the USDA has mentioned this approach as a means of addressing the difficult implementation problems posed by the complexities of the labeling scheme that the current Guidelines apply to mixed produce. Nevertheless, we submit that the result of such an approach would be similar to, but not exactly equivalent to, the country of origin requirements established under the tariff laws. As such, it would not correct the problem of duplicative regulation by two different regulatory agencies, and it would not offer the consumer meaningful information over and above that already provided for in regulations implementing the tariff laws. For the reasons set forth above and in the discussion of Recommendation 3, below, AFFI, GMA and NFPA submit that the better regulatory choice would be for USDA to provide that mixed processed food

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4/ *See* 67 Fed. Reg. at 63,371. ("An example of a mixed or blended product where the individual constituents can be separately identified is a bagged salad. For a bagged salad that contains lettuce, spinach, and peppers from three different countries, the package label would list the applicable country of origin separately for each constituent ingredient.")

products, including mixed processed produce products, are outside the scope of its Subtitle D regulations.

B. Recommendation 2: USDA Must Delete from the Implementing Regulations the Requirement in the Guidelines to Display the Country where Processing Occurred

Under the USDA interpretation of Subtitle D, as reflected in the Guidelines, the package or retail bin for certain covered commodities must display information in addition to the country of origin, such as the country in which a covered commodity was processed. This interpretation is contrary to the statute. If USDA were to include such a requirement in its binding regulations, it would exceed its regulatory authority.

With one specific exception (applying to seafood, for which Subtitle D requires that the information disclosed distinguish between wild and farm-raised seafood 5/), Subtitle D concerns itself solely with the *country of origin* of the covered commodity as it is offered for sale to the ultimate purchaser. Subtitle D, section 282(a)(1) ("a retailer of a covered commodity shall inform consumers, at the final point of sale of the covered commodity to consumers, of *the country of origin* of the covered commodity"). Nothing in Subtitle D directs or authorizes the USDA to require that covered commodities that are not seafood display any information other than the country of origin.

Nevertheless, the Guidelines reveal that USDA intends to require, in numerous instances, the disclosure of information in addition to the country of origin, such as disclosure of a country, other than the country of origin, in which processing of a covered commodity occurred. 6/ *See* discussion in the Preamble to the Guidelines, 67 Fed. Reg. at 63,370-63,371. Such a regulatory requirement is beyond the scope of authority granted by Subtitle D and must be deleted from any binding regulations that USDA may issue in the future.

5/ Subtitle D, section 282(a)(3) ("*The notice of country of origin for wild fish and farm-raised fish shall distinguish between wild fish and farm-raised fish*").

6/ With respect to meats, the Guidelines similarly would require disclosure of information other than the country of origin, such as the country in which the animal was born, raised, and slaughtered.

C. Recommendation 3: USDA Should Exclude Frozen Produce Products from Its Implementing Regulations

Frozen produce products of "foreign origin," as determined under the tariff laws, already are subject to country of origin labeling under a comprehensive set of regulations administered by the Bureau of Customs and Border Protection ("Customs"; formerly, the "U.S. Customs Service") 7/. These regulations, codified at 19 C.F.R. Part 134, interpret and administer the country of origin labeling ("marking") requirement established by Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. § 1304; ("Section 304")).

Frozen produce determined under judicial and administrative tariff law precedent to have domestic origin is not subject to the Section 304 marking requirements; however, producers of these domestic origin products may label or advertise their products as having U.S. origin, provided that any U.S. reference complies with rules and guidelines of the Federal Trade Commission. Because of the long-standing practice under which foreign-origin frozen produce is required to display country of origin labeling, consumers are accustomed to presuming that frozen produce products bearing no country of origin labeling are not of foreign origin.

Section 304 and the implementing regulations expressly require that packages of foreign-origin frozen produce be labeled ("marked") "in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article." 8/

Section 304 applies generally to goods of foreign origin that are imported into the United States. However, the statute excepts from the marking requirement natural products, including produce, that are offered for sale to the ultimate purchaser in bulk and in their natural state. 19 U.S.C. § 1304(a)(3)(J); 19 C.F.R. § 134.33. This exclusion from the marking requirement, known as the "J-List exclusion," pertains to fresh produce offered for retail sale in bulk. It does

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7/ Effective March 1, 2003, the bureau formerly known as the U.S. Customs Service is renamed the "Bureau of Customs and Border Protection"; formerly part of the Department of the Treasury, it is now a bureau of the Department of Homeland Security.

8/ 19 U.S.C. § 1304(a).

not pertain to fresh produce that is offered for retail sale in containers. The statutory J-List exclusion does not apply to *any* frozen produce, which of necessity is offered for retail sale in a processed state (and, in any event, invariably is offered for retail sale in containers).

As noted previously, Subtitle D, in section 281(2)(B), excludes from regulation any covered commodity that is an ingredient in a processed food item. Because all frozen produce falls within the plain meaning of this exclusion and the meaning of this exclusion as construed according to the legislative history (as discussed herein), USDA should exclude all frozen produce from its country of origin labeling regulations.

An exclusion for frozen produce would serve the essential purpose of avoiding duplication and overlap with the country of origin marking regulations under Section 304, which apply to all frozen produce except frozen produce of domestic origin. There is no regulatory need to address domestic-origin frozen produce under the Subtitle D regulations, for two reasons. First, as noted previously, consumers understand based on long-standing practice that these products are not of foreign origin. Second, as also noted previously, food producers voluntarily may label such products as products of U.S. origin, provided in doing so they comply with rules and guidance of the Federal Trade Commission. These rules and guidance are designed to ensure that labeling references to U.S. origin are not misleading to the consumer.

For more than a century, the Congress has delegated to Customs the authority to administer the country of origin labeling requirements for imported products, as set forth in Section 304 and in predecessor statutes. As a result, Customs and the courts have developed, over the course of decades of practice, interpretations of the marking requirement that offer a measure of predictability and stability in this area of the law. For example, there is a well-developed body of law on the determination of which country is the country of origin in instances in which goods are grown, processed, or manufactured in more than one country. 9/

9/ *See, e.g., United States v. Gibson-Thompsen Co. Inc.*, 27 C.C.P.A. 267 (1940), which concerned wooden handles imported to manufacture hairbrushes and toothbrushes and which generally is regarded as the seminal case on determinations of origin for marking purposes; *see also Grafton Spools Ltd. v. United States*, 45 Cust. Ct. 16, C.D. 2190 (1960) (imported typewriter ribbon spools); *Cardinal Glove Co. v. United States*, 4 CIT 41 (1982) (glove halves); *Carlson Furniture Industries v. United States*, 65 Cust. Ct. 474 (1970) (furniture parts to be

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The Customs regulations (19 C.F.R. Part 134) and various administrative rulings also address issues concerning the method of country of origin labeling to ensure that the necessary information is readily available to the ultimate purchaser at the time the purchasing decision is made. In contrast, Subtitle D, as currently interpreted by the USDA, applies rules for determining origin that are inconsistent with those that have been established under Section 304 during a century of precedent. As such, it would require creation of a new, overlapping regulatory and enforcement scheme that cannot avoid wasteful duplication, confusion, and conflicting interpretations.

In view of the comprehensive scope of Section 304 marking requirement, it is nonsensical and wasteful for USDA to regulate the country of origin labeling of frozen produce. Subtitle D does not require USDA to do so and provides an exclusion that reasonably should be interpreted as the basis for not doing so. The legislative history of Subtitle D further supports the conclusion that Congress did not intend for the USDA to re-regulate and over-regulate by including frozen produce within the scope of its country of origin regulations.

The sponsors of the Senate country of origin labeling proposal made clear that their intention was to bring within the scope of the new country of origin labeling requirements food products that are not currently subject to country of origin labeling. During consideration of the Farm Bill Conference Report, Senator Johnson, who sponsored the original legislation upon which Subtitle D was based (S. 280), urged USDA "to adhere to the intent of Congress in passing this important

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assembled into complete articles); *Uniroyal, Inc. v. United States*, 542 F. Supp. 1026 (Ct. Int'l Trade 1982), *aff'd per curiam*, 702 F.2d 1022 (Fed. Cir. 1983) (handsewn shoe uppers to which soles would be attached after importation); *National Juice Products Association v. United States*, 10 CIT 48, 628 F. Supp. 978 (Ct. Int'l Trade 1986) (frozen concentrated orange juice imported for use in manufacturing finished orange juice products); *Ferrostaal Metals Corp. v. United States*, 664 F. Supp 535 (Ct. Int'l Trade 1987) (steel sheet to be subjected to galvanizing and annealing); *Koru North America v. United States*, 701 F. Supp. 229 (Ct. Int'l Trade 1988) (headed and gutted fish for transformation into fish fillets); *National Hand Tool Corp. v. United States*, 16 CIT 308, 14 ITRD 1252 (Ct. Int'l Trade 1992); *aff'd per curiam* 989 F.2d 1201 (Fed. Cir. 1993) (components of hand tools imported for processing and assembly).

labeling legislation, and to comply with my intent as the primary author" as a preface for discussing his rationale for advancing this bill. 10/ Senator Johnson stated that "[u]nder present law [Section 304], most products require labeling according to their country-of-origin if they are produced outside of the United States. However, some products, such as fruits, vegetables, and peanuts have been excluded from this requirement [referring to the J-List exclusion]." 11/ In addition, upon introduction of S. 280, Senator Graham cited a nationwide survey indicating that "consumers favor mandatory country of origin labeling for *fresh produce*." 12/ During debate over the Farm Bill, Senator Johnson submitted a letter from producer groups who supported "inclusion of a measure to provide mandatory country of origin labeling for *fresh* produce and meat products in the Senate farm bill" and another, which requested support for "legislation to require country of origin labeling at retail for meat and *fresh* fruits and vegetables." 13/

Furthermore, Representative Mary Bono (R-CA), the sponsor of the House counterpart bill to S. 280, made clear that her intent was to extend the requirement for country of origin labeling to fresh produce and thus to eliminate the effect of the current "J-List" exclusion from the marking requirement administered under Section 304. This limited intent is manifest in the following statement by Representative Bono: "When the last comprehensive labeling Act was passed by Congress nearly 70 years ago, there were very few fruit and vegetable imports into the United States so the [labeling] requirement was unnecessary . . . the truth is that everyone wants to know where their food comes from. In the 21st century, with our local supermarkets carrying everything from Brazilian bananas to Chilean table grapes, *virtually everything bears its place of origin except for produce*. I believe consumers want this to change."14/

10/ Congressional Record at S4024 (May 8, 2002) (statement of Senator Johnson).

11/ *Id*.

12/ Congressional Record at S1135 (February 7, 2001) (statement of Senator Graham) (emphasis added).

13/ Congressional Record at S13271 (December 14, 2001) (statement of Senator Johnson) (emphasis added).

14/ Congressional Record at H6353 (October 4, 2001) (statement of Representative Bono) (emphasis added).

For these reasons, action by the USDA to exclude frozen produce from the scope of its future Subtitle D regulations is the only regulatory choice that is permissible under the plain meaning of the statute, consistent with the expressed intent of Congress as demonstrated by the legislative history, and feasible as a matter of the sound administration of the country of origin labeling requirement.

D. Recommendation 4: USDA Should Exclude Frozen Seafood Products from Its Implementing Regulations

Frozen seafood, like frozen produce, is described by the exclusion in section 281(2)(B) of Subtitle D, which applies to a commodity that is an ingredient in a processed food item. 15/ Frozen seafood products are, of necessity, "processed" food products. The raw seafood used to produce these products is an "ingredient," whether or not it is the sole or principal ingredient. As is frozen produce, foreign-origin frozen seafood products already are subject to the country of origin labeling scheme in place under Section 304. No "J-List" exclusion from the marking requirement applies to these products.

Frozen seafood products, like frozen produce products, should be excluded from the scope of the USDA's regulations to implement Subtitle D. Including frozen seafood in those regulations would provide no consumer benefit and instead would place countless food products under duplicative Federal labeling schemes, thus injuring U.S. processed food industries. Like frozen produce, frozen seafood is subject to country of origin labeling under a comprehensive set of regulations administered by Customs pursuant to Section 304. Section 304 and the implementing regulations require that packages of foreign-origin frozen seafood be labeled legibly and permanently, and in a conspicuous place, with the country of origin. 16/ Like frozen produce products, frozen seafood does not qualify for the J-List exclusion related to the country-of-origin labeling requirement under Section 304.

The USDA should confine its regulation of the country of origin labeling of seafood to fresh seafood that is not "processed" within the meaning of the

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15/ *See* Congressional Record at S4024 (May 8, 2002) (statement of Senator Johnson) ("If . . . a covered commodity is an ingredient in a processed food, the section *does not require that item to be labeled as to its country of origin*" (emphasis added)).

16/ 19 U.S.C § 1304(a).

exclusion in section 281(2)(B) of Subtitle D. In comparison, frozen seafood should be excluded from the scope of USDA's country of origin labeling requirements as it clearly is "processed" within the meaning of the section 281(2)(B) exclusion. Confining the scope of USDA regulation in this way is also reasonable because fresh seafood, as frequently displayed for retail sale, qualifies for the J-List exception to the Section 304 country of origin marking requirement.

Moreover, the legislative history of Subtitle D fully supports the exclusion of frozen seafood products from USDA's regulations. As the Senate Conference Report on the Farm Bill indicates, fish and seafood were added to Subtitle D to provide information on the country of origin to consumers, and to support U.S. fishermen. During Senate consideration of the conference report, Senator Inouye sought confirmation of the purpose of the country of origin provision: "This program will *specifically inform consumers right at their local markets whether they are eating U.S. products, or products produced under the laws of another nation*. In a time of uncertainty about our economic, environmental, and personal security, we want to provide this level of assurance to our citizens and to our producers. U.S. origin labeling is important because it will allow consumers to vote with their wallets to *support U.S. farmers, ranchers, and fishermen* . . . I ask the distinguished Senator from Iowa, one of the managers of the bill, if this is not the purpose of the country of origin provision?" 17/ Senator Harkin confirmed this purpose: "Indeed, the distinguished Senator from Hawaii is correct about the intent of the provision." 18/

In addition, the legislative history indicates that the purpose of Subtitle D was to impose country of origin labeling requirements on products that were excepted from Section 304. Senator Johnson, the author of the original legislation providing for USDA country of origin labeling and resulting in the enactment of Subtitle D, in summing up the purpose behind Subtitle D, stated: "meat from livestock or fish born outside of the United States, or born and raised outside of the United States, and slaughtered or processed within the United States, *are not required* to be identified as foreign product." 19/ By contrast, however, *frozen* seafood products, *are* in fact required to be identified as foreign

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17/ Congressional Record at S4022 (statement of Senator Inouye) (May 8, 2002) (emphasis added).

18/ *Id.* at S4023 (statement of Senator Harkin).

19/ *Id.* at S4024 (statement of Senator Johnson).

product, pursuant to Section 304 and the regulations and rules of origin promulgated thereunder.

During the week that Congress passed the Farm Bill, it also considered an amendment to Subtitle D that would have extended the Subtitle D country of origin labeling requirement to "frozen" and other processed seafood products. 20/ This proposed change to Subtitle D was not included in the final legislative language enacted into law. 21/ The rejection of this amendment is yet further support for the principle that the USDA should exclude frozen seafood from the scope of its regulations implementing Subtitle D. 22/

Application of Subtitle D's country of origin labeling requirements to frozen seafood products not only would be contrary to the congressional intent, it also would be unreasonably duplicative and wasteful. As demonstrated above, frozen seafood products are already subject to country of labeling requirements under Section 304, and additional labeling requirements under USDA's regulations would confer no benefit to consumers or to U.S. fishermen. Such additional requirements would, on the other hand, impose unnecessary and unreasonable burdens on the U.S. frozen seafood industry. For these reasons, USDA should exclude frozen seafood products from the scope of its country of origin labeling requirements.

E. Recommendation 5: USDA Should Not Require Multiple Countries of Origin to Be Listed in the Order of Predominance by Weight

USDA's voluntary guidelines further depart from the requirements of Subtitle D in addressing the country of origin of covered commodities having multiple countries of origin. Such commodities, which under the Section 304 regulatory scheme are regarded as "commingled fungible goods," are required under

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20/ *See* Amendment SA 3401 (to provide a substitute amendment to H.R. 3009, the Andean Trade Preference Act) (introduced May 10, 2002) at Section 1001.

21/ *See* Public Law No. 107-210 (enacted Aug. 6, 2002).

22/ The only amendment made with respect to fish products under Subtitle D relates to the determination of country of origin of wild fish processed aboard a U.S. flag vessel. *See* Public Law No. 107-206 (enacted Aug. 2, 2002) at Section 208.

that regulatory scheme to display the multiple foreign countries of origin, but not in any particular order.

For commingled fungible goods, USDA's voluntary guidelines require that the countries be listed in the order of their predominance by weight, even though no such requirement appears in Subtitle D. The requirement to disclose this level of detail in country of origin information, which is of dubious value to the consumer, will greatly complicate the record-keeping and other compliance-related burdens on the U.S. food industry and require frequent, and costly, labeling changes. Deletion of this "order of predominance by weight" requirement for all covered commodities significantly would reduce the regulatory compliance burden on the U.S. food processing industries.

The particular way in which USDA has imposed the "order of predominance by weight" requirement is troublesome in treating U.S. food producers significantly less favorably than those located in foreign countries. Under the USDA approach, a commingled fungible food product that undergoes no processing or blending in the United States, or processing limited to packaging, would be subject to country of origin labeling requirements essentially equivalent to those already in place under the Tariff Act of 1930. If processing or blending occurs in the United States (including, in particular, blending with a U.S.-origin covered commodity), the Guidelines impose country of origin labeling and record-keeping requirements that are significantly more onerous, to include the "order of predominance by weight" requirement and, if applicable, the disclosure of the place where processing occurred (discussed previously). The result of this anomalous treatment would be needless costs on U.S. food producers, a disincentive to conduct blending and processing operations in the United States, and a disincentive for processors to obtain produce and other commodities from U.S. suppliers. Deletion of the order of predominance by weight requirement is essential to a reasonable and workable system of regulation for country of origin labeling.

F. Recommendation 6: USDA Should Define the Scope of the Implementing Regulations to Apply to In-Shell Peanuts But Not Peanuts that Are Shelled and Roasted

Subtitle D includes "peanuts" among the list of covered commodities. We believe that, with respect to peanut products, Subtitle D requires the USDA to regulate the country of origin labeling of only unshelled peanuts sold in bulk. The statute is so structured that some peanut products necessarily would be excluded from the scope of regulations for country of origin labeling. Other types of peanut products also should be excluded, as a matter of USDA's regulatory discretion and the sound administration of the Subtitle D program.

The Guidelines mention as examples of excluded peanut products "candy coated peanuts, peanut brittle, and peanut butter." 23/However, the Guidelines make an unsound decision in further concluding that "[b]ecause the vast majority of peanuts sold at retail are shelled, roasted, and salted, the Agency believes these products were intended to be covered by the law." 24/This approach is not supported by the legislative history of Subtitle D and would result in duplicative regulation and unnecessary regulatory burdens.

First, peanut products that are not sold in bulk are already covered by Section 304, under which it is required to be labeled for its country of origin. By contrast, unshelled peanuts sold in bulk are the exception; as unshelled peanuts are "incapable of being marked," 25/ they fall under an exception to the Section 304 labeling requirements. Shelled peanuts, on the other hand, which are sold to the retail customer in roasted form and generally are also salted, are already subject to the country of origin marking requirements of Section 304. The "incapable of being marked" exception does not apply to shelled and roasted peanuts, which are not sold in bulk, but invariably are sold in containers. If the label of such a container does not bear country of origin marking, consumers correctly understand that the good is a domestic product. Producers of these domestic products are free to label the product as a product of the United States, provided that in so doing they comply with FTC guidelines.

Second, unshelled peanuts sold in bulk arguably are within the "J-List" exception to the Section 304 marking requirement and, in practice, typically are not labeled for country of origin at the point of retail display. In contrast, shelled peanuts, which are sold to the retail customer in roasted form and generally are also salted, are already subject to the country of origin marking requirements of Section 304. The J-List exception does not apply to these shelled and roasted peanuts, which are no longer in their natural state and, in any event, invariably are sold in containers.

23/ 67 Fed. Reg. at 63,369.

24/ *Id*.

25/ 19 U.S.C. § 1304(a)(3)(A) ("The Secretary of the Treasury may . . .authorize the exception of any article from the requirements of marking if – such article is incapable of being marked").

Third, the green peanuts used to produce finished snack food products consisting of shelled, roasted, and salted peanuts are "ingredients in a processed food item" and should be excluded from USDA regulation based on section 281(2)(B) of Subtitle D. Not only is such an exclusion reasonable under the plain meaning of the language of the statute, it is consistent with the legislative history of Subtitle D, which as discussed previously in this submission, shows that Subtitle D is intended generally to extend country of origin labeling to those commodities not currently required to bear such labeling.

Because Subtitle D, as discussed above, was not intended generally to pertain to products already regulated for country of origin labeling, and because peanut products are not excepted from Section 304 but are required to bear labeling indicating its country of origin, and also fall within the exception provided for in section 281(2)(B) of Subtitle D, USDA's exclusion of these products from regulations is the only reasonable course of action.

The approach the Guidelines take to the country of origin labeling of peanuts would result in duplicative labeling regulations administered by two different agencies, USDA and Customs, which are under two different cabinet departments. This is an unsound and wasteful approach to the labeling of these products that will not serve consumers and serve only to increase costs on producers. Because Subtitle D, as discussed above, was not intended generally to pertain to products already regulated for country of origin labeling, and because peanuts fall within the exception provided for in section 281(2)(B) of Subtitle D, USDA's excluding shelled and roasted peanuts from its future Subtitle D regulations is the only reasonable course of action with respect to these products.

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AFFI, GMA and NFPA appreciate the opportunity to provide comments to the USDA concerning the USDA's future regulations to implement the Subtitle D program.

Please contact any of the undersigned if you have any questions or if you would like additional information concerning the issues addressed in this submission.

Respectfully submitted,

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