

# Canadian Cattle Association (CCA) and Confederación Nacional de Organizaciones Ganaderas (CNOG) Discussion Issues – January 31 OIRA E.O. 12866 Meeting on FSIS Proposed Product of USA Rule

## Failure to Meet Rulemaking Standards of the Administrative Procedure Act (APA)

- On March 26, 2020, FSIS publicly announced that it had decided to initiate this rulemaking “to define the conditions under which the labeling of meat products would be permitted to bear voluntary statements that indicate that the product is of U.S. origin” and that it intended “to propose that such labeling be limited to meat products derived from livestock that were slaughtered and processed in the United States.” FSIS specifically noted that:  
“The Agency has determined that a voluntary U.S. meat product origin labeling policy that focusses on where the product is made, i.e., where the livestock are slaughtered and processed, **without regard to where the source animals were born**, may more accurately reflect what “origin” means with respect to meat products processed in the United States and will thus result in labels that are truthful and not misleading.” (emphasis added)
- Not only does the proposed rule not follow this guidance, it fails to explain the change of position with “regard to where the source animals were born” or even offer such a standard as an alternative for public comment.
- It is established case law as articulated by the Supreme Court in *Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Auto. Ins. Co.* that an agency’s failure to consider reasonable alternatives in its rulemaking is an abuse of discretion (holding that an “alternative way\*\* of achieving the [stated] objectives ... should have been addressed and adequate reasons given for its abandonment”).
- Moreover, FSIS’ failure runs counter to the Supreme Court’s 2009 decision in *FCC v. Fox Television* that an agency must “display awareness” that it is changing its position. Agency action that departs from a prior policy without acknowledging the change, or that creates an “unexplained inconsistency”

with prior policy is generally viewed as arbitrary and capricious. As such we believe it will not withstand APA scrutiny.

- These principles apply equally to FSIS' expansion of the rule to multi-ingredient FSIS-regulated products. We are unaware of FSIS ever taking a position with respect to origin requirements for additional ingredients to qualify for a "Product of USA" or "Made in the USA" label. Yet no acknowledgment of this fact is made in the rule, let alone an explanation offered for it.

*Inconsistent with US Customs Practice, USMCA, and International Standards*

- Slaughter is considered by U.S. Customs and Border Protection - and virtually every other Customs authority in the world - to be a substantial transformation that confers origin on the resulting products to the place of slaughter.
- The proposed rule ignores the United States' own interpretation of the term "originating product" contained in Chapter 4 of USMCA that is defined by tariff shift criteria that include the transformation of a live animal into meat.
- The U.S. is an active participant in Codex Alimentarius Commission, and in the development and amendment of the GENERAL STANDARD FOR THE LABELLING OF PREPACKAGED FOODS. Article 4.5.2 of that standard provides that: "When a food undergoes processing in a second country which changes its nature, the country in which the processing is performed shall be considered to be the country of origin for the purposes of labelling." Ironically, over the years the US has opposed amendments to this provision like FSIS' proposed rule.

*Reliance on Survey, Data, and Analysis that are Flawed, Questionable, and/or Incomplete.*

- The RTI study upon which FSIS relies is so flawed that it takes pages of analysis to review the multiple methodological, interpretative, data, and other errors in the study that make it unreliable. Such an analysis was included as an Appendix to CCA's submission to FSIS, which has been provided for this meeting. We encourage a thorough review of that work and attach a summary of its findings to this paper.

- With respect to the costs and benefits of the proposed rule, FSIS notes that it has not quantified benefits, but its cost analysis is also flawed. It is flawed not only for what are significant understatements of direct costs associated with relabeling, segregation, labor, etc., but for the failure to analyze the potential impacts in the supply chain through to the consumer if the rule is adopted. For example:
  1. Consumer confusion with the current Product of USA definition has been considered, but consumer confusion with the proposed Product of USA definition has not.
  2. The consumer burden of higher retail price for Product of USA ground beef has not been considered.
  3. Changes in the volume of ground beef purchased by consumers because of a higher price for Product of USA ground beef has not been considered.
  4. Potential economic harm to US family farmers and independent ranchers if consumers purchase less Product of USA ground beef under the proposed USA-only label has not been considered.
  5. The impact of higher Product of USA ground beef prices on lower income households has not been considered.
  6. Consumer purchase behavior when faced with qualified claims rather than Product of USA labels has not been considered.

*Negative Market Impacts on Imported Cattle and Beef and COOL Retaliatory Rights*

- Despite the ostensibly voluntary nature of the rule, if adopted as proposed the rule could have a significant impact on the highly integrated North American market, reminiscent of the disruptions that occurred in 2008 when mandatory country-of-origin labeling (COOL) was imposed.
- The resulting discrimination and segregation caused by COOL for beef and pork was litigated at the World Trade Organization (WTO) and, in 2015, Canada and Mexico were authorized to retaliate on over \$1 billion worth of US exports.
- Specifically, adoption of the "Product of USA" label under the proposed new rule, particularly with its expansion to processed products, could lead parts of the market to shift existing supply chains away from Canadian and

Mexican inputs, thereby discriminating against Canadian and Mexican products.

- As an example, over 10 percent of American beef production is exported, which is sourced from a significantly larger percentage of US cattle production given that only limited cuts from each animal are exported. Under the proposed rule these exports would continue to be labeled "Product of USA" under the current "processed" standard, while product for domestic consumption bearing the exact same label would need to be sourced from cattle "born, raised, slaughtered, and processed" in the US.
- In short, two different supply chains would be created for products bearing identical labels. The economic inefficiency is clear and any prudent US processor wanting to sell "Product of USA" labeled product in both the domestic and export markets would seek to eliminate the inefficiency by relying on one supply chain to source production for both markets.
- Under the proposed rule that supply chain would have to consist of US born, raised, slaughtered, and processed cattle, eliminating cattle born and/or raised in Canada or Mexico from markets they currently serve, even if slaughtered in the US.
- Such discrimination would surely implicate Canada's and Mexico's retaliatory rights authorized under the WTO COOL case.

## FSIS Proposed Rule: A Methodological Assessment

### Summary of Findings

FSIS reviewed a wide range of information in coming to its recommendation that the Product of USA claim rule be modified to require that the animal to be born, raised, slaughtered, and processed in the USA. From the *USA-Origin Labeling Notice*, however, it appears that FSIS relied heavily on data and analyses that are flawed, questionable or incomplete.

#### **1. Validity of core RTI Survey findings is undermined by methodological issues.**

Example: Due to the implied importance of fat content to consumers revealed in the Canada Beef survey discussed below, and the inverse relationship between fat content and price of ground beef, MWTP estimates in the RTI Survey and Canada Beef study can only be generalized to consumers who typically purchase 85% lean/15% fat ground beef (approximately 28% of all ground beef consumers).

#### **2. Validity of the FSIS Pricing Study marginal willingness to pay findings is undermined by methodological issues.**

Example: FSIS assigned 15% fat content to ground beef UPCs that have no fat content displayed, which introduced errors into the dataset and in doing so, introduced bias in FSIS MTWP estimates, the direction and size of which are unmeasurable.

Example: The FSIS data source covered only about 55% of all ground beef products sold, and also excluded private/store brands. This incompleteness of the data may produce systematic bias in the data and the findings.

#### **3. Implementation of a new Product of USA definition will not resolve consumer confusion.**

Currently, 47% of consumers believe the Product of USA definition to mean that the animals are born, raised, slaughtered, and processed in the USA (RTI Survey), which is the proposed definition. Hence, if the proposed definition were implemented now, 47% of consumers would know the correct definition and most consumers (53%) would not.

#### **4. The Product of USA label is of little interest and little importance to most consumers.**

In each unaided question (RTI Survey), a small proportion of respondents (9%-31%) recalled the Product of USA label on the package of ground beef they viewed—even though they were given *20 seconds* to look at just one image, and even when "Product of USA" was next to an American flag on the package. This suggests a lack of noticeability and importance of the Product of USA label. The RTI Survey also directly asked consumers how often they look for a Product of USA label when shopping for ground beef; only 42% said always or almost always. Another RTI survey question asked respondents to select the most important feature of ground beef when deciding what to buy: grass-fed, free from antibiotics, or Product of USA; only 27% said Product of USA.

#### **5. Impact of higher Product of USA prices on lower income households needs greater consideration.**

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In the RTI survey, differences between lower income and higher income households were not statistically significant due to small sample sizes and the use of binary household income categories. The Canada Beef survey discussed below found that poverty income households are twice as likely as higher income households to "always" purchase ground beef on sale or at a discounted price (26% vs. 13%), which suggests the need for greater investigation into the potential impact on lower income households of higher Product of USA ground beef prices under a new definition.

#### **6. Although recommending a new Product of USA definition, FSIS is missing critical information that is required to fully assess the benefits and drawbacks to consumers and American beef producers.**

- Consumer confusion with the current Product of USA definition has been considered, but consumer confusion with the proposed Product of USA definition has not.

- There is no evaluation on potential changes in the volume of ground beef purchased by consumers because of a higher price for Product of USA ground beef under the proposed Product of USA definition.
- There is no consideration of potential economic harm to U.S. family farmers and independent ranchers if consumers purchase less Product of USA ground beef under the proposed USA-only label.
- Marginal willingness to pay for *specific* countries of origin, like Canada, has not been tested, which has resulted in an overestimation of the MWTP for ground beef with a Product of USA label.
- There is no apparent consideration of the impact of the expected Product of USA ground beef price increase for consumers who believe the current definition is the proposed definition.
- Insufficient consideration has been given to the impact of higher Product of USA ground beef prices on lower income households.
- Consumer purchase behavior when faced with qualified claims instead of Product of USA labels has not been explored.