

June 9, 2023

U.S. Department of Agriculture
Food Safety and Inspection Service
1400 Independence Avenue SW
Washington, DC 20250-3700

Submitted to Regulations.gov, Docket No. FSIS 2022-0015

Re: Voluntary Labeling of FSIS-Regulated Products with U.S.-Origin Claims

The Open Markets Institute thanks the United States Department of Agriculture (USDA) for proposing a rule that ensures honest and transparent food origin labels. Current labeling standards allow foreign meat corporations to deceive consumers and unfairly compete with domestic producers by selling meat born, raised, and slaughtered abroad as a “Product of USA” if it simply passes through a USDA facility.¹ USDA’s proposed rule would end this deceptive practice and ensure integrity and fair competition in meat markets. The agency must use its clear authority to finalize its proposal.

To have a fair market, consumers must be able to realize their preferences through informed choices. Surveys show that American consumers value domestically made products and are willing to pay more for them, in part because they believe doing so supports the U.S. economy.² However, under current “Product of USA” labeling standards, shoppers may unknowingly purchase meat with a domestic origin claim that does not support, or even undermines, U.S. farmers and ranchers. USDA’s own surveys show that consumers generally do not understand the meaning of current “Product of USA” labels on meat and eggs.³

The Food Safety and Inspection Service (FSIS) must adopt uniformly clear regulations for voluntary “Product of USA” labels that comply with consumers’ expectations, which means meat and eggs with a U.S.-origin claim must come from animals born, raised, and slaughtered in the U.S. Without well-defined U.S.-origin labels, foreign meat producers can access the premium domestic meat market by deceiving consumers. A multitude of regulatory inspection programs gives the USDA broad authority and duty to regulate food packaging and labeling in service of keeping American consumers safe and preventing deception.⁴

¹ Food Safety and Inspection Service, “Voluntary Labeling of FSIS-Regulated Products With U.S.-Origin Claims,” 88 FED. REG. 15292 (Mar. 13, 2023) (“FSIS- regulated products that are derived from animals that may have been born, raised, and slaughtered in another country but are minimally processed in the United States may currently be labeled as “Product of USA.””).

² *Id.* at 15295 (explaining that “The results [of USDA’s study] suggest that participants were willing to pay more for a product derived from animals when all preparation and processing steps occurred in the United States—born, raised, slaughtered, and processed—than for product when fewer steps occurred in the United States.”).

³ *Id.* USDA’s study asked participants to explain their understanding of what “Product of USA” labels meant. They found that “[o]nly 16 percent of the participants selected the current meaning of the label claim (*i.e.*, the meat was processed in the United States.” *Id.*

⁴ Federal Meat Inspection Act (FMIA), 21 U.S.C. 601 *et seq.*; Poultry Products Inspection Act (PPIA), 21 U.S.C. 451 *et seq.*; Egg Products Inspection Act (EPIA), 21 U.S.C. 1031 *et seq.*; and, the Agricultural Marketing Act (AMA), 7 U.S.C. 1622 and 1624.

- I. FSIS must set standards for voluntary “Product of USA” labels that comply with consumers’ expectations. Surveys show that the current standards deceive consumers.

Current standards for “Product of USA” labels confuse and deceive customers. As it stands, meat products must only be “minimally processed” in a USDA-licensed facility to qualify for a voluntary U.S.-origin (“Product of USA”) label.⁵ “Minimally processed” means that the animals may be born, raised, slaughtered, and processed in a foreign country, but as long as they pass through a USDA-licensed plant, they may bear a “Product of USA.” label.⁶

Research, including USDA’s own study, shows that consumers rely on labels to accurately provide information about a product’s origins and ingredients⁷ and that they are willing to pay a premium for products stamped with a U.S.-origin claim.⁸ For instance, one meta-analysis found American shoppers were willing to pay \$3.57 more per pound for domestic beef in 2016.⁹ Another 2011 study found that over a quarter of U.S. consumers would avoid imported beef when given the choice.¹⁰ However, a recent study by USDA shows that consumers do not understand the standards behind a “Product of USA” label. For instance, nearly half of those surveyed by USDA believed that a “Product of USA” label meant that product came from animals born, raised, and slaughtered in the U.S.¹¹

Foreign meat bearing a “Product of USA” label takes advantage of consumers’ positive connotations with domestically produced meat, deceiving them into thinking they are supporting the United States economy. In 2020, the Federal Trade Commission presented a report explaining the findings from a workshop on how consumers understand “Made in the USA” labels.¹² They found consumers associate labels claiming U.S. origin with a myriad of positive attributes.¹³ Consumers perceive U.S.-origin labeled products as higher quality and feel that

⁵ Voluntary Labeling Rule, *supra* note 1.

⁶ Food Safety and Inspection Service, “Voluntary Labeling of FSIS-Regulated Products With U.S.-Origin Claims,” 88 FED. REG. 15292 (Mar. 13, 2023) <https://www.federalregister.gov/d/2023-04815/p-46>.

⁷ *Id.* at 15302 ([A] false or misleading “Product of USA” claim would economically harm consumers, who look to such labeling to convey accurate information about the U.S. origin of the production and preparation of the labeled product....”), <https://www.federalregister.gov/d/2023-04815/p-155>.

⁸ *Id.* at 15301 (“consumers are willing to pay more for products with a “Product of USA” claim, in comparison to similar products without this claim”) <https://www.federalregister.gov/d/2023-04815/p-150>.

⁹ See Yu, X., Gao, Z. & Shimokawa, S., *Consumer preferences for US beef products: a meta-analysis*, 71(2) Italian Review of Agricultural Economics 177 (2016).

¹⁰ See Kar H. Lim, *et al.*, *U.S. Consumers’ Preference and Willingness to Pay for Country-of-Origin-Labeled Beef Steak and Food Safety Enhancements*, Selected Paper prepared for presentation at the Agricultural & Applied Economics Association’s 2011 AAEA & NAREA Joint Annual Meeting (2011).

¹¹ *Supra* note 6 at 15294 (“47 percent of participants believed that the label indicates that the animal was born, raised, slaughtered, and the meat then processed, in the United States. Only 16 percent of participants selected the current meaning of the label claim (*i.e.*, the meat was processed in the United States.”) <https://www.federalregister.gov/d/2023-04815/p-84>.

¹² BUREAU OF CONSUMER PROT., MADE IN THE USA: AN FTC WORKSHOP, F.T.C. (2020), https://www.ftc.gov/system/files/documents/reports/made-usa-ftc-workshop/p074204_-_musa_workshop_report_-_final.pdf.

¹³ *Id.* Explaining that consumers saw certain brands, logos, and labels as markers of quality. For example, a MUSA (“Made in the USA”) label meant the product was of higher quality; purchasing goods with such a label “keeps jobs

these products “support American jobs” and a strong United States economy.¹⁴ Most importantly, both the USDA and the FTC’s studies revealed that consumers will pay a higher price for products that they believe are produced in the United States.¹⁵

While there may be no “real-world transaction in which both parties have perfect and complete information,” the FSIS must strive to ensure that consumers do have the necessary information available to them for the purposes of informed choice.¹⁶ Information asymmetry in and of itself may not be problematic, but when it creates opportunities for the party with more power to benefit at the expense of the party with less information, this asymmetry can result in unfair competition.¹⁷ Accurate and transparent labeling informs and “assists consumers to choose intelligently among competing products,” protecting fair competition.¹⁸

If foreign meat producers label their products as “Product of USA” when a substantial part of the product originated in a foreign country, a consumer cannot make an informed choice and make purchases in accordance with their preferences. Transparent U.S.-origin claims labeling allows consumers to knowingly choose products based on accurate information and creates a fair and level playing field between competitors.

II. Deceptive labels create an unfair playing field for domestic meat producers.

Under current “Product of USA” labeling standards, foreign meat producers can unfairly profit off consumers’ willingness to pay more for domestic products, putting genuine domestic producers who raise, slaughter, and process animals in the U.S. at a competitive disadvantage. Such deceptive labeling should be considered an unfair method of competition, as some foreign producers can unjustly benefit from both the U.S.-origin label premium and the lower production costs of raising animals outside the U.S.

For example, U.S. grass-fed beef producers face substantial competition from imports. Grass-fed and grass-finished beef requires more grazing land than grain-fed beef to produce the same amount of meat,¹⁹ and producers in Australia, Argentina, and New Zealand have access to cheaper and more plentiful grazing land than producers in the U.S., lowering their production

in America” and “helps the US economy;” as well as supporting “patriotism.” Some researchers found that consumers buying MUSA products have a desire to support the economy, help the economy, and support local families by supporting American jobs. *Id.* at n. 30.

¹⁴ *Id.*

¹⁵ *Id.* See also Voluntary Labeling Rule, *supra* note 1, at 15295 describing that 47% of respondents to a survey asking what the meaning of a Product of USA label believed that it meant the animals were born, raised, slaughtered, and processed in the USA and were willing to pay a higher price for that product.

¹⁶ Jeremy N. Sheff, The Ethics of Unbranding, 21 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 983, 992 (2011).

¹⁷ *Id.* at 992–93.

¹⁸ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 1 (AM. L. INST. 1995)

¹⁹ Dan Charles, “Why Lots of Grass-Fed Beef Sold In U.S. Comes From Down Under,” NAT’L PUB. RADIO, (Oct. 3, 2013) <https://www.npr.org/sections/thesalt/2019/08/13/746576239/is-grass-fed-beef-really-better-for-the-planet-heres-the-science#:~:text=It%20can%20boost%20the%20nutrient,the%20same%20amount%20of%20meat>.

costs.²⁰ Grass-fed beef producers in the southern hemisphere also benefit from natural year-round grazing access, which further reduces costs and increases overall output.²¹ Not only do foreign meat producers benefit from climactic competitive advantages, but their final product is also subject to vastly different growing, production, and inspection standards than U.S. producers.

Allowing these foreign meat producers to put a deceptive domestic-origin label on their products gives them unearned access to a premium price without bearing the higher production costs that would otherwise be required to truthfully claim the domestic-origin premium. These foreign producers can either offer lower prices that domestic producers cannot compete with, or they can maintain price parity with genuine domestic grass-fed beef products and pocket higher profit margins. Either way, domestic grass-fed ranchers cannot compete with foreign producers unfairly taking advantage of the “Product of USA” premium, and they could be pushed out of the market as a result. In this way, current meat labeling standards deceive consumers who want to support the U.S. economy into buying products that actually harm domestic farmers and ranchers, going against their preferences.

III. The FSIS, through the Federal Meat Inspection Act, has the authority to regulate meat labeling in the United States.

In addition to other powers, the Food Safety and Inspection Service may approve, deny, and otherwise regulate mandatory and voluntary labeling to protect consumers from misleading statements on food products.²² Federal courts support FSIS’s power to standardize meat labeling. The Federal Meat Inspection Act gives FSIS the power to regulate “a broad range of activities,” including the ability to create rules that will ensure “meat and meat food products” are “properly marked, labeled, and packaged.”²³ Other agencies such as the Federal Trade Commission consider regulating meatpacking labels within the purview of the USDA and the FSIS.²⁴

The Courts have upheld FSIS’s authority to set meat labeling standards. For example, when the agency decided to withhold approval from a label applied to re-boxed meat products on the

²⁰ *Id.*

²¹ Julius Ruechel, “Is Grass Fed Beef Production More Expensive Than Producing Grain Fed Beef?” GRASS-FED-SOLUTIONS.COM, <https://www.grass-fed-solutions.com/beef-production.html> <https://www.grass-fed-solutions.com/beef-production.html> (explaining that while the quality of beef raised from calves born during the growing season does not affect quality, but it greatly reduces the cost of production. American farmers must plan calving dates around growing seasons to ensure the best nutritional benefits and to incur “significant cost savings” as compared to calving during other seasons. If farmers do not have to plan around a single growing season, then their cattle can continuously produce calves, streamlining the growing and farming processes and reducing costs.). *See also* Julius Ruechel, “The Benefits of Calving on Pasture during the Growing Season: Calving Ease, Cattle Health, Calf Survival Rates, and Marketing & Sales Strategy,” GRASS-FED-SOLUTIONS.COM, <https://www.grass-fed-solutions.com/summer-calving-benefits.html>.

²² C.F.R. § T. 9, Ch. III, Subch. E, Pt. 412; 21 U.S.C. 451–470, 601–695; 7 CFR 2.18, 2.53.

²³ *Nat'l Meat Ass'n v. Harris*, 565 U.S. 452, 455, 181 L.Ed.2d 950 (2012). *See also* 21 U.S.C. § 602.

²⁴ F.T.C. Made in USA Labeling Rule, 16 C.F.R. 323 (2021), <https://www.federalregister.gov/d/2021-14610/p-143>.

grounds that the label was misleading, the Court affirmed that decision.²⁵ More specifically, the Court found that meat exporters may not use their supplier's identification number on re-boxed meat products to falsely indicate the meat's origin.²⁶ The meat processor in this case bore the burden of proving that the label was not misleading to consumers but was unable to do so.²⁷ Thus, the FSIS has both the duty and jurisdictional support to regulate voluntary U.S.-origin labels and prevent misleading labels as it has before.

- IV. Other governmental agencies recognize the need for clear standards on a product's origin labels to prevent deception. USDA must issue rules to better align with U.S.-origin standards in other markets.

As a parallel rulemaking body, the USDA should consider how the Federal Trade Commission regulates misleading food labels as a deceptive practice under the Fair Packaging and Labeling Act.²⁸ The FTC's "Made in USA Labeling Rule" reinforces the Act's established principle that products with U.S.-origin claims must contain no more than a negligible amount of foreign ingredients.²⁹ A "deceptive" practice as defined by the Commission, "is an omission or practice that is likely to mislead a consumer acting reasonably in the circumstances."³⁰ Reasonable consumers looking to buy a domestic product assume that a "Product of USA" means exactly what it says: that the product substantially originated in the U.S. Therefore, allowing foreign meat to bear a label claiming to have originated in the U.S. satisfies both the elements of being (1) likely to mislead a (2) consumer acting reasonably under the circumstances. For these reasons, the USDA must adopt clear regulatory standards to protect consumers from deception.

While the FTC appropriately exercises its authority through rulemaking to regulate Made in USA labels on products and goods generally, the agency's power does not extend to the meatpacking industry's voluntary labeling program. Instead, the USDA and FSIS should fill in the gap to standardize all voluntary U.S.-origin claim labels across industries to improve consumer understanding and prevent misinformation. The FTC concedes that the agency has neither the authority nor the jurisdiction to regulate meat labels, as that lies with USDA.³¹ Should the USDA fail to implement standards for voluntary "Product of USA" labels, consumers will be unable to discern the labels' true meaning across industries. Additionally, agricultural products bearing "Product of USA" labels will continue to mislead consumers if regulatory agencies provide differing standards across industries.

²⁵ *United Source One, Inc. v. U.S. Dept. of Agric., Food Safety and Inspection Serv.*, 865 F.3d 710, 718 (D.C. Cir. 2017).

²⁶ *Id.*

²⁷ *Id.* at 716.

²⁸ 15 U.S.C. 1453, 1454, 1455; 1 C.F.R. Part 500.

²⁹ F.T.C., FTC TO RETAIN "ALL OR VIRTUALLY ALL" STANDARD FOR "MADE IN USA" ADVERTISING AND LABELING CLAIMS, File No. P894219, (1997) <https://www.ftc.gov/news-events/news/press-releases/1997/12/ftc-retain-all-or-virtually-all-standard-made-usa-advertising-labeling-claims> (explaining that the concept of "all or virtually all" is a percentage of product produced in the United States which may bear a "Made in USA" label consumers may trust because the FTC clearly sets standards that such a product may contain only a negligible amount of foreign content. *Id.*

³⁰ JAMES C. MILLER III, CHAIRMAN, F.T.C. POLICY STATEMENT ON DECEPTION, 103 F.T.C. 110, 174 (1984) https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf.

³¹ F.T.C. Made in USA Labeling Rule, *supra* note 24, at 37029–30.

V. Conclusion

The FSIS must adopt the Voluntary Labeling of FSIS-Regulated Products with U.S.-Origin Claims Rule to protect American consumers from deceptive and misleading claims about the origin of their food. Creating clear regulatory standards for “Product of USA” labels will prevent foreign meat producers from accessing a premium market through misleading U.S.-origin claims. In addition to protecting fair competition in and of itself, the USDA must take up the mantle from the FTC to fill the regulatory gap regarding food origin labels where “Made in USA” labeling rules fall short. It is wholly within the USDA’s and FSIS’s jurisdiction and authority to standardize U.S.-origin claims on domestic and foreign meat packaging. The agency must adopt this rule to enable consumers to make informed choices about the origin of their food.