August 17, 2018

Matthew Michael, Director
Mary Porretta, Petitions Manager
Issuances Staff
Office of Policy and Program Development
Food Safety and Inspection Service
1400 Independence Avenue, SW
Washington, DC 20250-3700

Re: Petition 18-05 – Organization for Competitive Markets and American Grassfed Association Petition for change to the Food Safety and Inspection Services Standards and Labeling Policy Book on "Product of U.S.A."

Dear Mr. Michael and Ms. Porretta:

The North American Meat Institute (NAMI or the Meat Institute) Meat Importers Council of America, Inc. (MICA), and Shelf-Stable Food Processors Association (together, the associations) submit these comments opposing the above-referenced petition (petition). The Meat Institute is the nation's oldest and largest trade association representing packers and processors of beef, pork, lamb, veal, turkey, and processed meat products and NAMI member companies account for more than 95 percent of United States output of these products. The Meat Institute provides regulatory, scientific, legislative, public relations, and educational services to the meat and poultry packing and processing industry.

MICA represents the U.S. industry that imports fresh, chilled, and frozen beef and sheepmeat into the United States. MICA's members include importers, who account for most of the non-NAFTA imports of these products, as well as end users. MICA's membership also includes organizations, such as port authorities, refrigerated warehouses, customhouse brokers, *etc*. that provide services in connection with imported meat products.

SFPA is the national trade association serving shelf-stable prepared food manufacturers, marketers and their suppliers. Members include companies of all sizes, from regional processors to large multi-plant operations. Originally founded as the National Meat Canners Association in 1923, the new name was adopted to more accurately reflect the wide variety of shelf-stable food products produced by its members and the international scope of their businesses.

The petition asks the Food Safety and Inspection Service (FSIS or the agency) to amend its longstanding policy regarding when a federally inspected meat or poultry product may bear a "Product of the USA" claim. Current policy allows a federally inspected product to bear that phrase

> 1. If the country to which the product is exported requires this phrase, and the product is processed in the U.S., or
> 2. The product is processed in the U.S. (*i.e.* is of domestic origin).[1]

The petition asks the agency to amend the second prong of the policy and revert to the language found in a rescinded policy memo, Policy Memo 080. The proposed amendment would read as follows.

> 2. If it can be determined that significant ingredients having a bearing on consumer preference such as meat, vegetables, fruits, dairy products, *etc.*, are of domestic origin (minor ingredients such as spices and flavorings are not included). In this case, the labels should be approved with the understanding that such ingredients are of domestic origin.

The proposed amendment should be rejected for at least two reasons. First, the "Product of the U.S.A." policy currently articulated in the Food Standards and Labeling Policy Book (Book) is appropriate because it accurately reflects Congressional intent. Second, the proposed language would cause confusion and chaos for consumers, packers and processors, and the agency. For the reasons discussed below the petition should be denied.

The Existing Policy Reflects Congressional Intent.

Petitioners' loosely use the term "domestic origin" in their proposal, yet do not define the term. Conspicuous in its absence in the petition is any reference to a key statutory provision, 21 U.S.C. 620(a), of the Federal Meat Inspection Act (FMIA), which lays the groundwork for the policy and relevant regulations and provides useful guidance about what constitutes "domestic origin." That section provides

> … All products, after entry into the United States, shall be deemed and treated as domestic products subject to the other provisions of this chapter and the Federal Food, Drug, and Cosmetic Act: Provided,

[1] See Food Standards and Labeling Policy Book. https://www.fsis.usda.gov/wps/wcm/connect/7c48be3e-e516-4ccf-a2d5-b95a128f04ae/Labeling-Policy-Book.pdf?MOD=AJPERES

> [T]hat they shall be marked and labeled as required by such regulations for imported articles . . .

In short, the FMIA provides that once imported into the U.S. meat products are to be "deemed and treated as domestic products" for regulatory purposes, which includes labeling policies.

That the policy is consistent with the intent of Congress as articulated in the FMIA was confirmed just one week before the petition was filed. In 2017 the Ranchers-Cattlemen Action Legal Fund (R-CALF) and the Cattle Producers of Washington filed a lawsuit in the United States District Court for the Eastern District of Washington challenging the agency's longstanding regulation and "Product of the U.S.A." policy. R-CALF asserted that the agency failed to implement properly the FMIA requirements because the agency's "Product of the U.S.A." policy did not incorporate the Tariff Act of 1930's requirements regarding origin labeling. R-CALF argued that the Tariff Act required imported meat to bear a foreign country origin marking even if processed in a federally inspected establishment, absent undergoing substantial transformation.

On June 5, 2018, the court made short work of the plaintiffs' Tariff Act argument, granting the agency's motion for summary judgment and dismissing the case. Specifically, the court found the agency's "implementation of … the 1989 Foreign Products Rule [9 CFR 327.18(a)] … directly reflects statutory language enacted by Congress," *i.e.* 21 U.S.C. 620(a).

That the current policy is appropriate also was voiced previously by the agency in a 2001 advance notice of proposed rulemaking (ANPR).[2] In discussing rescinded Policy Memo 080 and "Product of the U.S.A." claims the agency stated

> "Product of the U.S.A." has been applied to products that, at a minimum, have been prepared in the United States. <u>It has never been construed by FSIS to mean that the product is derived only from animals that were born, raised, slaughtered, and prepared in the United States.</u> The only requirement for products bearing this labeling statement is that the product has been prepared (*i.e.*, slaughtered, canned, salted, rendered, boned, *etc.*). No further distinction is required. In addition, there is nothing to preclude the use of this label statement in the domestic market, which occurs, to some degree.[3]

---

[2] 66 *Fed. Reg*. 41160 (August 7, 2001).

[3] *Id*. at 41160-41161 (Emphasis added). The highlighted declarative statement strongly suggests that rescinded Policy Memo 080 was interpreted in a manner consistent with the current policy book interpretation.

The agency went on acknowledge that the "Product of the U.S.A." claim was appropriate for "products that were derived from cattle that originated in other countries and that were slaughtered and prepared in the United States."[4] The ANPR concluded its discussion about labeling of imported products again by recognizing the 21 U.S.C. 620 requirement that "imported beef products are to be treated as 'domestic' product upon entry into the United States" and that "[W]hen an imported product has been further prepared, the labeling requirements for the resultant product are the same as for domestic product."[5]

The Petition's Reliance on other Statutory Authority is misplaced.

Although petitioners fail to cite the most relevant provision of the FMIA, they are quick to point to other statutory and regulatory provisions to argue their case. Those statutory provisions, however, are irrelevant.

The Food and Drug Administration (FDA), the Federal Trade Commission (FTC), and U.S. Customs and Border Protection (CBP) all have roles to play in preventing consumer deception and petitioners cite the general authorities afforded them to accomplish that goal. However, primary jurisdiction regarding the labeling of federally inspected meat and poultry product rests with FSIS. The FSIS policy at issue has been in place for more than 30 years. Both the FDA rule and the FTC policy cited by petitioners also have been in place for many years and in that time FSIS has not seen fit to adjust what is a proper application of the FMIA and the Poultry Products Inspection Act.[6] Moreover, the petitioners failed to acknowledge that the court in the Eastern District of Washington summarily dispatched the Tariff Act argument a week before the petition was filed.

Granting the Petition would Cause Chaos in the Marketplace and Confuse Consumers.

Not only is the current policy supported by the best reading of the statute, but granting the petition, which the agency should not do, would cause chaos in the marketplace and confuse consumers. Again, the petition asks that the second prong of the policy be changed to read

> 2. If it can be determined that significant ingredients having a bearing on consumer preference such as meat, vegetables, fruits, dairy products, *etc.*, are of domestic origin (minor ingredients such as spices

[4] *Id*. at 41161.
[5] *Id*.
[6] The Petition's reliance on the Tariff Act of 1930 and U.S. Customs and Border Protection rules was dispatched by the United States District Court for the Eastern District of Washington on June 5. See discussion *supra*.

> and flavorings are not included). In this case, the labels should be approved with the understanding that such ingredients are of domestic origin.

The ambiguity inherent in that language could explain why the policy memo was rescinded. Assuming an interpretation of the proposal is true to the language in section 620 of the FMIA as to domestic origin of the meat component, the language raises other questions. For example, how is the term "significant" interpreted? The proposed language attempts to make clear that spices and flavorings are not significant but if a vegetable or dairy ingredient constitutes only a small percentage of the product is it significant and what are the implications of sourcing such ingredients from different locations depending on seasonality and other factors?

For example, the petition would allow a product to bear the "Product of U.S.A." if all ingredients in a canned beef stew product were raised or grown in the United States but that same product could not bear the claim for a three month period in the winter if the processor was forced to source the carrots or celery from South America. This "on again, off again" approach to labeling would confuse consumers and create chaos in the marketplace.

* * * * *

The associations appreciate the opportunity to submit these comments opposing the petition. If you have questions or would like to discuss the issues or points presented, please contact Mark Dopp at 202 587 4229 or mdopp@meatinstitute.org or Laurie Bryant at 202 587 4239 or lauriebryant@micausa.org or Susan Backus at 202 587 4220 or sbackus@meatinstitute.org.

Respectfully submitted,

Mark Dopp
Senior Vice President, Regulatory and
Scientific Affairs, and General Counsel;
North American Meat Institute

Laurie Bryant
Executive Director
Meat Importers Council of America, Inc.

Susan L. Backus
Executive Secretary
Shelf-Stable Food Processors Association

cc: Carmen Rottenberg
Paul Kiecker
Roberta Wagner
Barry Carpenter