

### Enforcement

The law encourages the Secretary to enter into partnerships with States to the extent practicable to assist in the administration of this program. As such, USDA will seek to enter into partnerships with States that have enforcement infrastructure to conduct retail compliance reviews.

Routine compliance reviews may be conducted at retail establishments and associated administrative offices, and suppliers subject to these regulations. USDA would coordinate the scheduling and determine the procedures for reviews. Only USDA will be able to initiate enforcement actions against a person found to be in violation of the law. USDA may also conduct investigations of complaints made by any person alleging violations of these regulations when the Secretary determines that reasonable grounds for such investigation exist.

Retailers, upon being notified of the commencement of a compliance review, must make all records or other documentary evidence material to this review available to USDA representatives and provide any necessary facilities for such inspections.

AMS invites further comment on all aspects of enforcement of this retail labeling rule. Specific comment is requested on the implications of the statutory mandate for retail labeling beginning September 30, 2004, relative to the amount of lead time necessary for firms in the supply chain to comply with this rule.

### Violations

The law contains enforcement provisions for both retailers and suppliers that include civil penalties of up to \$10,000 for each violation. For retailers, the law states that if the Secretary determines that a retailer is in violation of the Act, the Secretary must notify the retailer of the determination and provide the retailer with a 30-day period during which the retailer may take necessary steps to comply. If upon completion of the 30-day period the Secretary determines the retailer has willfully violated the Act, after providing notice and an opportunity for a hearing, the retailer may be fined not more than \$10,000 for each violation.

AMS received numerous comments requesting a clarification as to how AMS will apply the standard of willfulness. These commenters urge USDA to recognize that if a majority of covered commodity items bear a label indicating the product's country of origin, the retailer has met their obligation under these regulations. AMS recognizes that

many suppliers, particularly in the case of produce, will apply stickers to individual covered commodities indicating the country of origin and that such labeling technology does not result in a 100 percent adhesion level. AMS also recognizes that consumers may separate hands of bananas that may only have one or two stickers per hand or otherwise move an item from one bin to another as they make their selections. AMS will take these and all other circumstances into account in determining whether or not a retailer has committed a willful violation.

In addition to the enforcement provisions contained in the Act, statements regarding a product's origin must also comply with other existing Federal statutes. For example, if a firm misrepresents the State, country, or region of origin of a perishable agricultural commodity, the firm is in violation of PACA. In addition, both FMIA and the Federal Food, Drug, and Cosmetic Act prohibit labeling that is false or misleading. Thus, inaccurate country of origin labeling of covered commodities may lead to additional penalties under these statutes as well.

### Executive Order 12988

The contents of this proposed rule were reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have a retroactive effect. States and local jurisdictions are preempted from creating or operating country of origin labeling programs for the commodities specified in the Act and these regulations. With regard to other Federal statutes, all labeling claims made in conjunction with this regulation must be consistent with other applicable Federal requirements. Further, the Act does not restrict or modify the authority of the Secretary to administer or enforce FMIA (21 U.S.C. 601 *et seq.*) or PACA (7 U.S.C. 499 *et seq.*). There are no administrative procedures that must be exhausted prior to any judicial challenge to the provisions of this rule.

### Civil Rights Review

AMS has considered the potential civil rights implications of this rule on minorities, women, or persons with disabilities to ensure that no person or group shall be discriminated against on the basis of race, color, national origin, gender, religion, age, disability, sexual orientation, marital or family status, political beliefs, parental status, or protected genetic information. This review included persons that are employees of the entities that are subject to these regulations. This proposed rule does not require affected entities to

relocate or alter their operations in ways that could adversely affect such persons or groups. Further, this proposed rule would not deny any persons or groups the benefits of the program or subject any persons or groups to discrimination.

### Executive Order 13132

This proposed rule has been reviewed under Executive Order 13132, Federalism. This Order directs agencies to construe, in regulations and otherwise, a Federal statute to preempt State law only where the statute contains an express preemption provision or there is some other clear evidence to conclude that the Congress intended preemption of State law, or where the exercise of State authority conflicts with the exercise of Federal authority under the Federal statute. This proposed rule is required by the Farm Bill. While this statute does not contain an express preemption provision, it is clear from the language in the statute that Congress intended preemption of State law.

Several States have implemented mandatory programs for country of origin labeling of certain commodities. For example, Alabama, Arkansas, Mississippi, and Louisiana have origin labeling requirements for certain seafood products. Other States including Wyoming, Idaho, North Dakota, South Dakota, Louisiana, Kansas, and Mississippi have origin labeling requirements for certain meat products. In addition, the State of Florida and the State of Maine have origin labeling requirements for fresh produce items.

To the extent that these State country of origin labeling programs encompass commodities which are not governed by this regulation, the States may continue to operate them. With regard to consultation with States, as directed by the law, AMS has consulted with the States that have country of origin labeling programs. Further, State officials were invited to attend, and in many cases did participate in, the 12 educational and listening sessions AMS held across the United States. Further, States are expressly invited to comment on this proposed rule as it relates to existing State programs.

### Executive Order 12866

USDA has examined the economic impact of this proposed rule as required by Executive Order 12866. USDA has determined that this regulatory action is economically significant, as it is likely to result in a rule that would have an annual effect on the economy of \$100 million or more and therefore has been reviewed by OMB. Executive Order