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## Note

### Country of Origin Labeling Revisited: Processed Chicken from China and the USDA Processed Foods Exception

*Daniel Sullivan Schueppert\**

In late August 2013, the United States Department of Agriculture (USDA) made it possible for the United States to export chicken to China for processing.<sup>1</sup> Under these present regulations, chicken originating from U.S. farms can be slaughtered in the United States, shipped to China for processing, and then shipped back to the United States for sale.<sup>2</sup> This chicken need not include Country of Origin Labeling (COOL) to indicate that it has been processed in China.<sup>3</sup> This practice was technically authorized several years ago, but was specifically denied funding by affirmative use of a three-year congressional ban by means of congressional appropriations bills.<sup>4</sup> Since China's original application for approval, a total of ten years has passed in the course of lengthy inspections, the

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1. Stephanie Strom, *Chinese Chicken Processors Are Cleared to Ship to U.S.*, N.Y. TIMES, Aug. 31, 2013, at B3.

2. *Id.*

3. See 7 C.F.R. §§ 65.220, .300 (2014).

4. Food Safety & Inspection Serv., *Frequently Asked Questions – Equivalence of China's Poultry Processing System*, U.S. DEP'T AGRIC., <http://www.fsis.usda.gov/wps/portal/fsis/newsroom/news-releases-statements-transcripts/news-release-archives-by-year/archive/2013/faq-china-08302013> (last updated Sept. 26, 2013) [hereinafter *Equivalence FAQ*]; see Letter from Andreas Keller, Dir. Int'l Equivalence Staff Office of Policy Program Dev., USDA Food Safety Inspection Serv., to Li Chunfeng, Deputy Dir. Gen., Gen. Admin. of Quality Supervision, Inspection & Quarantine (Aug. 30, 2013) [hereinafter Letter from Andreas Keller], available at [http://www.fsis.usda.gov/wps/wcm/connect/c3dab827-151d-4373-917f-139db6a2466d/China\\_2013\\_Poultry\\_Processing.pdf?MOD=AJPERES](http://www.fsis.usda.gov/wps/wcm/connect/c3dab827-151d-4373-917f-139db6a2466d/China_2013_Poultry_Processing.pdf?MOD=AJPERES).

congressional ban, and yet more inspections.<sup>5</sup> Time was also required to write and issue official reports.<sup>6</sup> In 2013, the Food Safety and Inspection Service (FSIS), an arm of the USDA,<sup>7</sup> completed remedial audits of China's poultry processing system.<sup>8</sup> The FSIS again certified the administrative side of the Chinese poultry processing system<sup>9</sup> in addition to issuing permits to four select processing plants, thereby deeming them equivalent to U.S. standards.<sup>10</sup> Perhaps inevitably, this was not a popular change. Some American politicians and consumer groups have retained reservations about the safety of chicken processed in China due to a variety of newer and older reasons relating back to the congressional ban.<sup>11</sup> As it stands, opponents point to perceived food-safety concerns and consumer-information issues based on the fact that consumers will not know in which country their chicken products have been processed.<sup>12</sup>

The COOL regulations applicable to USDA-covered commodities, such as muscle-cut meats, specifically exclude processed food items.<sup>13</sup> This exclusion is in marked contrast with the policy rationales behind COOL regulations on raw

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5. *Equivalence FAQ*, *supra* note 4; see FOOD SAFETY & INSPECTION SERV., FINAL REPORT OF AN AUDIT CONDUCTED IN THE PEOPLE'S REPUBLIC OF CHINA: THE FOOD SAFETY SYSTEM GOVERNING THE PRODUCTION OF SLAUGHTERED POULTRY INTENDED FOR EXPORT TO THE UNITED STATES OF AMERICA 8–9 (2013) [hereinafter FSIS REPORT].

6. See FSIS REPORT, *supra* note 5, at 2.

7. *Id.* at 1.

8. *Id.* at 7–8.

9. *Id.*

10. Strom, *supra* note 1; Letter from Andreas Keller, *supra* note 4, at 2.

11. See, e.g., Adam Minter, *Don't Trust a Chicken Nugget That's Visited China*, BLOOMBERG (Sept. 3, 2013, 11:03 AM), [www.bloomberg.com/news/2013-09-03/don-t-trust-a-chicken-nugget-that-s-visited-china.html](http://www.bloomberg.com/news/2013-09-03/don-t-trust-a-chicken-nugget-that-s-visited-china.html) (providing a sampling of both public and private concerns regarding the safety of chicken processed in China); Brian Wingfield & Shruti Date Singh, *Chicken Processed in China Triggers U.S. Food Safety Protests*, BLOOMBERG (Sept. 26, 2013, 8:46 PM), <http://www.bloomberg.com/news/2013-09-27/chicken-processed-in-china-triggers-u-s-food-safety-protests.html>.

12. Wendy A. Johncheck, *An Examination of Whether U.S. Country of Origin Labeling Legislation Plays a Role in Protecting Consumers from Contaminated Food*, 21 STAN. L & POL'Y REV. 191, 191–92 (2010); Wingfield & Singh, *supra* note 11.

13. 7 C.F.R. § 65.300 (2014); see Johncheck, *supra* note 12, at 196–97 (“Products covered by the COOL measure include muscle and ground cuts of meat . . . . Covered commodities that are included as ingredients in a processed food item are exempt from origin labeling requirements.”).

meats, such as raw comingled meats or muscle cuts, which have been tightened in the last four years to compel detailed COOL<sup>14</sup> at great expense to meat industry participants.<sup>15</sup> Business losses within the U.S. poultry industry's existing transactions with Chinese firms, as well as American-owned operations in China,<sup>16</sup> have already materialized due to poultry-related trade disagreements raised by both private and government actors.<sup>17</sup> Thus, permitting import of Chinese-processed poultry food items would seem to raise political, economic, social, and health concerns against a background of seemingly inconsistent regulations regarding COOL as applied to raw meat commodities and processed food items.

Part I of this Note introduces the relevant background information and the history of Chinese processed poultry standards. Within Part I, the concept of equivalence and a brief history of U.S. assessment of Chinese poultry processing are introduced. Part I concludes with a description of the health safety scares in China in the context of this issue. Part II analyzes these trends and argues for the adoption of modified COOL standards for some processed foods in light of strategic uses of COOL. Finally, Part III summarizes the main points and offers a conclusion that will encourage domestic and foreign business, add consistency to USDA regulations while informing consumers, and likely have nominal implementation and oversight costs for the USDA.

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14. *Am. Meat Inst. v. U.S. Dep't of Agric.*, 968 F. Supp. 2d 38, 43–44 (D.D.C. 2013) (summarizing comments attached to the most recent promulgation of USDA muscle cut rules regarding challenges to COOL).

15. See Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts, 78 Fed. Reg. 31,367, 31,368, 31,385 (May 24, 2013) (to be codified at 7 C.F.R. pts. 60, 65).

16. Jacob Bunge & Erin McCarthy, *Tyson Foods Profit Rises, Despite Chinese Drag*, WALL ST. J. (Jan. 31, 2014, 11:13 AM), <http://online.wsj.com/news/articles/SB10001424052702303973704579354462984309316> (explaining how Tyson Foods, a meat packing giant, has also experienced problems in their China market due to food-safety concerns).

17. *E.g.*, Bloomberg News, *China Probes 'Unfair Trade' in U.S. Chicken and Auto Products*, BLOOMBERG (Sept. 13, 2009, 10:19 PM), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a9igRzOC55wE>.

## I. BACKGROUND

## A. AN INTRODUCTION TO EQUIVALENCE

Poultry born, raised, and slaughtered in the United States or another equivalent country may be processed in China and then exported back to the United States for sale without any notice of its journey to consumers.<sup>18</sup> China is only authorized to export processed poultry to the United States, as distinguished from being able to export raw chicken born, raised, or slaughtered domestically in China.<sup>19</sup> China is not permitted to export raw chicken to the United States, nor is it authorized to export any other kind of meat for human consumption to the United States, in either raw or processed form.<sup>20</sup> The only meat that China may export to the United States is “processed (heat-treated/cooked) poultry products . . . provided raw poultry is sourced from countries that have been determined by FSIS to have an equivalent poultry slaughter inspection system.”<sup>21</sup> FSIS determines equivalence by comparing a foreign state’s food production systems to a number of regulatory-defined metrics.<sup>22</sup> It is a technical process, which involves what is essentially both a comprehensive document and processing-site audit.<sup>23</sup> The FSIS-approved poultry slaughter equivalence list is fairly limited, and, of course, all the countries that are

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18. Strom, *supra* note 1.

19. 9 C.F.R. § 381.196 (2014). China and Israel are permitted to export processed poultry products to the United States, but are not permitted to export raw poultry to the United States. Food Safety & Inspection Serv., *Countries/Products Eligible for Export to the United States*, U.S. DEP’T AGRIC., [http://www.fsis.usda.gov/wps/wcm/connect/4872809d-90c6-4fa6-a2a8-baa77f48e9af/Countries\\_Products\\_Eligible\\_for\\_Export.pdf?MOD=AJPERES](http://www.fsis.usda.gov/wps/wcm/connect/4872809d-90c6-4fa6-a2a8-baa77f48e9af/Countries_Products_Eligible_for_Export.pdf?MOD=AJPERES) (last updated Feb. 7, 2014) [hereinafter *Eligibility Factsheet*]. China and Mexico are the only two countries that are expressly limited to the export of processed poultry; however, Australia and New Zealand are approved for “ratites only.” *Id.* The USDA defines Ratites as a “family of flightless birds” and, specifically, the Emu, Ostrich, and Rhea. Food Safety & Inspection Serv., *Food Safety Information: Ratites (Emu, Ostrich, and Rhea)*, U.S. DEP’T AGRIC., [http://www.fsis.usda.gov/wps/wcm/connect/5b49da82-39a8-4722-bcce-a85bcd1d8833/Ratites\\_Emu\\_Ostrich\\_Rhea.pdf?MOD=AJPERES](http://www.fsis.usda.gov/wps/wcm/connect/5b49da82-39a8-4722-bcce-a85bcd1d8833/Ratites_Emu_Ostrich_Rhea.pdf?MOD=AJPERES) (last updated May 2011).

20. *Eligibility Factsheet*, *supra* note 19. China is not eligible to export raw or processed “Beef/Veal,” “Lamb/Mutton,” “Goat,” “Equine,” or “Egg Products” to the United States. *Id.*

21. *Id.*

22. See 9 C.F.R. § 327.2 (2014).

23. *Id.*

eligible under any equivalency measure are by definition only held to the standards that have already been established in the United States.<sup>24</sup>

In 2013, China was cleared to process U.S.-slaughtered poultry at four separate processing facilities,<sup>25</sup> all of which have passed inspections by FSIS.<sup>26</sup> In addition to these specific processing facilities being certified by on-site inspectors, the administrative side of the Chinese poultry processing inspection system was evaluated and approved.<sup>27</sup> These audits were an “exhaustive” process that examined a number of factors.<sup>28</sup> The processed-poultry system in China was, as a whole, evaluated in terms of its equivalence to U.S. standards on six different factors: (1) Government Oversight; (2) Statutory Authority and Food Safety Regulations; (3) Sanitation; (4) Hazard Analysis and Critical Control Point Systems; (5) Chemical Residue Programs; and (6) Microbiological Testing Programs.<sup>29</sup>

The most recent round of audits was prompted by an official request made by China.<sup>30</sup> In practice, the 2013 audits were remedial to the prior grant of equivalence in late 2010.<sup>31</sup> The 2013 inspections also helped gauge to what extent China had successfully implemented and executed its own 2009 Food

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24. *Eligibility Factsheet*, *supra* note 19. In addition to the United States, the countries that may slaughter and process for use in the United States are Canada, Chile, and France. *Id.* Great Britain’s “eligibility is suspended pending an equivalence re-verification.” *Id.*; see 9 C.F.R. §§ 327.2, 381.196, 590.910 (2014) (eligibility criteria for different products).

25. Letter from Andreas Keller, *supra* note 4, at 2, 7 (identifying a total of four poultry processing facilities each separately owned: Qingdao 9-Alliance Group, Ltd.; Zucheng Waimao Co., Ltd.; Weifang Legang Food Co., Ltd.; and Zhong’ AO Holdings Group Co., Ltd).

26. See FSIS REPORT, *supra* note 5.

27. *Id.* at 2.

28. Dan Flynn, *How China Got Approval to Process and Export U.S. Chicken*, FOOD SAFETY NEWS (Sept. 5, 2013), <http://www.foodsafetynews.com/2013/09/how-chinese-processed-chicken-was-approved-for-export-to-usa/#.UmxJlvmsi-0>.

29. 9 C.F.R. § 381.196; Letter from Andreas Keller, *supra* note 4, at 2; see Flynn, *supra* note 28.

30. FSIS REPORT, *supra* note 5, at 8; Flynn, *supra* note 28; Letter from Andreas Keller, *supra* note 4, at 8.

31. Letter from Andreas Keller, *supra* note 4, at 2 (“This audit was necessary to assess the effectiveness of the corrective actions the PRC submitted in response to the December 1–21, 2010 verification audit.”).

Safety Law.<sup>32</sup> The 2009 Food Safety Law was meant, among other things, to improve relative compliance with existing Chinese food-safety measures and introduce certain improvements.<sup>33</sup> One of the successes of the 2009 Food Safety Law has proven to be the international attention violators have received. For example, Yum! Brands, a U.S.-based company, sold tainted chicken products in its Kentucky Fried Chicken (KFC) restaurants located in China.<sup>34</sup> All of the KFC chicken products in question had been sourced from China.<sup>35</sup> In 2010, the Shanghai Food and Drug Administration found that KFC's chicken had abnormal quantities of "amantadine, a drug used to treat Parkinson's disease."<sup>36</sup> As a result of publicity surrounding KFC's chicken supply,<sup>37</sup> KFC's sales in China dropped by thirteen percent.<sup>38</sup> In response, KFC reportedly cut "more than 1,000 farms from its network of suppliers in China . . . ."<sup>39</sup> And in the United States, Yum! Brands has had federal securities fraud claims filed against it for issues related to its subsidiary businesses in China, including KFC.<sup>40</sup>

Equivalence eligibility for poultry exported to the United States is not presumed; rather, countries must request consideration and subject themselves to intense initial assessments, in addition to random periodic document and on-site inspections by experts in order to maintain eligible status.<sup>41</sup> China has made sweeping efforts to become slaughter

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32. *Id.* at 8.

33. *See* Flynn, *supra* note 28.

34. Complaint for Violations of Federal Securities Laws, Yun v. YUM Brands Inc., No. SACV13-00147-CJC(MLGx), 2013 WL 328536 (C.D. Cal. Jan. 29, 2013) [hereinafter Yun Complaint].

35. J.D. Heyes, *KFC Halts Chicken Supply from 1,000 Chinese Farms After Antibiotics Scare*, NATURAL NEWS (Mar. 2, 2013), [http://www.naturalnews.com/039318\\_kfc\\_antibiotics\\_chicken\\_supply.html#](http://www.naturalnews.com/039318_kfc_antibiotics_chicken_supply.html#).

36. Yun Complaint, *supra* note 34, at 18 (suggesting that third-party labs found that discrete samples of KFC's chicken also contained high levels of steroids and antibiotics, but the Shanghai FDA issued a statement that the levels were within legal parameters).

37. *Id.* at 13 (quoting a news article reporting that the tainted chicken originated from Chinese chicken supplier Shandong Liuhe).

38. Press Release, Yum! Brands, Yum! Brands Reports Third-Quarter 2013 EPS Declined 15%, Excluding Special Items; Soft KFC China Sales and Higher Tax Rate Reduce Full-Year EPS Expectations (Oct. 8, 2013).

39. Heyes, *supra* note 35.

40. *See generally* Yun Complaint, *supra* note 34 (alleging misrepresentation of business prospects and profits in the China division).

41. 9 C.F.R. § 381.196 (2014).

and processing eligible.<sup>42</sup> It has made several attempts to satisfy FSIS poultry-slaughter equivalency, but has yet to pass the export equivalence audit.<sup>43</sup>

These failures are despite substantial national reforms codified in the 2009 Food Safety Law.<sup>44</sup> The 2009 Food Safety Law was largely in response to the 2008 melamine-tainted infant formula crisis, which “affect[ed] not only China, but also forty-six other countries . . . [totaling] about 300,000 infants and young children, with more than 50,000 infants hospitalized and six reported deaths.”<sup>45</sup> Critics have claimed in practice that the law alone “is unlikely to solve existing food safety issues.”<sup>46</sup> One of the most challenging obstacles to effectuating the 2009 Food Safety Law’s provisions is a chronic lack of enforcement.<sup>47</sup> Another problem is the recurrence of food safety issues of a similar nature despite some being the very impetus for drafting the law.<sup>48</sup> For example, not long after the 2009 Food Safety Law was passed, melamine contaminants were discovered once again in products sold domestically in China and elsewhere.<sup>49</sup>

Given the relatively low number of countries eligible for poultry slaughter exports to the United States, it is worth mentioning that a country not being poultry slaughter equivalent with the United States is the rule while meeting poultry-slaughter equivalence is the exception.<sup>50</sup> This is not necessarily true for all meat categories, such as processed pork,<sup>51</sup> where China is one of only four of thirty-four foreign

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42. FSIS Report, *supra* note 5, at 2; Flynn, *supra* note 28; Letter from Andreas Keller, *supra* note 4, at 2; see Ching-Fu Lin, *Global Food Safety: Exploring Key Elements for an International Regulatory Strategy*, 51 VA. J. INT’L L. 637, 650–53 (2011) (describing the 2009 Chinese Food Safety Law).

43. FSIS REPORT, *supra* note 5, at 2, 7; *Equivalence FAQ*, *supra* note 4.

44. Lin, *supra* note 42, at 645–46 (discussing action taken largely in response to the 2008 melamine-tainted infant formula crisis).

45. *Id.* at 646.

46. *Id.* at 651.

47. *See id.* at 651–53.

48. *Id.*

49. *Id.*

50. *See Eligibility Factsheet*, *supra* note 19.

51. *See id.* Israel and China are not eligible to export any kind of pork while the Czech Republic and Romania were previously eligible to export processed pork, but that “eligibility is suspended pending an equivalence re-verification.” *Id.*

countries with some type of U.S. meat export eligibility that may not export processed pork to the United States.<sup>52</sup>

#### B. POLITICAL OPPOSITION: THE BRIEF AND TORTURED HISTORY OF U.S. ASSESSMENT OF THE CHINESE POULTRY SYSTEM

The current situation is distinguishable because now the USDA, unlike in previous years, has funding earmarked for FSIS oversight of poultry processing establishments in China.<sup>53</sup> In 2005, the FSIS conducted an audit of China's food processing and inspection systems and in the same year issued a final report that determined that China had met the poultry processing equivalency standards for processing poultry, essentially on the same terms found in the 2013 arrangement.<sup>54</sup> In November 2005, the FSIS proposed a new final rule that would allow China to export processed poultry to the United States and advised that "10 to 25 processing establishments in China would export more than 2.5 million pounds of shelf-stable cooked poultry products to the United States in the first year under the proposal."<sup>55</sup> Thus, in 2005, the FSIS was expecting as many as six times more Chinese poultry processing facilities producing poultry for U.S. export than were approved by the FSIS in 2013.<sup>56</sup> For two months, commentary was collected on the proposed rule, and by early 2006, opponents had expressed concerns ranging from commingling with slaughtered poultry, to viral infection, and other facility effectiveness issues.<sup>57</sup> After assessing these concerns, the FSIS determined that despite the perceptions of the opposition, China's systems were "adequate."<sup>58</sup> In 2006, the

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52. *Id.*

53. *Equivalence FAQ*, *supra* note 4 ("[T]he House and Senate Appropriations Committees banned the use of funds to import processed poultry product from China. As a result, China was unable to export any processed poultry product to the United States.").

54. RENÉE JOHNSON & GEOFFREY S. BECKER, CONG. RESEARCH SERV., R40706, CHINA-U.S. POULTRY DISPUTE 2 (Apr. 5, 2010).

55. *Id.*

56. *Compare id.* (predicting up to twenty-five Chinese processing plants would export poultry to the United States), *with* Letter from Andreas Keller, *supra* note 4, at 2, 7 (describing the audit of four Chinese facilities inspected for equivalence in 2013).

57. *See* JOHNSON & BECKER, *supra* note 54, at 2 (explaining that avian flu, H5N1, was a major concern at the time).

58. *Id.* at 3.

FSIS issued the final rule allowing processed poultry exports from China, but despite the high initial facility estimates “no eligible plants were approved.”<sup>59</sup>

The 2006 rule had been officially published, but it lacked concrete direction for implementation because no facilities were identified.<sup>60</sup> To complicate matters more, the 2006 rule was met with pushback from politicians in the U.S. Congress, and the USDA was ultimately denied funding to implement the rule.<sup>61</sup> Through a series of appropriations bills that required annual renewal, the funds to implement the 2006 rule were blocked for the fiscal years of 2007, 2008, and 2009.<sup>62</sup> The arguments that successfully blocked the implementation of the final rule during a three-fiscal-year period known as the congressional ban<sup>63</sup> challenged FSIS technical findings and offered skepticism of alleged political and economic pressures behind the rule from the George W. Bush administration and Chinese leaders.<sup>64</sup>

### C. ECONOMIC CASUALTIES: POULTRY TRADE WAR

China was not amused by the congressional ban, nor by the beleaguered return on its request to be considered as a poultry equivalent.<sup>65</sup> These actions meant that lucrative trade was foreclosed due to factors unrelated to China’s compliance with and equivalence to U.S. regulatory standards.<sup>66</sup> Major American corporations like Cargill, Tyson, McDonald’s, Wal-Mart, Sam’s, and Yum! Brands all reportedly had an interest in exploiting burgeoning Chinese poultry markets.<sup>67</sup> These

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59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* (the “DeLauro amendment”); see Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, 123 Stat. 524; Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844 (2007); Revised Continuing Appropriations Resolution, 2007, Pub. L. No. 110-5, 121 Stat. 8 (each denying funding for the final rule).

63. See *supra* note 62 and accompanying text. “Congressional ban” refers to the period between regulatory approval and an operational program with funding. During the congressional ban, FSIS was specifically denied funding to oversee the program by the Appropriations Committee.

64. JOHNSON & BECKER, *supra* note 54, at 3–4.

65. See *id.* at 6–8.

66. *Id.*

67. See Kim Souza, *China Is a Land for Opportunity for Poultry Growth*, THE CITY WIRE (Sept. 12, 2013, 10:28 PM), <http://www.thecitywire.com/node/29571#.Um3PyPmsi-1>.

companies had a financial stake in, at the minimum, maintaining any profitable contracts with entities in China because of their foothold in Chinese product markets or in international trade arrangements.<sup>68</sup> KFC, owned by Yum! Brands, generated 42% of its global profits from business in China during 2012.<sup>69</sup>

In response to the congressional ban, China claimed that the United States had violated terms of an international trade agreement regarding technical barriers to trade as well as the General Agreement on Tariffs and Trade.<sup>70</sup> China brought its claims seeking an enforceable remedy from the World Trade Organization (WTO).<sup>71</sup> During roughly the same time period, some Chinese poultry corporations unilaterally rejected poultry product shipments originating from the United States.<sup>72</sup> More significantly, China allegedly engaged in its own retaliatory trade restrictions aimed at the U.S. chicken product industry.<sup>73</sup> China provided U.S. exporters with the choice between very high tariffs or potential punitive damages if they wanted to retain access to the Chinese markets.<sup>74</sup> These duties were a success—the year after they were imposed, U.S. broiler chicken exports decreased by approximately 90%.<sup>75</sup>

China's tariffs would result in U.S. poultry exporters being subjected to "huge tariffs"<sup>76</sup> of up to 105.4%.<sup>77</sup> These trade restrictions took care to target individual products that were part of certain industries. One of the most widely traded and profitable types of chicken called a "broiler" was subject to the

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68. *See id.*

69. YUM! BRANDS, ANNUAL CUSTOMER MANIA REPORT (2012), available at <http://yum.com/annualreport/pdf/2012yumAnnReport.pdf>.

70. JOHNSON & BECKER, *supra* note 54, at 6–8.

71. *Id.*

72. *Id.* at 7.

73. *Id.*

74. Michael Kitchen, *China to Set Anti-dumping Measures on U.S. Chicken*, MARKET WATCH (Feb. 5, 2010, 12:27 AM), <http://www.marketwatch.com/story/china-to-set-anti-dumping-measures-on-us-chicken-2010-02-05>.

75. Poultry News Desk, *China Will Not Appeal US Chicken Trade Decision; WTO Ruling Favoured US*, THE POULTRY SITE (Sept. 26, 2013), <http://www.thepoultrysite.com/poultrynews/30164/china-will-not-appeal-us-chicken-trade-decision-wto-ruling-favoured-us>.

76. Strom, *supra* note 1.

77. Kitchen, *supra* note 74.

highest possible tariff.<sup>78</sup> Directly targeting broilers is significant because “[broilers] constitute virtually all commercial chicken production” in the United States.<sup>79</sup> In 2010, the “[r]etail equivalent value of the U.S. broiler industry” was \$45 billion.<sup>80</sup> In the same year, the United States produced 36.9 billion pounds of broiler meat, of which 18% was exported to various countries.<sup>81</sup> Despite these sanctions, the American poultry industry “exported to China more than 240,000 metric tons of broilers valued at \$283.3 million” in 2012.<sup>82</sup>

The restrictions were designed to give U.S. chicken producers the choice of facing “punitive damages of 43.1% to 80.5%, while those who don’t comply would see their shipments face the top tariff.”<sup>83</sup> Although largely impacting only the poultry industry, this “tit-for-tat low-level trade war between the two nations” failed to satisfy either country.<sup>84</sup> Indeed, the tenuous relationships between poultry businesses that had formed before or during the interim years of the congressional ban were soured further due to disagreements on these matters of “unfair” access to trade.<sup>85</sup> Major U.S. chicken product exporters, such as Sanderson Farms<sup>86</sup> and Tyson,<sup>87</sup> considered China’s “[un]justified” restrictions<sup>88</sup> to have made “shipping to

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78. *Id.*

79. USDA Economic Research Serv., *Statistics & Information*, U.S. DEPT AGRIC. (May 28, 2012), <http://www.ers.usda.gov/topics/animal-products/poultry-eggs/statistics-information.aspx#.Uo70IcSsi-0>.

80. *Id.*

81. *Id.*

82. Brian Wingfield, *Victory in China Chicken Case Seen Aiding U.S. Trade Wars*, BLOOMBERG NEWS (Aug. 2, 2013, 4:45 PM), <http://www.bloomberg.com/news/2013-08-02/china-loses-wto-trade-dispute-over-duties-on-u-s-chicken-parts.html>.

83. Kitchen, *supra* note 74.

84. *Id.*

85. *See id.*

86. *See Investors*, SANDERSON FARMS, <http://ir.sandersonfarms.com/> (last visited Feb. 22, 2014). Sanderson Farms sells only chicken products. *Id.* In 2013, Sanderson Farms reported over \$2.68 billion in annual sales. *Id.*

87. *See* TYSON FOODS, INC., FISCAL 2012 FACT BOOK (2013) available at <http://edg1.precisionir.com/companyspotlight/NA018523/TYSON-2012-Fact-Book.pdf>. In fiscal year 2012, Tyson accounted for 22% of all U.S. chicken production, *id.* at 7, and had total annual sales of \$33.3 billion—35% of which was chicken and 10% of which was “prepared foods”. *Id.* at 2.

88. Wingfield, *supra* note 82 (paraphrasing official email statements made on behalf of Tyson by its spokesman, Worth Sparkman).

China . . . ‘economically unfeasible.’”<sup>89</sup> On September 25, 2013, the WTO trade arbiter issued a decision mandating that China reduce chicken trade restrictions and tariffs.<sup>90</sup> China had the option to appeal, which it did not exercise.<sup>91</sup> In response to the WTO decision, a U.S. poultry industry leader stated “[w]e’re hopeful that mutually beneficial trade in poultry products between China and the United States can now be restored as soon as possible.”<sup>92</sup> Shortly before the WTO issued its decision, FSIS submitted the first draft of its 2013 Chinese poultry-processing inspections to Chinese officials.<sup>93</sup> When the arbiter’s decision was released and China opted not to appeal, FSIS was in the process of revising its final report in conjunction with Chinese officials.<sup>94</sup> The final FSIS report was published in August 2013.<sup>95</sup>

In addition to WTO activities, internal pressures in the United States played a role in diffusing this multi-million dollar game of chicken when the congressional ban was not renewed for the 2010 fiscal year.<sup>96</sup> Funding was accordingly made available to FSIS for administration of China-to-United States poultry export programs.<sup>97</sup> Dissemination of the funding was qualified in two respects: (1) that China requests an eligibility assessment; and (2) that the USDA (through FSIS) re-evaluates China and maintains compliance with regulations.<sup>98</sup> This meant that FSIS had to reboot its previous work in China when, “[i]n December 2010, China requested that FSIS audit their poultry processing systems again.”<sup>99</sup> Some remedial actions were necessary in that year; however, by 2013 FSIS had once again signed off on China’s processed poultry exports.<sup>100</sup> Thus, for the first time since the approval

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89. *Id.* (quoting Sanderson Farms’ CFO, Mike Cockrell).

90. Poultry News Desk, *supra* note 75.

91. *Id.*

92. *Id.* (statement made by National Chicken Council President Mike Brown).

93. *See* Letter from Andreas Keller, *supra* note 4, at 2.

94. *See id.*

95. *Id.*

96. *See Equivalence FAQ*, *supra* note 4.

97. *Id.*

98. *See id.*

99. *Id.*

100. *E.g.*, Letter from Andreas Keller, *supra* note 4, at 2.

process began almost nine years earlier, a viable conduit for processed poultry exports was in place.<sup>101</sup>

#### D. ADDITIONAL CONTEXT: HEALTH SCARES IN PERSPECTIVE

Some politicians remain skeptical that the Chinese food-processing system will reliably deliver equivalent and safe food to U.S. consumers, and therefore, they are denouncing the regulations and processes that facilitate implementation of the 2013 final rule.<sup>102</sup> Senator Charles Schumer “wrote recently that China’s appallingly poor food-safety record . . . makes it deeply troubling that U.S. poultry will be processed in Chinese plants.”<sup>103</sup> He and other food safety advocates are critical of China’s track record and often cite to attention-grabbing food safety issues.<sup>104</sup> Popular choices include: the melamine milk crisis, which reportedly sickened 300,000 children and put 50,000 in hospitals;<sup>105</sup> high levels of arsenic in imported apple juice;<sup>106</sup> and illegal use of antibiotics and growth hormones.<sup>107</sup> Melamine has also found its way into livestock and pet food.<sup>108</sup>

In October 2013, the U.S. Food and Drug Administration (FDA) issued a report disclosing that since 2007, it has received roughly 3000 reports of animal illness caused by jerky treat products sourced from China, a majority of which were made from chicken.<sup>109</sup> The FDA is in the process of an ongoing investigation but it has already recorded illnesses in “more than 3600 dogs, 10 cats and . . . more than 580 deaths.”<sup>110</sup> The fact remains that processed chicken, albeit not for human

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101. See *Equivalence FAQ*, *supra* note 4.

102. Dan Chapman, *Ruling Opens Door to U.S. Sales of China-Processed Chicken*, SEATTLE TIMES, [http://seattletimes.com/html/business/technology/2022117749\\_chickenchinaxml.html](http://seattletimes.com/html/business/technology/2022117749_chickenchinaxml.html) (last updated Oct. 24, 2013, 7:42 PM).

103. *Id.*

104. *Id.*

105. Lin, *supra* note 42, at 645–46; Chapman, *supra* note 102.

106. Chapman, *supra* note 102.

107. *Id.*

108. Danielle Nierenberg, *Real Food Safety*, WORLDWATCH INST., <http://www.worldwatch.org/node/5054> (last updated May 16, 2007) (reporting that tainted feed was found in at least six U.S. states).

109. *Questions and Answers Regarding Jerky Pet Treats*, U.S. FOOD & DRUG ADMIN. (Oct. 22, 2013), <http://www.fda.gov/animalveterinary/safetyhealth/productsafetyinformation/ucm295445.htm>.

110. *Id.*

consumption, has been tainted.<sup>111</sup> This is in conjunction with ongoing concerns of bird flu in China and other parts of Asia.<sup>112</sup> Bird flu is understood to be spread through contact with live chickens, poultry products, or chicken byproducts.<sup>113</sup> Some bird flu strains have proven communicable and sometimes deadly to humans.<sup>114</sup> Bird flu is likely to remain a hot issue for some time because established strains are difficult to extinguish and new, scientifically unknown strains continue to be discovered.<sup>115</sup> A new strain called H7N9 was discovered in 2013 and has killed 45 of the 135 people infected with it in China.<sup>116</sup>

Other opponents of processed chicken imports from China are concerned about a perceived information barrier between consumers and their foods if they are buying products or consuming poultry processed in China.<sup>117</sup> These concerns are largely a result of fairly technical exceptions to the USDA's COOL regime.<sup>118</sup> Another sensitive issue relates to institutional usage of these products. Chicken fed to children in the National School Lunch Program could be processed in China.<sup>119</sup> The USDA purchases 20% of the food that ends up in the National School Lunch Program, all of which must be "produced, raised, and processed only in the United States," but the USDA need not necessarily purchase chicken products as part of that 20%.<sup>120</sup> The remaining food not purchased by

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111. *See id.*

112. Kate Kelland, *New China H7N9 Bird Flu Cases Could Mean Winter Epidemic*, HUFFINGTON POST (Oct. 24, 2013, 5:29 PM), [http://www.huffingtonpost.com/2013/10/24/china-h7n9-bird-flu-epidemic\\_n\\_4159317.html](http://www.huffingtonpost.com/2013/10/24/china-h7n9-bird-flu-epidemic_n_4159317.html).

113. *See Avian Influenza, Questions and Answers*, FOOD & AGRIC. ORG. UNITED NATIONS, <http://www.fao.org/avianflu/en/qanda.html#5> (last visited Mar. 1, 2014).

114. *Id.* (Chinese researchers report that bird flu is expected to remain at pandemic levels due to winter weather conditions).

115. *See id.*

116. *Id.*

117. *See* Minter, *supra* note 11.

118. *See id.*

119. National School Lunch Act, 42 U.S.C. § 1760(n)(2) (2006); *Equivalence FAQ*, *supra* note 4.

120. *Equivalence FAQ*, *supra* note 4 ("The USDA's Agricultural Marketing Service purchases approximately 20 percent of food for the National School Lunch Program on behalf of schools. The product purchased by AMS must be of 100 percent domestic origin, meaning that they are produced and processed from products which were produced, raised, and processed only in the United States.").

USDA programs is left to the discretion of individual schools to buy commercially.<sup>121</sup> The schools are required to buy food that has “to the maximum extent *practicable*” been processed domestically.<sup>122</sup> Together these examples reflect issues that critics of Chinese-sourced food products look to when discussing the implications of the 2013 final rule.<sup>123</sup> In practice, some of these concerns helped to substantiate the three-year congressional ban despite FSIS findings.<sup>124</sup>

#### E. REGULATORY INCONSISTENCY: COUNTRY OF ORIGIN LABELING AND ITS POLICY RATIONALE

Processed food is excluded from COOL standards.<sup>125</sup> Raw muscle cuts, ground commingled meat, or live imported animals are not excluded.<sup>126</sup> These raw, muscle-cut commodities must comply with elaborate COOL requirements if they are bound for retail sale.<sup>127</sup> Under this framework, COOL must disclose certain geographic changes that occurred during an animal’s life in addition to information about the country in which it was raised, slaughtered, butchered, and prepared for sale.<sup>128</sup> These production-step requirements under COOL are a relatively new addition to the USDA regime.<sup>129</sup> These production-step requirements have been made even stricter in 2009 and again in 2013 because of, among other things, USDA policy regarding consumer information and safety.<sup>130</sup> COOL distinguishes between processed and muscle-cut meats in this manner for chicken, and indeed, several traditional meat sources.<sup>131</sup>

A commodity that would otherwise be a mandatory COOL covered commodity is excluded from COOL requirements if it is used as an ingredient in a processed food item.<sup>132</sup> The USDA

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121. *Id.*; see 42 U.S.C. § 1760(n).

122. 42 U.S.C. § 1760(n).

123. See, e.g., Minter, *supra* note 11.

124. JOHNSON & BECKER, *supra* note 54, at 3–5, 7.

125. 7 C.F.R. §§ 65.220, .300 (2014).

126. *Id.* § 65.300.

127. *Id.*

128. See *id.*; *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 968 F. Supp. 2d 38, 43, 45–46 (D.D.C. 2013).

129. See *Am. Meat Inst.*, 968 F. Supp. 2d at 44–45.

130. See *id.*

131. See *id.* at 44 n.4 (beef, pork, lamb, chicken, goat, and certain nuts).

132. *Id.* at 43 n.1.

defines processed food item ingredients broadly to include “a component either in part or in full, of a finished retail food product.”<sup>133</sup> Under this framework, fairly minimal processing need actually occur in order to effectively revoke COOL requirements, even if that commodity represents a “full” component of the resulting product.<sup>134</sup>

A processed food results when a USDA-covered commodity, like chicken, has been specifically changed in character or combined with another food so as to improve or prepare it for consumption.<sup>135</sup> For example, a chicken tender with breading on it would be excluded from mandatory COOL while raw chicken, like a breast with or without bone, would generally not be excluded.<sup>136</sup> The result under this regime is that a processed chicken food item at retail would not disclose that it was processed in China because the USDA does not have mandatory COOL for chicken originating from the United States and shipped to China. The only required labeling on processed poultry products such as these is that, if they come from China, they must have a small, circular label affixed to them stating that they have been “[i]nspected for wholesomeness by the U.S. Department of Agriculture.”<sup>137</sup>

The COOL regulations were recently amended by the USDA (hereinafter referred to as the “Muscle Cut Rule of 2013”).<sup>138</sup> The changes were at least in part due to complaints

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133. 7 C.F.R. § 65.185.

134. *Id.*

135. 7 C.F.R. § 65.220. “Processed food item” means:

a retail item derived from a covered commodity that has undergone specific processing resulting in a change in the character of the covered commodity, or that has been combined with at least one other covered commodity or other substantive food component (e.g., chocolate, breading, tomato sauce), except that the addition of a component (such as water, salt, or sugar) that enhances or represents a further step in the preparation of the food product for consumption, would not in itself result in a processed food item.

*Id.* Examples of processes that change the “character” of the food to “processed food” include various methods of cooking, curing, smoking, or restructuring commodities. *Id.*

136. *See id.*; *see also* Johncheck, *supra* note 12, at 197–98.

137. 9 C.F.R. § 381.96 (2014) (pursuant to the Poultry Products Inspection Act, 21 U.S.C. § 466 (2012)).

138. Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural

brought to the WTO by Canada and Mexico about the “relative imprecision of the information required by the 2009 rule.”<sup>139</sup> As a result of these objections “[a] WTO arbitrator gave the United States until May 23, 2013 to bring its COOL requirements into compliance with [what would become the] 2013 rule.”<sup>140</sup> The new regulations were put into force on May 24, 2013.<sup>141</sup> The final rule changes the previous 2009 COOL rules in two central ways:

First, the Final Rule requires COOL labels for muscle cut meats to specify where the “production steps” for each such product took place—that is, where the animal from which the commodity was derived was born, raised, and slaughtered. . . . Second, the Final Rule states that “this final rule eliminates the allowance for commingling of muscle cut covered commodities of different origins” in order to “let[] consumers benefit from more specific labels.”<sup>142</sup>

In considering these modifications, the USDA calculated that the total estimated adjustment and unique label modification costs across all impacted meat producers would fall within a “range from \$53.1 million at the low end to \$192.1 million at the high end.”<sup>143</sup> These estimates are meant to encompass the costs to industry production alone, not intermediaries.<sup>144</sup> To become compliant with the 2009 COOL requirements, intermediaries were estimated to face total adjustment costs amounting to roughly “\$1,427.4 million in 2012 dollars.”<sup>145</sup> Because the USDA concedes that “it may not be feasible for all of the affected entities to achieve 100% compliance immediately[,]” it has provided a six-month ramp-

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Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts, 78 Fed. Reg. 31,367–85 (May 24, 2013) (to be codified at 7 C.F.R. pts. 60, 65).

139. *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 746 F.3d 1065, 1069 (D.C. Cir. 2014).

140. *Id.*

141. Mandatory Country of Origin Labeling, 78 Fed. Reg. at 31,367.

142. *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 968 F. Supp. 2d 38, 45–46 (D.D.C. 2013) (footnote omitted) (unsuccessfully challenged by a group of meat industry trade associations which sought a preliminary injunction against the USDA while the final rule was still a proposal). Interestingly, other “meat industry trade groups and a consumer advocacy group” were permitted by the court to intervene as defendants in support of the final rule. *Id.* at 43–44. See also *Am. Meat Inst.*, 746 F.3d 1065 (affirming).

143. Mandatory Country of Origin Labeling, 78 Fed. Reg. at 31,381.

144. *Id.* at 31,381–82.

145. *Id.* at 31,382.

up period.<sup>146</sup> It also expects these costs to taper and eventually diminish as affected entities tailor their logistics and processing systems accordingly.<sup>147</sup> The USDA cited specific policy goals when amending COOL to require more rigorous action by the meat industry. The USDA's "objective of this rulemaking is to amend current mandatory COOL requirements to provide consumers with information on the country in which productions steps occurred."<sup>148</sup>

## II. ANALYSIS

### A. COOL SHOULD BE REQUIRED FOR CHICKEN PROCESSED IN CHINA

A reduced COOL standard should be required for processed poultry food items imported from China. The ten-year history behind China's poultry equivalency applications and the United States' responses, namely the three-year congressional ban, point to the fact that the current arrangement may not be a permanent measure.<sup>149</sup> A political upset in Congress may very well result in FSIS's inability to maintain the mandatory schedule of investigations and audits of China-based poultry processing, a condition of lifting the appropriation ban.<sup>150</sup> From a business perspective, it is clear that the U.S.-China poultry trade wars have had a multi-million-dollar impact on poultry trade agreements.<sup>151</sup> Another trade dispute, resulting in modification to bilateral trade arrangements, would also likely restrict the expansion of trade in other sectors.<sup>152</sup> One, or both, countries might once again end up bringing claims to WTO arbitration panels.<sup>153</sup> A more tenable solution would be to foster confidence in relationships between China and the United States by removing the uncertainty fashioned by FSIS-USDA regulations.<sup>154</sup>

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146. *Id.* at 31,369.

147. *Id.* at 31,382.

148. *Id.*

149. *Equivalence FAQ*, *supra* note 4.

150. *See id.*

151. *See* Wingfield, *supra* note 82.

152. *See id.* (explaining how high broiler-chicken tariffs contributed to U.S.-China trade disputes).

153. *See id.*

154. *See supra* Part I.E.

Preserving trade relationships will become of particular concern in the long term if the Chinese monetary authority follows through with plans to end longstanding practices of currency intervention in the international currency markets.<sup>155</sup> “Unlike other currencies, the Chinese [renminbi] does not fluctuate freely against the dollar. Instead, China has tightly pegged its currency to the U.S. dollar at a rate that encourages a large bilateral trade surplus with the United States.”<sup>156</sup> China currently holds large reserves, about \$3.66 trillion, in U.S. dollars.<sup>157</sup> The effect of these reserves has been to offset the trade imbalance between the United States and China by deflating the comparative value of the renminbi to the dollar.<sup>158</sup> Basic economics suggests that exporting goods or services to China may become more profitable for U.S. firms if the value of the renminbi increases in relation to the dollar.<sup>159</sup> On the other hand, if currency values were to realign then the cost of importing goods and services from China could realistically be expected to increase, thereby serving to diminish profitability for some U.S. firms.<sup>160</sup>

#### B. POSSIBLE SOLUTION: REQUIRE LIMITED COOL FOR USDA-COVERED PROCESSED FOOD ITEMS

The exemption of processed food items from COOL should be amended to require COOL indicating the country where processing has occurred.<sup>161</sup> Such an amendment would be supported by historical and present issues related to the U.S.-

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155. See Xin Zhou & Fion Li, *PBOC Says No Longer in China's Interest to Increase Reserves*, BLOOMBERG (Nov. 20, 2013, 9:03 PM), <http://www.bloomberg.com/news/2013-11-20/pboc-says-no-longer-in-china-s-favor-to-boost-record-reserves.html>.

156. Robert E. Scott, *The China Toll: Growing U.S. Trade Deficit with China Cost More than 2.7 Million Jobs Between 2001 and 2011, with Job Losses in Every State* 4 (Econ. Policy Inst., Briefing Paper No. 345, 2012) (footnote omitted), available at <http://www.epi.org/publication/bp345-china-growing-trade-deficit-cost/>.

157. *Id.*

158. See Zhou & Li, *supra* note 155. See generally Nicholaas Groenewold & Lei He, *The US-China Trade Imbalance: Will Revaluing the RMB Help (Much)?*, 96 ECON. LETTERS 127, 129 (2007) (discussing the economics behind trade imbalance and currency valuation).

159. See Groenewold & He, *supra* note 158.

160. See *id.*

161. 7 C.F.R. § 65.220 (2014) (defining processing as “a change in the character of the covered commodity”).

China poultry trade and align with the two key changes to COOL already built into the Muscle Cut Rule of 2013.<sup>162</sup> First, the definition of “processed food items” is overly inclusive.<sup>163</sup> Second, enhancements to COOL found in the Muscle Cut Rule of 2013 include well-reasoned USDA policy modifications that are inconsistent with the practice of excluding processed food items from COOL.<sup>164</sup> Specifically, the Muscle Cut Rule of 2013 contains two provisions which are analogous to how the USDA treats the requisite production steps that go into taking a commodity that would, but for processing, otherwise require COOL.<sup>165</sup> They are: i) the inclusion of detailed production steps in COOL;<sup>166</sup> and ii) the removal of the meat commingling COOL exception for live or slaughtered commodities with multiple origins (accounting for production steps), even for live or slaughtered meat that enters the United States from other countries.<sup>167</sup> In light of these rather significant and costly changes there is little rationale capable of supporting the continued exclusion of processed food items from COOL—particularly in the fairly exceptional case of poultry processed in China.

#### 1. The USDA’s Definition of “Processed Food Item” Is Over Inclusive

The USDA defines what constitutes a “processed food item” within the scope of USDA-covered commodities broadly.<sup>168</sup> The extent to which a covered commodity, such as chicken, must be prepared in order to constitute a processed commodity or ingredient is ambiguous.<sup>169</sup> Generally speaking, there are three categories of processing activity: changing the character of a covered commodity, combining the commodity with another covered commodity, or combining the commodity with other

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162. *See supra* Part I.E.

163. *See* Johncheck, *supra* note 12, at 197–204.

164. *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 968 F. Supp. 2d 38, 43–44 (D.D.C. 2013).

165. *Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts*, 78 Fed. Reg. 31,367, 31,367–68 (May 24, 2013) (to be codified at 7 C.F.R. pts. 60, 65).

166. *Id.*

167. *Id.*

168. *See* 7 C.F.R. § 65.220 (2014).

169. *See id.*

substantive food components.<sup>170</sup> The regulatory examples indicate methods of changing or combining covered commodities, which are extremely basic.<sup>171</sup> The relative ease of creating a processed commodity creates the opportunity for manufacturers to intentionally circumvent COOL through use of the processed-food-item exception.<sup>172</sup> Potential application of this loophole could lead to situations where a U.S.-based poultry producer intentionally repurposes unmarketable chicken—perhaps due to consumer perceptions—and uses it for processed food instead.<sup>173</sup> This use conforms with how COOL worked prior to the Muscle Cut Rule of 2013,<sup>174</sup> however, it is in functional opposition with policy supporting the most recent revisions.<sup>175</sup> The USDA’s policy interests were validated by the District of Columbia Circuit when it held that the Muscle Cut Rule of 2013 does more than “merely satisfy[y] consumers’ curiosity”<sup>176</sup> because it supports a government interest in facilitating consumer choice.<sup>177</sup> Thus, through the processed-food exception, the over-inclusive definition of “processed food item” is able to skirt a main purpose of the new 2013 COOL—consumer preference empowerment.<sup>178</sup>

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170. *Id.*; see Johncheck, *supra* note 12, at 198.

171. See 7 C.F.R. § 65.220.

172. See *id.*

173. See Johncheck, *supra* note 12, at 199.

174. See *id.*

175. See Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts, 78 Fed. Reg. 31,367, 31,377 (May 24, 2013) (to be codified at 7 C.F.R. pts. 60, 65) (suggesting that removing the commingling allowance provides consumers with more information).

176. *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 746 F.3d 1065, 1073 (D.C. Cir. 2014).

177. But we can see non-frivolous values advanced by the information. Obviously it enables a

consumer to apply patriotic or protectionist criteria in the choice of meat. And it enables one who believes that United States practices and regulation are better at assuring food safety than those of other countries, or indeed the reverse, to act on that premise. We cannot declare these goals so trivial or misguided as to fall below the threshold needed to justify the “minimal” intrusion on AMI’s First Amendment interests. Thus AMI has failed to show a likelihood of success on the merits.

*Id.* at 1073–74 (citation omitted).

178. See Johncheck, *supra* note 12, at 199.

## 2. Incoherent USDA Policy

One of the most persuasive reasons for requiring a modified COOL for processed food items relates to recent changes in USDA policy that are inconsistent with the implementation of COOL.<sup>179</sup> The USDA has proposed changes in its approach to discrete production steps of meat products under the Muscle Cut Rule of 2013.<sup>180</sup> These changes impart significant information upon “certain U.S. consumers [that] value the designation of the countries of birth, raising, and slaughter on meat product labels.”<sup>181</sup> The USDA’s policy justifications for requiring COOL on raw meat products can be nearly seamlessly applied to processed food items, particularly poultry processed in China.<sup>182</sup> The same ideas of informed consumer choice, ability to inspect retail products, and other latent attributes are all considered benefits by the USDA in its most recent COOL regime.<sup>183</sup> These benefits would naturally apply to certain processed commodities and thus the goals of USDA COOL regulations would be more coherently applied by requiring COOL for certain categories of processed foods.<sup>184</sup>

In 2013, the USDA removed a specialized exception targeted at commingled meats.<sup>185</sup> Commingled meat is generally a ground product derived from more than one animal.<sup>186</sup> Commonly, commingling is used for products like ground beef and pork.<sup>187</sup> When this new rule is fully implemented, producers of raw, commingled meats must include COOL for each country in which the meat has been subjected to a production step.<sup>188</sup> This means that if meat in a single commingled package contains animal products from multiple countries, all countries must be listed, with a few

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179. *See supra* Part I.E.

180. Mandatory Country of Origin Labeling, 78 Fed. Reg. at 31,377.

181. *Id.*

182. *See id.*

183. *Id.* at 31,375–77.

184. *See id.*

185. *Id.* at 31,367–68.

186. 7 C.F.R. § 65.125 (2014) (“*Commingled covered commodities* means covered commodities (of the same type) presented for retail sale in a consumer package that have been prepared from raw material sources having different origins . . .”).

187. Mandatory Country of Origin Labeling, 78 Fed. Reg. at 31,367.

188. *Id.*

exceptions.<sup>189</sup> These changes do, nevertheless, reserve a degree of cost management flexibility to meat producers because “the new rule does not ‘force the segregated handling of animals with varying geographical histories,’ except in the sense that compliance with any regulation may induce changes in unregulated production techniques that a profit-seeking producer would not otherwise make.”<sup>190</sup> The loss of the earlier COOL’s commingling flexibility (through the exception) is an example of a regulatory exception to COOL that was removed due to changing agency goals, namely promotion of consumer information.<sup>191</sup> This demonstrates that the current COOL exclusion for processed food need not be idolized as unchanging when countervailing circumstances, such as the unprecedented access to China’s poultry processing facilities, changes business and perceived safety mechanics of the regulatory scheme.

### 3. The Processed Food COOL Exception Fails to Account for Special Factors Relevant for Poultry Processed in China

COOL’s power to capture so-called “credence attributes” is another key aspect of COOL that applies to poultry processing in China.<sup>192</sup> According to the USDA, credence attributes are those that “consumers would not be able to obtain information on or verify by inspection of the product at the point of purchase.”<sup>193</sup> The congressional ban and food safety concerns may very well be linked to credence attributes that, the USDA explains, are chronically undersupplied in unregulated markets according to “[e]conomic theory.”<sup>194</sup> Credence attributes find application in the present discussion in two ways, both addressing the gap between FSIS approval and perceived product safety.

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189. *See id.*

190. *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 746 F.3d 1065, 1070 (D.C. Cir. 2014) (citation omitted).

191. *See* Mandatory Country of Origin Labeling, 78 Fed. Reg. at 31,369 (“Removing the commingling allowance lets consumers benefit from more specific labels.”).

192. *Id.* at 31,377.

193. *Id.*

194. *Id.* (although it is not clear which “economic theory” the USDA is referring to).

First, it is necessary to recognize that consumers can use COOL in response to a food crisis.<sup>195</sup> This becomes applicable if a food-borne illness or contamination problem were to arise with processed poultry for which China has been identified as a source, such as in the melamine scare.<sup>196</sup> In these situations “consumers could use an origin label to avoid a given product from a particular country” if there are marked health reasons for doing so.<sup>197</sup> This method has proven useful to consumers and resellers when identifying potentially unwholesome products in the past.<sup>198</sup> This method would also have viable application to processed products that have been identified as dangerous. This strategy empowers consumers to mitigate their own “individual[] risk of consuming contaminated food” through the use of COOL after being warned of a hazard.<sup>199</sup> Businesses would need to adapt their expectations about consumers’ ability to respond to a safety violation, much as the meat industry did when transitioning from the less-restrictive 2009 COOL rule.<sup>200</sup>

Second, COOL information can be used by consumers preemptively to change their consumption habits through enhanced choice and information.<sup>201</sup> By encouraging use of COOL preemptively, a compromise can be formed between the polarizing positions on both sides of the Chinese processed chicken issue without returning to economically irrational trade disputes or another congressional ban. Instead of reacting to food safety scares, like with the first option, consumers may also use COOL to be “proactive” in their purchasing decisions.<sup>202</sup> This option would likely be most

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195. Johnecheck, *supra* note 12, at 207; see Mandatory Country of Origin Labeling, 78 Fed. Reg. at 31,377.

196. See Lin, *supra* note 42, at 645–46.

197. Johnecheck, *supra* note 12, at 207.

198. *Id.* (describing use of origination information by government to identify food safety problems, used in 2008 to recommend that consumers avoid certain produce from “specified states, regions, and countries”).

199. *Id.*

200. See Mandatory Country of Origin Labeling, 78 Fed. Reg. at 31,381–82.

201. See *id.* at 31,376 (“The purpose of COOL is to provide consumers with information upon which they can make informed shopping choices.”).

202. Johnecheck, *supra* note 12, at 207 (comparing the response-oriented approach to COOL use to the preemptive use of COOL).

appealing to a fairly small category of consumers.<sup>203</sup> Those consumers concerned about the safety of foods originating from certain countries—like those who pushed for the congressional ban—may be satisfied by a limited COOL disclosure that at least could be used to inform their purchasing decisions.<sup>204</sup> This would allow individuals to avoid products that have been substantially processed in countries with a reputation for violating food safety laws.<sup>205</sup> Preemptive consumer use of COOL would effectively allow American consumers to vote with their wallets, deciding for themselves whether they want to purchase chicken processed in China.<sup>206</sup> Alternatively, this may prove advantageous for any rival domestic or foreign processors if there is a significant violation from one processing source.<sup>207</sup>

### C. ARGUMENTS AGAINST A MODIFIED COOL FOR PROCESSED FOODS

A spillover problem may arise if an issue with the processed chicken supply from China develops. Spillover effects can develop when country-specific information is released in concert with food contamination or recall announcements.<sup>208</sup> The risk of “long-term economic impacts” within the product sector “as well as other products from the targeted country” tied to COOL spillover may push China, and other countries, to fight against a modification to the COOL exclusion.<sup>209</sup>

Poultry processors may also cite logistical and technical barriers, such as adjustment costs, as reasons against COOL.

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203. Alli Condra, *A Question of Origin*, FOOD SAFETY NEWS (Apr. 9, 2012), <http://www.foodsafetynews.com/2012/04/a-question-of-origin/#.UpF35sSsiFw> (“For some people, knowing where their food comes from is very important. For others, it may not matter at all.”).

204. *Id.*; cf. *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 746 F.3d 1065, 1073 (D.C. Cir. 2014) (“Obviously [COOL] enables a consumer to apply patriotic or protectionist criteria in the choice of meat.”).

205. Johnecheck, *supra* note 12, at 208.

206. *See* Mandatory Country of Origin Labeling, 78 Fed. Reg. at 31,376 (“The purpose of COOL is to provide consumers with information upon which they can make informed shopping choices.”).

207. Johnecheck, *supra* note 12, at 207–08 (describing a study by the FDA in which COOL was used in conjunction with a running catalog of food chemical violations within various food sectors finding the United States had significantly more chemical violations than other countries connected to some products, but fewer in others).

208. *Id.*

209. *Id.* at 207.

These arguments are not new. In 2013 the U.S. meat lobby unsuccessfully challenged the new COOL final rules on these grounds and others.<sup>210</sup> It is relatively unlikely that the USDA, if it were to modify COOL, would deem adjustment costs to industry as a prohibitive matter because of the established agency priorities that have already been used to justify nearly \$2 billion in meat industry adjustment costs.<sup>211</sup> Many of these costs developed from point-of-origin and sorting-of-live-animal issues when those animals are slaughtered.<sup>212</sup> Those types of point-adjustment costs will likely diminish in the context of China's processed poultry because, due to the limits of the current FSIS permit, all chicken for processing must arrive from a short list of approved countries<sup>213</sup>—probably frozen and in bulk to preserve the “cold-chain.”<sup>214</sup>

### III. CONCLUSION

The removal of the COOL exception for processed food items and the modification of COOL to require disclosure of the locations in which USDA covered commodities were substantially processed will address the special issue of poultry processed in China for import into the United States.<sup>215</sup> Additionally, COOL has the potential to rein in “systemic concerns about the safety of the U.S. food supply”<sup>216</sup> in a manner which captures many perceived food safety problems<sup>217</sup>

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210. *See* *Am. Meat Inst. v. U.S. Dep't of Agric.*, 968 F. Supp. 2d 38, 42–43 (D.D.C. 2013). The plaintiffs, claiming that the new 2013 COOL rules were arbitrary, capricious, and served no purpose, were denied an injunction against implementation of the rules, and are petitioning for an appeal. *Id.* at 42–46. Plaintiffs also argued that COOL was an illegal means to compel corporate speech, *id.* at 47; the rules were upheld on grounds of USDA agency authority. *Id.* at 52–68.

211. *See* *Mandatory Country of Origin Labeling*, 78 Fed. Reg. at 31,381 (adding estimated COOL adjustment costs from 2009 and 2013 final rules).

212. *Id.* at 31,380–81.

213. 9 C.F.R. § 381.196 (2014).

214. *See* *FOOD SAFETY & INSPECTION SERV., FSIS SAFETY AND SECURITY GUIDELINES FOR THE TRANSPORTATION AND DISTRIBUTION OF MEAT, POULTRY, AND EGG PRODUCTS 3* (2005), available at [http://www.fsis.usda.gov/shared/PDF/Transportation\\_Security\\_Guidelines.pdf](http://www.fsis.usda.gov/shared/PDF/Transportation_Security_Guidelines.pdf) (requiring meat and other products to always be refrigerated or frozen).

215. *See supra* Part II.B.

216. *Johnecheck, supra* note 12, at 210.

217. *See supra* Part II.

forwarded by groups and politicians.<sup>218</sup> The nearly unprecedented nature of the 2013 final rule, enabling the use of the four FSIS audited processing plants in China, raises economic concerns tied to U.S.-China poultry trade, in addition to collateral industries<sup>219</sup> and political arrangements.<sup>220</sup> Moreover, the terms and policies supporting what the USDA will soon require once the Muscle Cut Rule of 2013 becomes effective in May 2014 indicates not only changing USDA policies toward consumer information,<sup>221</sup> but also how COOL is used to effectuate those goals.<sup>222</sup> The USDA's current use of COOL illustrates that COOL will soon require more from the meat industry in terms of compliance and adjustment costs<sup>223</sup> and that the USDA's COOL regime has, and can, be adapted to address evolving concerns in the U.S. food supply without overstepping agency authority.<sup>224</sup> Courts have upheld the tightening of COOL as applied to certain covered commodities, such as raw muscle cuts, by upholding removal of exceptions for processes such as commingling.<sup>225</sup> Accordingly, for the foreseeable future, processing of chicken in China remains an open issue absent administrative changes or judicial guidance.<sup>226</sup> The solution remains subject to the ebb and flow of

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218. See JOHNSON & BECKER, *supra* note 54, at 3–4; Strom, *supra* note 1.

219. Wingfield, *supra* note 82 (automotive products were part of the broiler chicken import tariffs).

220. *Id.* (explaining that the Obama administration was forced to take a position opposed to China's trade practices during the WTO arbitrations).

221. Compare 7 C.F.R. § 65.300 (2014) (providing a plain exception to COOL for processed food products), with *Am. Meat Inst. v. U.S. Dep't of Agric.*, 746 F.3d 1065 (D.C. Cir. 2014) (upholding consumer preference and choice as government interests sufficient to compel the more detailed COOL disclosures required in the 2013 rule).

222. Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts, 78 Fed. Reg. 31,367, 31,367 (May 24, 2013) (to be codified at 7 C.F.R. pts. 60, 65) (analyzing costs and benefits of COOL as applied to muscle cut meats).

223. See *id.* at 31,381 (estimating that changes in COOL will cost upwards of \$2 billion).

224. See *Am. Meat Inst.*, 746 F.3d at 1073–74; *Am. Meat Inst. v. U.S. Dep't of Agric.*, 968 F. Supp. 2d 38, 53 (D.D.C. 2013).

225. See *Am. Meat Inst.*, 746 F.3d 1065; Mandatory Country of Origin Labeling, 78 Fed. Reg. at 31,367.

226. *Equivalence FAQ*, *supra* note 4.

political gamesmanship rather than the all-or-nothing approach traditionally employed by prior regulation.<sup>227</sup>

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227. Karen Lo, *Congress Urged to Stop Processing American Poultry in China*, THE DAILY MEAL (Jan. 31, 2014), <http://www.thedailymeal.com/congress-urged-stop-processing-american-poultry-china-13114> (revealing that over 280,000 people have signed petitions “urging Congress and the USDA not to let Chinese facilities process chicken for American consumption”). Fourteen members of Congress sent an open letter to the Agricultural Appropriations Committee advocating for the removal of Chinese processed chicken from national food programs, such as school lunch programs. Letter from Members of Congress, to Mark Pryor, Chairman of Senate Comm. on Appropriations Subcomm. on Agric., Rural Dev., Food & Drug Admin, & Related Agencies, Roy Blunt, Ranking Member Senate Comm. on Appropriations Subcomm. on Agric., Rural Dev., Food & Drug Admin, & Related Agencies, Robert Aderholt, Chairman of House Comm. on Appropriations Subcomm. on Agric., Sam Farr, Ranking Member House Comm. on Appropriations Subcomm. on Agric. (2013), available at [http://delauro.house.gov/images/pdf/food\\_safety\\_chinese\\_chicken\\_letter.pdf](http://delauro.house.gov/images/pdf/food_safety_chinese_chicken_letter.pdf).