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Quarterly Food & Beverage Industry Web Conference Series

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NewsFeedSM
Quarterly Food & Beverage Industry Web Conference Series

Food Packaging and Country of Origin: Minimizing Compliance Risks

Wednesday, April 24, 2013

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Presenters



Tim Sheehan
Partner
International Industry - Chair
tsheehan@foley.com



Lisa Noller
Partner
lnoller@foley.com



Rich Casper
Partner
rcasper@foley.com

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Intro: Country of Origin Issues in Food Packaging

- Customs Requirements
- USDA/AMS Requirements
- “Made in USA” issues
- Who is responsible?
- Penalties and Enforcement
- Supply Chain Integrity: Compliance

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First Line of Defense: Customs Requirements

- Every imported article must be marked to show country of origin. (19 USC Sec. 1304)
- Marking requirements:
 - conspicuous place
 - Legible
 - as indelible and permanent as nature of product (or container) will allow
- Goal is to indicate to ultimate purchaser, at time of purchase, country of origin of product
- Special rules for marking bulk goods (container), special commodities (J list)

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First Line of Defense: Customs Requirements (cont.)

- Exemption for natural food products: Natural items are on the J-list and only the outer container, if there is one, in which the product usually reaches consumer needs to be marked
- Importer must instruct buyer in writing of marking requirement for repackaged goods
- Port can require any importer of goods likely to be repackaged to certify that it will inform any buyers of the goods that any repackaged product must show the country of origin

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First Line of Defense: Customs Requirements (cont.)

- Buyer of goods from importer must, if goods are repackaged (without substantial transformation), mark packages with country of origin and, at request of CBP, certify to government that repackaged goods have been properly marked.
- Substantial transformation: FTA vs. “new and different article”
- “ultimate purchaser” defined “generally the last person in the United States who will receive the article in the form in which it was imported”
19 C.F.R. §134.1(d)

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First Line of Defense: Customs Requirements (cont.)

- If the processor/repackager of the imported product simply blends or dilutes or evaporates or otherwise processes it such that there is no substantial transformation, then the processor is NOT the “ultimate purchaser” and the product must be packaged to show origin of all imported ingredients (e.g., imported olive oil, imported Irish and Scotch whiskeys)
- If imported product is so processed or changed that it undergoes a “substantial transformation” into a “new and different article,” then the processor is the end user and the processor needn’t show for the product it makes the country of origin of imported ingredients.

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Special Food Requirements: FDA and USDA/AMS Obligations

- FDA: Country of Origin Labeling (generally) is NOT an FDA issue.
 - A statement of country of origin on the label of imported food is not specifically required under the Federal Food, Drug & Cosmetic Act
 - Caveat: Food labeling statements regarding geographical origin must not be false or misleading, and the prohibition against false or misleading labeling of food applies equally to imported and domestic products. (Section 403(a)(1) and 21 CFR 101.18)

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Special Food Requirements: FDA and USDA/AMS Obligations (cont.)

- FDA’s policy regarding false or misleading country of origin labeling is to defer to U.S. Customs and Border Protection
<http://www.fda.gov/ICECI/ComplianceManuals/CompliancePolicyGuidanceManual/ucm074567.htm>
- USDA/Agricultural Marketing Service (AMS) Requirements
 - USDA’s Country of Origin Labeling (“COOL”) requires many retailers to notify their customers with information regarding the source of certain foods
 - Who’s covered: Retailers such as full-line grocery stores, supermarkets and club warehouse stores.
 - Suppliers must make available to retailers information about the origin of food products (either by marking on the packages or containers, or disclosing in commercial or shipping documents).

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Special Food Requirements: FDA and USDA/AMS Obligations (cont.)

- Covered commodities include: muscle cut and ground meats: beef veal, pork, lamb, goat and chicken; wild and farm-raised fish and shellfish; fresh and frozen fruits and vegetables; peanuts, pecans, and macadamia nuts; and ginseng. 7 CFR art 60 and Part 65
- Processed food items are generally exempt from COOL requirements but not exempt from Customs requirements. Processed foods that enter the US as such must be marked with the country of origin. Processed foods made in the US are those that have either undergone processing in the US sufficient to change the nature of a covered commodity or been combined with another commodity. Processed foods made in the US may be exempt from COOL requirements but if they are processed in the US from imported natural ingredients, Customs marking requirements will apply.

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Special Food Requirements: FDA and USDA/AMS Obligations (cont.)

- (cont.) If, however, the imported commodities undergo a change sufficient to mark a “substantial transformation” or change of origin under an FTA, the foreign origin of ingredients need not be marked under Customs rules.
- Other products: Some products are subject to special marking rules. For example, honey bearing any official USDA mark or statement is required to be marked with country of origin under AMS regulations.
- Penalties for failure to mark include civil fines and, in some cases such as honey, possibly debarment from USDA inspection and certification services.

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“Made in U.S.A.” Issues

- Operating under its authority to prevent unfair and deceptive practices in commerce, the Federal Trade Commission has adopted “guidelines” for U.S.-origin claims, whether made on packaging or in advertising.
- The FTC guides divide such claims into two major categories: “unqualified” and “qualified.”
 - The FTC’s standard for making an unqualified claim is very demanding: “all or virtually all” U.S. content and final “assembly” in the U.S. California law seems to be still more demanding.

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“Made in U.S.A.” Issues (cont.)

- Depending on their remoteness to the final product, such “content” may include raw materials. In general, it is probable that no food ingredients are sufficiently remote for their origin to be disregarded.
- A food seller making a U.S.-origin claim is responsible to make reasonable inquiry into the origin of ingredients.
- Unqualified claims are those that explicitly or implicitly refer to the U.S. without explaining that the supplier means something more limited than that virtually all content is domestic.

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“Made in U.S.A.” Issues (cont.)

- The use of the U.S. flag, or a red/white/blue motif, is a U.S.-origin claim.
- To effectively qualify a U.S.-origin claim, the qualification must be “clear,” “prominent” and “proximate” to the claim.
- A qualification may be a reference to a specific process, such as “bottled” or “baked,” but “produced,” “made,” “processed,” etc. are inherently unqualified.

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“Made in U.S.A.” Issues (cont.)

- The use of one of those general terms with a qualification (e.g., “processed in the U.S. from U.S. and foreign ingredients”) will likely be interpreted as meaning that, at a minimum, the last processing of the product occurred in the U.S. and the product was “substantially transformed” in the U.S.

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Who is Responsible?

- CBP asserts authority over all downstream packagers and processors to police the marking of goods presented to consumers
- Entire supply chain is liable for crimes committed along its course, provided target had knowledge
 - Knowledge has broad definition
 - Cannot rely on an importer of record or others
 - Cannot ignore obvious signs of issues (“ostriching”)

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Penalties: Administrative, Civil, Criminal

- CBP can impose additional duties (a “marking penalty”) of 10% of the entered value of any goods not properly marked. 19 USC Sec. 1304(h)
- CBP can seize the mislabeled or adulterated goods
- CBP can impose penalties under Sec. 509 of the Tariff Act (19 U.S.C. Sec. 1509) up to \$100,000 per occurrence for willful failure to produce the certifications regarding repackaging of imported goods

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Penalties: Administrative, Civil, Criminal (cont.)

- CBP can assert penalties under the Customs Fraud statute, 19 USC Sec. 1592:
 - For mere negligence or clerical error: the lesser of the value of the merchandise at issue or two times the amount of lost duty plus interest
 - More likely: “gross negligence” standard
 - can be as much as the lesser of the value domestic value of merchandise at issue or four times the amount of lost duty plus interest
 - For fraud, penalties can be 100% of the domestic value of the entered goods

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Penalties: Administrative, Civil, Criminal (cont.)

- Enforcement issues
 - Civil or Criminal
 - **Depends on level of knowledge**
 - **Knowledge is a legal terms not necessarily a common sense term**
 - Forfeiture
 - **Regardless of whether possessor had any knowledge of the violation**
 - **Akin to strict liability**

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Penalties: Administrative, Civil, Criminal (cont.)

- Issuance of a false marking certificate involving willful deceit can lead to further penalties under 18 U.S.C. Sec. 1001
- Also a Sec. 1001 violation to submit a false certification to the government
- Penalty: criminal fines up to \$10,000 and up to five (5) years in prison (per violation)

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Penalties: Administrative, Civil, Criminal (cont.)

27. CERTIFICATION

I hereby make application for entry/immediate delivery. I certify that the above information is accurate, the bond is sufficient, valid, and current, and that all requirements of 19 CFR Part 142 have been met.

SIGNATURE OF APPLICANT

PHONE NO.	DATE
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29. BROKER OR OTHER GOVT. AGENCY USE

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Penalties: Administrative, Civil, Criminal (cont.)

- Fraud for misstatements on CBP forms, purchasing docs, etc. (many of which are filed by wire):
 - 18 USC §545 (smuggling: criminal fines and up to 20 years in jail)
 - 18 U.S.C. §1341 (mail fraud: criminal fines and up to 20 years in jail)
 - 18 U.S.C. §1343 (wire fraud: criminal fines and up to 20 years in jail)

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Penalties: Administrative, Civil, Criminal (cont.)

- Criminal Enforcement depends on knowledge
 - Did defendant “knowingly” engage in prohibited conduct?
 - i.e., defendant had knowledge of facts that made the specific import, export, sale, etc. illegal
 - Defendant does not need to have knowledge of the specific law at issue
- Individuals and corporations may not circumvent liability by ignoring warning signs or red flags
- Companies are liable for acts of officers, directors and executives

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Penalties: Administrative, Civil, Criminal (cont.)

- “You may infer knowledge from a combination of suspicion and indifference to the truth. If you find that [the defendant] had a strong suspicion that things were not what they seemed or that someone had withheld some important facts, yet shut his eyes for fear of what he would learn, you may conclude that he acted knowingly, as I have used that word. You may not conclude that the defendant had knowledge if he was merely negligent in not discovering the truth.” (Seventh Circuit Federal Criminal Jury Instructions § 4.06 (1999))

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Compliance: Managing Supply Chain Integrity

- Contractual provisions
 - To discharge its duty of inquiry in making U.S.-origin claims and protect itself from problems resulting from its suppliers' mislabeling or misrepresentation of U.S.- origin of input, a seller should obtain written agreements
 - Such agreements should include a specific representation by the supplier and, if covering the seller's attorneys fees is desired, should include an indemnification clause
 - Sending standard purchase terms is not sufficient for the purpose, unless signed by the supplier

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Compliance: Managing Supply Chain Integrity (cont.)

- Many purchasers use one-page indemnification agreements (often also covering products liability and insurance) to accomplish this
- Specifications: address not only products but also the delivery of documentation
- A best practice in managing marking obligations is to obtain a right to review a supplier's records regarding its importation of products supplied and the country of origin of such supply

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Compliance: Managing Supply Chain Integrity (cont.)

- **HOWEVER**, it is not sufficient to rely on contracts (remember the “knowledge” instruction)
- **Red Flags for compliance problems:**
 - Goods priced significantly below the going market rate
 - Cash-only payments
 - Bribes
 - Offers at a lower price for goods without paperwork
 - Prices that do not include legal tariffs or duties
 - Prices too good to be true
 - Incorrect, inconsistent or imprecise product labeling

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Compliance: Managing Supply Chain Integrity (cont.)

- Paperwork facially invalid or otherwise suspect
- Inability or unwillingness to answer questions about the product's origin
- Inability of suppliers to provide rational answers to routine questions
- Transactions fit the description of illegal transactions discussed in trade/industry publications
- Other unusual sales methods or practices

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Compliance: Managing Supply Chain Integrity (cont.)

- Compliance Guidance
 - Must eliminate illegal products and practices from supply chain
 - Cannot follow product from point of origin to table; however, can practice due care
 - Must implement a meaningful compliance program
 - Demonstrate an effort to avoid knowing violations of the law
 - Ask suppliers questions
 - Obtain a copy of – AND MEANINGFULLY REVIEW – CBP paperwork
 - Ask questions based on any specific concerns in the source material's region
 - Confirm that source companies operate legally by requesting to see licenses and checking certifications

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Compliance: Managing Supply Chain Integrity (cont.)

- Purchase from suppliers who can demonstrate their products are compliant
- Establish long-term relationships rather than buying on spot markets
- Know your supply chain and know your suppliers
- Implement internal policies and procedures to track products
- Use a robust management system to assess risk of illegality
- Conduct independent research on suppliers and others with whom you do business
- Consistently question your suppliers about the origin of their products and document their answers
- Make meaningful supplier visits, if possible
- Keep complete records of your efforts, to demonstrate you did not hide from suspicion

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Compliance: Managing Supply Chain Integrity (cont.)

- CBP paperwork must be true and accurate
 - Review each category; must be accurate
 - Must review forms for whiteout, markings, cut/paste
 - CBP strongly advises that importers subscribe to a database (e.g., Datamyne) to confirm containers are actual containers
- If anything on the form does not look accurate, or it looks like it's been tampered with, reject the loads
 - Supplier should address all issues
 - If they do not, then do not buy!

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Compliance: Managing Supply Chain Integrity (cont.)

- Record Keeping Requirements
 - CBP’s specific recordkeeping requirements apply only to importers of record, consignees, and others who caused the importation of goods
 - Buyer of imported goods from a domestic supplier might be subject to recordkeeping requirements if he designed specifications or procured goods DDP, or otherwise “caused” the importation to be made
 - Otherwise no specific CBP recordkeeping requirement applies to a US food processor/repackager

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Compliance: Managing Supply Chain Integrity (cont.)

- Prudent compliance practices dictate that a company buying imported ingredients keep good records: type of imported goods, the country of origin, and whether there is a “substantial transformation” or other change
- Buyer should impose on suppliers a duty to keep appropriate records relating to goods that they import for sale to the company. Such obligations can be written into a company’s procurement terms.

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Compliance: Managing Supply Chain Integrity (cont.)

- (cont.) A company marking its products without reflecting the foreign origin of imported ingredients should be able to show that such marking is unnecessary if CBP should ask for a marking certification.
- Best defense is a good offense: Compliance Programs
 - Designed to address identified risks (COO Marking)
 - Meet Sentencing Guideline requirements:
 - Top-level support
 - Effective communication throughout organization

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Compliance: Managing Supply Chain Integrity (cont.)

- include programs and policies designed to detect whether a supplier is delivering mismarked imported goods or failing to notify the company of the marking requirements applicable to repackagers.
- Required contract terms
- Training, training, training
- Annual audit
- Confidential reporting
- Disclose violations

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Country of Origin Issues in Food Packaging

QUESTIONS?

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Country of Origin Issues in Food Packaging

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