Attachment C

NORTH AMERICAN MEAT INSTITUTE

January 23, 2018

Mary Lou Chapman
President
Rocky Mountain Food Industry Assn.
P.O. Box 1083
Arvada, CO 80001-1083

Re: Colorado House Bill 18-1043 – Concerning a Requirement that a Retailer Indicate the Country of Origin of Beef Sold to the Public.

Dear Ms. Chapman:

You have asked the North American Meat Institute (NAMI or the Meat Institute) to provide information about a bill pending before the Colorado General Assembly, Colorado House Bill 18-1043 (HB 18-1043 or the bill), which would require mandatory country of origin labeling on certain beef products offered for retail sale in Colorado. NAMI is the nation's oldest and largest trade association representing packers and processors of beef, pork, lamb, veal, turkey, and processed meat products and some NAMI members produce beef products sold in Colorado. As was the case last year when the Meat Institute commented on a similar bill introduced in the Colorado legislature, HB 17-1234, NAMI and its constituents have a keen interest in the labeling requirements applicable to meat products sold at retail in Colorado and for that reason NAMI is providing this perspective about the bill. I hope you find it useful.

HB 18-1043, if enacted, provides that a "retailer who sells beef or offers beef for sale shall use a conspicuous placard that is clearly visible and readily viewable by the public and placed in the immediate vicinity of the beef and display the beef" as either "USA beef," as that term is defined or as "imported," as that term is defined.[1] If the bill is enacted it would be preempted by federal law, at least regarding beef products processed under federal inspection and offered for retail sale in Colorado.[2]

[1] HB 18-1043, proposed section 25-5-419.5.(2). Display of beef products - rules – definitions. The bill has an exception for certain prepared foods. See 25-5-419.5.(1)(b). The language is remarkably similar to last year's bill, HB 17-1234.

[2] Because Colorado is a designated state there are no state inspected facilities that might be subject to the bill should it become law.

The Federal Meat Inspection Act Contains Explicit Preemption Language Precluding State Labeling and Other Requirements.

The Federal Meat Inspection Act (FMIA or the Act) regulates the processing and distribution of meat products in interstate commerce.[3] Among the Act's requirements is that labels on meat products be approved by the Secretary of Agriculture to ensure they are not false or misleading.[4] The FMIA also contains an explicit preemption provision regarding meat products prepared at any establishment under inspection under Title I of the FMIA.[5] That provision provides, in pertinent part, that

> ... Marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any State or Territory or the District of Columbia with respect to articles prepared at any establishment under inspection in accordance with the requirements under subchapter I of this chapter, ...[6]

In addition, the FMIA broadly defines the term "label" to mean "a display of written, printed, or graphic matter upon the immediate container (not including package liners) of any article" and it defines the term "labeling" broadly to mean "all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article."[7]

Through the FMIA and its regulations, Congress and USDA have occupied the field concerning labeling and packaging for meat products. Although the Act enables states to exercise concurrent jurisdiction over meat products not in federally inspected establishments, the FMIA does not permit states to impose different or additional requirements.[8]

The federal courts repeatedly have confirmed the broad scope of the preemption authority provided by the Act. Most notably, in 2012 the United States Supreme Court, in a 9-0 decision, stated

> The FMIA's preemption clause sweeps widely, and so blocks the applications of §599f challenged here. The clause prevents a State from imposing any additional or different—even if nonconflicting—requirements that fall within the FMIA's scope and concern slaughterhouse facilities or operations.[9]

The *Harris* case involved the explicit preemption language in section 678 regarding a federally inspected establishment's operations. That language is identical to the language in section 678 cited above, which applies to labeling.

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[3] 21 U.S.C. 601 *et. seq.*
[4] 21 U.S.C. 607, 611
[5] 21 U.S.C. 678. The Poultry Products Inspection Act (PPIA) contains an almost identical preemption provision, 21 U.S.C. 467e.
[6] 21 U.S.C. 678. (Emphasis added).
[7] 21 U.S.C. 601(o), (p)(emphasis added).
[8] *Id.*
[9] *NMA. v. Harris*, 131 S.Ct. 3083 (2012).

Indeed, the courts have consistently found state labeling requirements to be preempted by the FMIA. See: *Jones v. Rath Packing Co.*, 430 U.S. 519, 532 (1976) (holding that the FMIA preempted a California law regarding net weight labeling that made no allowance for loss of weight resulting from moisture loss); *National Broiler Council v. Voss*, 44 F.3d 740 (9th Cir. 1994) (finding the Poultry Products Inspection Act preempts a California law prohibiting use of the word "fresh" on labels of poultry products unless poultry has been stored at temperatures at or above 26 degrees); *Armour & Co. v. Ball*, 468 F.2d 76 (6th Cir. 1972) (finding a Michigan law preempted because it established a standard of identity for sausage different than the federal standard), *cert. denied*, 411 U.S. 981 (1973); *Animal Legal Defense Fund Boston, Inc. v. Provimi Veal Corporation*, 626 F. Supp. 278, 282-85 (D. Mass.) ("Meat ingredient standards, labeling and packaging have been preempted by the FMIA"), *aff'd*, 802 F.2d 440 (1986); *Grocery Manufacturers of America v. Gerace*, 581 F. Supp. 658, 666 (S.D. N.Y. 1984) (holding the FMIA to preempt a New York law regarding labeling of meat food products containing "imitation" cheese), *aff'd in part and rev'd in part on other grounds*, 755 F.2d 993 (2d Cir. 1985).

Besides the judicial precedent, United States Department of Agriculture officials have not hesitated to advise states of the FMIA's broad preemptive effect about state-imposed requirements for meat and poultry. USDA views the preemption provision as an integral part of the comprehensive regulatory scheme created by the FMIA and PPIA.[10] Former USDA General Counsel Nancy Bryson described the Act as creating a "comprehensive statutory framework"— a framework designed to ensure that the labeling and packaging of meat and poultry products is truthful and not misleading. Ms. Bryson underscored USDA's long-standing position that state requirements affecting meat and poultry labeling that are "in addition to, or different than, the federal requirements" are preempted.[11] The same conclusion applies to any labeling requirement Colorado might attempt to impose on meat products processed and labeled in a federally inspected establishment.

The Bill would require Retailers to Provide Labeling in Addition to, or Different than required by the United States Department of Agriculture, and therefore the Bill would be preempted.

Here, the bill would require a retailer to "use a conspicuous placard that is clearly visible and readily viewable by the public and placed in the immediate vicinity of the beef to designate and display the beef as" USA beef or imported beef. The required placard is labeling as that term is defined in the FMIA.[12] Because USDA does not require country of origin labeling of federally inspected meat products the labeling requirement HB 18-1043 would impose is "in addition to, or different than" the federal requirements and therefore it

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[10] *See* Letter from Ann M. Veneman, Secretary of Agriculture, to the Honorable Arnold Schwarzenegger, Governor of California (Dec. 15, 2004); Letter from Mike Espy, Secretary of Agriculture, to the Honorable Pedro J. Rossello, Governor of Puerto Rico (Feb. 1, 1993); Letter from Richard E. Lyng, Secretary of Agriculture, to the Honorable George Deukmajian, Governor of California (June 12, 1987).

[11] *See* Letter from Nancy Bryson, USDA General Counsel, to the Honorable Bill Lockyer, Attorney General, State of California (Feb. 10, 2005). (Attachment A.)

[12] Point of purchase information required by the bill is deemed labeling by USDA. (See Attachment B.)

would be preempted. This conclusion applies whether the product offered for sale at retail is in case ready packing or the labeling is included at retail.

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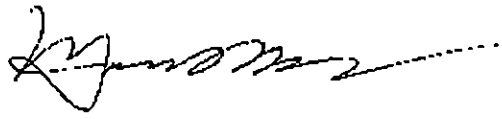
Thank you for the opportunity to provide this perspective regarding HB 18-1043. I would be happy to discuss this issue in more detail if you have questions regarding this letter or the preemptive effect of the FMIA.

Respectfully submitted,



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cc: Barry Carpenter
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