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Implementation of Country of Origin Labeling

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SUBJECT: Implementation of Country of Origin Labeling

This report represents the results of our audit of Country of Origin Labeling. Your response to the official draft report, dated June 10, 2011, is included in its entirety at the end of the report. Excerpts of your response and the Office of Inspector General's position are incorporated into the Findings and Recommendations section of the report. Based on your response, we have reached management decision on all of the report's 14 recommendations, and no further response to us is necessary. Departmental Regulation 1720-1 requires final action to be taken within 1 year of each management decision to prevent being listed in the Department's annual Performance and Accountability Report. Please follow your internal agency procedures in forwarding final action correspondence to OCFO.

We appreciate the courtesies and cooperation extended to us by members of your staff during our audit fieldwork and subsequent discussions.

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Implementation of Country of Origin Labeling

Executive Summary

For many years, various agricultural and consumer advocacy groups have argued for legislation that would require food suppliers to provide consumers with country-of-origin information about food products to help consumers make purchasing decisions. The Farm Security and Rural Investment Act of 2002 (2002 Farm Bill) and the Food, Conservation, and Energy Act of 2008 (2008 Farm Bill) amended the Agricultural Marketing Act of 1946 (Act) to require retailers to notify their customers of the country of origin of certain commodities at the final point of sale. The commodities covered by the legislation include muscle cuts of beef (including veal), lamb, chicken, goat, and pork; ground meats including beef, lamb, chicken, goat, and pork; wild and farm-raised fish and shellfish; perishable agricultural commodities;¹ macadamia nuts; pecans; ginseng; and peanuts. Entities licensed as retailers under the Perishable Agricultural Commodities Act (PACA) of 1930² are the only entities required to label these covered commodities for country of origin. The Country of Origin Labeling (COOL) final rule³ went into effect in March 2009. We designed this audit to evaluate the Agricultural Marketing Service's (AMS) implementation and oversight of the COOL final rule.

AMS made significant strides implementing the final rule. For example, AMS entered into cooperative agreements with all 50 States to conduct reviews of PACA-licensed retailers to ensure they adhere to COOL regulations. AMS also conducts tracebacks of covered commodities to ensure establishments that supply covered commodities to retailers meet COOL recordkeeping requirements. In addition, these tracebacks verify the accuracy of the method of production and country of origin labeling information. AMS also implemented a complaint system that allows customers to file complaints regarding how products are labeled. COOL is a relatively new labeling program and AMS officials continue to make improvements in the agency's oversight and enforcement of the COOL regulations.

However, we found that AMS still needs to make improvements to its controls and processes to ensure retailers and suppliers fully comply with the regulations. Specifically, AMS needs to strengthen its process for selecting retailers for review, strengthen the review process itself, and improve the timeliness with which AMS evaluates retailer documentation and issues noncompliance letters. AMS needs to vigorously enforce COOL requirements, provide better oversight of the State agencies tasked with conducting the retailer reviews, and improve the way it communicates with and provides program guidance to retailers.

Retailer reviews include procedures to (1) review the labels on all covered commodities to determine compliance with COOL labeling regulations, and (2) review the records that support the country-of-origin and method of production labels for five covered commodities. AMS uses a database maintained by a private contractor to select retailers for onsite reviews. AMS forwards the sample of retailers to the appropriate States to conduct COOL reviews and

¹ The Perishable Agricultural Commodities Act defines perishable agricultural commodities as fresh and frozen fruits and vegetables of all kinds, including cherries in brine.

² An entity licensed as a retailer is one with \$230,000 in annual invoice costs of perishable agricultural commodities and 2,000 pounds in sales of perishable agricultural commodities in any given day during a year.

³ COOL Final Rule, January 15, 2009.

reimburses the States \$600 per review. Since the database was not designed to identify which retailers are PACA-licensed and therefore subject to COOL, AMS makes its selections based on the type of store (supermarket and wholesale club stores) and the amount of sales (greater than \$2 million annually)—that are designed to target probable PACA-licensed retailers. However, our audit testing found at least 40 retailers in 15 States that, despite being PACA-licensed, fell outside the AMS target group of stores having annual sales in excess of \$2 million. We concluded that AMS' methodology does not ensure that all PACA-licensed retailers have a chance of being selected for onsite reviews. We also found that AMS does not currently have a procedure for removing from the sample any retailers who are found not to be PACA-licensed or are no longer in business. As a result, AMS reimbursed State agencies \$296,400 for onsite reviews performed at retailers who were out-of-business or not subject to COOL.

During the audit, we questioned whether smaller branches of a PACA-licensed corporation must adhere to COOL. Officials of both AMS and the Office of the General Counsel stated that, under the Act, all retail branches of a PACA-licensed corporation, regardless of whether the branches individually meet PACA licensing requirements, are required to adhere to COOL. However, AMS did not include these retailers in their onsite monitoring efforts because they focused their resources on large retailers. As a result of discussions we held with AMS officials, they agreed to begin monitoring such retailers for compliance with COOL.

AMS designed its retailer review process to identify specific retailer noncompliances and to notify the retailers when these are found; however, the agency simply rated retailers on a pass/fail system and did not implement a more detailed compliance rating system that would allow AMS to evaluate the overall compliance of retailers nationwide or to identify the control problems that may have resulted in the noncompliances. AMS officials began developing a compliance rating system over the course of our audit; however the system was not implemented during audit fieldwork. In addition, although AMS' procedures for conducting onsite reviews require State reviewers to ensure that the required country-of-origin labels are in place for all products, we concluded they do not require adequate testing to verify the accuracy of the labels themselves. This occurred because AMS designed the noncompliance procedures to be uniform for all retailers regardless of the extent of noncompliance, and because AMS placed a greater emphasis on ensuring that commodities were labeled rather than ensuring the accuracy of the labels. As a result, AMS had reduced assurance that onsite reviews were of sufficient scope to identify the true extent of retailers' compliance, or that any underlying causes for noncompliances were being identified and corrected.

Once the States complete retailer reviews, AMS has an internal policy to evaluate the reviews and issue noncompliance letters within 30⁴ days of receiving completed reviews from the States. State agencies completed 5,007 reviews during the calendar year (CY) 2009 review cycle; however, as of February 17, 2010, AMS still had not reviewed 1,003 (20 percent) of these reviews. We attributed this problem to a lack of sufficient personnel dedicated to evaluating reviews. As of February 2010, only five permanent AMS employees had been tasked with evaluating the reviews completed in CY 2009. Following our discussions with AMS officials, they temporarily re-assigned and trained an additional 14 employees to help reduce this backlog. Despite these actions, the backlog had not been entirely eliminated by the time AMS completed

⁴ The 30 day policy was implemented on August 25, 2010. Prior to the issuance of this policy, AMS' policy required evaluation of retailer reviews within 5 days of receiving them from the States.

the 2010 review cycle. In addition, in cases where the AMS evaluations confirmed instances of retailer noncompliance, the agency did not timely notify the retailer of noncompliance and require corrective actions. We found that in 1,719 of the 5,528 reviews conducted during CY 2010 with identified noncompliances, AMS did not formally notify retailers that they were out of compliance for at least 60 days following the completion of onsite reviews. AMS believes that a new database they plan on implementing in August 2011 will eliminate backlogs through electronic data input and automatic data updating. We were not able to analyze the database during fieldwork because AMS was in the process of developing it.

AMS has not issued any civil penalties, which are allowed up to \$1,000 per violation, even though these may have been warranted in some cases. This occurred because COOL was a new program and AMS wanted retailers to become familiar with its requirements. Although AMS conducted followup reviews, the agency did not use these reviews to identify and investigate cases where continued noncompliances of the same type may have indicated willful violations on the part of the retailers. By analyzing the 1,005 followup reviews AMS initiated between February 2010 and September 2010, we identified 21 retailers who had more instances of recorded noncompliances at the time of the followup than were noted in the initial visits, and whose noncompliances repeated those noted previously. For four retailers, the noncompliances noted in the followup review even involved the same commodity items involved in the earlier noncompliances. While these represent only a small portion of the total followup reviews, they do indicate the possibility that some retailers may be deliberately violating regulations, which may require monetary penalties.

We found that AMS had not established supervisory or other controls to ensure that State reviewers consistently evaluated compliance with COOL requirements. During our audit fieldwork, we noted significant variations in the number of noncompliances identified by reviewers in different States, and in some cases by reviewers within the same State. For example, only 18 percent of the reviews completed in Kentucky during CY 2009 identified one or more noncompliances, while 96 percent of those conducted in Missouri during the same period identified noncompliances. In California, where four reviewers completed over 99 percent of the reviews performed during CY 2009, we noticed similar variations among the individual reviewers. Each of the reviewers completed at least 100 reviews. In total they issued 333 noncompliances for inaccurate origin declarations.⁵ Two of the 4 identified 6 percent of the inaccurate origin declaration noncompliances while the other 2 identified 94 percent of such noncompliances. In our discussions with two of the California reviewers, we found that they had significantly different understandings of what constituted a noncompliance. The agency did not have a process in place to assure the quality of these State-performed reviews on an ongoing, nationwide basis.

Although we found most retailers are aware of COOL, AMS needs to make additional efforts to ensure all retailers are aware of the COOL requirements. This occurred because AMS officials believed their initial education and outreach efforts—such as the COOL website, webinars, and open forums—would sufficiently educate all retailers about COOL. Although these initiatives were effective in disseminating COOL information to most retailers, AMS needs to make additional efforts to ensure that all retailers comply with COOL. For example, we analyzed the

⁵ An inaccurate origin declaration occurs when bin signage is different than the individual labels on the items in the bin.

results of our 24 retailer visits between March and May of 2010 and determined that all 3 of the independent retailers⁶ we reviewed were not aware of COOL regulations and consequently did not label for country of origin.

We recognize that COOL is relatively new and AMS officials continue to make improvements in their management of the program. However, agency officials should implement measures to improve the retailer review process and enhance their oversight and enforcement of the program.

Recommendations Summary

We recommend that AMS develop and implement a process for selecting only PACA-licensed retailers for retailer reviews. We also recommend that AMS officials develop and implement a retailer compliance rating system and appropriate followup procedures for retailers identified as noncompliant and promptly issue noncompliance letters. In addition, we recommend that AMS enhance its enforcement procedures, periodically evaluate State performance of retailer reviews, and improve communications with retailers.

Agency Response

AMS agreed with the report's 14 recommendations. AMS' June 10, 2011, response is included in its entirety at the end of the report.

OIG Position

Based on AMS' responses, we have reached management decision on each of the report's 14 recommendations.

⁶ An independent retailer is a retailer with three or less locations nationwide.

Background & Objectives

Background

Congress enacted Country of Origin Labeling (COOL) requirements to assist consumers in making informed purchasing decisions by notifying them of a commodity's country of origin at the final point of sale. The Farm Security and Rural Investment Act of 2002 (2002 Farm Bill) and the Food, Conservation, and Energy Act of 2008 (2008 Farm Bill) amended the Agricultural Marketing Act of 1946 (Act) to mandate COOL. The 2002 Farm Bill required retailers who are licensed under the Perishable Agricultural Commodity Act of 1930 (PACA), and who sell specified types of meat,⁷ fish,⁸ perishable agricultural commodities,⁹ and peanuts to notify customers of the country of origin for these products at the final point of sale. Retailers are required to become PACA-licensed when they sell more than 2,000 pounds of perishable agricultural commodities in any given day, and also have annual invoice costs of perishable agricultural commodities totaling at least \$230,000.¹⁰ The 2008 Farm Bill amended the 2002 Farm Bill provisions to include meat products from goats and chickens (in whole and in part), along with ginseng, pecans, and macadamia nuts. Retailers who do not fall under the licensing requirements of PACA are exempt from complying with COOL.

The interim final rule for fish and shellfish (7 Code of Federal Regulations (CFR) Part 60) went into effect in April 2005 while the final rule for all covered commodities (7 CFR Part 65) went into effect in March 2009. The final rule requires retailers¹¹ to label covered commodities with the country of origin(s) at the final point of sale and to maintain records supporting the origin reflected on the label. AMS allowed retailers different methods to label covered commodities with country of origin information, including labels on the individual product, bulk bin, carton, crate, barrel, cluster, or consumer package. These labels can either be in the form of a placard, sign, label, sticker, band, twist tie, pin tag, or other format that allows consumers to identify the country of origin. Covered commodities that are ingredients in processed foods are exempt from the requirements of the final rule. Processed foods include food that is cooked, cured, smoked, or restructured. Examples of processed food items include teriyaki flavored pork loin, roasted peanuts, breaded chicken tenders, and fruit medley.

The Agricultural Marketing Service (AMS) is the U.S. Department of Agriculture (USDA) agency directly charged with overseeing the implementation of COOL. Specifically, the COOL Branch of AMS' Livestock and Seed Program makes policy and oversees enforcement of COOL regulations. According to AMS data, there are 4,040 companies with over 36,000 retail stores licensed under PACA. In addition, AMS estimates that approximately 1.3 million

⁷ Meat products that were covered under the 2002 Farm Bill included muscle cuts of beef, lamb and pork; and ground beef, lamb and pork.

⁸ Fish products that were covered under the 2002 Farm Bill included farm-raised fish and shellfish as well as wild-caught fish and shellfish.

⁹ PACA defines perishable agricultural commodities as fresh and frozen fruits and vegetables of all kinds, including cherries in brine.

¹⁰ The original amount in the Perishable Agricultural Commodities Act of 1930 was \$90,000. This amount increased to \$230,000 over time.

¹¹ For purposes of this report, retailers refer to all stores that maintain a PACA license. Non-PACA licensed facilities will be referred to as non-PACA-licensed retailers.

establishments (which include producers, handlers, processors, wholesalers, and other non-retail establishments) could be affected by COOL.

AMS created an enforcement structure that included reviews of retailers for compliance with the regulations; tracebacks of commodities to ensure suppliers comply with COOL recordkeeping regulations and verification of the accuracy of method of production and country of origin labeling information; and a program complaint system to allow consumers to file complaints regarding how products are labeled. AMS' Fruit and Vegetable (FV) program oversees PACA by ensuring that all retailers required to be PACA-licensed apply for and obtain a license. FV also has an enforcement structure to identify retailers who are required to be licensed under PACA, but who have not done so.

AMS entered into cooperative agreements with all 50 States to assist in carrying out retailer reviews. AMS holds annual sessions with the States to train and refresh State COOL officials regarding COOL regulations. The State officials who attend these meetings are authorized to train all reviewers within their States to conduct retailer reviews. States do not have the authority to choose the retailers to be reviewed; instead, AMS provides each State with a list of retailers to be reviewed and a deadline for completion of reviews. Officials in AMS' Meat, Grading, and Certification Branch complete any reviews that States are unable to finish.

The frequency and number of retailer reviews conducted in any given year depends on AMS' budget allocations to pay for the selection of retailers to review, to pay for the training of State agency officials, and to reimburse State agencies for each review completed. Beginning in 2009, AMS reimbursed the States \$600 per review. However, in 2008 AMS reimbursed the States \$300 per review completed because fish and shellfish were the only covered commodities.

Since AMS does not have a listing of all retailers in the United States, the agency contracts out the selection of retailers for review. PACA regulations only require retailers to obtain one PACA license for all stores an entity may own. The PACA database only identifies the licensee and not the individual store locations; therefore, AMS cannot use this database to identify individual stores to review. To obtain a list of retailers to review, AMS hired a contractor that has a database with the locations of all retailers in the United States. This database breaks down the retailer listing into categories based on different factors, such as sales, types of products sold, volume of products sold, and physical size of the store. Examples of the categories include supermarkets (annual sales greater than \$2 million), small grocery stores (annual sales less than \$2 million), wholesale clubs (membership stores distributing in bulk), and convenience stores (between 800 and 1,300 square feet, among other requirements). Since the database does not identify whether retailers are PACA-licensed, AMS must select retailers for review using available parameters that target those retailers most likely to be licensed. Based on these parameters, AMS requests a sample of stores from the supermarket and wholesale club categories. The contractor randomly selects stores and provides a listing of these selections to AMS.

Each State agency is responsible for completing reviews of the retailers located in its State. These reviews include two parts: (1) a visual review of the country of origin labels on all covered commodities at the retailer to determine if the labels comply with COOL regulations and (2) a review of the records for five commodities to determine if the label on those products accurately

reflects the records to support the country of origin. AMS divided covered commodities into 19 commodity areas and separated them into 5 categories for retailer review purposes:

- Category 1—Fresh fruits, frozen fruits, peanuts, pecans, macadamia nuts;
- Category 2—Ginseng, fresh vegetables, frozen vegetables;
- Category 3—Fresh fish and shellfish, frozen fish and shellfish;
- Category 4—Beef muscle cuts, ground beef, veal muscle cuts, ground veal, pork muscle cuts, ground pork; and
- Category 5—Chicken muscle cuts, ground chicken, goat muscle cuts, ground goat, lamb muscle cuts, and ground lamb.

AMS uses a random number generator¹² to select one commodity area from each of the five categories for each retailer selected for review. These selections are sent to the States with the sample of retailers to review. Since AMS cannot know the exact products at a retailer, State reviewers must use their judgment when selecting specific products for record review.

The State reviewer completes a retailer review worksheet following completion of the retailer visit. The reviewer documents all noncompliances, as well as supplier information for the five commodities reviewed on this worksheet. Examples of noncompliances State reviewers may identify at retailers include: lack of origin or method of production; declaration of origin is not accurate; and country of origin abbreviations that do not clearly indicate country of origin. State officials are responsible for submitting the completed review worksheets to AMS. AMS officials evaluate the worksheets for completeness and accuracy and issue noncompliance letters to the retailers as necessary. AMS' internal policy prior to August 2010 required AMS officials to evaluate State review worksheets and distribute noncompliance letters within 5 days of submission from the State.¹³ However, in August 2010, AMS revised this policy to require evaluation of State review worksheets within 30 days of submission from the State. Retailers have 30 days from receipt of the noncompliance letter to submit corrective actions to AMS. AMS evaluates corrective actions implemented, and determines if they were acceptable to correct the noncompliances. If not, AMS will follow up as needed.

In addition to the retailer reviews conducted by the State and overseen by AMS' COOL Branch, AMS' Meat, Grading, and Certification Branch conducts supplier tracebacks of covered commodities to ensure records support the method of production and country of origin. To conduct these tracebacks, COOL officials randomly select a pre-specified number of retailer reviews that the States completed. Then, a random number generator is used to select one of the five commodities that were reviewed for record verification during the retailer review. Meat, Grading, and Certification Branch officials will then contact the supplier of that product and all previous suppliers until the originating source of the product is identified. COOL regulations require suppliers to maintain records supporting COOL for one year. Once the traceback is

¹² AMS uses a function in a computer program to generate a random set of numbers based on a given set of criteria. In this case, the random numbers are used to select commodity areas within the five commodity categories.

¹³ COOL Program Operating Procedures and Employee Handbook Section 1.4(d).

complete, Meat, Grading, and Certification Branch officials complete a report and send it to COOL Branch officials who will then identify and issue noncompliance letters to suppliers.

Objective

The objective of this audit was to evaluate the implementation of the COOL final rule that went into effect in March 2009. In addition, we (1) determined whether AMS ensured that all retailers adequately met COOL requirements, and (2) evaluated the adequacy and consistency of the oversight provided by AMS personnel to ensure requirements were met.

Section 1: Retailer Reviews

Finding 1: AMS Needs to Improve the Retailer Selection Process

We found that AMS' method of selecting retailers for review did not ensure that all retailers subject to COOL had an opportunity to be selected, particularly PACA-licensed retailers whose annual sales fell below \$2 million. In addition, agency officials had not implemented a process to eliminate from the selection process those retailers who were exempt from COOL requirements or who were found to have gone out of business. This occurred because AMS could not specifically identify PACA-licensed retailers, and instead devised parameters to select retailers for onsite visits that inadvertently excluded smaller retailers who were nevertheless subject to COOL. In addition, AMS did not implement procedures to identify selected retailers who were not in fact PACA-licensed or who had gone out of business before attempting actual onsite visits. As a result, retailers subject to COOL may never be selected for onsite compliance reviews. At the same time, we found that retailers exempt from COOL requirements had been visited by State reviewers and cited for violating requirements that they were not legally required to follow.¹⁴ Since calendar year (CY) 2009, AMS reimbursed State agencies \$296,400 for 494 retailer reviews at non-PACA-licensed and out-of-business retailers (see exhibit A).

The Act allows the Secretary to conduct an audit¹⁵ of any person who prepares, stores, handles, or distributes a covered commodity for retail sale to verify compliance with Subtitle D of the Act. Subtitle D of the Act refers to COOL requirements, which includes defining a retailer based on PACA requirements. PACA defines a retailer as any "person" who is a "dealer" in the business of selling any perishable agricultural commodity at retail. PACA states that persons are not considered dealers until the annual invoice cost of perishable agricultural commodities exceeds \$230,000.¹⁶

AMS does not have a comprehensive list of the locations of all PACA-licensed retailers. Instead, AMS officials outsourced the selection of retailers to a contractor who maintains a list of all retailers across the country. However, the contractor is not able to distinguish between PACA-licensed retailers and those who do not have licenses and are therefore not subject to COOL. To determine which retailers are subject to review, each year AMS instructs the contractor to generate a sample of retailers based on parameters that are designed to target those most likely to be PACA-licensed retailers subject to COOL. These listings are then sent to AMS, which uses them to select the retailers to be visited by State reviewers during the upcoming year. AMS assigns all States a number of retailers to review based on State populations from the latest Census. For example, since California had the largest population in the last Census, AMS assigned that State the most retailers to review.

¹⁴ AMS did not assess monetary penalties against these retailers, however AMS asked the retailers to comply with COOL and dedicated resources into addressing noncompliances that did not apply to them.

¹⁵ The Act uses the word "audits"; however, AMS internal policies refer to them as "retailer surveillance reviews." For purposes of this report, we refer to them as "reviews."

¹⁶ The original amount in the Perishable Agricultural Commodities Act of 1930 was \$90,000. This amount has increased to \$230,000.

AMS requests a sample of stores from the “supermarket” and “wholesale club” categories established by the contractor. Supermarket stores are those with over \$2 million in annual sales and wholesale club stores are membership stores that distribute in bulk. AMS did not select retailers from the small grocery category because, based on a Small Business Administration analysis, AMS concluded it was “likely” that a store would have to have sales receipts greater than \$3 million annually before reaching the PACA-licensing requirement. However, AMS officials could not provide us with support that there were no PACA-licensed retailers with under \$2 million in sales because the PACA database does not include sales data.

To test whether there were PACA-licensed retailers with under \$2 million in annual sales, we obtained listings of grocery stores in all 50 States using the Food and Nutrition Service’s Anti-Fraud Locator Using Electronic Benefits Transfer Retailer Transactions (ALERT) system. ALERT contains retailer gross sales data for the tax year of the retailer’s Supplemental Nutrition Assistance Program application. We analyzed the ALERT data for the first 15 alphabetically listed States and compared it to the same States in AMS’ PACA database. We referred 79 retailers with sales under \$2 million in ALERT that had a similarly corresponding record in the PACA database to AMS to determine if they were indeed PACA-licensed. AMS confirmed that at least 40 of these retailers were PACA-licensed.

Additionally we found that AMS, before it assigned the retailers to States for review, did not verify that retailers provided by the contractor were, in fact, both PACA-licensed and currently operating. After reviews were completed, AMS found that State reviewers visited 264 stores in CY 2009 and 2010 that were not PACA-licensed. These stores alerted the State reviewers that they were not PACA-licensed either at the time of the review, or later alerted AMS HQ officials after receiving letters of noncompliance from the agency. In addition, State reviewers attempted to review 230 retailers that were found to be closed. Since AMS reimbursed the States the full \$600 reimbursement amount even when reviewers visited stores that were not PACA-licensed, AMS reimbursed the States at least \$158,400 for reviews at 264 stores that were not PACA-licensed. In addition, AMS reimbursed the States \$138,000 for 230 reviews attempted at retailers who were no longer in business,¹⁷ resulting in a total of \$296,400 in taxpayer funds that could have been put to better use.

Without procedures for verifying that retailers were subject to COOL, the State reviewers visited non-PACA-licensed retailers and caused them to dedicate resources to label commodities for country of origin even though they were not required to do so. We visited 17 retailers between March 2010 and May 2010 who were previously reviewed by State reviewers in 2009. After our review, AMS searched the PACA database and determined that five of these retailers were not PACA-licensed, and did not have to adhere to COOL requirements. However, AMS sent noncompliance letters to all five of these retailers after the States reviewed them in 2009, leading the retailers to believe that they had to adhere to COOL. After the State reviews, these five retailers made an effort to label their commodities for country of origin. The retailers did not alert State reviewers that they were not PACA-licensed because these retailers were not familiar with either the PACA or COOL regulations. Following our reviews AMS notified these retailers that they did not have to adhere to COOL. To prevent this type of confusion, AMS needs to

¹⁷ State reviewers visited out-of-business retailers because AMS did not develop procedures to identify such stores prior to State reviewers visiting them.

identify any additional non-PACA-licensed retailers from the 15,000 retailer reviews conducted since 2008 and inform them that they are not required to adhere to COOL.

When we alerted AMS that non-PACA-licensed retailers were selected for review, they implemented procedures to verify the lists the contractor provided against the PACA database to ensure that all retailers selected for review were licensed. We determined that these procedures should allow AMS to exclude all non-PACA-licensed retailers from the retailer review sample. However, these procedures would not identify closed stores prior to a reviewer visiting them.

During the audit, we questioned whether smaller branches of a PACA-licensed corporation must adhere to COOL. Officials of both AMS and the Office of the General Counsel (OGC) stated that, under the Act, all retail branches of a PACA-licensed corporation, regardless of whether the branches individually meet the PACA-licensing requirements, are required to adhere to COOL. However, AMS did not include these retailers in their onsite monitoring efforts because they focused their resources on large retailers. AMS officials agreed that they should begin monitoring COOL compliance at these smaller corporate branches, which would have the desired effect of ensuring that all retailers were monitored for COOL compliance.

The weaknesses we identified in AMS' retailer selection process resulted in non-PACA-licensed retailers dedicating resources to COOL even though they were not required to do so. AMS needs to initiate a process to analyze retailer reviews completed since 2008 and identify all reviews completed at non-PACA-licensed retailers, contact these stores, and inform them they do not need to adhere to COOL. In addition, AMS needs to develop a system for identifying and extracting non-PACA-licensed and closed stores from the sample of stores received from AMS' contractor and submitted to the States for review. AMS' current parameters for selecting retailers for review also exclude some PACA-licensed retailers from being monitored for COOL compliance. AMS needs to develop a process to ensure all PACA-licensed retailers are included in the retailer review selection universe.

Recommendation 1

Conduct an analysis of retailers with under \$2 million in annual sales to determine if PACA-licensed retailers are in this category of the contractor's database. If this analysis does identify PACA-licensed retailers having under \$2 million in annual sales, develop parameters to include a percentage of stores with under \$2 million in annual sales when requesting retailers for review.

Agency Response

As stated in the final rule, AMS estimates that there are over 37,000 retail stores subject to the COOL regulation. At the time of the audit, AMS focused its resources on retail stores with over \$2 million in grocery sales to ensure that the greatest number of covered commodities was reviewed. In response to the recommendation, AMS officials agreed to purchase a list of retailers with \$1-2 million in grocery sales from their contractor, and match the store locations on that list against the PACA data base to identify PACA-licensed entities. A stratified random sample of identified PACA-licensed retail stores in the \$1-2 million sales range will be assigned to State and Federal officials for retail surveillance activities in FY 2012. In a supplemental

e-mail response dated June 27, 2011, AMS officials said that they will implement the proposed action by July 2012.

OIG Position

We accept AMS' management decision.

Recommendation 2

Develop and implement a system for identifying stores that are out-of-business or not PACA-licensed and remove these stores from the retailer review lists sent to the States.

Agency Response

AMS officials stated that they have developed and implemented a process to ensure that only PACA-licensed and operational retailers are scheduled for retailer reviews beginning with retail surveillance activity conducted during FY 2011. Prior to selecting the final retail stores that will be reviewed, AMS will confirm that all retail stores meet the definition of a "retailer" to ensure that only those retail store locations that are licensed under PACA are reviewed for COOL requirements. In addition, State reviewers are now instructed to contact all retailers prior to conducting reviews to ensure the retail locations are still in operation. In a supplemental e-mail response dated June 27, 2011, AMS officials stated that they had implemented the proposed actions in June 2011.

OIG Position

We accept AMS' management decision.

Recommendation 3

Initiate a process to begin verifying that retailers selected for past reviews were PACA-licensed and required to adhere to COOL. For non-PACA-licensed retailers, contact these stores, and inform them they do not need to adhere to COOL.

Agency Response

AMS officials stated that in 2010, 152 retail facilities (1.8 percent of total stores reviewed) that were assigned to State cooperating agencies were later found to not be PACA-licensed. Accordingly, these facilities were not subject to the COOL requirements. A letter was subsequently mailed to each of these retailers informing them that they were not subject to the COOL regulations or required to respond to the non-compliance letters they received.

In a supplemental e-mail response dated June 27, 2011, AMS officials added that they had already completed this process for the reviews that were conducted in FY 2010. For the remaining reviews that have been conducted since 2008, AMS will verify the PACA license status for each retailer. For those retailers that were reviewed and found not to be PACA-licensed, AMS will send a followup letter notifying them accordingly. AMS plans to complete this review and notification process by July 2012.

OIG Position

We accept AMS' management decision.

Recommendation 4

Begin monitoring COOL compliance at smaller branches of PACA-licensed corporations that are required to adhere to COOL.

Agency Response

AMS officials stated that a stratified random sample of smaller branches (i.e., retail or convenience stores) of PACA-licensed corporations will be assigned to State and Federal officials for retail surveillance activities in FY 2012. In a supplemental e-mail response dated June 27, 2011, AMS officials said that they will implement the proposed action by July 2012.

OIG Position

We accept AMS' management decision.

Finding 2: AMS Needs to Strengthen Retailer Review Procedures

Although AMS' retailer review process identified specific retailer noncompliances with the COOL labeling and recordkeeping requirements, the process did not include determining whether there were systemic reasons for these noncompliances. In addition, AMS' procedures required minimal testing of label accuracy through record reviews of only five commodities per retailer, regardless of the number of commodities a retailer stocked.¹⁸ This occurred because AMS designed the noncompliance procedures to be uniform for all retailers regardless of the extent of noncompliance, and because AMS placed a greater emphasis on ensuring that commodities were labeled rather than ensuring the accuracy of the labels. As a result, AMS has reduced assurance that commodity labels accurately describe a commodity's country of origin and noncompliant retailers address potential systemic problems.

AMS entered into cooperative agreements¹⁹ with all 50 States to assist in administering COOL.²⁰ Under these written agreements with AMS, State agencies conduct reviews at retailers to verify their compliance with COOL.²¹ The State reviewers use AMS-distributed procedures and worksheets to perform the reviews. Retailer reviews include two sections to verify compliance for the approximately 300 covered commodities that retailers might carry. These sections include procedures for: (1) reviewing the labels on all covered commodities to determine compliance with COOL labeling regulations; and (2) reviewing records that support the country-of-origin labels for five covered commodities.

¹⁸ AMS estimated that a typical PACA-licensed retailer sells an average of 300 covered commodities. AMS based this estimate on completed 2009 retailer reviews.

¹⁹ Under these agreements, States are required to conduct retailer reviews in accordance with the instructions provided by AMS.

²⁰ Agricultural Marketing Act of 1946, Subtitle D, Section 284(c), as amended by the 2002 and 2008 Farm Bills.

²¹ Agricultural Marketing Act of 1946, Subtitle D, Section 282(d), as amended by the 2002 and 2008 Farm Bills.

AMS uses a pass/fail system to rate retailer compliance with COOL. If a retailer review identified one noncompliance, AMS rated the review as a fail and distributed noncompliance letters regardless of the number or type of noncompliances. For example, we obtained documentation that a retailer with a single noncompliance received the same treatment as one with 100 noncompliances. As part of its standard process, AMS would not determine whether the large number of noncompliances in the latter instance resulted from some systemic problem at the retailer. The noncompliance letters that AMS sends to retailers are templates, with each letter adjusted only to reflect the retailer's identifying information and a list of noncompliances identified during the review. Although AMS responded to retailers who reached out to the agency with questions, agency officials did not initiate dialogue with retailers who had a relatively high number of noncompliances after retailer review completion. AMS needs to develop and implement a retailer compliance rating system that establishes thresholds or levels of materiality regarding noncompliances to identify retailers who need additional assistance complying with COOL.

AMS' retailer review procedures require record reviews for only 5 of the approximately 300 covered commodities that a given retailer might carry, regardless of the actual number of commodities that may be present. AMS relied on its statistician's conclusion that selection of five commodities for record review would be sufficient to determine whether a retailer had an established recordkeeping system in place. However, AMS was unable to provide us with the analysis that led to this conclusion. As noted above, neither the State reviewers nor AMS evaluated a retailer's recordkeeping system, regardless of the number of noncompliances identified. In addition, AMS has no requirement to test additional commodities if noncompliances are found in the five record reviews. We conducted our own retailer visits at 24 PACA-licensed retailers. Using AMS' procedures, we pre-selected 5 covered commodities and determined that 8 of the 104 commodities (7.7 percent) we sampled for records review were labeled with an origin that was inconsistent with the origin information in the records.²² For example, one of the retailers we visited had live Dungeness crab labeled with USA origin; however, the invoice we reviewed to verify the origin identified Canada as the country of origin. Because inaccurate labels are misleading to customers, AMS needs to improve its procedures for ensuring that the labels retailers place on commodities are accurate.

AMS officials stated that they do not currently evaluate retailers' overall compliance or identify problem retailers who need additional support, but acknowledged the need for a compliance rating system that would rate retailers' overall compliance. AMS officials felt that they had not gathered enough data to draw conclusions about how to accurately rate individual retailers' compliance with the COOL requirements, even though they conducted 5,007 reviews in 2009 and 7,741 reviews in 2010. In January 2010, AMS conducted a one-time analysis of 3,871 of the CY 2009 reviews to provide a snapshot analysis of the COOL program; however, AMS officials determined that this analysis was not comprehensive and was not intended to be conducted on a regular basis. AMS needs to amend its retailer review process to rate retailer compliance with COOL and follow up with retailers who are not complying.

²² Although we attempted to review 120 commodities total, we tested 104 commodities for record review because not all retailers had commodity categories on hand to test during our visits.

Recommendation 5

Develop and implement a retailer compliance rating system that establishes thresholds or levels of materiality regarding noncompliances to identify retailers who need additional oversight.

Agency Response

AMS officials stated that the agency has amended its compliance and enforcement procedures to include a Retail Review Compliance Rating Scale for stores subject to COOL surveillance reviews. During a COOL retail store review, data and evidence is gathered, which is then used to assess the extent to which a retail store is complying with COOL requirements. The amended procedures were implemented and used to evaluate the FY 2010 retail reviews for further retailer evaluations and enforcement actions. In a supplemental e-mail response dated June 27, 2011, AMS officials clarified that the amended procedures were implemented in April 2011.

OIG Position

We accept AMS' management decision.

Recommendation 6

Using the rating system, develop and issue noncompliance letters appropriate for the extent of retailer noncompliance and amend the retailer review followup procedures to determine reasons for retailer noncompliance.

Agency Response

AMS officials stated they developed and implemented a Retail Review Compliance Rating Scale for COOL surveillance reviews in FY 2010 and identified approximately 1,200 stores that will receive followup reviews during FY 2011. In addition, AMS developed a Compliance and Enforcement Requirements document that contains enforcement policies and protocols and defines good faith effort and willful violations. Using this document, followup reviews will be analyzed to determine whether a retailer's corrective and preventative measures are adequate and the retailer is acting in good faith or whether it appears that the retailer is willfully violating the statute and regulation.

In a supplemental e-mail response on June 27, 2011, AMS officials stated further that they had implemented the Retail Review Compliance Rating Scale in April 2011. Using this scale, AMS has identified approximately 1,200 stores that will receive followup reviews in FY 2011. These reviews are currently being conducted with an estimated 50 percent having already been completed. The remaining followup reviews will be completed by September 2011. The results of these reviews will be analyzed to determine whether it appears the retailers are willfully violating the regulations or whether additional retailer education is warranted.

OIG Position

We accept AMS' management decision.

Recommendation 7

Develop and implement procedures to test additional commodities if errors are identified during record reviews and evaluate retailers' recordkeeping systems.

Agency Response

AMS officials stated that they have implemented procedures to assess the effectiveness of a retailer's recordkeeping system. In the event that a retailer meets the criteria for a followup review and had a recordkeeping finding in the initial review, additional records (a total of 8) will be reviewed during the followup review to verify the retailer is conveying accurate country of origin information and retaining complete records for 1 year.

In a supplemental e-mail response dated June 29, 2011, AMS officials addressed an OIG concern about testing additional records during the initial review. They proposed that in the event that records are made available during the initial retail surveillance review and noncompliances are noted, an additional eight records for covered commodities will be requested and evaluated during the initial review. AMS plans to implement the revised recordkeeping evaluation procedures by August 2011.

OIG Position

We accept AMS' management decision.

Finding 3: AMS Needs to Improve the Timeliness of Its Evaluation of Retailer Review Documentation

AMS did not timely evaluate the retailer reviews completed by State agencies in CY 2009 and CY 2010. Moreover, once the reviews were completed, AMS did not timely issue noncompliance letters requiring corrective actions from retailers found to be noncompliant. These problems occurred because AMS did not permanently allocate enough resources to effectively evaluate the retailer reviews the State agencies completed. At the beginning of our audit, AMS had 5 permanent employees dedicated to evaluating the 5,007 reviews completed in 2009. Unless retailers receive noncompliance letters from AMS timely, they may remain noncompliant longer since they are not required to take corrective action until they receive these letters. We found that in 1,719 of the 5,397 reviews (32 percent) we analyzed with noncompliances during CY 2010, AMS did not formally notify retailers that they were out of compliance for at least 60 days following the completion of onsite reviews.

AMS' program guidelines specify that after a retailer review file is received from a State agency, AMS should evaluate the file and take any necessary actions against the retailer within 30²³ days of receipt.²⁴ COOL procedures require AMS to complete evaluations of State-submitted retailer

²³ The 30 day policy was implemented on August 25, 2010. Prior to the issuance of this policy, AMS' policy required evaluation of retailer reviews within five days of receiving them from the States.

²⁴ COOL Program Operation Procedures and Employee Handbook, Section 1.10(b).

reviews prior to distribution of compliance letters.²⁵ Although State reviewers notify retailer officials of any noncompliances identified at the time of the review, retailers are not required to take corrective action until the compliance letters are received.²⁶

State agencies completed 5,007 reviews during the CY 2009 review cycle. As of February 17, 2010, we determined that 1,003 of the 5,007 CY 2009 reviews (20 percent) had not been evaluated by AMS. Once we notified AMS of this problem, they trained 14 temporarily reassigned AMS employees in March 2010 to reduce the backlogged reviews and issue noncompliance letters as needed. As of June 24, 2010, we determined that AMS officials completed their evaluation of the CY 2009 reviews and distributed noncompliance letters to all retailers found to be out of compliance. However, the insufficient resources assigned to evaluate the 2009 reviews resulted in backlogs and untimely issuance of noncompliance letters for the CY 2010 review cycle. AMS believes that a new database they plan on implementing in August 2011 will eliminate backlogs through electronic data input and automatic data updating. We were not able to analyze the database during fieldwork because AMS was in the process of developing it.

State agencies completed 7,741 reviews during the CY 2010 review cycle. As of October 4, 2010, AMS evaluated all of the retailer reviews that the State agencies had completed in CY 2010. However, AMS did not distribute noncompliance letters to 84 of these retailers for 60 days or more because AMS employees were working to eliminate the backlog from the CY 2009 review cycle. Without timely distribution of noncompliance letters, retailers may remain noncompliant longer since they are not required to take corrective action until they receive these letters.

We believe that AMS needs a permanent solution for evaluating retailer review documentation. We evaluated 5,397 of the 5,528 total CY 2010 reviews with findings for adherence to AMS' 30-day internal policy. AMS met its 30-day internal policy for only 1,667 (31 percent) of these reviews, was unable to issue noncompliance letters within 60 days of review for 1,719 reviews (32 percent), and in one instance, was 222 days late. Although AMS reduced its backlog in 2010, it still needs to develop and implement a solution to timely issue noncompliance letters.

Recommendation 8

Implement procedures to ensure that AMS' evaluations of retailer reviews and distribution of noncompliance letters are completed in a timely manner.

Agency Response

AMS officials stated that the agency has reduced the processing time of retail store reviews since implementation of the Final Rule in March 2009, with the mean processing time going from 49 to 34 days. As of June 2011, the COOL Program has hired an additional four full-time staff members to assist with processing retail store reviews in an effort to meet the 30-day target processing time from date of submission to date of noncompliance letter. In addition, the COOL

²⁵ COOL Program Operation Procedures and Employee Handbook, Section 1.5(a).

²⁶ COOL Retail Audit Workbook.

FACTS database is under development and scheduled to be implemented in fall 2011, which will also help reduce the processing time.

OIG Position

We accept AMS' management decision.

Section 2: Oversight and Enforcement

Finding 4: AMS Needs to Improve Enforcement of COOL Regulations

Retailers required to adhere to COOL continued to have significant numbers of repeat noncompliances, after being cited for those same noncompliances by AMS. This occurred, in part, because AMS officials did not identify and investigate repeat violators of the COOL requirements or assess monetary penalties where appropriate. Instead, AMS allowed repeat violators 30 days to submit corrective actions in response to noncompliances identified during followup reviews without any further investigation. As a result, AMS has not issued any civil penalties since the final rule went into effect in 2009, even though such penalties may have been warranted in some cases. In addition, AMS does not have adequate assurance that retailers are adhering to all necessary requirements of COOL. When comparing the results of CY 2009 retailer reviews with followup CY 2010 reviews at the same retailers, we noted 24 instances in which retailers had recurring noncompliances within the same commodity categories, such as not providing a country of origin label for vegetables.

COOL requires that if a retailer (or person engaged in the business of supplying a covered commodity to a retailer) is in violation of the Act, the Secretary shall notify the retailer of the determination and provide the retailer a 30-day period, during which the retailer may take necessary steps to comply with the Act. If, on completion of the 30-day period, the Secretary determines that the retailer has not made a good faith effort to comply and continues to willfully violate the Act, the Secretary shall provide notice and an opportunity for a hearing with respect to the violation, and may fine the retailer up to \$1,000 per violation.²⁷

We found, however, that AMS has not issued any civil penalties since the implementation of COOL. The Act did not specifically explain how enforcement actions should be carried out, including the circumstances under which violations would warrant the imposition of monetary penalties. AMS is in the process of drafting new procedures but has not finalized language as to what types of violations constitute a willful violation. AMS defined violations in another policy document as either: (1) failing to label a product; (2) mislabeling a product; or (3) failing to maintain records.²⁸ This document, however, does not define what constitutes a willful violation. OIG maintains that AMS needs to develop a clear definition of what types of violations constitute a willful violation, and specify at what point a retailer might be subject to monetary penalties.

Although our review was not designed to identify actual cases of retailers willfully violating program regulations, we did identify instances where the nature of the violations should have warranted further investigation by AMS. AMS required States to perform followup reviews at a pre-determined number of retailers who were reviewed in the prior review cycle. AMS selects retailers for a followup review if the retailers had at least one noncompliance in their prior review. However, AMS did not use these followup reviews to identify and investigate frequent violators, to determine if these retailers willfully violated program regulations, or to ascertain whether retailers made a good faith effort to adhere to COOL. Instead, AMS officials treated

²⁷ Agricultural Marketing Act of 1946, as amended by the 2008 Farm Bill, Section 283.

²⁸ COOL Surveillance Review Procedures for Retail Facilities, revised April 23, 2009.

followup reviews the same as an initial review. After we pointed this out to AMS officials, they realized that they needed to make better use of followup reviews and stated they would implement procedures to do so in the future.

We compared the results of retailer reviews completed in 2009 to the results of followup reviews completed in 2010 to determine if retailers remained noncompliant. Continued noncompliance could be an indicator that retailers willfully violated COOL regulations or did not make a good faith effort to comply with COOL. We analyzed the 1,005 followup reviews AMS initiated between February 2010 and September 2010, and identified 29 retailers with at least 10 more noncompliances in the followup review than the initial review. Twenty-four of these 29 retailers had noncompliances in the same commodity category in both the initial review and followup review. Twenty-one of the 29 retailers had at least 10 more commodities that did not have a country of origin label in the followup review than the initial review. In addition, four retailers had noncompliances for the same commodity in both the followup review and the initial review. State reviewers are required to bring noncompliances to retailers' attention during retailer reviews; therefore, we concluded, based on our fieldwork, that retailers should be more aware of COOL after retailer reviews.

AMS officials acknowledged that they did not have a process to identify retailers who may be willfully violating COOL requirements or are not making a good faith effort to correct previously identified noncompliances. They also stated that the majority of their resources are used to ensure reviews are processed and retailer responses are received; therefore, they did not focus resources on identifying potential repeat violators.

We concluded that AMS needs to implement procedures to monitor followup reviews to identify retailers whose actions may warrant stronger enforcement actions, including the imposition of monetary penalties. Without procedures to identify and more closely monitor significantly noncompliant retailers and issue civil penalties when warranted, AMS monitoring program for COOL is less effective

Recommendation 9

Develop and implement written procedures to monitor and provide timely followup with retailers who may be willfully violating COOL regulations or who do not make a good faith effort to comply with COOL regulations. These procedures should include comparing followup reviews to prior reviews completed at applicable retailers.

Agency Response

AMS has implemented Compliance and Enforcement Requirements, which define good faith effort and willful violations. Any review with 10 or more findings will trigger a followup review within 18 months. Federal officials conduct all followup reviews. The data collected from these reviews will be analyzed to determine whether adequate corrective measures have been implemented. In a supplemental e-mail response dated June 27, 2011, AMS officials said that they implemented the new procedures in April 2011.

OIG Position

We accept AMS' management decision.

Recommendation 10

Develop procedures to investigate potentially willful violations and issue civil penalties. This should include specific criteria for the types of violations that warrant civil penalties.

Agency Response

AMS officials stated that the COOL Compliance and Enforcement Requirements define good faith effort and willful violations and also depict specific criteria for the types of violations warranting civil penalties. Since the Compliance and Enforcement document has been implemented, AMS has referred 137 cases of possible willful violations to the Office of the General Counsel for further action, including potential civil penalties. In a supplemental e-mail response dated June 27, 2011, AMS officials said that they implemented the new procedures in April 2011.

OIG Position

We accept AMS' management decision.

Finding 5: AMS Needs to Improve Its Oversight of State Agencies

In at least two States, there were indications that reviewers were inconsistent in their interpretation of COOL requirements. This occurred because AMS did not routinely monitor the performance of State reviewers as they conducted retailer reviews or require that the States themselves perform this function. AMS allocated approximately \$8.1 million between CY 2008 and 2010 for the States to conduct retailer reviews and did not dedicate any resources to monitor how the States performed these reviews. Without an improved nationwide oversight process, AMS has reduced assurance that State reviewers consistently perform reviews and identify retailer noncompliances. For example, Kentucky reviewers found one or more noncompliances in 15 of the 83 (18 percent) reviews they completed; in contrast, Missouri reviewers identified one or more noncompliances in 96 of 100 reviews (96 percent) completed. In addition, two California reviewers we interviewed had different opinions on what is considered an inaccurate country of origin declaration.

State cooperative agreements require AMS to generally supervise all enforcement activities under these agreements; initiate any required proceedings under the Act or regulation that are warranted following a review; and make further investigations within the cooperator's State when deemed necessary.²⁹ One of the responsibilities of State agencies under this cooperative

²⁹ Section II.A of State cooperative agreements.

agreement is to conduct retailer review activities in accordance with the instructions specified by AMS.³⁰

AMS allows States to create their own enforcement infrastructure for completing retailer reviews.³¹ Each of the three States we visited had either one or two supervisors assigned to manage retailer reviews, with the remaining COOL staff identified as reviewers. During the CY 2010 review cycle, the 50 States trained a total of 488 reviewers, with individual States having anywhere between 2 and 104 reviewers. However, we determined that AMS did not implement any oversight procedures to ensure that the reviewers consistently and accurately completed retailer reviews.

We identified inconsistencies in the number of noncompliances identified by State reviewers during retailer reviews in CY 2009 and CY 2010. For example, in 2009, 73 percent of the stores reviewed nationwide had at least one noncompliance identified. However, there were wide discrepancies between some States. Kentucky reviewers found one or more noncompliances in 15 of the 83 (18 percent) reviews they completed; in contrast, Missouri reviewers identified one or more noncompliances in 96 of 100 reviews (96 percent) completed.

We examined the results of reviews completed in the three States we visited and identified other possible inconsistencies, including different understandings among State reviewers of what qualifies as a noncompliance. For example, 4 reviewers completed 554 out of the 556 reviews in California in 2009, and each of these 4 reviewers completed at least 100 reviews. These 4 reviewers issued 333 noncompliances for inaccurate origin declarations.³² Two of these reviewers identified 94 percent of these noncompliances while the other 2 reviewers identified only 6 percent of them. We interviewed 2 of the 4 California reviewers including 1 of the reviewers who identified at least 151 noncompliances. We asked her if she would write a noncompliance if she saw inaccurate origin declaration. She stated that she would, and this is reflected in the number of noncompliances she identified in this area. We also interviewed the reviewer who identified 19 noncompliances in this category. When presented with the same scenario, she stated that she would not consider this to be inaccurate origin declaration as long as the records supported either the bin sign or the individual labels, which would explain the very few noncompliances she noted in that category. AMS agreed that reviewers inconsistently conducted retailer reviews. In addition, AMS officials agreed that there is a need to periodically evaluate State reviewers' performance of retailer reviews.

AMS officials separated the 50 States, Puerto Rico, and the District of Columbia into 2 different geographic regions to assist in evaluating the results of retailer reviews. This structure assisted AMS officials in identifying and following up on broad issues within a specific locale. For example, AMS reviewers identified trends relating to compliance at New Jersey retailers. New Jersey had three reviewers to complete the 154 reviews assigned by AMS. One of the reviewers submitted documentation showing that she completed 30 reviews in 3 days, recording no noncompliances and finding all of the retailers to be fully compliant. This result is inconsistent with AMS' conclusion that the average review takes 1 to 4 hours to complete. Noting the high

³⁰ Section II.B.2 of State cooperative agreements.

³¹ Agricultural Marketing Act of 1946, as amended by the 2008 Farm Bill, Section 284(c).

³² Inaccurate origin declaration occurs when bin signage is different than the individual labels on the items in the bin.

number of reviews completed by this reviewer without any noncompliances, AMS officials analyzed the performance of all three New Jersey reviewers and found that 94 percent of the stores they had reviewed as of October 2009 were fully compliant. When informed of this, the New Jersey COOL manager determined that these three reviewers were not adequately trained. As a result, the three New Jersey reviewers attended AMS COOL training in Atlanta, Georgia, in February 2010, and their managers implemented more stringent oversight of these three reviewers. Despite being alerted to this problem in New Jersey, AMS did not consistently analyze nationwide performance to identify other trends or inconsistencies.

During our audit, AMS developed procedures for their Audit, Review, and Compliance Branch to conduct onsite retailer review evaluations for 1.5 percent of the retailer reviews conducted in each State. Based on the total amount of retailer reviews completed in CY 2010, the Audit, Review, and Compliance Branch would conduct 116 onsite review evaluations from the CY 2010 review cycle. During the evaluation, Audit, Review, and Compliance Branch auditors interviewed store officials who were present during the retailer reviews to determine if the State reviewers conducted reviews in accordance with COOL. AMS developed a checklist for Audit, Review, and Compliance Branch auditors to use during this evaluation that includes 30 questions regarding the retailer review completed.

We agree that these procedures will help AMS evaluate performance of State reviewers during retailer reviews. However, AMS needs to implement a process to periodically evaluate overall State performance of retailer reviews. This process should identify those States that appear to have deficiencies in evaluating COOL compliance. For these States, AMS should develop compensating controls to ensure the States improve their ability to conduct retailer reviews.

Recommendation 11

Implement a process to periodically evaluate State performance of retailer reviews. For State agencies determined to have deficiencies in evaluating COOL compliance, perform followup as necessary to improve their ability to conduct retailer reviews.

Agency Response

AMS officials stated that they are improving and expanding training for State and Federal reviewers by providing six in-depth training sessions in nationwide locations. The expanded training will be provided for up to five designated reviewers per State. AMS is also strengthening the examination process by having the AMS officials administer and grade all of the exams and raising the minimum test score to become a certified COOL retail reviewer. In addition, AMS will evaluate State performance of retail reviews by comparing reviews by State to determine high noncompliance States, low non-compliance States to the national average. AMS will identify outlier States and investigate reasons for outlier status on a quarterly basis through direct observation. Performance issues will be addressed through additional training and other actions, as deemed appropriate to address the deficiency. If performance does not improve, AMS will suspend either the individual reviewer or a State's COOL participation overall, until performance issues have been effectively addressed. In a supplemental e-mail response dated June 27, 2011, AMS officials said that they will implement the proposed action by July 2011.

OIG Position

We accept AMS' management decision.

Finding 6: AMS Needs to Improve Communication with Retailers

Although we found most retailers are aware of COOL, AMS needs to make additional efforts to ensure all retailers are aware of the COOL requirements. Of the 24 retailers we visited, 11 retailers stated that they did not receive COOL materials from AMS; 3 of these further stated that they were not aware of COOL regulations and consequently did not label for country of origin. This occurred because AMS did not have a process in place to analyze the results of retailer reviews and distribute formal guidance to all retailers as needed. In addition, we concluded AMS officials believed that their education and outreach initiatives—such as the COOL website, webinars, and open forums—would sufficiently inform all retailers of COOL regulations and requirements. Based on the results of our retailer visits, we believe that unless AMS more proactively communicates its requirements to retailers, the agency will have reduced assurance that all retailers are properly labeling country of origin for all covered commodities.

According to Office of Management and Budget Circular No. A-123, management is responsible for developing and maintaining internal control activities that ensure the agency communicates with outside organizations.³³ Although AMS has a process to contact noncompliant retailers, AMS does not have internal procedures for communicating COOL requirements directly to all retailers.

During the 6-month period following the effective date of the COOL requirements, AMS conducted an industry education and outreach program concerning the provisions and requirements of the final rule. Referred to as a period of “informed compliance,”³⁴ AMS conducted various activities during this time, including developing a COOL website, hosting webinars with industry and economic groups, creating retailer and supplier brochures, establishing a COOL email inbox for public input, and hosting open forum sessions that educated retailers, suppliers, producers, and trade associations. Although AMS conducted education and outreach initiatives through the COOL informed compliance period, the agency still needs to be more diligent to ensure it continuously informs all retailers, particularly new retailers, of COOL requirements.

We conducted retailer reviews at 24 PACA-licensed retailers. During our visits, we received feedback from 20 of these regarding whether they used or received AMS-distributed guidance for COOL. Eleven of the 20 retailers said they did not receive materials from AMS. Of those 11, 8 retailers learned of the COOL requirements from sources other than AMS and the remaining 3 stated that they were not aware of the COOL regulations. Of the 20 retailers, 6 used AMS materials on the COOL website to implement COOL and 3 retailers received guidance directly from AMS.

³³ OMB Circular No. A-123 “Management’s Responsibility for Internal Control,” as revised December 21, 2004.

³⁴ COOL Final Rule, January 15, 2009, Page 2701.

AMS allowed retailers to use different methods to label covered commodities with country of origin information, including labels on the individual product, bulk bin, carton, crate, barrel, cluster, or consumer package.³⁵ A bulk container may contain covered commodities from more than one country only if all countries of origin are listed on the label.³⁶ When a label contains more than one country of origin, the retailer cannot use “or” and “and/or” on the label.³⁷ For example, “Product of USA and Honduras” is acceptable; however, statements such as “Product of USA and/or Honduras” and “Product of USA or Honduras” are not acceptable origin labels. Retailers may abbreviate country names on labels provided the abbreviations are approved under Customs and Border Protection Agency labeling requirements.³⁸

During our 24 visits to PACA-licensed retailers, we identified 4 examples of areas where retailers deviated from AMS’ COOL labeling requirements. These noncompliances occurred because retailers did not correctly interpret or were not aware of COOL requirements:

Lack of Country of Origin Label: We identified 20 retailers who did not always label all covered commodities with country of origin. Six retailers did not always label all fish and shellfish with method of production. Only four retailers, two club stores, and two supermarkets labeled all covered commodities for COOL.

Inaccurate Origin Declaration: We identified 16 retailers who did not accurately label the country of origin for the covered commodities because the bin labels and individual labels on the products contained conflicting countries of origin. For example, a bin label stated “USA” and the individual products in the bin had three separate individual labels that included “Mexico,” “USA,” and “Canada.” This sort of label would be acceptable if the bin label included “USA, Mexico, and Canada,” but we concluded that the observed label was not compliant because a bulk container may contain covered commodities from more than one country only if all countries of origin are listed on the label.

Unacceptable Abbreviations and Form of Origin: We identified two retailers who used unacceptable abbreviations for countries of origin. For example, one retailer incorrectly abbreviated Mexico as “Mexi.” In addition, three retailers used “or” and “and/or” in their country of origin labels. For example, one retailer labeled a product as “USA or Canada.”

Independent Retailers Not Aware of COOL: We visited three independent retailers who were not aware of COOL regulations and consequently did not label for country of origin.³⁹

AMS officials tracked completed retailer review data for all 50 States. However, they did not implement a process to analyze these data which prevented them from identifying and correcting common adverse trends to ensure that retailers consistently follow COOL. According to AMS data, over 36,000 retailers are licensed under PACA.⁴⁰ AMS officials believed they did not conduct enough reviews to analyze their results and form conclusions about the entire universe

³⁵ Title 7 CFR Part 65.300 (a).

³⁶ Title 7 CFR Part 65.400 (d).

³⁷ COOL Final Rule, January 15, 2009, page 2670.

³⁸ Title 7 CFR Part 65.400 (e).

³⁹ An independent retailer is a retailer with three or less locations nationwide.

⁴⁰ COOL Final Rule, January 15, 2009, Table 9, page 2698.

of retailers. However, AMS has conducted reviews at 35 percent (12,507) of the estimated total retailers subject to COOL since the program's implementation. In January 2010, AMS performed a one-time analysis of completed reviews to provide a snapshot analysis of the COOL program. Based on that analysis, we believe that AMS has sufficient information to begin the process of identifying problematic areas in the COOL requirements and issue guidance to promote increased adherence to COOL requirements among retailers. AMS officials also stated that as a result of this audit, they would more closely analyze the corrective actions submitted by retailers to determine why problems exist

Recommendation 12

Distribute specific guidance regarding labeling requirements, abbreviations, and acceptable forms of origin to all retail establishments subject to COOL.

Agency Response

AMS officials stated that prior to implementation of the final rule, AMS conducted extensive outreach and education efforts, which reached most of the regulated community. Nevertheless, in March 2011, AMS distributed a comprehensive package of materials about COOL to the approximately 37,000 retail firms that AMS identified as being covered by COOL. The packet includes frequently asked questions about COOL regulatory requirements and enforcement activities, copies of brochures in English and in Spanish for retailers to use with their employees and customers, and a poster that provides an easy-to-use summary of covered commodities, quick labeling tips, helpful hints and acceptable abbreviations. In addition, contact information for the COOL Branch officials and website address were also provided.

OIG Position

We accept AMS' management decision.

Recommendation 13

Implement a system to analyze the results of retailer reviews and retailer corrective actions and identify noncompliance trends that exist on a nationwide basis and, as applicable, corporate-wide basis.

Agency Response

AMS has designed and developed an automated database management system (called COOL FACTS) that will identify various trends based on the data in the system. The COOL FACTS project is expected to be implemented in fall 2011.

OIG Position

We accept AMS' management decision.

Recommendation 14

Implement a process to develop and disseminate guidance to correct the noncompliances identified in the trend analysis.

Agency Response

AMS will disseminate information on noncompliances identified in the trend analysis through its education and outreach efforts. (e.g., webinars, speaking engagements, etc), future global mailings to retailers, and in interactions with individual retailers concerning their corporate performance. In a supplemental e-mail response dated June 27, 2011, AMS officials said that they will implement the proposed action by July 2012.

OIG Position

We accept AMS' management decision.

Scope and Methodology

We performed our audit at AMS Headquarters in Washington, DC, 3 State agencies, and 32 retailers between February 2010 and October 2010. Following our review, it was determined that only 24 of the 32 retailers were PACA-licensed. To accomplish our objectives, we evaluated AMS' implementation of its policies and procedures between January 2008 and October 2010.

AMS Headquarters

To evaluate AMS' oversight, we held discussions with officials at AMS' Livestock and Seed; COOL Branch; FV Program; and Meat Grading and Certification Branch. We also obtained data and documentation on all retailer reviews completed between 2008 and 2010 to help us analyze State retailer review performance as well as AMS' oversight of the States and retailers.

State Agencies

We visited three State agencies to help us evaluate AMS' oversight of COOL. We analyzed the 5,007 retailer reviews completed in 2009 by the reviewers in all 50 States to determine the percentage of stores that were found to have at least one noncompliance. We selected States that had a high percentage of stores with noncompliances as this may indicate strong oversight by the State, as well as States with a low percentage of stores with noncompliances as this may indicate weak oversight. In addition, we used AMS' contractor data to select States with a large number of stores to ensure the most audit coverage. Based on these criteria, we visited:

- Pennsylvania Department of Agriculture,
- California Department of Food and Agriculture, and
- Texas Department of State Health Services.

Retailers

Following our review of the State agencies, we conducted retailer reviews similar to the ones completed by State reviewers in each of the States we visited. Half of our visits were to retailers already reviewed by State reviewers while half were to retailers never reviewed by the State. In addition, we visited retailers based on store type, including corporately owned, independently owned, and club stores.

We reviewed 24 retailers in Pennsylvania and California, including 4 club stores. In addition, we reviewed eight retailers in Texas. Following our California visit, we determined that club stores were almost always fully compliant with COOL requirements. Therefore, we did not visit two club stores in Texas that we originally planned to visit. In total we visited four less stores in Texas than in the other two States we visited.

Our audit was conducted in accordance with *Generally Accepted Government Auditing Standards*. These standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our

audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions. In addition, AMS provided OIG with data related to retailer reviews completed and data relating to State cooperative agreements. We make no representations regarding the accuracy or reliability of these data as they were not evaluated and information system controls were not part of our audit objective.

Abbreviations

Act.....	Agricultural Marketing Act of 1946
ALERT.....	Anti-Fraud Locator Using Electronic Benefits Transfer Retailer Transactions
AMS.....	Agricultural Marketing Service
CFR.....	Code of Federal Regulations
COOL.....	Country of Origin Labeling
CY.....	Calendar Year
2002 Farm Bill	Farm Security and Rural Investment Act of 2002
2008 Farm Bill	Food, Conservation, and Energy Act of 2008
FV	Fruit and Vegetable Program
OGC	Office of the General Counsel
OIG	Office of Inspector General
PACA.....	Perishable Agricultural Commodities Act of 1930
U.S.	United States
USDA.....	United States Department of Agriculture

Exhibit A - Summary of Monetary Results

Finding Number	Description	Amount	Category
1	AMS reimbursed State agencies for retailer reviews conducted at non-PACA-licensed and out-of-business retailers	\$296,400	Questioned Costs, No Recovery
Total Monetary Results		\$296,400	

This table provides a brief description of the questioned costs associated with Finding 1, the dollar amount, and the category of the questioned costs.

USDA'S

AGRICULTURAL MARKETING SERVICE

RESPONSE TO AUDIT REPORT



1400 Independence Avenue, SW.
Room 3071-S, STOP 0201
Washington, DC 20250-0201

DATE: June 10, 2011

TO: Gil H. Harden
Assistant Inspector General for Audit
Office of Inspector General

FROM: Rayne Pegg /s/
Administrator

SUBJECT: AMS' Response to OIG Audit #01601-04-Hy: Implementation of
County of Origin Labeling

We have reviewed the subject audit report and agree in principle with the findings and recommendations. Our detailed response, including actions already taken and actions to be taken to address the recommendations, is attached.

If you have any questions or need further information, please contact Frank Woods, Internal Controls and Audits Branch Chief, at (202) 720-8836.

Attachment

AGRICULTURAL MARKETING SERVICE

This is the response of the Agricultural Marketing Service (AMS) to an audit of its country of origin labeling (COOL) program by the Department of Agriculture's (USDA) Office of the Inspector General (OIG). The audit results, conclusions, findings and recommendations are set forth in Audit Report 01601-04-Hy.

BACKGROUND:

The Farm Security and Rural Investment Act of 2002 (2002 Farm Bill) and the Food, Conservation, and Energy Act of 2008 (2008 Farm Bill) amended the Agricultural Marketing Act of 1946 to require retailers to notify their customers of the country of origin for specific commodities in addition to the method of production for fish and shellfish. The COOL final rule became effective in March 2009, and enforcement activities began for all covered commodities later that year. AMS enforced COOL requirements only for fish and shellfish items from October 2006 to March 2009, as provided by the relevant statutory authorities. Funding of the COOL program began in fiscal year (FY) 2006 at a level that provided minimal oversight of fish and shellfish compliance. Additional funding was not appropriated until late FY 2009 to support administration and oversight of all covered commodities.

OIG officials began auditing the COOL program in February 2010, less than 10 months after the final rule became effective and less than 9 months after additional funds were provided to administer the program. During the initial months of program implementation, AMS concentrated resources on outreach activities with retail and industry trade associations, individual retail officials, consumer groups and others to educate interested parties on COOL requirements and promote compliance with the new regulations. Prior to and during the timeframe of the OIG audit, AMS also conducted approximately 12,000 retail store reviews through Federal and State cooperators to assess the level of compliance. AMS' strategy for the COOL Program involved collaborating with all 50 States to leverage available resources and minimize the need to expand internal AMS permanent resources until additional data was available on retail store compliance. As additional funding was provided in late FY 2009 and performance data collected, AMS began to expand its internal infrastructure of permanent employees and data management system. Establishment of the program also focused on the recognition that COOL is a retail labeling law designed to provide information to consumers so they can make informed decisions about the origin of the foods they purchase. COOL is not a food safety initiative that provides or ensures safe and wholesome food products, nor does it provide nutritional information or consumer warnings. AMS considered other Federal labeling requirements and enforcement policies, and designed a robust onsite review process appropriate to accomplish the Congressional intent of the Act.

AMS officials constantly monitor ongoing program activities, retail and industry performance, best industry practices, consumer feedback and published research findings on country of origin

labeling. Based upon these and other sources of information and data, changes are made each year to the compliance and enforcement procedures to continuously improve the effectiveness of the COOL program to provide consumer information and overall program controls.

OVERVIEW:

As indicated by OIG, the objective of the audit was to evaluate the implementation of the COOL final rule that went into effect in March 2009. In addition, OIG attempted to determine if AMS ensured that all retailers adequately met COOL requirements. OIG also evaluated the adequacy and consistency of the oversight provided by AMS personnel to ensure requirements were met.

In response to OIG's findings, AMS believes that it currently exercises significant and substantial management controls over the COOL program, as evidenced by the continuing high level of correct product labeling in the over 37,000 retail stores nationwide subject to the requirements. That being said, AMS views the recommendations contained in the audit report as an additional opportunity to contribute to the Agency's ability to continuously improve the COOL program.

Separate and apart from the OIG audit and recommendations, AMS has initiated external compliance reviews and a number of other actions to strengthen program controls and COOL accuracy. It is important to note that many of the changes to be implemented by AMS for the future will go well beyond the recommendations provided by OIG. AMS will implement very prescriptive changes in areas such as retail and supplier sampling frequency based upon risk assessment, the training of State cooperators, the conduct of follow-up reviews, identification of "willful violators", analysis of retail review data to better target enforcement resources, and engaging in enforcement actions to address the non-compliances of "willful violators" which will serve as an incentive for compliance by all retailers. All of the revisions planned by AMS will be compatible with or serve to enhance the OIG recommendations.

OIG FINDINGS AND RECOMMENDATIONS AND AMS RESPONSE

Recommendation Summary

We recommend that AMS develop and implement a process for selecting only PACA-licensed retailers for retailer reviews. We also recommend that AMS officials develop and implement a retailer compliance rating system and appropriate followup procedures for retailers identified as noncompliant and promptly issue noncompliance letters. In addition, we recommend that AMS enhance its enforcement procedures, periodically evaluate State performance of retailer reviews, and improve communications with retailers.

Agency Response

AMS generally agrees with the report's 14 recommendations.

FINDING 1. AMS needs to improve the retailer selection process.

Recommendation 1. Conduct an analysis of retailers with under \$2 million in annual sales to determine if PACA-licensed retailers are in this category of the contractor's database. If this analysis does identify PACA-licensed retailers having under \$2 million in annual sales, develop parameters to include a percentage of stores with under \$2 million in annual sales when requesting retailers for review.

AMS Response

As stated in the final rule, AMS estimates that there are over 37,000 retail stores subject to the COOL regulation. At the time of the audit, AMS focused its resources on retail stores with over \$2 million in grocery sales to ensure that the greatest number of covered commodities was reviewed. In response to the recommendation, AMS will purchase a list of retailers with \$1-2 million in grocery sales from our contractor, and match the store locations on that list against the PACA data base to identify PACA-licensed entities. A stratified random sample of identified PACA-licensed retail stores in the \$1-2 million sales range will be assigned to State and Federal officials for retail surveillance activities in FY 2012.

Recommendation 2. Develop and implement a system for identifying stores that are out-of-business or not PACA-licensed and remove these stores from the retailer review lists sent to the States.

AMS Response

AMS has developed and implemented a process to ensure only PACA-licensed and operational retailers are scheduled for retailer reviews beginning with retail surveillance activity conducted during Fiscal Year (FY) 2011. Prior to selecting the final retail stores that will be reviewed, AMS will confirm that all retail stores meet the definition of a "retailer" to ensure that only those retail store locations that are licensed under PACA are reviewed for COOL requirements. In addition, State reviewers are now instructed to contact all retailers prior to conducting reviews to ensure the retail locations are still in operation.

Recommendation 3. Initiate a process to begin identifying that retailers selected from past reviews were PACA-licensed and required to adhere to COOL. For non-PACA-licensed retailers, contact these stores and inform them they do not need to adhere to COOL.

AMS Response

In 2010, 152 retail facilities (1.8% of total stores reviewed) that were assigned to state cooperating agencies were later found to not be PACA licensed. Accordingly, these facilities were not subject to the COOL requirements. A letter was subsequently mailed to each of these retailers informing them that they were not subject to the COOL regulations or required to respond to the non-compliance letters they received.

Recommendation 4.

Begin monitoring COOL compliance at smaller branches of PACA-licensed corporations that are required to adhere to COOL.

AMS Response

A stratified random sample of smaller branches (i.e., retail or convenience stores) of PACA-licensed corporations will be assigned to State and Federal officials for retail surveillance activities in FY 2012.

FINDING 2. AMS needs to strengthen retailer review procedures

Recommendation 5. Develop and implement a retailer compliance rating system that establishes thresholds or levels of materiality regarding non-compliances to identify retailers who need additional assistance complying with COOL.

AMS Response

AMS has amended its compliance and enforcement procedures to include a Retail Review Compliance Rating Scale for stores subject to COOL surveillance reviews. During a COOL retail store review, data and evidence is gathered, which is then used to assess the extent to which a retail store is complying with COOL requirements. The amended procedures were implemented and used to evaluate the FY 2010 retail reviews for further retailer evaluations and enforcement actions.

Recommendation 6. Using the rating system, develop and issue non-compliance letters appropriate for the extent of retailer noncompliance and amend the retailer review follow up procedures to determine reasons for retailer noncompliance.

AMS Response

AMS developed and implemented a Retail Review Compliance Rating Scale for COOL surveillance reviews in FY 10 and identified approximately 1,200 stores that will receive follow up reviews during FY 11. In addition, AMS developed a Compliance and Enforcement Requirements document that contains enforcement policies and protocols and defines good faith effort and willful violations. Using this document, follow up reviews will be analyzed to

determine whether a retailer's corrective and preventative measures are adequate and the retailer is acting in good faith or whether it appears that the retailer is willfully violating the statute and regulation.

Recommendation 7. Develop and implement procedures to test additional commodities if errors are identified during record reviews and evaluate retailers' recordkeeping systems.

AMS Response

Procedures have been implemented to assess the effectiveness of a retailer's recordkeeping system. In the event a retailer meets the criteria for a follow-up review and had a recordkeeping finding in the initial review, additional records (a total of 8) will be reviewed to verify the retailer is conveying accurate country of origin information and retaining complete records for 1 year.

FINDING 3. AMS needs to improve the timeliness of its evaluation of retailer review documentation

Recommendation 8. Implement procedures to ensure that AMS' evaluations of retailer reviews and distribution of non-compliance letters are completed in a timely manner.

AMS Response

AMS has reduced the processing time (the mean processing time was reduced from 49 days to 34 days) of retail store reviews since implementation of the Final Rule in March 2009. As of June 2011, the COOL Program has hired an additional four full time staff members to assist with processing retail store reviews in an effort to meet the 30-day target processing time from date of submission to date of non-compliance letter. In addition, the COOL FACTS database is under development and scheduled to be implemented in fall 2011, which will also help reduce the processing time.

FINDING 4. AMS needs to improve enforcement of COOL regulations

Recommendation 9. Develop and implement written procedures to monitor and provide timely follow-up with retailers who may be willfully violating COOL regulations or do not make good faith effort to comply with COOL regulations. These procedures should include comparing follow-up reviews to prior reviews completed at applicable retailers.

AMS Response

AMS has implemented Compliance and Enforcement Requirements, which define good faith effort and willful violations. Any review with 10 or more findings will trigger a follow up review within 18 months. Federal officials conduct all follow up reviews. The data collected from these reviews will be analyzed to determine whether adequate corrective measures have been implemented.

Recommendation 10. Develop procedures to investigate potentially willful violations and issue civil penalties. This should include specific criteria for the types of violations that

warrant the issuance of civil penalties and the manner in which these determinations may be appealed.

AMS Response

The COOL Compliance and Enforcement Requirements defines good faith effort and willful violations and also depicts specific criteria for the types of violations warranting civil penalties. Since the C&E document has been implemented, AMS referred 137 cases of possible willful violations to the Office of General Counsel for further action, including potential civil penalties.

FINDING 5. AMS needs to improve its oversight of state agencies

Recommendation 11. Implement a process to periodically evaluate State performance of retailer reviews. For State agencies determined to have deficiencies in evaluating COOL compliance, perform follow-up as necessary to improve their ability to conduct retailer reviews.

AMS Response

AMS is improving and expanding training for State and Federal reviewers by providing six in-depth training sessions in nationwide locations. The expanded training will be provided for up to five designated reviewers per State. AMS is also strengthening the examination process by having the AMS officials administer and grade all of the exams and raising the minimum test score to become a certified COOL retail reviewer. In addition, AMS will evaluate state performance of retail reviews by comparing reviews by state to determine high non-compliance states, low non-compliance states to the national average. AMS will identify outlier states and investigate reasons for outlier status on a quarterly basis through direct observation. Performance issues will be addressed through additional training and other actions, as deemed appropriate to address the deficiency. If performance does not improve, AMS will suspend the reviewer or state COOL participation until performance issues have been effectively addressed.

FINDING 6. AMS needs to improve communication with retailers

Recommendation 12. Distribute specific guidance regarding labeling requirements, abbreviations, and acceptable forms of origin to all retail establishments subject to COOL.

AMS Response

Prior to implementation of the final rule, AMS conducted extensive outreach and education efforts, which reached most of the regulated community. Nevertheless, in March 2011, AMS distributed a comprehensive package of materials about COOL to the approximately 37,000 retail firms that AMS identified as being covered by COOL. The packet includes frequently asked questions about COOL regulatory requirements and enforcement activities, copies of brochures in English and in Spanish for retailers to use with their employees and customers, and a poster that provides an easy to use summary of covered commodities, quick labeling tips, helpful hints and acceptable abbreviations. In addition, contact information for the COOL Branch officials and website address were also provided.

Recommendation 13. Implement a system to analyze the results of retailer reviews and retailer corrective actions and identify noncompliance trends that exist on a nationwide basis and, as applicable, corporate-wide basis.

AMS Response

AMS has designed and developed an automated database management system (called COOL FACTS) that will identify various trends based on the data in the system. The COOL FACTS project is expected to be implemented in fall 2011.

Recommendation 14. Implement a process to develop and disseminate guidance to correct the non-compliances identified in the trend analysis.

AMS Response

AMS will disseminate information on non-compliances identified in the trend analysis through its education and outreach efforts (e.g., webinars, speaking engagements, etc), future global mailings to retailers, and in interactions with individual retailers concerning their corporate performance.