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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 983

[Docket No. AMS-FV-07-0082; FV07-983-1 FIR]

#### Pistachios Grown in California; Changes in Handling Requirements

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** The Department of Agriculture (USDA) is adopting, as a final rule, without change, an interim final rule changing the handling requirements authorized under the California pistachio marketing order (order). The order regulates the handling of pistachios grown in California and is administered locally by the Administrative Committee for Pistachios (committee). This rule continues in effect the action that suspended the minimum quality requirements, including maximum defects and minimum sizes, for California pistachios. This reduces handler costs and provides handlers more flexibility in meeting customer needs.

**DATES:** *Effective Date:* April 21, 2008.

#### FOR FURTHER INFORMATION CONTACT:

Terry Vawter, Senior Marketing Specialist, or Kurt J. Kimmel, Regional Manager, California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA; Telephone: (559) 487-5901, Fax: (559) 487-5906, or E-mail: [Terry.Vawter@usda.gov](mailto:Terry.Vawter@usda.gov) or [Kurt.Kimmel@usda.gov](mailto:Kurt.Kimmel@usda.gov).

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs,

AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491, Fax: (202) 720-8938, or E-mail: [Jay.Guerber@usda.gov](mailto:Jay.Guerber@usda.gov).

**SUPPLEMENTARY INFORMATION:** This rule is issued under Marketing Order No. 983 (7 CFR part 983), regulating the handling of pistachios grown in California, hereinafter referred to as the "order." The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act." USDA is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This rule continues in effect the action that changed the handling requirements for pistachios currently authorized under the order. This rule continues to suspend the minimum quality requirements, including maximum defects and minimum sizes, for California pistachios. This reduces handler costs and provides handlers more flexibility in meeting customer needs. This action was recommended by the committee.

Prior to implementation of the interim final rule, § 983.39 established minimum quality levels for pistachios,

including maximum defects and minimum sizes permitted under the order. Under § 983.46, the Secretary may modify, suspend, or make rules and regulations to implement §§ 983.38 through 983.45 based upon a recommendation by seven concurring committee members or other available information.

The quality and size requirements were in effect for California pistachios since the order's inception in 2004. Evidence provided at the promulgation hearing suggested that there was a direct link between lower-quality pistachios and the incidence of aflatoxin contamination (see 68 FR 45990). Aflatoxin is one of a group of mycotoxins produced by the molds *Aspergillus flavus* and *Aspergillus parasiticus*. Aflatoxins are naturally-occurring in the field and can be further spread in improperly processed and stored nuts, dried fruits, and grains. The data presented at the hearing was based on aflatoxin analyses of pistachios with different defects. Although the data also indicated that the levels of aflatoxin associated with each defect varied widely, researchers attributed this to variability among the samples.

As further data was collected in 2005 and 2006, University of California researchers concluded that variability in aflatoxin levels seen in previous studies may have been due to geographic variability.<sup>1 2</sup> Aflatoxin contamination is more prevalent in pistachios produced in the northern San Joaquin Valley, while quality defects, largely due to insect damage, are less prevalent. The opposite is true for the southern San Joaquin Valley. It is now believed that these differences in aflatoxin contamination between the growing areas are due to differences in climate. The northern San Joaquin Valley has more aflatoxin contamination because its cooler temperatures and greater moisture are more conducive to *Aspergillus* and aflatoxin development, but less conducive to insect population

<sup>1</sup> Doster, M.A., T.J. Michailides, L.D. Boeckler, and D.P. Morgan, 2006. Development of expert systems and predictive models for aflatoxin contamination in pistachios. In California Pistachio Industry Annual Report Crop Year 2005-2006, pg. 101-102.

<sup>2</sup> Doster, M.A., T.J. Michailides, L.D. Boeckler, and D.P. Morgan, 2007. Prediction of aflatoxin contamination and a survey of fungi producing Ochratoxin A in California pistachios. In California Pistachio Industry Annual Report Crop Year 2006-2007, pg. 109-110.

and damage. However, in the southern San Joaquin Valley, there is a higher incidence of insect damage and a much lower incidence of aflatoxin contamination because of the drier environment and higher temperatures. Thus, recent research suggests that aflatoxin occurrence in pistachios may be attributable to climatic factors.

Additionally, growers and handlers are reporting unexpected problems with the size of pistachios this season, as well as with staining of the nut shell from the hull. Pistachios are smaller than usual, and the large crop has resulted in a large percentage of pistachios which may not have met the requirements of the order because the sizes are smaller than authorized, which was 30/64ths of an inch. Staining is a problem this season due to unseasonable humidity and spotty rains on August 26th and 30th. The moisture wet the outer hull, and the hull then stained the pistachio shell. Dark stains are an external defect, which affects overall pistachio quality.

Thus, the committee recommended suspending the minimum quality requirements, which include maximum defects and minimum sizes, under the order. This reduces handler costs and provides handlers more flexibility in meeting customer needs. Suspending these requirements also necessitated modifications to other sections of the order and regulations that referenced minimum quality and size requirements. Accordingly, this rule continues to partially suspend or amend language in §§ 983.6, 983.7, 983.31, 983.38, 983.40, 983.41, 983.42, 983.45, 983.138, 983.143, and 983.147 of the order; and continues to suspend §§ 983.19, 983.20, 983.39, and 983.141 in their entirety.

Additionally, the third sentence in § 983.11(b), and all of § 983.71 were removed because the committee's State counterpart, the California Pistachio Commission, has been terminated and there is currently no relationship between the two organizations.

### Final Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses would not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are

unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 740 producers in the production area, and 50 handlers of California pistachios subject to regulation. The Small Business Administration (SBA) (13 CFR 121.201) defines small agricultural producers as those having annual receipts less than \$750,000, and defines small agricultural service firms as those whose annual receipts are less than \$6,500,000. Of the 740 producers, approximately 722 have annual receipts of less than \$750,000. Forty-two of the 50 handlers subject to regulation have annual pistachio receipts of less than \$6,500,000. Thus, the majority of producers and handlers of California pistachios may be classified as small entities.

This rule continues in effect the action that changed the handling requirements authorized under the order. This rule continues to suspend the minimum quality requirements, including maximum defects and minimum sizes, for California pistachios. Authority for this action is provided in § 983.46.

Regarding the impact on affected entities, suspending the minimum quality requirements decreases handler inspection costs. The committee estimates that the direct costs to obtain inspection average approximately \$50.00 per lot. The average lot is approximately 44,000 pounds. With over 100,000,000 pounds shipped domestically, the direct costs for inspection for approximately 2,300 lots could total \$115,000 for the industry. The direct costs do not include handler staff time in preparing samples, and handler storage and recordkeeping costs associated with inspected pistachios.

The committee considered alternatives to suspending the minimum quality requirements. Some producers were concerned that this could give handlers too much latitude in their operations. Other producers commented that handlers' customers would likely dictate product quality and prevent shipment of substandard pistachios into the market. Ultimately, the majority of committee members supported the changes.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the form ACP-5, "Minimal Testing" being suspended by this rule was previously approved by the Office of Management and Budget and assigned OMB No. 0581-0215, Pistachios Grown in California, for 1 burden hour. As with all Federal

marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

AMS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

In addition, as noted in the initial regulatory flexibility analysis, USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

Further, the committee meetings where this action was discussed were widely publicized throughout the pistachio industry and all interested persons were encouraged to attend the meetings and participate in the committee's deliberations. Like all committee meetings, these were public meetings, and entities of all sizes were encouraged to express their views on these issues.

An interim final rule concerning this action was published in the **Federal Register** on December 7, 2007. Copies of the rule were mailed by the committee's staff to all committee members and pistachio handlers. In addition, the rule was made available by USDA and the Office of the **Federal Register**. That rule provided for a 60-day comment period which ended February 5, 2008. One comment was received that was not relevant to the interim final rule.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: <http://www.ams.usda.gov/fv/moab/html>. Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

The order provisions and regulations that were suspended or terminated no longer tend to effectuate the declared policy of the Act, while the regulations that were revised tend to effectuate the declared policy of the Act. Accordingly, after consideration of all relevant material presented, including the committee's recommendation, and other information, it is found that finalizing this interim final rule, without change, as published in the **Federal Register** (72 FR 69139, December 7, 2007), will effectuate the declared policy of the Act.

### List of Subjects in 7 CFR Part 983

Pistachios, Marketing agreements and orders, Reporting and recordkeeping requirements.

**PART 983—PISTACHIOS GROWN IN CALIFORNIA**

■ Accordingly, the interim final rule amending 7 CFR part 983 which was published at 72 FR 69139 on December 7, 2007, is adopted as a final rule without change.

Dated: March 13, 2008.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

[FR Doc. E8-5648 Filed 3-19-08; 8:45 am]

BILLING CODE 3410-02-P

**DEPARTMENT OF AGRICULTURE****Agricultural Marketing Service****7 CFR Part 1216**

[Docket No.: AMS-FV-08-0001; FV-08-701 IFR]

**Peanut Promotion, Research, and Information Order; Amendment to Primary Peanut-Producing States and Adjustment of Membership**

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Interim final rule with request for comments.

**SUMMARY:** This rule would add a producer member and alternate from the State of Mississippi to the National Peanut Board (Board). The change was proposed by the Board, which administers the nationally coordinated program, in accordance to the provisions of the Peanut Promotion, Research, and Information Order (Order) which is authorized under the Commodity Promotion, Research, and Information Act of 1996 (1996 Act). This change is made because Mississippi is now considered a major peanut-producing state based on the Board's review of the geographical distribution of the production of peanuts. The Order requires a review of the geographical distribution of the production of peanuts at least every five years. The addition of a member from Mississippi will provide for additional representation from another primary peanut-producing state.

**DATES:** *Effective date:* March 21, 2008. Comments must be submitted on or before April 21, 2008.

**ADDRESSES:** Interested persons are invited to submit written comments on the Internet at: <http://www.regulations.gov> or to the Research and Promotion Branch, Fruit and Vegetable Programs, Agricultural Marketing Service (AMS), U.S.

Department of Agriculture, Room 0632-S, Stop 0244, 1400 Independence Avenue, SW., Washington, DC 20250-0244; fax: (202) 205-2800. All comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be made available for public inspection in the above office during regular business hours or can be viewed at <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:**

Jeanette Palmer, Marketing Specialist, Research and Promotion Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., Room 0632, Stop 0244, Washington, DC 20250-0244; telephone: (202) 720-9915; or fax: (202) 205-2800; or e-mail: [Jeanette.Palmer@usda.gov](mailto:Jeanette.Palmer@usda.gov).

**SUPPLEMENTARY INFORMATION:** This rule is issued under the Peanut Promotion, Research, and Information Order [7 CFR Part 1216]. The Order is authorized under the Commodity Promotion, Research, and Information Act of 1996 [7 U.S.C. 7411-7425].

**Executive Order 12866**

The Office of Management and Budget has waived the review process required by Executive Order 12866 for this action.

**Executive Order 12988**

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. The rule is not intended to have a retroactive effect and will not affect or preempt any other State or Federal law authorizing promotion or research relating to an agricultural commodity.

The 1996 Act provides that any person subject to an order may file a written petition with the Department of Agriculture (Department) if they believe that the order, any provision of the order, or any obligation imposed in connection with the order, is not established in accordance with the law. In any petition, the person may request a modification of the order or an exemption from the order. The petitioner is afforded the opportunity for a hearing on the petition. After a hearing, the Department would rule on the petition. The 1996 Act provides that the district court of the United States in any district in which the petitioner resides or conducts business shall have the jurisdiction to review the Department's ruling on the petition, provided a complaint is filed not later than 20 days after the date of the entry of the ruling.

**Regulatory Flexibility Analysis**

In accordance with the Regulatory Flexibility Act (RFA) [5 U.S.C. 601-

612], AMS has examined the economic impact of this rule on small entities that would be affected by this rule. The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened.

The Small Business Administration defines, in 13 CFR part 121, small agricultural producers as those having annual receipts of no more than \$750,000 and small agricultural service firms as having receipts of no more than \$6,500,000 million.

There are approximately 10,840 producers and 33 handlers of peanuts who are subject to the program. Most producers would be classified as small businesses under the criteria established by the Small Business Administration [13 CFR 121.201], and most of the handlers would not be classified as small businesses.

The Department's National Agricultural Statistics Service (NASS), reports U.S. peanut production from the 10 major peanut-producing states. The combined production from these states totaled 3.74 billion pounds in 2007. NASS data indicates that Georgia was the largest producer (44 percent of the total U.S. production), followed by Texas (20 percent), Alabama (11 percent), Florida (9 percent), North Carolina (7 percent), South Carolina (5 percent), Mississippi (2 percent), Oklahoma (2 percent), Virginia (2 percent), and New Mexico (1 percent). According to the 2002 Census of Agriculture, small amounts of peanuts were also grown in six other states. NASS data indicates that the farm value of the peanuts produced in the top 10 states in 2007 was \$763 million.

Three main types of peanuts are grown in the United States: Runners, Virginia, and Spanish. The southeast growing region grows mostly the medium-kernel Runner peanuts. The southwest growing region used to grow two-thirds Spanish and one-third Runner peanuts, but now more Runners than Spanish are grown. Virtually all of the Spanish peanut production is in Oklahoma and Texas. In the Virginia-Carolina region, mainly large-kernel Virginia peanuts are grown. New Mexico grows a fourth type of peanut, the Valencia.

According to the Department's *Agricultural Statistics* report, in 2005 there were 10,840 commercial producers of peanuts in the United States. If that number of growers is divided into the total U.S. production in 2005, the resulting average is 449,249 pounds of peanuts per grower. Peanuts produced during 2005 provided average