

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 983

[Doc. No. AO-FV-08-0147; AMS-FV-08-0051; FV08-983-1]

#### Pistachios Grown in California; Recommended Decision and Opportunity To File Written Exceptions to Proposed Amendment of Marketing Order No. 983

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

**ACTION:** Proposed rule and opportunity to file exceptions.

**SUMMARY:** This is a recommended decision regarding proposed amendments to Marketing Agreement and Order No. 983 (order), which regulates the handling of pistachios grown in California. The amendments were proposed by the Administrative Committee for Pistachios (Committee), which is responsible for local administration of the order. The proposed amendments would: Expand the production area covered under the order to include Arizona and New Mexico in addition to California; authorize the Committee to reimburse handlers for a portion of their inspection and certification costs in certain situations; authorize the Committee to recommend research projects; modify existing order authorities concerning aflatoxin and quality regulations; modify the authority for interhandler transfers of order obligations; redesignate several sections of the order; remove previously suspended order provisions, and make other related changes. The amendments are intended to improve the operation and functioning of the marketing order program. This recommended decision invites written exceptions on the proposed amendments. This rule also announces AMS's intention to request approval by the Office of Management and Budget (OMB) of a new information collection.

**DATES:** Written exceptions must be filed by June 4, 2009. Pursuant to the Paperwork Reduction Act, comments on the information collection burden must be received by July 6, 2009.

**ADDRESSES:** Written exceptions should be filed with the Hearing Clerk, U.S. Department of Agriculture, Room 1031-S, Washington, DC 20250-9200, *Fax:* (202) 720-9776 or via the Internet at <http://www.regulations.gov>, or to Martin Engeler at the E-mail address provided in the **FOR FURTHER INFORMATION CONTACT** section. All comments should reference the document number and the date and page number of this issue of the **Federal Register**. Comments will be made available for public inspection in the Office of the Hearing Clerk during regular business hours, or can be viewed at: <http://www.regulations.gov>. All comments submitted in response to this rule will be included in the record and will be made available to the public. Please be advised that the identity of the individuals or entities submitting the comments will be made public on the Internet at the address provided above.

**FOR FURTHER INFORMATION CONTACT:** Martin Engeler, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 2202 Monterey Street, Suite 102-B, Fresno, California 93721; *Telephone:* (559) 487-5110, *Fax:* (559) 487-5906, or *E-mail:* [Martin.Engeler@ams.usda.gov](mailto:Martin.Engeler@ams.usda.gov); or Laurel May, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., Stop 0237, Washington, DC 20250-0237; *Telephone:* (202) 720-1509, *Fax:* (202) 720-8938, or *E-mail:* [Laurel.May@ams.usda.gov](mailto:Laurel.May@ams.usda.gov).

Small businesses may request information on this proceeding 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, *E-mail:* [Jay.Guerber@ams.usda.gov](mailto:Jay.Guerber@ams.usda.gov).

**SUPPLEMENTARY INFORMATION:** Prior document in this proceeding: Notice of Hearing issued on July 15, 2008, and published in the July 18, 2008, issue of the **Federal Register** (73 FR 41298).

This action is governed by the provisions of sections 556 and 557 of title 5 of the United States Code and is

therefore excluded from the requirements of Executive Order 12866.

#### Preliminary Statement

Notice is hereby given of the filing with the Hearing Clerk of this recommended decision with respect to the proposed amendments to Marketing Agreement and Order 983 regulating the handling of pistachios grown in California, and the opportunity to file written exceptions thereto. Copies of this decision can be obtained from Martin Engeler, whose address is listed above.

This recommended decision is issued pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act", and the applicable rules of practice and procedure governing the formulation of marketing agreements and orders (7 CFR Part 900).

The proposed amendments are based on the record of a public hearing held July 29 and 30, 2008, in Fresno, California. Notice of this hearing was published in the **Federal Register** on July 18, 2008 (73 FR 41298). The notice of hearing contained the proposals submitted by the Committee.

The proposed amendments were recommended by the Committee and submitted to USDA on June 10, 2008. After reviewing the recommendation and other information submitted by the Committee, AMS determined to proceed with the formal rulemaking process and schedule the matter for hearing.

The proposed amendments include addition of new sections to the order which would result in numerical redesignation of several sections of the order. The redesignated sections would allow the related provisions to be grouped together in the order. The proposed amendments recommended by the Committee are summarized below.

1. Proposal 1 would amend the order to expand the production area to include the States of Arizona and New Mexico. The production area covered under the order is currently limited to the State of California. This proposal would revise existing § 983.26, Production area, and redesignate it as § 983.25. It would also result in corresponding changes being made to existing § 983.11, Districts; § 983.21, Part and subpart; and existing § 983.32, Establishment and membership. Existing sections 983.21 and 983.32

would also be redesignated as § 983.20 and § 983.41, respectively.

2. Proposal 2 would amend the order to authorize the Committee to reimburse handlers for travel and shipping costs related to aflatoxin inspection, under certain circumstances. This proposal would amend existing § 983.44, Inspection, certification and identification, and redesignate it as § 983.56.

3. Proposal 3 would amend the order to add a new § 983.46, Research, that would authorize the Committee to engage in research projects with the approval of USDA. This proposed amendment would also require corresponding changes to existing § 983.34, Procedure, to establish voting requirements for Committee recommendations concerning research. It would also require corresponding changes to existing § 983.46, Modification or suspension of regulations, and § 983.54, Contributions. The existing § 983.34, § 983.46, and § 983.54 would also be redesignated as § 983.43, § 983.59, and § 983.72, respectively.

4. Proposal 4 would amend the order to provide broad authority for aflatoxin regulations by revising existing § 983.38, Aflatoxin levels, and redesignating it as § 983.50. This proposal would also require corresponding changes to existing § 983.40, and redesignating that section as § 983.52. It would also require corresponding changes to § 983.1, Accredited laboratory.

5. Proposal 5 would amend the order to provide broad authority for quality regulations by revising existing § 983.39, Minimum quality levels, and redesignating it as § 983.51. It would also remove provisions from that section concerning specific quality regulations that are currently suspended. This amendment would also require corresponding changes by removing currently suspended language in § 983.6, Assessed weight; revising § 983.7, Certified pistachios; removing existing § 982.19, Minimum quality requirements and § 983.20, Minimum quality certificate; revising existing § 983.31, Shelled pistachios; revising existing § 983.41, Testing of minimal quantities, and removing currently suspended language in that section; revising existing § 983.42, Commingling; and revising existing § 983.45, Substandard pistachios. Sections 983.31, 983.41, 983.42, and 983.45 would be redesignated as sections 983.30, 983.53, 983.54, and 983.57, respectively.

6. Proposal 6 would amend the order to add a new § 983.58, Interhandler Transfers. This proposal would modify

existing authority under the order by expanding the range of marketing order obligations that may be transferred between handlers when pistachios are transferred between handlers. This proposal would require a corresponding change to existing § 983.53, Assessments, and would redesignate § 983.53 as § 983.71.

7. As a result of the proposed amendments and corresponding changes to the order summarized above, numerous administrative changes to the order would also be required. Such changes include numerical redesignations to several sections of the order, changes to cross references of section numbers in regulatory text as a result of the numerical redesignations, and removal of obsolete provisions. In addition, a change would be made to amend existing § 983.70 and redesignate it as § 983.92.

In addition to the proposed amendments to the order, AMS proposed to make any such additional changes as may be necessary to the order to conform to any amendment that may result from the hearing.

Fourteen industry witnesses testified at the hearing. These witnesses represented pistachio producers and handlers in the production area, as well as Committee staff, and all were supportive of the proposed amendments.

At the conclusion of the hearing, the Administrative Law Judge established a deadline of September 26, 2008, for interested persons to file proposed findings and conclusions or written arguments and briefs based on the evidence received at the hearing. Five briefs were filed during that period; all supported the proposed amendments.

#### Material Issues

The material issues presented on the record of hearing are as follows:

(1) Whether to amend the order to expand the production area to include the States of Arizona and New Mexico and to make related changes regarding Committee membership, representation, and voting requirements;

(2) Whether to amend the order to authorize the Committee to reimburse handlers for travel and shipping costs related to aflatoxin inspection, under certain circumstances;

(3) Whether to amend the order to add a new section that would authorize the Committee to engage in research projects with the approval of USDA;

(4) Whether to amend the order to provide broad authority for aflatoxin regulations;

(5) Whether to amend the order to provide broad authority for quality

regulations and to remove existing provisions from the order concerning specific quality regulations that are currently suspended; and,

(6) Whether to amend the order to add specific provisions for interhandler transfers of marketing order obligations. This proposal would modify existing authority under the order by expanding the range of marketing order obligations that may be transferred between handlers when pistachios are transferred between handlers.

Numerous administrative changes to the order would also be required if the proposed amendments described in the material issues above are adopted. Such changes include numerical redesignations to several sections of the order, changes to cross references of section numbers in regulatory text as a result of the numerical redesignations, and removal of obsolete provisions.

#### Findings and Conclusions

The following findings and conclusions on the material issues are based on evidence presented at the hearing and the record thereof.

#### Material Issue Number 1—Expanding the Production Area

Section 983.26 of the order should be amended to expand the production area to include the States of Arizona and New Mexico. The production area is currently limited to the State of California. This section should also be redesignated as § 983.25. Sections 983.11, Districts; 983.21, Part and subpart; and 983.32, Establishment and membership, should also be amended to reflect the proposed addition of Arizona and New Mexico to the order. Section 983.34 should likewise be amended to revise the voting requirements needed to approve Committee actions due to the above proposed changes. Existing sections 983.21 and 983.32 should also be redesignated as sections 983.20 and 983.41, respectively.

The order regulating the handling of pistachios grown in the State of California was established in 2004. The primary feature of the order is a quality provision that requires pistachios to be sampled and tested for aflatoxin prior to shipment to domestic markets. Such shipments of pistachios may not exceed a tolerance level for aflatoxin of 15 parts per billion. Aflatoxin is a carcinogen that is considered to be harmful to humans if ingested.

According to the record, one of the primary reasons the order was established was to assure consumers of a high quality product through the aflatoxin program. Reducing the risk of potential aflatoxin incidence in

pistachios would help to bolster consumer confidence in the quality of pistachios, thus leading to increased demand and improved grower returns. An economic study that included a cost-benefit analysis of the aflatoxin provisions of the pistachio marketing order was included in the hearing record as hearing exhibit 10. This study's findings, which are discussed in more detail in the Regulatory Flexibility Analysis section of this recommended decision, indicate the order's aflatoxin program results in a positive benefit to both the industry and consumers over various time horizons.

Witnesses testified at the hearing that this proposal is intended to further the goal of improving the quality of pistachios available to consumers by reducing the risk of potential aflatoxin incidence in pistachios through expanding the scope of the regulatory requirements to include all the areas of the United States where pistachios are produced commercially. Record evidence indicates that area includes the States of California, Arizona, and New Mexico. The record shows that while California accounts for over 95 percent of commercial production (up to 98 percent in some years), the States of Arizona and New Mexico are also considered to have commercially significant production. Pistachios are also grown in small quantities in Texas, Utah, and Nevada. Witnesses testified that production from those states account for less than .02 percent (two one-hundredths of one percent) of the pistachios grown in the United States. Witnesses also testified that pistachios produced in those states are considered to be the result of hobby farming and are not commercially significant in volume. California, Arizona, and New Mexico account for over 99.99 percent of domestic pistachio production and essentially all of the production used for commercial purposes, according to the record.

Witnesses from both California and the new states proposed to be added to the production area (Arizona and New Mexico) testified in support of this proposal. They testified that the implications from an aflatoxin contamination incident in pistachios, whether within the current production area or otherwise, would have an adverse impact on the entire U.S. pistachio industry, citing a previous example. Examples of other events also were cited in other agricultural commodities.

Therefore, they believe it is important to the U.S. pistachio industry that the production area be expanded to cover

all commercial pistachio producing areas in the U.S.

Witnesses from California testified that the aflatoxin testing program under the order has been successful since it was implemented in 2005. Through the aflatoxin sampling and testing program, pistachio lots exceeding the maximum tolerance for aflatoxin have been prevented from being shipped to markets.

Witnesses testified that to further improve the quality of product to consumers and to reduce the likelihood of an aflatoxin incident in the pistachio industry, all product destined for commercial shipment should be subject to the same aflatoxin sampling, testing, and maximum tolerance requirements. Witnesses testified that ensuring consumers of a good quality product will increase consumer confidence in pistachios, leading to increased demand and improved grower returns.

Witnesses from Arizona and New Mexico testified in support of those states being included under the order. They recognized the need to ensure that consumers receive a good quality product. They also recognized that an aflatoxin incident in any one commercial producing area could adversely affect other commercial producing areas.

Witnesses from Arizona and New Mexico testified that pistachios from those areas should not have any specific problems or issues that would make it difficult to meet aflatoxin requirements, when compared to California-grown pistachios. They testified that Arizona and New Mexico produce a high quality product and have not had any known problems with aflatoxin. They do not anticipate any problem meeting the aflatoxin requirements currently in effect under the order. Witnesses from Arizona and New Mexico also expressed that they did not believe that pistachios grown in those states would have any trouble meeting other quality regulations that may be established in the future.

Witnesses from Arizona and New Mexico also testified that they were aware there are certain costs associated with being included under the order. However, they testified that they believe the benefits associated with being included under the order would outweigh the costs.

Witnesses also testified that including Arizona and New Mexico under the existing order would be more desirable than establishing a separate order or orders applicable to their state or states. They stated that it is important that uniform quality and testing requirements be applied consistently to

all commercially produced pistachios in the U.S., and the three states should be considered one production area under the order.

In addition to having consistent quality requirements, witnesses testified that it would be more cost effective to be included under the existing pistachio order than to establish a separate order or orders. Certain fixed costs are inherent in administering a marketing order program, such as staffing costs, office space, office equipment and supplies, etc. The existing marketing order has this infrastructure in place. If a separate order or orders were established, these costs would have to be funded separately, which would likely result in higher program administration costs than if Arizona and New Mexico were added to the existing order.

Section 983.11, Districts, should be amended to add a new district for Committee representation purposes. Expanding the production area to include Arizona and New Mexico warrants a change to the order with respect to geographic representation on the Committee and membership on the Committee. Currently, the order provides for three districts within the State of California. Witnesses supported establishing a new district encompassing the States of Arizona and New Mexico for Committee representation purposes. This new district would be District 4.

Witnesses from California, Arizona, and New Mexico testified that one member representing Arizona and New Mexico would provide the new District 4 with adequate representation on the Committee. One position on the Committee is equal to  $\frac{1}{12}$  of the Committee positions, or 8.3 percent. Based on data presented at the hearing, the 5-year average production of Arizona and New Mexico production was about 3.5 percent of the 5-year average of U.S. production for the period 2002 through 2006.

Section 983.32, Establishment and membership, should be amended to reflect the addition of a new district and an additional member on the Committee. Witnesses testified in support of changes to this section to reflect the addition of the new District 4 encompassing the States of Arizona and New Mexico, an increase in Committee size from eleven to twelve total members, and an increase in the number of producer members on the Committee from eight to nine. This section should also be redesignated as § 983.41.

As a result of the inclusion of Arizona and New Mexico under the order, it is

recommended that § 983.34, Procedure, be amended to revise the voting requirements necessary to approve certain actions of the Committee. Witnesses testified that a unanimous vote of the Committee should be required in order to approve actions on research, aflatoxin regulations, and quality regulations. This would ensure that broad industry support exists before actions of the Committee regarding these issues are taken. According to the record, the more stringent voting requirements are also intended to ensure support from representatives of Arizona and New Mexico. Changes to § 983.34 pertaining to unanimous consent are discussed further under Material Issues 3, 4, and 5 in this recommended decision. Section 983.34 should also be amended to require 8 votes on issues concerning inspection programs and the establishment of the Committee. Those issues currently require 7 votes; the increase to 8 votes reflects the increase in Committee membership from 11 to 12 members, thus the proportion of votes to pass actions on these issues would remain nearly the same. Section 983.34 should also be redesignated as § 983.43.

Finally, a corresponding change to § 983.21, Part and subpart, is necessary to include Arizona and New Mexico as part of the area to which the order and regulations pertain. This section should also be redesignated as § 983.20.

Record evidence supports expanding the production area to include Arizona and New Mexico. This would help to ensure a uniform and consistent quality product from all commercial producing areas in the U.S., with the intent of increasing consumer confidence in pistachios, leading to increased demand and improved grower returns.

Record evidence also supports providing for a representative on the Committee to represent the proposed addition of the States of Arizona and New Mexico, which requires a modification to the representation districts and an increase in the size of the Committee from eleven members to twelve members. Record evidence also indicates that inclusion of Arizona and New Mexico under the existing order would be more cost effective and more desirable than establishing separate orders. Including Arizona and New Mexico in the production area would establish the smallest regional production area that is practicable. According to the record, voting requirements should also be changed to help ensure broad industry support exists for certain Committee actions.

There was no opposition testimony given against these proposed

amendments. Witnesses from the producing areas of California, Arizona, and New Mexico all expressed support for the proposed amendments. For the reasons stated herein, it is recommended that § 983.26, Production area, be amended to expand the production area under the order to include the States of Arizona and New Mexico. It is also recommended that corresponding changes be made to §§ 983.11, Districts, 983.21, Part and subpart, 983.32, Establishment and membership, and 983.34, Procedure. The proposed addition of new sections to the order as discussed under material issues 3 and 6 of this recommended decision would require numerical redesignation of several sections of the order, including some of those discussed under this material issue. It is therefore also recommended that §§ 983.21, 983.26, 983.32, and 983.34 be redesignated as §§ 983.20, 983.25, 983.41, and 983.43, respectively.

#### **Material Issue Number 2— Reimbursement of Handler Inspection Costs**

Section 983.44 of the order should be amended to provide authority for the Committee to reimburse handlers for certain costs associated with aflatoxin testing of pistachios, with approval of USDA. This section should also be redesignated as § 983.56. Under this proposed amendment, the Committee could recommend to USDA informal rulemaking that would specify parameters for such reimbursement to handlers operating in areas where inspection costs for inspector travel and shipment of samples of pistachios for aflatoxin testing exceed the average of those same costs for comparable handling operations in Districts 1 and 2.

The order requires pistachios to be sampled and tested at a USDA laboratory or a USDA-approved laboratory to determine the aflatoxin level prior to shipment. Section 983.44 of the order currently provides that all inspections shall be at the expense of the handler. According to hearing evidence, typical costs associated with aflatoxin inspection include: travel for inspectors, charges for retrieving samples, shipment of samples to laboratories, laboratory analysis, and the value of the product utilized during the testing process.

Witness testimony indicates that in the State of California, handler's facilities are typically in close proximity to Federal-State Inspection Service (Inspection) offices. Inspectors therefore have relatively short distances to travel to perform the necessary services related to the aflatoxin program. In most cases,

there is little or no cost for inspectors to travel to handler's facilities for aflatoxin inspections. In addition, handler's facilities are relatively close to laboratories that perform the analytical aflatoxin testing of the product. In some cases, handler facilities have on-site laboratories. Costs of shipping samples to laboratories for analyses are thus relatively minor and in some instances non-existent.

In contrast, witnesses testified that the pistachio handling operations in Arizona and New Mexico are located sizeable distances from Inspection personnel. According to the record, in some instances the nearest available inspector is over 200 miles from the handler's facility. Costs for inspector travel would thus be significant in Arizona and New Mexico in such cases.

Witnesses also testified that there are no approved laboratories in Arizona or New Mexico for analyzing pistachio samples for aflatoxin. Further, the volume of pistachios produced and handled in Arizona and New Mexico would not warrant the establishment of analytical laboratories for testing pistachios for aflatoxin in those states. Samples of pistachios would therefore need to be shipped to California to an approved laboratory for aflatoxin analysis. As a result, costs of shipping samples would also be higher in Arizona and New Mexico than in California. According to the record, there would be no appreciable difference in other costs associated with the aflatoxin program in Arizona, New Mexico, and California.

Data was presented at the hearing to illustrate the potential difference in costs associated with aflatoxin inspections in California, Arizona, and New Mexico. As discussed above, these differences are attributed to inspector travel costs and shipping costs. Individual costs can vary depending on individual circumstances, but inspection costs associated with the aflatoxin program would be significantly higher in Arizona and New Mexico than California. A detailed analysis of the costs and possible reimbursement is discussed in the Regulatory Flexibility Analysis section of this recommended decision, as well as the benefits.

Record evidence supports adding authority to the order to allow the Committee to equitably reimburse handlers for certain costs associated with aflatoxin testing. The intent of this proposed amendment is to recognize potential differences in costs, and provide a method whereby the costs of inspection for the aflatoxin program can be more equitably distributed so that

Arizona and New Mexico industry members would not be unduly burdened as a result of their inclusion under the order. As previously discussed, this proposal would only provide authority for the Committee to recommend to USDA criteria for reimbursement, and informal rulemaking would be required prior to implementation.

There was no opposition testimony to this proposed amendment. For the reasons stated above, it is recommended that § 983.44, Inspection, certification, and identification, be amended to authorize the Committee, with approval of the Secretary, to reimburse handlers for inspection costs for inspector travel and shipment of samples for aflatoxin testing that exceed the average of those same inspection costs for comparable handling operations in Districts 1 and 2. Informal rulemaking to establish rules and regulations outlining the parameters of reimbursement would be required to implement this authority. Section 983.44 would also be redesignated as § 983.56.

### Material Issue Number 3—Research

A new section 983.46, Research, should be added to the order. This proposed amendment would provide authority for the Committee to engage in research projects with the approval of USDA. Corresponding changes should be made to existing § 983.46, Modification or suspension of regulations, to reflect changes to other sections of the order. Corresponding changes should also be made to § 983.54, Contributions, to add authority for the Committee to accept voluntary contributions for research purposes. Additionally, corresponding changes to § 983.34, Procedure, should be made to establish voting requirements for Committee recommendations concerning research. Finally, existing §§ 983.34, 983.46, and 983.54 should be redesignated as §§ 983.43, 983.59, and 983.72, respectively.

Currently, the order does not contain authority for the Committee to recommend or conduct research projects. Witnesses testified that at the time the order was promulgated, the California Pistachio Commission (CPC), a state marketing program, supported the industry's production and nutrition research. Therefore, the industry did not believe that providing research authority in the order was necessary. However, CPC was discontinued in 2007, and the responsibility for production research was temporarily assumed by individual entities and other industry organizations in order to provide for continuity of ongoing

projects. In December 2007, the California Pistachio Research Program (CPRP), a state program, was enacted under the authority of the California Marketing Act of 1937, Chapter 1, Part 2, Division 21 of the California Food and Agriculture Code, as amended. CPRP is authorized to conduct production and post-harvest research, for which it may collect limited assessment revenues.

The record indicates that CPRP is not authorized to conduct nutrition research. According to witnesses, nutrition research, which is designed to determine the effects of pistachio consumption on human health, is critical to the marketing of pistachios. To fill this critical need, witnesses supported amending the order to authorize the Committee to recommend, conduct, and fund research projects designed to determine the effects of pistachio consumption on human health.

One witness described previous industry research on the effects of cholesterol on heart health as related to pistachio consumption. The witness suggested that that type of research might be pursued by the Committee.

Witness testimony also supported the addition of authority to recommend, conduct, and fund research projects to improve the efficient production and postharvest handling of pistachios. The record shows that the ability to establish production research projects in response to immediate needs is important to the industry. Witnesses cited two examples of critical production research needs in the past. In the 1970's and 1980's, *Verticillium* wilt, which ultimately leads to tree death, threatened the existence of the pistachio industry in California. Through collaborative research efforts, rootstocks resistant to *Verticillium* wilt were developed and are today widely used in the industry. In the 1990's, *Botryosphaeria* blight, which attacks the nut clusters and foliage, reached epidemic proportions in northern California. According to witness testimony, industry-funded research efforts led to the development of cultural practices and fungicides that now effectively control the disease. One witness emphasized the fact that it is difficult to anticipate what production problems could arise in the future, but that the Committee could best prepare itself for emergencies by maintaining a stable funding source to address those needs.

Witnesses testified that the Committee does not intend to duplicate activities conducted by the CPRP if it is authorized to conduct research programs under the order. Witnesses

explained that the Committee manager and staff, as well as many Committee members, are informed about CPRP's activities and that their participation in Committee deliberations would ensure that research activities would not be duplicative. In addition, witnesses testified that the CPRP program has a cap on the amount of assessments it may collect. This cap could limit the industry's ability to fund research projects at a level necessary to address certain issues, especially in emergency situations. Nonetheless, if a situation occurred where the CPRP could not fund critical production or post harvest research needed by the industry, the research could be funded under the Federal marketing order and still avoid duplication.

Funding for the Committee's projects would come from the collection of assessments from pistachio handlers, which is authorized under the order. Currently, the Committee's assessments cover the costs of administration of the order and operation of its other program activities. Although the Committee's assessment rate could increase to cover the costs of any research projects they might establish, record evidence indicates that the benefits to be derived from such research are expected to exceed related assessment costs.

In conjunction with the authority to establish research programs, the Committee proposed amending § 983.54, Contributions, to provide authority to accept voluntary contributions toward research programs. Currently, the Committee is authorized to accept voluntary contributions toward the administrative costs of the order. Witnesses testified that voluntary contributions could augment or replace assessment funds used for research projects. According to witnesses, contributors could designate that contributions be used for the Committee's research programs, but they would not retain control of how the Committee uses the funds. It would be the responsibility of the Committee to allocate those funds appropriately.

Addition of the authority to conduct research programs would merely authorize the Committee to recommend such programs and, following USDA approval, to plan and conduct those projects. Witnesses explained that if authority to conduct research programs is added to the order, the Committee might appoint a new subcommittee to consider research proposals and make recommendations for specific projects to the Committee.

The Committee's amendment proposals included a revision to their voting procedures under § 983.34 that

would specify that recommendations regarding research projects should require the approval of the entire Committee. Witnesses testified that requiring unanimous approval would ensure consensus from all sectors of the industry. Witnesses testifying in favor of expanding the production area to include Arizona and New Mexico (Material Issue No. 1) explained that requiring unanimous Committee approval for research recommendations would assure the industry in those states that their interests are considered in Committee decision-making with regard to potential research projects.

The Committee also recommended amending the existing § 983.46, Modification or suspension of regulations. These changes would update cross-references to other sections of the order that are being proposed to change, and removes a redundant reference to voting requirements that is already included under another section of the order.

No testimony opposing this proposal was provided at the hearing. For the reasons stated above, it is recommended that a new § 983.46, Research, be added to the order to provide authority to establish and conduct production, post harvest, and nutrition research projects. Corresponding changes should be made to § 983.34, Procedure, to establish voting requirements for Committee recommendations concerning research; § 983.46, Modification or suspension of regulations, to update cross-references and remove redundant provisions; and to § 983.54, Contributions, to authorize the Committee to accept voluntary contributions toward research programs. Finally, existing §§ 983.34, 983.46, and 983.54 should be redesignated as §§ 983.43, 983.59, and 983.72, respectively.

#### **Material Issue Number 4—Aflatoxin Regulation**

Section 983.38, Aflatoxin levels, should be renamed Aflatoxin regulations, and amended to provide broad authority for aflatoxin regulation under the order. This would require removing extensive specific regulatory provisions in the order and replacing them with a provision providing general authority for aflatoxin regulation and authority to issue specific regulatory requirements through the informal rulemaking process. The current regulatory provisions that are removed from the order could then be proposed as rules and regulations through the informal rulemaking process. This section should also be redesignated as § 983.50. Corresponding changes to § 983.40, Failed lots/rework procedure

and § 983.1, Accredited laboratory, should also be made, and § 983.40 should be redesignated as § 983.52. In addition, § 983.34, Procedure, should be amended to require unanimous consent by the Committee to approve actions concerning aflatoxin levels, and § 983.34 should be redesignated as § 983.43.

Currently, the order provides authority for regulation of aflatoxin levels in pistachios, and specific regulatory requirements such as sampling, testing, and certification are also included in the order. The order provisions also allow for modification of the regulatory requirements by issuing rules and regulations through the informal rulemaking process.

Witness testimony indicated that including specific regulatory details in the order language, with authority to change such requirements through the informal rulemaking process, is not the most desired way to structure a marketing order for another reason also. If specific regulatory requirements in the order are subsequently modified through informal rulemaking, regulatory language in the order would be different than regulatory language in the rules and regulations, which might cause confusion.

Witness testimony stated that a more appropriate approach is to provide general authority for aflatoxin regulations in the order language, and provide authority to issue rules and regulations through the informal rulemaking process to implement specific regulations and procedures. Witnesses testified that it is important to maintain continuity in the existing aflatoxin regulations at this time. With this approach, the existing aflatoxin requirements could be proposed in the informal rulemaking process.

Hearing testimony also supported amending § 983.34 to require a unanimous vote of the Committee on any recommendations concerning aflatoxin regulations. The record indicates that it is important to have widespread industry support prior to implementing or changing aflatoxin regulations. With the unanimous consent provision, the States of Arizona and New Mexico would be entitled to a voting representative on the Committee and would need to vote in favor of any recommendation by the Committee with respect to regulations in order for such action to be approved.

A witness testified that a corresponding amendment to § 983.40, Failed lots/rework procedure should be made. General authority would be provided in this section of the order to authorize establishment of procedures

to rework product that failed the aflatoxin requirements. Similar to the preceding amendment to § 983.38, detailed procedures currently contained in § 983.40 would be established as rules and regulations through informal rulemaking in order to avoid an interruption in the existing procedures. Section 983.40 should also be redesignated as § 983.52.

Witnesses also testified in support of amending the order to incorporate a corresponding change to § 983.1, Accredited laboratory. This change would revise the definition of accredited laboratory by removing a restriction that limited accredited laboratories to only aflatoxin testing. Testimony noted that this change would give flexibility to this definition, given the previously discussed changes to quality regulation. This discussion appears in material issue number 5.

Record evidence supports amending § 983.38, Aflatoxin levels, renaming it Aflatoxin regulations, and redesignating it as § 983.50. Corresponding changes to § 983.40, Failed lots/rework procedure and § 983.1, Accredited laboratory, are also recommended, and § 983.40 should be redesignated as 983.52. Record evidence also supports amending Section 983.34, Procedure, and redesignating it as 983.43. No opposition testimony was given regarding these proposed amendments, and they are thus recommended for adoption.

#### **Material Issue Number 5—Quality Regulation**

Section 983.39, Minimum quality levels, should be renamed Quality regulations, and should be amended to provide broad authority for quality regulation under the order. This would require removing extensive regulatory provisions in the order pertaining to minimum quality levels and replacing them with a provision providing general authority for quality regulation and authority to issue specific quality regulatory requirements through the informal rulemaking process. Section 983.39 should also be redesignated as § 983.51. Corresponding changes should also be made to § 983.6, Assessed weight; § 983.7, Certified pistachios; § 983.31, Substandard pistachios; § 983.41, Testing of minimal quantities; § 983.42, Commingling; and § 983.45, Substandard pistachios. Sections 983.19 and 983.20 should be removed as a result of this amendment. Section 983.34, Procedure, should be amended to require a unanimous vote of the Committee to approve actions concerning quality regulations. Finally, Sections 983.31, 983.41, 983.42, and

983.45 would be redesignated as sections 983.30, 983.53, 983.54, 983.57, respectively.

Witnesses testified that specific requirements pertaining to quality levels are contained in the provisions of the order. These provisions were in effect from 2004 through 2007. In December of 2007, the requirements were suspended because they were no longer meeting the industry's needs. Witness testimony indicated that while there is no desire to reinstate the specific quality regulations previously in effect or any intent at this time to recommend any form of quality regulation, the industry would like to retain authority to implement some form of quality regulation in the future if circumstances warrant. Adding broad authority for quality regulation would provide flexibility in the order because it would enable the industry to establish additional requirements for quality regulations in addition to the current requirements in the order.

Witnesses also testified that adding broad authority for quality regulation, with the ability to implement and change requirements through informal rulemaking, could be especially beneficial in the event the proposal to expand the production area to include Arizona and New Mexico is adopted. Growing conditions and other factors that impact the quality of pistachios may vary in different states. Record testimony indicates this proposal provides flexibility to take into account factors affecting the quality of pistachios from different areas, and other pertinent information in developing quality regulations that may be recommended in the future. Any regulations, if established, could be revised through the informal rulemaking process to adapt to changing industry conditions and to accommodate the various growing regions, if necessary.

Witnesses also testified that § 983.34 should be amended to require a unanimous vote of the Committee in order to recommend adopting or changing potential quality regulations established under this proposed new order authority. Witnesses testified that it was important to have widespread industry support prior to implementing any new quality regulations. According to testimony, the unanimous consent provision would help to ensure that any potential quality regulations would meet the needs of the States of Arizona and New Mexico, as well as California. Arizona and New Mexico would be entitled to a voting representative on the Committee and would need to vote in favor of any recommendation by the Committee with respect to quality

regulations in order for such action to be approved.

Witness testimony supported several corresponding changes to certain definitions in the order that are associated with the existing quality provisions in the order. The definition of Assessed weight, § 983.6, should be amended by removing references to the existing quality regulations and replacing such references with a provision that would allow assessed weight to be based on such quality requirements that may be established in the future. The definition of Certified pistachios, § 983.7, should also be amended by removing a reference to specific existing aflatoxin inspection and minimum quality certificates and replacing such reference with a reference to general inspection and certification requirements. The definition of Substandard pistachios, § 983.31, should similarly be amended by removing a reference to existing aflatoxin and minimum quality regulations and replacing such reference with a reference to sections of the order under which regulations may be established. Section 983.31 should also be redesignated as 983.30.

Witness testimony also supported amending § 983.41, Testing of minimal quantities, to remove a provision pertaining to an exemption from minimum quality requirements for handlers handling less than one million pounds of pistachios. That provision would be replaced by a more general provision that would allow the Committee, with approval of the Secretary, to establish regulations regarding minimal quantities in the event quality regulations are established in the future. The proposed language for this section published in the Notice of Hearing referenced specific aflatoxin levels. However, at the hearing, a witness clarified that the language should be revised to conform with other proposed amendments to the order, specifically by replacing references to specific levels of aflatoxin with references to levels of aflatoxin that may be established by the committee and approved by the Secretary. Therefore, AMS has revised the proposed language accordingly. Finally, this section should also be redesignated as § 983.53.

Witnesses also testified in support of amending § 983.42, Commingling, to clarify that if a lot of certified pistachios is commingled with a lot of uncertified pistachios, the resulting lot would lose its certification. This section should be redesignated as § 983.54.

The record also supports amending § 983.45, Substandard pistachios, by removing a reference to specific existing

aflatoxin requirements and quality requirements and replacing that reference with a more general reference to aflatoxin and quality requirements. This section should be redesignated as § 983.57.

Finally, the existing § 983.19, Minimum quality requirements, should be removed from the order because it pertains to requirements that would no longer be in effect as a result of the recommended amendments to the order. Similarly, existing § 983.20, Minimum quality certificate, should be removed from the order because it references a certificate that would no longer exist as a result of these amendments.

Record evidence supports amending the order to add broad authority for quality regulations and removing provisions concerning specific minimum quality levels. This would provide authority for the Committee to develop and recommend quality regulations in the future, if deemed appropriate, and any such regulations could take into account the new producing areas being proposed for addition to the order. Informal rulemaking would be required to implement any future quality regulations, and modifications thereto could also be accomplished through informal rulemaking. Record evidence also supports the corresponding changes as discussed in this material issue.

No testimony in opposition to this proposed amendment and corresponding changes was given. For the reasons stated above, it is recommended that § 983.39, Minimum quality levels, be renamed Minimum quality regulation, amended, and redesignated as 983.51. It is also recommended that corresponding changes be made to § 983.6, Assessed weight; and § 983.7, Certified pistachios. Corresponding changes are also recommended to § 983.31, Substandard pistachios; § 983.41, Testing of minimal quantities; § 983.42, Commingling; and § 983.45, Substandard pistachios, and those sections be redesignated as §§ 983.30, 983.53, 983.54, and 983.57, respectively. It is also recommended that § 983.34, Procedure be amended. Finally, it is recommended that § 983.19, Minimum quality requirements and § 983.20, Minimum quality certificate, be removed.

#### **Material Issue Number 6—Interhandler Transfers**

A new section, § 983.58, Interhandler Transfers, should be added to the order. This recommended section would allow handlers to transfer marketing order obligations such as aflatoxin testing requirements, assessments, inspection



requirements, or any other marketing order requirements, to the receiving handler if pistachios are transferred from one handler to another. The recommended provisions would also allow the Committee, with approval of the Secretary, to establish methods and procedures, including reports, to maintain an accurate accounting of the pistachios and accompanying marketing order obligations. The existing § 983.58 should be redesignated as § 983.80. Section 983.53, Assessments, should also be amended to provide an exception from assessment payment for those handlers who transfer the obligation to another handler pursuant to the proposed new § 983.58. Section 983.53 should also be redesignated as § 983.71.

According to witness testimony, this provision would provide flexibility in administering the marketing order, especially with regard to the proposed new District 4, the States of Arizona and New Mexico. Under the order, hulling and drying of pistachios is considered a handling function. Persons performing handling functions are considered to be handlers, and marketing order obligations are applied to handlers.

Witnesses testified that in the proposed District 4, some small producers may not have access to nearby processing facilities, and as a result must hull and dry their product prior to delivery to a facility that further processes and packages it and puts it into the stream of commerce. Under the order, such small producers would be considered handlers by definition, and would be subject to marketing order obligations such as reporting, aflatoxin testing, and payment of assessments. This proposed amendment would allow such grower/handlers to transfer the marketing order obligations to the subsequent handler that further processes the pistachios and places them into the current of commerce. This would help to ensure that marketing order obligations are met.

According to testimony, this amendment would provide flexibility under the order to allow producers and handlers in District 4 to continue their current business practices.

Witness testimony also supported a corresponding change to § 983.53, Assessments. This section of the order requires each handler to pay assessments under the order. The proposed change corresponds with the interhandler transfer authority by excepting from assessment payment those handlers who transfer the obligation to another handler pursuant to the proposed new § 983.58. Section

983.53 should also be redesignated as § 983.71.

Record evidence supports these changes to the order. No testimony in opposition to the proposed changes was given at the hearing. For the reasons stated above, it is recommended that a new § 983.58, Interhandler transfers, be added to the order; a corresponding change be made to § 983.53, Assessments; and that § 983.53 be redesignated as § 983.71.

#### **Material Issue Number 7— Administrative Changes**

The proposed amendments discussed in Material Issues 1 through 6 necessitate several administrative changes to the order. Such changes include numerical redesignations to several sections of the order, changes to cross references of section numbers in regulatory text as a result of the numerical redesignations, and removal of obsolete provisions. These changes are summarized below.

Section 983.8, Committee, should be amended by removing a reference to § 983.32 and replacing it with a reference to § 983.41. Section 983.23, Pistachios, should be redesignated as § 983.22 and amended by adding “and species” after the word “genus”, as this was inadvertently omitted when the order was promulgated. Section 983.33, Initial members and nomination of successor members, should be redesignated as § 983.42 and amended by removing the word “grower” and replacing it with the word “producer”, as that term is defined in the order; and references to §§ 983.32, 983.33, and 983.34 should be removed and replaced with references to §§ 983.41, 983.42, and 983.43, respectively. Section 983.34 should be redesignated as § 983.43 and in paragraphs (a)(1) and (2), the word “level” should be removed and replaced with the word “regulation” to correspond to changes made to the titles of §§ 983.51 and 983.52. Section 983.56 should be redesignated as § 983.74 and amended by removing the reference to § 983.53 and replacing it with a reference to § 983.71. Section 983.57 should be redesignated as § 983.75 and amended by removing the reference to “§§ 983.47 through 983.56” and replacing it with “§§ 983.64 through 983.74”. Section 983.58, Compliance, should be redesignated as § 983.80 as a result of the proposed new § 983.58, Interhandler transfers. Section 983.65 should be redesignated as § 983.87 and amended to remove a reference to “§ 983.66 or § 983.67” and replacing it with “§ 983.88 or § 983.89”.

Section 983.70 should be redesignated as § 983.92 and amended by removing

references to §§ 983.38, 983.45, and 983.53 and replacing them with references to §§ 983.50, 983.58, and 983.71, respectively. Redesignated § 983.92 should further be amended to remove the words “marketing” and “subpart” and replacing them with “production” and “section”, respectively. These changes would correct technical errors in the existing order provisions. This section also should be amended by replacing a reference to an exemption of 1,000 pounds with reference to an exemption of 5,000 pounds to update this order provision, given the current rules and regulations that were implemented under that section after the order was promulgated.

AMS is rewording the language that appears in the redesignated §§ 983.50, 983.52, 983.53(a), 983.59(c), and 983.92 to conform to other references to informal rulemaking that currently appear in the order. This language clarifies that the committee may establish, with the Secretary’s approval, rules and regulations regarding implementation of authorities provided in those sections. AMS is also rewording the language in § 983.56 to correctly state that handlers may be “reimbursed” rather than “compensated” by the committee regarding inspection costs.

The following table identifies changes that should be made regarding redesignation of sections to the order that have not been previously discussed in this recommended decision.

Old section	New section
983.22	983.21
983.24	983.23
983.25	983.24
983.27	983.26
983.28	983.27
983.29	983.28
983.30	983.29
983.35	983.44
983.36	983.45
983.37	983.47
983.43	983.55
983.47	983.64
983.48	983.65
983.49	983.66
983.50	983.67
983.51	983.68
983.52	983.70
983.55	983.73
983.59	983.81
983.60	983.80
983.61	983.83
983.62	983.84
983.63	983.85
983.64	983.86
983.66	983.88
983.67	983.89
983.68	983.90
983.69	983.91



There was no opposition testimony to these proposed changes. Record evidence supports these changes and they are therefore recommended for adoption.

### Conforming Changes

AMS also proposed to make such changes as may be necessary to the order to conform to any amendment that may result from the hearing. Other than previously discussed, no additional conforming changes have been made.

### Small Business Considerations

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

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions so that small businesses will not be unduly or disproportionately burdened. Marketing orders and amendments thereto are unique in that they are normally brought about through group action of essentially small entities for their own benefit.

Small agricultural service firms, which include handlers regulated under the order, have been defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of less than \$7,000,000. Small agricultural producers have been defined as those with annual receipts of less than \$750,000.

There are approximately 24 handlers and approximately 800 producers of pistachios in the State of California. It is estimated that approximately 50 percent of the processing handlers had annual receipts of less than \$7,000,000, according to information presented at the hearing. In addition, based on the number of producers, the size of the 2007 crop, and the average producer price per pound data reported by the National Agricultural Statistics Service (NASS), the average producer revenue for the 2007 crop was \$702,000. It is estimated that 85% of the producers in California produced less than \$750,000 worth of pistachios and would thus be considered small businesses according to the SBA definition.

Based on information presented at the hearing, it is estimated that there are approximately 40 to 50 growers of pistachios in Arizona and approximately 30 growers in New Mexico. It is also estimated that there are 2 handlers in Arizona and 3 handlers in New Mexico. Although no official data is available, based on hearing testimony it is estimated that

the majority of producers in Arizona and New Mexico are small businesses according to SBA's definition. It is also estimated that all of the handlers in New Mexico are small businesses and one of the handlers in Arizona is a small business.

California accounts for the vast majority of pistachio acreage and production in the U.S. According to data from the National Agricultural Statistics Service (NASS), California's total acreage in 2007 was reported at 176,400 acres. While no 2007 acreage data is available from NASS for Arizona and New Mexico, in 2006, Arizona acreage was reported at 2,500 acres while New Mexico acreage was reported at 1,350 acres in 2002. Two witnesses from New Mexico testified that they estimate acreage in New Mexico to be about 450 acres in 2007. Pistachios are also grown in small quantities in Texas, Utah, and Nevada. However, witnesses testified that pistachios produced in those states are considered to be the result of hobby farming and are not commercially significant in volume. California, Arizona, and New Mexico account for over 99.99 percent of domestic pistachio production and essentially all of the production used for commercial purposes, according to the record.

The order regulating the handling of pistachios grown in the State of California was established in 2004. The primary feature of the order is a quality provision that requires pistachios to be sampled and tested for aflatoxin prior to shipment to domestic markets. Such shipments of pistachios may not exceed a tolerance level for aflatoxin. Information collection and dissemination is also conducted under the order. The program is funded through assessments on handlers according to the quantity of pistachios handled. The order is administered by an industry committee of handlers and growers, and is designed to support both large and small pistachio handlers and growers. Committee meetings where regulatory recommendations and other decisions are made are open to the public. All members are able to participate in Committee deliberations, and each Committee member has an equal vote. Others in attendance at meetings are also allowed to express their views.

The Committee met on March 6, 2008, and requested that USDA conduct a public hearing to consider proposed amendments to the order. USDA reviewed the request and determined to proceed to a hearing. A hearing was conducted on July 29 and 30, 2008, in Fresno, California. The Committee's

meeting and the hearing were both open to the public and all that attended were able to participate and express their views.

The proposed amendments recommended by the Committee would: expand the production area to include the States of Arizona and New Mexico; authorize the Committee to reimburse handlers for certain inspection costs; authorize research activities under the order; provide broad authority for aflatoxin regulation under the order, provide broad authority for quality regulation under the order; provide authority for interhandler transfer of marketing order obligations; and make corresponding administrative changes to the order as a result of the aforementioned proposed changes.

The proposed amendments are intended to improve the operation and functioning of the marketing order program. Record evidence indicates that the proposals are intended to benefit all producers and handlers under the order, regardless of size. All grower and handler witnesses at the hearing supported the proposed amendments and while acknowledging the additional cost implications, they stated that they expected the benefits to outweigh the costs.

A description of the proposed amendments and their anticipated economic impact on small and large entities is discussed below.

### Evaluation of the Potential Economic Impacts of the Proposed Amendments

The key economic issues to examine in considering the proposed amendments to the marketing order are the benefits and costs to growers and handlers of the proposed expansion of the production area and the consequences of that expansion. The most significant change in terms of its potentially significant and immediate impact is the fact that if the production area is expanded to include Arizona and New Mexico, the pistachio handlers in those two states would become regulated under the order and would have to meet the same aflatoxin certification requirements that apply to California handlers.

### Aflatoxin Requirements

California handlers currently must have all pistachio lots destined for the domestic market tested and certified that they do not exceed a maximum aflatoxin tolerance. To comply with the standard, California handlers arrange for a sample to be taken from each lot that is to be shipped domestically and to have that sample tested for aflatoxin. Lots that meet the standard receive

written certifications that allow shipment to the domestic market. Lots that exceed the aflatoxin tolerance cannot be shipped domestically. Handlers may rework the lots to remove contaminated nuts and then can begin the certification process again. There are costs associated with each of these steps, which are currently borne by California handlers and would be borne by handlers in the other two states, if the order is amended.

Before considering cost-related details, it is important to examine the benefits associated with mandatory aflatoxin certification. Various grower and handler witnesses testified that they expected significant benefits to accrue from the mandatory requirements enforced through the marketing order, and increased consumer confidence in the quality of U.S. pistachios. Arizona and New Mexico handler witnesses indicated that they would willingly comply with all of the steps involved in meeting the aflatoxin standards. Grower witnesses from Arizona and New Mexico indicated awareness that at least part of the increased handler costs from aflatoxin certification would be passed onto them, but that they expected the net effect to be strongly positive. Grower witnesses from Arizona and New Mexico also stated they did not expect to have to undertake any significant changes in their pistachio production operations as a result of coming under the authority of the marketing order. Witnesses said that they believed that they would have overall improved returns and higher sales than would be the case without the marketing order regulation. They expected the benefits of the proposed amendments to far outweigh the costs.

A 2005 benefit cost analysis of federal marketing order mandatory aflatoxin requirements for California was submitted as evidence at the hearing. The analysis, prepared by agricultural economists at the University of California-Davis, was entitled

“Economic Consequences of Mandated Grading and Food Safety Assurance: *Ex Ante* Analysis of the Federal Marketing Order for California Pistachios” (Richard S. Gray and others, University of California, Giannini Foundation Monograph 46, March 2005). In present-value terms, over a 20-year horizon, the benefits to producers in the study’s baseline scenario were estimated to be \$75.3 million. The study reported a “most likely scenario” benefit cost ratio of nearly 6:1, with a range from about 4:1 to 9:1 under alternative scenarios representing low and high aflatoxin event impacts, respectively, on the pistachio market.

One witness noted that, depending on compliance cost and aflatoxin event assumptions under alternative scenarios in the study, the expected benefit cost ratio from implementation of mandatory aflatoxin standards under the California marketing order ranged between 5:1 and 17:1. Several grower and handler witnesses suggested that these significant benefit cost ratios for the California marketing order would also likely apply if the order were expanded to include Arizona and New Mexico.

The following section examines the cost impacts of the mandatory aflatoxin requirements in an expanded marketing order.

#### Differences in Aflatoxin Inspection and Certification Costs

Aflatoxin inspection and certification costs can be divided into the costs of: (1) Inspector travel time to pistachio handler’s premises; (2) time required for the inspector to draw samples from lots designated for domestic shipment; (3) cost of shipping samples to the testing laboratory; (4) aflatoxin analysis (testing cost); and (5) value of the destroyed pistachios used in the sampling and analysis.

The three tables below present estimated costs for representative handlers in California, Arizona, and New Mexico. Each table is designed to

summarize handler costs for the lots being tested, including each of the five cost elements listed above. For clarity of the cost comparisons, the lot size to be sampled is assumed to be 50,000 pounds in the representative scenarios for all three states. The 50,000-pound lot size is most appropriate for California’s handler plants, which are generally larger than the handler plants in Arizona and New Mexico. The impact in terms of higher unit cost for smaller lot sizes is discussed below.

Table 1 is a representation of the current aflatoxin certification cost situation in California, which is the production area of the current federal marketing order for pistachios. It serves as a benchmark with which to compare the costs in the other two states, Arizona and New Mexico, which would be included under the proposed expanded production area. Witnesses from the pistachio industry in each of the three states submitted as evidence the data used in the three tables, and stated that the data was representative of the situation that exists or would be faced by handlers in those states.

Witnesses pointed out that inspector travel costs and sample shipment costs were the most variable costs across the states. Inspector travel costs consist of the mileage reimbursement that inspectors need to be paid by the handlers, plus the time spent traveling to the handler’s location. In California, inspectors are regularly in the plants, and there is no additional travel time associated with aflatoxin sampling. Witnesses testified that New Mexico inspector travel costs could be as high as \$485 per lot due to the large distances involved, but that the figure of \$432.50 was the most representative. Data presented at the hearing indicated that Arizona inspector travel cost could be as high as \$100 per lot, but that a lower figure of \$32.70 was more likely due to the closer proximity of Arizona Plant Services inspectors, who may be certified to take the sample.

TABLE 1—CALIFORNIA PISTACHIOS: COST SCENARIO FOR SAMPLING AND AFLATOXIN TESTING FOR REPRESENTATIVE HANDLER

	50,000-pound lots		Description of cost elements
	Dollars per lot	Dollars per pound	
Inspector Travel Time to Plant .....	.....	.....	No inspector travel time; inspector regularly in plant.
Inspector Sampling Time .....	\$70.00	\$0.0014	[Cost of sampler time: 2 hours] @ \$35/hour = \$70]; [2 hours to draw 100 samples for one lot <sup>2</sup> ].
Value of Pistachio Sample .....	\$44.00	\$0.0009	[10 kg (22-lb) weight of sample from 100 sub-samples]; [22 lbs. @ \$2.00 per pound = \$44].
Shipping Cost to Laboratory <sup>1</sup> .....	.....	.....	Onsite labs in plants; no shipping cost.
Aflatoxin Testing Cost <sup>2</sup> .....	\$90.00	\$0.0018	\$90 lab fee to determine aflatoxin level of sample.

TABLE 1—CALIFORNIA PISTACHIOS: COST SCENARIO FOR SAMPLING AND AFLATOXIN TESTING FOR REPRESENTATIVE HANDLER—Continued

	50,000-pound lots		Description of cost elements
	Dollars per lot	Dollars per pound	
Total Cost .....	\$204.00	\$0.0041	
Pct. of price received by handler .....	.....	0.2%	Industry estimate of CA handler sale price per pound = \$2.00.
Pct. of price received by grower .....	.....	0.3%	NASS estimate of 2007 CA grower price per pound = \$1.35.

<sup>1</sup> DFA laboratory in Fresno, CA.

<sup>2</sup> Aflatoxin analysis done in onsite laboratory; imputed cost of \$90 is based on cost in outside laboratory.

Source: Testimony at pistachio federal marketing order hearing, July 29–30, 2008, in Fresno, CA.

TABLE 2—ARIZONA PISTACHIOS: COST SCENARIO FOR SAMPLING AND AFLATOXIN TESTING FOR REPRESENTATIVE HANDLER

	50,000-pound lots		Description of cost elements
	Dollars per lot	Dollars per pound	
Inspector Travel Time to Plant .....	\$32.70	\$0.0007	[24 miles <sup>1</sup> @ \$0.40 per mile = \$9.60]; [Cost of sampler time: 40 min. (0.66 hours) @ \$35/hour = \$23.10].
Inspector Sampling Time .....	\$70.00	\$0.0014	[Cost of sampler time: 2 hours) @ \$35/hour = \$70]; 2 hours to draw 100 samples for one lot <sup>2</sup> .
Value of Pistachio Sample .....	\$60.50	\$0.0012	[(10 kg (22-lb) weight of sample from 100 sub-samples); [22 lbs. @ \$2.75 per pound = \$60.50].
Shipping Cost to Laboratory <sup>3</sup> .....	\$200.00	\$0.0040	Shipping cost per 10 kg sample.
Aflatoxin Testing Cost .....	\$90.00	\$0.0018	\$90 lab fee to determine aflatoxin level of sample.
Total Cost .....	\$453.20	\$0.0091	
Pct. of price received by handler .....	.....	0.3%	Industry estimate of AZ handler sale price per pound = \$2.75.
Pct. of price received by grower .....	.....	0.7%	USDA/NASS estimate of 2007 CA grower price per pound = \$1.35 (AZ price not available).

<sup>1</sup> 12 miles each way from pistachio handler plant in Bowie, AZ, to the San Simon, AZ, location of Arizona Plant Services inspectors (certified samplers).

<sup>2</sup> Three lots sampled per visit over a 6-hour period.

<sup>3</sup> DFA laboratory in Fresno, CA; handler witness expected to use overnight shipping, estimated at \$200 per 10 kg sample.

Source: Computed by USDA, based on evidence presented at pistachio federal marketing order hearing, July 29–30, 2008, in Fresno, CA.

TABLE 3—NEW MEXICO PISTACHIOS: COST SCENARIO FOR SAMPLING AND AFLATOXIN TESTING FOR REPRESENTATIVE HANDLER

	50,000-pound lots		Description of cost elements
	Dollars per lot	Dollars per pound	
Inspector Travel Time to Plant .....	\$432.50	\$0.0087	600 miles <sup>1</sup> @ \$0.40 per mile = \$240; [Cost of sampler time: 5.5 hours <sup>2</sup> @ \$35/hour = \$192.50].
Inspector Sampling Time .....	\$70.00	\$0.0014	[Cost of sampler time: 2 hours) @ \$35/hour = \$70]; [2 hours to draw 100 samples for one lot].
Value of Pistachio Sample .....	\$44.00	\$0.0009	[10 kg (22-lb) weight of sample from 100 sub-samples]; [22 lbs. @ \$2.00 per pound = \$44].
Shipping Cost to Laboratory <sup>3</sup> .....	\$105.00	\$0.0021	Shipping cost per 10 kg sample. <sup>4</sup>
Aflatoxin Testing Cost .....	\$90.00	\$0.0018	\$90 lab fee to determine aflatoxin level of sample.
Total Cost .....	\$741.50	\$0.0148	
Pct. of price received by handler .....	.....	0.7%	Industry estimate of NM handler sale price per pound = \$2.00.
Pct. of price received by grower .....	.....	1.1%	USDA/NASS estimate of 2007 CA grower price per pound = \$1.35 (NM price not available).

<sup>1</sup> Average of round trip travel distances to Alamogordo, NM, pistachio handler plant from two NM inspector (certified sampler) locations—Portales (416 miles round trip) and Farmington (782 miles).

<sup>2</sup> Average of driving time estimates to two inspector locations: (4 + 7)/2 = 5.5 hours.

<sup>3</sup> DFA laboratory in Fresno, CA.

<sup>4</sup> Average of estimated range of shipping costs = (\$90 + \$120)/2 = \$105.

Source: Computed by USDA, based on evidence presented at pistachio federal marketing order hearing, July 29–30, 2008, in Fresno, CA.

Two cost elements that are uniform across the three states are sampling time and testing cost. The estimated time that it takes an inspector to draw a 10 kg (22 pound) sample for aflatoxin testing of a 50,000 pound lot, based on 100 sub-samples, is 2 hours. At a standard hourly rate of \$35 per hour, two hours of sampling time will cost the handler \$70. The testing cost for a laboratory to determine the aflatoxin level from a sample is \$90.

Witnesses indicated that the cost for the 22 pounds of pistachios used in the sample (handler sales revenue foregone) was \$2.00 per pound (\$44 total) in California and New Mexico and \$2.75 in Arizona (about \$61 total).

Given all of the assumptions that went into developing the cost summary in Table 1, the estimated cost per lot for a California handler for aflatoxin certification is \$204, which is less than one half cent per pound (about four tenths of a cent). This represents 0.2 percent of the \$2.00 pistachio value per pound at the handler level (estimate provided by industry witnesses) and 0.3 percent of the 2007 grower price per pound for California pistachios, estimated by NASS at \$1.35 per pound. A California pistachio industry witness pointed out that the unit price would be even lower with larger lot sizes and that the average lot size for "failed lots" in a recent year under the marketing order (those that exceeded the maximum aflatoxin tolerance) was nearly 67,000 pounds.

Table 2 shows that a representative Arizona handler would pay twice as much as a California handler—\$453 per lot, or nearly one cent per pound (about nine tenths of a cent). The data in Table 3 indicated that a New Mexico handler would pay even more for aflatoxin certification—\$742 per 50,000 pound lot, or about 1.5 cents per pound. Thus the certification costs for the smaller plants in Arizona and New Mexico would be between two and four times higher, if lot sizes were the same.

Typical lot sizes may be smaller in Arizona and New Mexico; witnesses indicated that lot sizes could vary between 10,000 and 50,000 pounds. An Arizona handler witness presented evidence indicating that 40,000 pounds would be a more likely typical lot size, and that the sample size and related cost factors would be the same. With a smaller lot size, the Arizona handler cost per pound rises from nine tenths of a cent (50,000 pound lot) to 1.1 cents (40,000 pound lot). This cost per pound is nearly 3 times higher than the cost for a California handler with a 50,000 pound lot, but the percentage of the

estimated handler sales price remains under one half of one percent (0.4%).

A New Mexico handler witness characterized their own operation as being quite a bit smaller than the main Arizona handler and most California handlers. If the typical lot size for a small New Mexico handler was 10,000 pounds, then the sample size would be smaller (13.2 pounds) and the inspector sampling time declines from two hours to one hour. The total cost would decline modestly, from \$742 for a 50,000 pound lot to \$689 for a 10,000 pound lot. However, since the costs are spread over fewer pounds, the unit cost for certification would rise to nearly seven cents per pound, about 3 percent of the handler sales price. If the small handler had a typical lot size of 30,000 pounds (the midpoint between 10,000 and 50,000 pounds) the certification cost would be about 2.5 cents per pound, just over one percent of the handler sale price.

However, the New Mexico handler witness indicated that they would try to organize their pistachio handling operation to keep the lot sizes for sampling and testing large enough to keep costs down. The 50,000 pound lot example shown in Table 3 therefore provides a reasonable representation of small handler certification costs. The higher costs are due largely to the less developed aflatoxin testing infrastructure than is available in California, and related issues such as greater distances for inspector travel.

Additional costs are incurred if a lot exceeds the maximum aflatoxin tolerance. Witnesses estimated that in all three states the cost for reworking a lot to remove the contaminated nuts would be 25 cents per pound. After reworking the lot a handler would incur another round of the sampling and testing costs highlighted in the tables.

Grower witnesses stated that the aflatoxin certification costs as presented by handler and other industry witnesses, and illustrated by the three tables, appeared to be reasonable representations of the cost of compliance with the aflatoxin requirements under the marketing order.

#### **Proposed Reimbursement To Account for Handler Cost Differences**

The significant cost differences highlighted above is the reason that pistachio industry witnesses from all three states supported a proposed amendment to authorize the Committee to reimburse handlers in more remote locations within the production area for the excess costs due to lack of access to inspection and certification services. Reimbursing handlers for the excess

costs would eliminate any differential impact and would equalize the aflatoxin certification costs across the proposed expanded production area.

Although the precise details of reimbursement would be established through the informal rulemaking process upon recommendation of the Committee if such authority were granted, the following example illustrates one way to estimate the amount of reimbursement that may occur. With a 50,000 pound lot size, Table 3 shows the cost per lot for a New Mexico handler is about \$742. The New Mexico handler would be expected to pay only the portion of the costs that are the same across the three states (\$70 for inspector sampling, plus \$90 testing cost, plus \$44 in revenue foregone from destroyed pistachios, for a total cost per lot of \$204). The handler represented by Table 3 would receive a reimbursement per lot of \$538 (\$742 minus \$204).

Using different cost assumptions, a pistachio industry witness provided an example with a somewhat higher estimate of the likely cost (\$605 per lot) that the Committee would reimburse New Mexico handlers. The witness estimated that with ten sampling trips per year, and one lot sampled per trip, the New Mexico reimbursements would total \$6,050. With an anticipated total of 100 lots tested in Arizona in the example presented by the witness, and with a reimbursement rate of \$235 per lot, the total Arizona cost would be \$23,500. The sum for the two states would be about \$30,000.

Based on similar assumptions used in developing the tables, the total current cost of marketing order aflatoxin certification for California handlers (excluding the Committee assessment) was estimated by an industry witness to be \$530,000. Based on this example, a \$30,000 reimbursement would be issued by the Committee to the Arizona and New Mexico handlers. The reimbursement would represent about a 6 percent increase above the \$530,000 currently paid by the California handlers. The witness also stated that when the reimbursement system is implemented, all handlers of like-size operations would have comparable inspection costs.

All California handler and grower witnesses expressed their support for such a reimbursement provision. In addition, all of the Arizona and New Mexico handler and grower witnesses also testified in favor of such a reimbursement.

Handler and grower witnesses indicated that the expected benefits from the operation of the expanded

marketing order would substantially exceed costs.

### Other Proposed Amendments

The addition of production, post harvest, and nutrition research authority to the order would have no immediate cost impact on the industry. If the proposal is adopted, it would allow the Committee to recommend research activities to USDA. If approved, the projects would be funded through handler assessments. It is likely that program assessments would increase in order to fund any projects recommended, which would increase costs to handlers. However, the order limits the total assessment that can be implemented under the order so that the entire assessment cannot exceed one half of one percent of the average price received by producers in the preceding crop year. To the extent that funds for research would only represent a portion of the assessment funds, the cost of any research that may be conducted would necessarily be less than one half of one percent of the average price received by producers. In addition, since assessments are collected from handlers based on the volume of pistachios handled, any cost associated with research projects would be proportionate to the size of the handlers.

Witnesses testified that the Committee would not undertake any research activities unless they expected the benefits to outweigh the costs. One witness testified that a presentation at a Symposium for Agricultural Research held on June 18 and 19, 2008, in Sacramento, California indicated that a benefit/cost ratio for agricultural research in California has been estimated at 30.7 to 1.

Handler and grower witnesses made positive comments in support of other proposed order amendments, including the granting of broad authority for aflatoxin standards and for other quality regulations. Witnesses stated that there would be no immediate impact from the granting of these authorities, because there are no industry plans for changes in regulations. However, handler and grower witnesses stated that having such authority would be quite helpful to the future of the pistachio industry, and that if the authorities were exercised in the future, they expected that it would be done in a way that assured that benefits would outweigh costs. Since unanimity of the Committee would generally be required to make such changes, they expressed confidence that only regulations would be established that had very broad industry consensus. They expected additional improvements in product quality and improved returns

to growers and handlers from the use of any such future regulations.

One other proposed amendment, relating to interhandler transfers, merits discussion in the context of economic impact on handlers and growers, particularly small ones. When the marketing order was promulgated in 2004, authority was given for interhandler transfers of noncertified pistachios. Evidence presented at the hearing indicates that the proposed amendment formalizes that authority and expands it to include other marketing order requirements, including the payment of assessments on hulled and dried pistachios, when that processing is done by the producer. Under the marketing order, the entity which hulls and dries pistachios is responsible for assessments and inspections. This provision was included because in California producers normally deliver pistachios to a handler (processor) for hulling and drying as well as the subsequent handling functions.

However, conditions in Arizona and New Mexico are different due to the limited processing capacity of some handlers, the lack of processing access of producers, and the small size of some producing operations. It is necessary in these conditions for some producers to process (hull and dry) their pistachios prior to delivery to a handler. The hulling and drying is part of the harvest process, and it is not the intent of these producers to perform any other handling functions. The proposal would therefore allow the transfer the responsibility for assessments, inspections and other marketing order requirements to the handler who places the pistachios into the stream of commerce.

According to evidence presented at the hearing, this amendment would allow a small number of producers who hull and dry their own production, but perform no additional handling functions (estimated at less than ten), to limit their responsibility to filing a form at the time of pistachio delivery. This proposal would more clearly delineate the responsibilities of handlers and the small number of affected producers. Both would continue their current practices in virtually all cases, and the proposal would neither increase nor decrease returns. If the proposal is not accepted, small grower/handlers would assume an additional paperwork burden associated with the role of a handler, according to testimony. This proposal has the effect of assisting small business operations by removing them from paperwork and other burdens.

### Handler Assessment Costs

Under the marketing order, handlers pay assessments to the Committee for costs associated with administering the program. Following is an evaluation of the impact these costs would have on handlers in Arizona and New Mexico if they are included under the order.

The assessment rate authorized under the order is limited to one-half of one percent (.005) of the average grower price received in the preceding crop year. The current assessment rate under the order is \$.0007 per pound, or .07 cents per pound. This compares to an estimated average grower price for the 2007 crop year of \$1.35 per pound. The assessment rate for the 2007 crop year was .05 percent (5/100ths of one percent) of the grower price.

Although there are no NASS data available regarding New Mexico pistachio production, information presented by witnesses at the hearing indicates average annual production in New Mexico could be in the range of 300,000 to 350,000 pounds. At an assessment rate of \$.0007, this would equate to a total annual assessment ranging from \$210 to \$245 for all New Mexico handlers combined. Production from Arizona was 7 million pounds in 2007, according to NASS data. At the \$.0007 per pound assessment rate, this would equate to a total annual assessment of \$4,900 for all Arizona handlers combined. Assessments under the order present a cost to handlers, but as can be seen from the foregoing example, the cost is minimal. In addition, the costs are applied to handlers in proportion to the quantity of pistachios handled, so there is no differential impact anticipated for small and large handlers.

### Paperwork Reduction Act

Information collection requirements for Part 983 are currently approved by the Office of Management and Budget (OMB) under OMB No. 0581-0215, "Pistachios Grown in California." The reporting changes generated by the proposed amendments would result in an increase in burden and will be submitted to OMB under OMB No. 0581-NEW. Upon approval, we will request that this collection be merged into OMB No. 0581-0215.

*Title:* Pistachios Grown in California, Marketing Order No. 983.

*OMB Number:* 0581-NEW.

*Expiration Date of Approval:* 3 years from date of approval.

*Type of Request:* Approval of the collection of a new information collection.

*Abstract:* Marketing order programs provide an opportunity for producers of

fresh fruits, vegetables and specialty crops, in a specified production area, to work together to solve marketing problems that cannot be solved individually. Order regulations help ensure adequate supplies of high quality product and adequate returns to producers. Under the Agricultural Marketing Agreement Act of 1937 [7 U.S.C. 601–674], (AMAA), as amended, industries enter into marketing order programs. The Secretary of Agriculture is authorized to oversee the orders' operations and issue regulations recommended by a committee of representatives from each commodity industry.

The information collection requirements in this request are essential to carry out the intent of the AMAA, to provide the respondents the type of service they request, and to administer the pistachio marketing order program.

If the proposed amendments to the pistachio marketing order are implemented to expand the production area to include the States of Arizona and New Mexico, the reporting requirements in effect under the order would be applied to handlers and producers in those states, thus increasing burden.

Once implemented, producers and handlers of pistachios located in the States of Arizona and New Mexico would be required to complete forms relating to committee nominations, background questionnaires, referendum and nomination ballots, and handler reports. This would result in a burden of 29 hours. Additionally, handlers would have to maintain related records and documentation for three full years following the end of the crop year.

The information collected is used only by authorized representatives of the Department of Agriculture (USDA), including AMS, Fruit and Vegetable Programs regional and headquarters staff, and authorized employees of the Committee. AMS is the primary user of the information and authorized committee employees are the secondary user.

*Estimate of Burden:* Public reporting burden for this collection of information is estimated to average .225 hours per response.

*Respondents:* Producers and handlers of pistachios grown in Arizona and New Mexico.

*Estimated Number of Respondents:* 85.

*Estimated Number of Responses per Respondent:* 1.51.

*Estimated Total Annual Burden on Respondents:* 29 hours.

Comments are invited on: (1) Whether the proposed collection of information

is necessary for the functioning of the pistachio marketing order program and USDA's oversight of that program; (2) the accuracy of the collection burden estimate and the validity of methodology and assumptions used in estimating the burden on respondents; (3) ways to enhance the quality, utility, and clarity of the information requested; and (4) ways to minimize the burden, including use of automated or electronic technologies.

Comments should reference OMB No. 0581–NEW and the Marketing Order for Pistachios Grown in California, and should be sent to the USDA in care of the Docket Clerk at the previous mentioned address or at <http://www.regulations.gov>.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record and will be available for public inspection during regular business hours at the same address or at <http://www.regulations.gov>.

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. USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this proposed rule. All of these amendments are designed to enhance the administration and functioning of the marketing order to the benefit of the industry.

While the implementation of these requirements may impose some additional costs on handlers, the costs are minimal and uniform on all handlers. Some of these costs may be passed on to growers. However, these costs would be offset by the benefits derived by the operation of the marketing order. In addition, the meetings regarding these proposals as well as the hearing date were widely publicized throughout the existing and proposed addition to the pistachio production area and all interested persons were invited to attend the meetings and the hearing and participate in Committee deliberations on all issues. All Committee meetings and the hearing were public forums and all entities, both large and small, were able to express views on these issues. The Committee itself is composed of members representing handlers and producers. Finally, interested persons are invited to submit information on the regulatory and informational impacts of this action on small businesses.

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.

### Civil Justice Reform

The amendments to Marketing Order 983 proposed herein have been reviewed under Executive Order 12988, Civil Justice Reform. They are not intended to have retroactive effect. If adopted, the proposed amendments would not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this proposal.

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 no later than 20 days after the date of the entry of the ruling.

### Rulings on Briefs of Interested Persons

Briefs, proposed findings and conclusions, and the evidence in the record were considered in making the findings and conclusions set forth in this recommended decision. To the extent that the suggested findings and conclusions filed by interested persons are inconsistent with the findings and conclusions of this recommended decision, the requests to make such findings or to reach such conclusions are denied.

### General Findings

The findings hereinafter set forth are supplementary to the findings and determinations which were previously made in connection with the issuance of the marketing order; and all said previous findings and determinations are hereby ratified and affirmed, except insofar as such findings and determinations may be in conflict with the findings and determinations set forth herein.

1. The marketing agreement and order, as amended, and as hereby proposed to be further amended, and all

of the terms and conditions thereof, would tend to effectuate the declared policy of the Act;

2. The marketing agreement and order, as amended, and as hereby proposed to be further amended, regulates the handling of pistachios grown in the production area in the same manner as, and is applicable only to, persons in the respective classes of commercial and industrial activity specified in the marketing order upon which a hearing has been held;

3. The marketing agreement and order, as amended, and as hereby proposed to be further amended, is limited in its application to the smallest regional production area which is practicable, consistent with carrying out the declared policy of the Act, and the issuance of several orders applicable to subdivisions of the production area would not effectively carry out the declared policy of the Act;

4. The marketing agreement and order, as amended, and as hereby proposed to be further amended, prescribes, insofar as practicable, such different terms applicable to different parts of the production area as are necessary to give due recognition to the differences in the production and marketing of pistachios grown in the production area; and

5. All handling of pistachios grown in the production area as defined in the marketing agreement and order, is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects such commerce.

A 30-day comment period is provided to allow interested persons to respond to this proposal. Thirty days is deemed appropriate because these proposed changes have been widely publicized and implementation of the changes, if adopted, would be desirable to benefit the industry as soon as possible. All written exceptions timely received will be considered and a grower referendum will be conducted before any of these proposals are implemented.

#### List of Subjects in 7 CFR Part 983

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

For the reasons set forth in the preamble, 7 CFR part 983 is proposed to be amended as follows:

#### PART 983—PISTACHIOS GROWN IN CALIFORNIA

1. The authority citation for 7 CFR part 983 continues to read as follows:

**Authority:** 7 U.S.C. 601–674.

2. Revise § 983.1 to read as follows:

#### § 983.1 Accredited laboratory.

An *accredited laboratory* is a laboratory that has been approved or accredited by the U.S. Department of Agriculture.

3. Lift the December 10, 2007, suspension of § 983.6, and revise the section to read as follows:

#### § 983.6 Assessed weight.

*Assessed weight* means pounds of inshell pistachios, with the weight computed at 5 percent moisture, received for processing by a handler within each production year: *Provided*, That for loose kernels, the actual weight shall be multiplied by two to obtain an inshell weight; *Provided further*, That the assessed weight may be based upon quality requirements for inshell pistachios that may be recommended by the Committee and approved by the Secretary.

4. Lift the December 10, 2007, suspension of § 983.7, and revise the section to read as follows:

#### § 983.7 Certified pistachios.

*Certified pistachios* are those that meet the inspection and certification requirements under this part.

5. Revise § 983.8 to read as follows:

#### § 983.8 Committee.

*Committee* means the Administrative Committee for Pistachios established pursuant to § 983.41.

6. Amend § 983.11 by adding a paragraph (a)(4) to read as follows:

#### § 983.11 Districts.

(a) \* \* \*

(4) *District 4* consists of the States of Arizona and New Mexico.

\* \* \* \* \*

#### § 983.19 [Removed]

7. Lift the December 10, 2007, suspension of § 983.19, and remove the section.

#### § 983.20 [Removed]

8a. Lift the December 10, 2007, suspension of § 983.20, and remove the section.

#### § 983.21 [Redesignated as § 983.20]

8b. Redesignate § 983.21 as § 983.20, and revise it to read as follows:

#### § 983.20 Part and subpart.

*Part* means the order regulating the handling of pistachios grown in the States of California, Arizona and New Mexico, and all the rules, regulations and supplementary orders issued thereunder. The aforesaid order regulating the handling of pistachios grown in California, Arizona and New Mexico shall be a subpart of such part.

#### § 983.22 [Redesignated as § 983.21]

9. Redesignate § 983.22 as § 983.21.

#### § 983.23 [Redesignated as § 983.22]

10. Redesignate § 983.23 as § 983.22, and revise it to read as follows:

#### § 983.22 Pistachios.

*Pistachios* means the nuts of the pistachio tree of the genus and species *Pistacia vera* grown in the production area, whether inshell or shelled.

#### § 983.24 [Redesignated as § 983.23]

11. Redesignate § 983.24 as § 983.23.

#### § 983.25 [Redesignated as § 983.24]

12. Redesignate § 983.25 as § 983.24.

#### § 983.26 [Redesignated as § 983.25]

13. Redesignate § 983.26 as § 983.25, and revise it to read as follows:

#### § 983.25 Production area.

*Production Area* means the States of California, Arizona, and New Mexico.

#### §§ 983.27 through 983.30 [Redesignated as §§ 983.26 through 983.29]

14. Redesignate §§ 983.27 through 983.30 as §§ 983.26 through 983.29, respectively.

#### § 983.31 [Redesignated as § 983.30]

15. Lift the December 10, 2007, suspension of § 983.31, redesignate § 983.31 as § 983.30, and revise the section to read as follows:

#### § 983.30 Substandard pistachios.

*Substandard pistachios* means pistachios, inshell or shelled, which do not meet regulations established pursuant to §§ 983.50 and 983.51.

#### § 983.53 [Redesignated as § 983.71]

16. Redesignate § 983.53 as § 983.71, and revise paragraph (a) to read as follows:

#### § 983.71 Assessments.

(a) Each handler who receives pistachios for processing in each production year, except as provided in § 983.58, shall pay the committee on demand, an assessment based on the *pro rata* share of the expenses authorized by the Secretary for that year attributable to the assessed weight of pistachios received by that handler in that year.

\* \* \* \* \*

#### § 983.54 [Redesignated as § 983.72]

17. Redesignate § 983.54 as § 983.72, and revise the section to read as follows:

#### § 983.72 Contributions.

The committee may accept voluntary contributions but these shall only be used to pay for committee expenses unless specified in support of research



under § 983.46. Furthermore, research contributions shall be free of additional encumbrances by the donor and the committee shall retain complete control of their use.

**§ 983.55 [Redesignated as § 983.73]**

18. Redesignate § 983.55 as § 983.73.

**§ 983.56 [Redesignated as § 983.74]**

19. Redesignate § 983.56 as § 983.74, and amend it by removing the reference to “§ 983.53” and adding in its place “§ 983.71” in paragraph (a)(1).

**§ 983.57 [Redesignated as § 983.75]**

20. Redesignate § 983.57 as § 983.75, and revise it to read as follows:

**§ 983.75 Implementation and amendments.**

The Secretary, upon the recommendation of a majority of the committee, may issue rules and regulations implementing or modifying §§ 983.64 through 983.74 inclusive.

**§§ 983.58 through 983.64 [Redesignated as §§ 983.80 through 983.86]**

21. Redesignate §§ 983.58 through 983.64 as §§ 983.80 through 983.86, respectively.

22. Move the undesignated center heading “MISCELLANEOUS PROVISIONS” to precede § 983.80.

**§ 983.65 [Redesignated as § 983.87]**

23. Redesignate § 983.65 as § 983.87, and revise it to read as follows:

**§ 983.87 Effective time.**

The provisions of this part, as well as any amendments, shall become effective at such time as the Secretary may declare, and shall continue in force until terminated or suspended in one of the ways specified in § 983.88 or § 983.89.

**§§ 983.66 through 983.69 [Redesignated as §§ 983.88 through 983.91]**

24. Redesignate §§ 983.66 through 983.69 as §§ 983.88 through 983.91, respectively.

**§ 983.70 [Redesignated as § 983.92]**

25. Redesignate § 983.70 as § 983.92, and revise it to read as follows:

**§ 983.92 Exemption.**

Any handler may handle pistachios within the production area free of the requirements in §§ 983.50 through 983.58 and § 983.71 if such pistachios are handled in quantities not exceeding 5,000 dried pounds during any production year. The Secretary, upon recommendation of the committee, may issue rules and regulations changing the 5,000 pound quantity applicable to this exemption.

**§ 983.41 [Redesignated as § 983.53]**

26. Lift the December 10, 2007, suspension of § 983.41, redesignate § 983.41 as § 983.53, and revise the section to read as follows:

**§ 983.53 Testing of minimal quantities.**

(a) *Aflatoxin*. Handlers who handle less than 1 million pounds of assessed weight per year have the option of utilizing both of the following methods for testing for aflatoxin:

(1) The handler may have an inspector sample and test his or her entire inventory of hulled and dried pistachios for the aflatoxin certification before further processing.

(2) The handler may segregate receipts into various lots at the handler's discretion and have an inspector sample and test each specific lot. Any lots that are found to have less aflatoxin than the level established by the Committee and approved by the Secretary can be certified by an inspector to be negative as to aflatoxin. Any lots that are found to have aflatoxin exceeding the level established by the Committee and approved by the Secretary may be tested after reworking in the same manner as specified in § 983.50.

(b) *Quality*. The committee may, with the approval of the Secretary, establish regulations regarding the testing of minimal quantities of pistachios for quality.

**§ 983.42 [Redesignated as § 983.54]**

27. Lift the December 10, 2007, suspension of § 983.42, redesignate § 983.42 as § 983.54, and revise the section to read as follows:

**§ 983.54 Commingling.**

Certified lots may be commingled with other certified lots, but the commingling of certified and uncertified lots shall cause the loss of certification for the commingled lots.

**§ 983.43 [Redesignated as § 983.55]**

28. Redesignate § 983.43 as § 983.55.

**§ 983.44 [Redesignated as § 983.56]**

29. Redesignate § 983.44 as § 983.56, and revise it to read as follows:

**§ 983.56 Inspection, certification and identification.**

Upon recommendation of the committee and approval of the Secretary, all pistachios that are required to be inspected and certified in accordance with this part shall be identified by appropriate seals, stamps, tags, or other identification to be affixed to the containers by the handler. All inspections shall be at the expense of the handler, *Provided*, That for handlers making shipments from facilities

located in an area where inspection costs for inspector travel and shipment of samples for aflatoxin testing would otherwise exceed the average of those same inspection costs for comparable handling operations located in Districts 1 and 2, such handlers may be reimbursed by the committee for the difference between their respective inspection costs and such average, or as otherwise recommended by the committee and approved by the Secretary.

**§ 983.45 [Redesignated as § 983.57]**

30. Lift the December 10, 2007, suspension of § 983.45, redesignate § 983.45 as § 983.57, and revise the section to read as follows:

**§ 983.57 Substandard pistachios.**

The committee shall, with the approval of the Secretary, establish such reporting and disposition procedures as it deems necessary to ensure that pistachios which do not meet the aflatoxin and quality requirements established pursuant to §§ 983.50 and 983.51 shall not be shipped for domestic human consumption.

**§ 983.46 [Redesignated as § 983.59]**

31. Redesignate § 983.46 as § 983.59, and revise it to read as follows:

**§ 983.59 Modification or suspension of regulations.**

(a) In the event that the committee, at any time, finds that by reason of changed conditions, any regulations issued pursuant to §§ 983.50 through 983.58 should be modified or suspended, it shall, pursuant to § 983.43, so recommend to the Secretary.

(b) Whenever the Secretary finds from the recommendations and information submitted by the committee or from other available information, that a regulation should be modified, suspended, or terminated with respect to any or all shipments of pistachios in order to effectuate the declared policy of the Act, the Secretary shall modify or suspend such provisions. If the Secretary finds that a regulation obstructs or does not tend to effectuate the declared policy of the Act, the Secretary shall suspend or terminate such regulation.

(c) The Secretary, upon recommendation of committee, may issue rules and regulations implementing §§ 983.50 through 983.58.

**§§ 983.47 through 983.51 [Redesignated as §§ 983.64 through 983.68]**

32. Redesignate §§ 983.47 through 983.51 as §§ 983.64 through 983.68, respectively.

33. Move the undesignated center heading "REPORTS, BOOKS, AND RECORDS" to precede § 983.64.

**§ 983.52 [Redesignated as § 983.70]**

34. Redesignate § 983.52 as § 983.70.

35. Move the undesignated center heading "EXPENSES AND ASSESSMENTS" to precede § 983.70.

36. Add a new § 983.58 to read as follows:

**§ 983.58 Interhandler Transfers.**

Within the production area, any handler may transfer pistachios to another handler for additional handling, and any assessments, inspection requirements, aflatoxin testing requirements, and any other marketing order requirements with respect to pistachios so transferred may be assumed by the receiving handler. The committee, with the approval of the Secretary, may establish methods and procedures, including necessary reports, to maintain accurate records for such transfers.

**§ 983.32 [Redesignated as § 983.41]**

37. Redesignate § 983.32 as § 983.41, amend the section by removing the words "eleven (11)" from the introductory paragraph and adding in their place the words "twelve (12)," and by revising paragraph (b) to read as follows:

**§ 983.41 Establishment and membership.**

(a) \* \* \*

(b) *Producers.* Nine members shall represent producers. Producers within the respective districts shall nominate four producers from District 1, three producers from District 2, one producer from District 3, and one producer from District 4. The Secretary, upon recommendation of the committee, may reapportion producer representation among the districts to ensure proper representation.

\* \* \* \* \*

**§ 983.33 [Redesignated as § 983.42]**

38. Redesignate § 983.33 as § 983.42, and amend the section by removing the word "grower" and adding in its place the word "producer" in paragraph (a), removing the reference to "§ 983.32" and adding in its place "§ 983.41" in paragraph (j), and by removing the reference to "§§ 983.32, 983.33, and 983.34" and adding in its place "§§ 983.41, 983.42, and 983.43" in paragraph (n).

**§ 983.34 [Redesignated as § 983.43]**

39. Redesignate § 983.34 as § 983.43, and revise paragraph (a) of that section to read as follows:

**§ 983.43 Procedure.**

(a) *Quorum.* A quorum of the committee shall be any seven voting committee members. The vote of a majority of members present at a meeting at which there is a quorum shall constitute the act of the committee: *Provided*, That actions of the committee with respect to the following issues shall require twelve (12) concurring votes of the voting members regarding any recommendation to the Secretary for adoption or change in:

- (1) Quality regulation;
- (2) Aflatoxin regulation;
- (3) Research under § 983.46; and

*Provided further*, That actions of the committee with respect to the following issues shall require eight (8) concurring votes of the voting members regarding recommendation to the Secretary for adoption or change in:

- (4) Inspection programs;
- (5) The establishment of the committee.

\* \* \* \* \*

**§ 983.35 [Redesignated as § 983.44]**

40. Redesignate § 983.35 as § 983.44.

**§ 983.36 [Redesignated as § 983.45]**

41. Redesignate § 983.36 as § 983.45.

**§ 983.37 [Redesignated as § 983.47]**

42. Redesignate § 983.37 as § 983.47.

43. Move the undesignated center heading "MARKETING POLICY" to precede § 983.47.

**§ 983.38 [Redesignated as § 983.50]**

44. Lift the December 10, 2007, suspension of § 983.38, redesignate § 983.38 as § 983.50, and revise the section to read as follows:

**§ 983.50 Aflatoxin regulations.**

The committee shall establish, with the approval of the Secretary, such aflatoxin sampling, analysis, and inspection requirements applicable to pistachios to be shipped for domestic human consumption as will contribute to orderly marketing or be in the public interest. No handler shall ship, for human consumption, pistachios that exceed an aflatoxin level established by the committee with approval of the Secretary. All domestic shipments must be covered by an aflatoxin inspection certificate.

45. Move the undesignated center heading "REGULATIONS" to precede § 983.50.

**§ 983.39 [Redesignated as § 983.51]**

46. Lift the December 10, 2007, suspension of § 983.39, redesignate § 983.39 as § 983.51, and revise the section to read as follows:

**§ 983.51 Quality regulations.**

For any production year, the committee may establish, with the approval of the Secretary, such quality and inspection requirements applicable to pistachios to be shipped for domestic human consumption as will contribute to orderly marketing or be in the public interest. In such production year, no handler shall ship pistachios for domestic human consumption unless they meet the applicable requirements as evidenced by certification acceptable to the committee.

**§ 983.40 [Redesignated as § 983.52]**

47. Lift the December 10, 2007, suspension of § 983.40, redesignate § 983.40 as § 983.52, and revise the section to read as follows:

**§ 983.52 Failed lots/rework procedure.**

(a) *Substandard pistachios.* Each lot of substandard pistachios may be reworked to meet aflatoxin or quality requirements. The committee may establish, with the Secretary's approval, appropriate rework procedures.

(b) *Failed lot reporting.* If a lot fails to meet the aflatoxin and/or the quality requirements of this part, a failed lot notification report shall be completed and sent to the committee within 10 working days of the test failure. This form must be completed and submitted to the committee each time a lot fails either aflatoxin or quality testing. The accredited laboratories shall send the failed lot notification reports for aflatoxin tests to the committee, and the handler, under the supervision of an inspector, shall send the failed lot notification reports for the lots that do not meet the quality requirements to the committee.

48. Add a new § 983.46, preceded by an undesignated center heading, to read as follows:

**Research**

**§ 983.46 Research.**

The committee, with the approval of the Secretary, may establish or provide for the establishment of projects involving research designed to assist or improve the efficient production and postharvest handling of quality pistachios. The committee, with the approval of the Secretary, may also establish or provide for the establishment of projects designed to determine the effects of pistachio consumption on human health and nutrition. Pursuant to § 983.43(a), such research projects may only be established with 12 concurring votes of the voting members of the committee. The expenses of such projects shall be

paid from funds collected pursuant to §§ 983.71 and 983.72.

Dated: April 29, 2009.

**Robert C. Keeney,**

*Acting Associate Administrator, Agricultural Marketing Service.*

[FR Doc. E9-10150 Filed 5-4-09; 8:45 am]

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## DEPARTMENT OF COMMERCE

### Economic Development Administration

#### 13 CFR Parts 313 and 315

[Docket No.: 090429810-9808-01]

RIN 0610-AA65

#### Revisions to the Trade Adjustment Assistance for Firms Program Regulations and Implementation Regulations for Community Trade Adjustment Assistance Program

**AGENCY:** Economic Development Administration, Department of Commerce.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** On February 17, 2009, President Barack Obama signed into law the American Recovery and Reinvestment Act of 2009 (Pub.L. No. 111-5, 123 STAT. 115). Included in that omnibus measure was the Trade and Globalization Adjustment Assistance Act of 2009 ("TGAAA"), which contains specific amendments to chapters 3 and 4 of the Trade Act of 1974, as amended (19 U.S.C. 2341 *et seq.*) ("Trade Act"). See Subtitle I (letter "I") of Title I of Division B of Public Law No. 111-5, 123 Stat. 367, at 396-436. Chapter 3 of the Trade Act authorizes the Trade Adjustment Assistance for Firms ("TAAF") Program, under which a national network of eleven Trade Adjustment Assistance Centers provide technical assistance to firms that have lost domestic sales and employment due to increased imports of similar or competitive goods. Chapter 4 of the Trade Act establishes the Community Trade Adjustment Assistance ("Community TAA") Program, which is designed to help local economies adjust to changing trade patterns through the coordination of federal, State, and local resources and the creation and implementation of community-based development strategies to help address trade impacts. As a result of the enactment of the TGAAA, EDA is publishing this notice of proposed rulemaking ("NPRM") to request comments on the promulgation of the Community TAA Program regulations and specific proposed changes to the

TAAF Program regulations, both of which implement the amendments to the Trade Act made by the TGAAA. In large part, the revisions to the existing TAAF Program regulations propose to make service sector firms potentially eligible for assistance and include longer "look back" time periods for which Firms may present data for certification purposes.

**DATES:** Comments on this NPRM must be received by EDA's Office of Chief Counsel no later than 5 p.m. Eastern Time on June 4, 2009.

**ADDRESSES:** Comments on this NPRM may be submitted through any of the following:

- *Federal eRulemaking Portal:* <http://www.Regulations.gov>.

- *Mail:* Economic Development Administration, Office of Chief Counsel, Room 7005, Department of Commerce, 1401 Constitution Avenue, NW., Washington, DC 20230.

Commenters are advised that U.S. Department of Commerce mail security measures may delay receipt of United States Postal Service mail for up to two weeks. Commenters may wish to use the facsimile or e-mail options.

- *Facsimile:* (202) 482-5671, *Attention:* Office of Chief Counsel. Please indicate "Comments on the NPRM" on the cover page.

- *E-mail:* [edaregs@eda.doc.gov](mailto:edaregs@eda.doc.gov). Please state "Comments on the NPRM" in the subject line.

**FOR FURTHER INFORMATION CONTACT:** Jamie Lipsey, Economic Development Administration, Department of Commerce, Room 7005, 1401 Constitution Avenue, NW., Washington, DC 20230; *telephone:* (202) 482-4687.

#### SUPPLEMENTARY INFORMATION:

##### Background

EDA's mission is to lead the federal economic development agenda by promoting innovation and competitiveness, preparing American regions for growth and success in the worldwide economy. In implementing this mission, EDA administers the TAAF Program under the Trade Act, which was enacted in part to provide adequate procedures to safeguard American industry and labor against unfair or injurious import competition and assist industries, firms, workers, and communities in adjusting to changes in international trade flows. The responsibility for administering both the TAAF and Community TAA Programs is delegated from the Secretary of Commerce to EDA.

EDA is publishing proposed revisions to its TAAF Program regulations to reflect the TGAAA amendments made

to chapter 3 of the Trade Act. Under the TAAF Program, EDA funds a national network of eleven non-profit or university-affiliated organizations, each known as a Trade Adjustment Assistance Center ("TAAC"). The TAACs provide technical assistance to Firms that have lost domestic sales and employment due to increased imports of similar or competitive goods.

In addition, the TGAAA amended chapter 4 of the Trade Act to establish the Community TAA Program. The purpose of this program is to assist communities impacted by trade with economic adjustment through the coordination of federal, State and local resources and the creation of community-based development strategies. EDA sets out in detail below proposed Community TAA Program regulations.

#### *Proposed Community TAA Program Regulations*

Set out below are EDA's proposed regulations for the Community TAA Program, which would be codified at 13 CFR part 313. In addition to implementing the amendments to the Trade Act made by TGAAA, the proposed regulations reflect EDA's practices and policies in administering the Community TAA Program similar to its administration of programs under the Public Works and Economic Development Act of 1965, as amended (42 U.S.C. 3121 *et seq.*). The discussion below presents the proposed regulations by section number and explains each proposed regulatory provision.

#### Part 313—Community Trade Adjustment Assistance

##### Authority Section

The authority for the Community TAA Program regulations derives from the Trade Act, inclusive of the amendments made by TGAAA.

##### Section 313.1—Purpose and Scope

This section introduces the Community TAA Program to the reader, including a reference to the TGAAA. It also provides the purpose of the program and a brief overview for its administration, including EDA's certification of Communities, provision of technical assistance, and assistance in the creation and implementation of Strategic Plans.

##### Section 313.2—Definitions

This section proposes definitions for key terms to be used in part 313. It includes terms provided in the TGAAA as well as new terms to increase clarity and to assist with the efficient