

*esculentum*" each time they occur and adding the words *Solanum lycopersicum*" in their place.

■ 3. Section 319.56–28 is amended as follows:

■ a. In paragraph (a) introductory text and paragraph (b) introductory text, by removing the words *Lycopersicon esculentum*" each time they occur and adding the words *Solanum lycopersicum*" in their place.

■ b. By revising paragraph (c) introductory text to read as set forth below.

■ c. In paragraph (c)(4), by removing the semicolon after the word "request" and adding a period in its place, and by adding at the end of the paragraph the sentence "The trapping records must be maintained for 1 year for APHIS review;"

■ d. In paragraph (d) introductory text, paragraph (e) introductory text, and paragraph (f) introductory text, by removing the words *Lycopersicon esculentum*" each time they occur and adding the words *Solanum lycopersicum*" in their place.

■ e. By adding a new paragraph (g) to read as set forth below.

■ f. By revising the OMB citation at the end of the section to read as set forth below.

**§ 319.56–28 Tomatoes from certain countries.**

\* \* \* \* \*

(c) *Tomatoes (fruit) (Solanum lycopersicum) from the provinces of El Jadida or Safi in Morocco and the province of Dahkla in Western Sahara.* Pink tomatoes may be imported into the United States from the provinces of El Jadida or Safi in Morocco and the province of Dahkla in Western Sahara only in accordance with this section and other applicable provisions of this subpart.<sup>7</sup>

\* \* \* \* \*

(g) *Tomatoes (fruit) (Solanum lycopersicum) from the Souss-Massa-Draa region of Morocco.* Pink tomatoes may be imported into the United States from the region of Souss-Massa-Draa in Morocco only in accordance with this section and other applicable provisions of this subpart.<sup>8</sup>

(1) The tomatoes must be grown in approved production sites within the region of Souss-Massa-Draa in Morocco in pest-exclusionary structures registered with, and inspected by, the Moroccan Ministry of Agriculture, Division of Plant Protection, Inspection, and Enforcement (DPVCTRF). Production sites will be approved

jointly by DPVCTRF and APHIS.

DPVCTRF will visit and inspect the production sites starting 2 months before harvest and continuing until the end of the shipping season. APHIS may monitor the production sites at any time during this period;

(2) The tomatoes may be shipped from the Souss-Massa-Draa region of Morocco only between December 1 and April 30, inclusive;

(3) Beginning 2 months prior to the start of the shipping season and continuing through the end of the shipping season, DPVCTRF must set and maintain Mediterranean fruit fly (Medfly) traps baited with trimedlure, or other approved protein bait, inside the pest-exclusionary structures at a rate of 8 traps per hectare, with a minimum of 4 traps per pest-exclusionary structure. Traps must also be placed outside registered pest-exclusionary structures within a 2-kilometer radius at a rate of 4 traps per square kilometer. All traps must be checked every 7 days;

(4) DPVCTRF must maintain records of trap placement, trap maintenance, and any Medfly captures, and make the records available to APHIS upon request. DPVCTRF must maintain an APHIS-approved quality control program to monitor or audit the trapping program. The trapping records must be maintained for 1 year for APHIS review;

(5) Capture of a single Medfly in a registered pest-exclusionary structure during the 2 months prior to export and continuing through the duration of the harvest, or detection of a Medfly in a consignment that is traced back to a registered pest-exclusionary structure, will immediately result in cancellation of exports from that pest-exclusionary structure until the source of the infestation is determined, the Medfly infestation has been eradicated, and measures are taken to preclude any future infestation. Exports will not be reinstated until APHIS and DPVCTRF mutually determine that risk mitigation has been achieved. Capture of a single Medfly within 200 meters of a registered pest-exclusionary structure will necessitate increasing trap density in order to determine whether there is a reproducing population in the area. Six additional traps must be placed within a radius of 200 meters surrounding the trap where the Medfly was captured. Capture of two Medflies within 200 meters of a registered pest-exclusionary structure and within a 1-month time period will necessitate Malathion bait sprays in the area every 7 to 10 days for 60 days to ensure eradication;

(6) No Medfly host material is permitted within 50 meters of the entry

door of the pest-exclusionary structure or the packinghouse;

(7) The tomatoes must be packed within 24 hours of harvest and must be pink at the time of packing. They must be safeguarded by an insect-proof mesh screen or plastic tarpaulin while in transit to the packinghouse and while awaiting packing. They must be packed in insect-proof cartons or containers, or covered by insect-proof mesh or plastic tarpaulin for transit to the airport or ship and export to the United States. These safeguards must be intact upon arrival in the United States. Sea containers must be kept closed if stored within 20 meters of Medfly host materials prior to loading;

(8) During the time the packinghouse is in use for exporting fruit to the United States, the packinghouse may only accept fruit from registered approved production sites; and

(9) The Moroccan Ministry of Agriculture, Fresh Product Export (EACCE) is responsible for export certification inspection and issuance of phytosanitary certificates. Each consignment of tomatoes must be accompanied by a phytosanitary certificate issued by EACCE and bearing the declaration, "These tomatoes were grown in registered pest-exclusionary structures in Souss-Massa-Draa Region, Morocco, and were pink at the time of packing."

(Approved by the Office of Management and Budget under control numbers 0579–0049, 0579–0131, 0579–0316, 0579–0286, and 0579–0345)

**§ 319.56–34 [Amended]**

■ 4. In § 319.56–34, paragraph (j)(2), footnote 8 is redesignated as footnote 9.

Done in Washington, DC, this 26<sup>th</sup> day of October 2009.

**Kevin Shea**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. E9–26308 Filed 10–30–09; 8:45 am]

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**DEPARTMENT OF AGRICULTURE**

**Agricultural Marketing Service**

**7 CFR Part 983**

**[Doc. No. AMS–FV–09–0031; FV09–983–1 FR]**

**Pistachios Grown in California; Changes to Handling Regulations**

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

**ACTION:** Final rule.

<sup>7</sup> See footnote 5 to paragraph (a) of this section.

<sup>8</sup> See footnote 5 to paragraph (a) of this section.

**SUMMARY:** This rule changes the handling regulations prescribed under Marketing Agreement and Order No. 983 (order), which regulate the handling of pistachios grown in California, Arizona, and New Mexico. The changes were recommended by the Administrative Committee for Pistachios (committee), which is responsible for local administration of the order. The changes bring the handling regulations into conformance with amendments to the order by including certain regulatory language previously contained in the order's provisions in the order's administrative rules and regulations, lifting the suspension of certain language, removing obsolete language, and revising references to renumbered order provisions.

**DATES:** *Effective Date:* November 3, 2009.

**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) 205-2830, Fax: (202) 720-8938, or E-mail: [Laurel.May@ams.usda.gov](mailto:Laurel.May@ams.usda.gov).

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., Stop 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491, Fax: (202) 720-8938, E-mail: [Jay.Guerber@ams.usda.gov](mailto:Jay.Guerber@ams.usda.gov).

**SUPPLEMENTARY INFORMATION:** This final rule is issued under Marketing Agreement and Order No. 983, both as amended (7 CFR part 983), regulating the handling of pistachios grown in California, Arizona, and New Mexico. The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act."

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect.

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, or any obligation imposed in connection with the order, is not in accordance with law and may request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This final rule makes changes to the administrative rules and regulations contained in the order. The changes will bring the current handling regulations into conformance with amendments to the order by including certain regulatory language previously contained in the order's provisions in the order's administrative rules and regulations, lifting the suspension of certain language, removing obsolete language, and revising references to renumbered order provisions. These changes were recommended by the committee and submitted to USDA on May 28, 2008.

A Secretary's decision, which describes the proposed amendments to the order, was published in the **Federal Register** on August 6, 2009 (74 FR 39230). A copy of the Secretary's decision may be viewed at: <http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480a02766>. An order amending the order implementing the amendments is also scheduled to be published in the **Federal Register** on the date this rule is published.

Amendments to the order's provisions will expand the production area subject to regulation under the order to include the States of Arizona and New Mexico in addition to California. Additional amendments to the order will modify existing provisions regarding aflatoxin and quality regulations, revise various administrative procedures under the order, authorize the committee to recommend research projects, and make other related changes. The amendments were approved by producers participating in a referendum conducted during the period August 10 through August 22, 2009; thus, conforming changes to the order's administrative rules and regulations are necessary.

Among other things, specific regulatory language contained in the order's aflatoxin and quality provisions

is being removed. To avoid a lapse in regulation, the committee recommended that specific order provisions concerning aflatoxin tolerance levels and testing procedures be added to the order's administrative rules and regulations section at the same time the amendments are effectuated. This will provide a seamless transition and will assure that pistachios continue to be handled under the same regulations previously in place for California pistachios under the order. This rule implements those conforming changes. It is intended that finalization of this rule correspond with the issuance of the order amending the order upon publication in the **Federal Register**.

Section 983.38 of the order previously specified the maximum aflatoxin tolerance level for domestic shipments of pistachios for human consumption. This section also specified aflatoxin testing and certification procedures. Section 983.39 of the order, which was suspended on December 10, 2007 (72 FR 69141), specified minimum quality levels for domestic shipments of pistachios for human consumption. Testing and certification procedures to verify pistachio quality were also specified in this section. Section 983.46(c) of the order authorized the committee to recommend administrative rules and regulations implementing the provisions of §§ 983.38 and 983.39.

The order as amended includes amendments to §§ 983.38 and 983.39 that removes specific regulatory language from those provisions and replaces it with general authority to recommend and establish aflatoxin and quality regulations through the informal rulemaking process. Sections 983.38 and 983.39 are also being redesignated as §§ 983.50 and 983.51, respectively. Such changes require the addition of new regulatory sections to the order's administrative rules and regulations, render certain other sections obsolete, and require the revision of other sections to reflect changes to the order provisions, including references to renumbered sections.

As a result of the amendment of § 983.38, certain specific handling requirements concerning aflatoxin levels and testing procedures previously provided in that section are being moved to a new § 983.150—Aflatoxin Regulations, which is added to the order's rules and regulations. Section 983.150 specifies an aflatoxin tolerance level of 15 ppb, which is the aflatoxin tolerance previously provided under the order. Section 983.150 also specifies the same aflatoxin sampling, testing, and certification procedures previously contained in the order, with some

modifications. For instance, the regulation requires that at least eight members of the committee recommend, and the Secretary approve, any alternative aflatoxin analysis methods. The regulation also requires accredited laboratories performing aflatoxin testing to certify that every lot of production area pistachios shipped domestically does not exceed the maximum aflatoxin tolerance level specified under the regulations. Additionally, handlers are required to maintain testing and shipping records for three years beyond the production year of their applicability. Finally, section references throughout the section are updated to reflect renumbered order provisions.

Section 983.138 of the order's administrative rules and regulations concerns the drawing of samples for aflatoxin testing in accordance with requirements in § 983.38. Because updated sampling procedures are contained in new § 983.150, this section would be obsolete under the amended order. Therefore, the committee recommended removing this section.

Due to amendment of § 983.39, the order will no longer contain specific regulations regarding minimal pistachio quality or testing. The committee will have general authority to consider and recommend minimal quality regulations and testing procedures. Certain references to the provisions of § 983.39 will also be obsolete. Therefore, the committee recommended that affected sections be revised to reflect proposed amendments to that section.

Section 983.141 outlines procedures for exempting handlers from minimum quality testing. This section has been suspended since December 10, 2007 (72 FR 69141), when the minimum quality provision of the order was also suspended. This section will be obsolete under the amended order. Therefore, the committee recommended lifting the suspension of § 983.141 and removing the section.

The order amendments include a change to § 983.40 that removes specific regulations regarding rework procedures for lots of pistachios failing aflatoxin and minimum quality testing. Those regulations are being replaced with general authority to recommend rework procedures for failed lots. Specific regulations describing rework provisions for lots failing aflatoxin testing are being moved to a new § 983.152—Failed lots/rework procedure. Conforming changes to the text of the current regulations are being made in § 983.152 to reference aflatoxin regulations in the amended order provisions, and references to

renumbered sections are also being changed.

The order amendments include a change to § 983.41 that removes a quality testing exemption for handlers handling fewer than 1,000,000 pounds of pistachios annually and replaces it with general authority to recommend testing procedures for minimum quantities. Section 983.41 is also being redesignated as § 983.53. Section 983.47 previously provided for the collection of necessary reports from regulated handlers. As a result of the amendments, § 983.47 is being redesignated as § 983.64. Paragraph (d) of § 983.147 describes Form ACP-5—“Minimal Testing Form,” for use by handlers handling fewer than 1,000,000 pounds of pistachios annually. That paragraph has been suspended since December 10, 2007 (72 FR 69141), when the minimum quality provision of the order was also suspended. The committee recommended revising that paragraph to specify that handlers may use Form ACP-5 to request permission to handle minimum quantities of pistachios according to the provisions of redesignated § 983.53. To remain consistent with the redesignation of § 983.47 as § 983.64, this rule redesignates § 983.147 as § 983.164.

The order amendments include a change to § 983.70, which previously provided an exemption from certain handling regulations under the order for handlers of fewer than 1,000 pounds of pistachios and authorized the committee to recommend revised exemption levels. The amendment raises the exemption level to 5,000 pounds. The section is also being redesignated as § 983.92. As authorized under § 983.70, § 983.170 of the order's administrative rules and regulations previously provided an exemption for handlers of fewer than 5,000 pounds. As a result of the amendment to § 983.70, § 983.170 is redundant. Therefore, the committee recommended that § 983.170 be removed. Additionally, a reference to § 983.170 in § 983.143 is revised to reference the exemption level in redesignated § 983.92. Finally, amendments to § 983.43 redesignate that section as § 983.55. To remain consistent with that redesignation, this rule also redesignates § 983.143 as § 983.155.

Section 983.53 of the order authorizes the collection of assessments from handlers on receipts of pistachios. Such assessments are used to fund expenses of the committee. Section 983.253 specifies the current assessment rate established for California pistachios. As explained above, the order amendments include expanding the production area

to include the States of Arizona and New Mexico, in addition to California. Therefore, the committee recommended that paragraph (b) of § 983.253 be revised to establish an assessment rate applicable to all production area pistachios. To conform to the definition of the committee's “production year” contained in the order, the language of paragraph (b) of § 983.253 is also being revised to specify that assessments are due to the committee by December 15 of the applicable production year.

#### Initial Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

Small business 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 29 handlers and 875 producers of pistachios in California, Arizona, and New Mexico. The committee has estimated that approximately 50 per cent of California handlers would be considered small businesses, as defined by SBA. The industry has estimated that one of the Arizona handlers and all three New Mexico handlers would also be considered small businesses.

Data provided by the committee regarding the size of the 2007 crop, as well as data reported by the National Agricultural Statistics Service (NASS), suggests that the average California producer revenue for the 2007 crop was \$733,200. It is estimated that 85 percent of California producers had receipts of less than \$750,000 and would thus be considered small businesses according to the SBA definition. Although there is no official data available, the industry estimates that the majority of producers in Arizona and New Mexico would also be considered small businesses.

The order previously regulated only pistachios produced in California. As a result of amendments to the order, the production area is being expanded to include Arizona and New Mexico. Additional amendments to the order will remove specific aflatoxin and quality regulations and testing procedures from the order's provisions and replace them with general authority for the committee to recommend aflatoxin and quality regulations. This rule makes changes to the order's administrative rules and regulations by adding the specific aflatoxin regulations previously found in the order's provisions and clarifying that the regulations pertain to handlers throughout the expanded production area. Certain language in the administrative rules and regulations section that is currently suspended, or that is redundant or obsolete due to enactment of the amendments, is being removed or revised. References to order sections that have been redesignated are also revised to reference the renumbered sections. These changes were recommended by the committee to ensure a seamless transition in aflatoxin regulation when the amendments are approved and to conform to various changes to the order's provisions.

Specifically, this rule removes § 983.138—Samples for testing, § 983.141—Procedures for exempting handlers from minimum quality testing, and § 983.170—Handler exemption, from the order's administrative rules and regulations. Conforming changes are being made to the language and references in §§ 983.143, 983.147, 983.253 to reflect amendments to the order, such as the expansion of the production area to include Arizona and New Mexico and the redesignation of several order sections. Sections 983.143 and 983.147 are being redesignated as §§ 983.155 and 983.164, respectively. Finally, two new sections, § 983.150—Aflatoxin regulations, and § 983.152—Failed lots/rework procedure, are being added to incorporate specific regulations concerning aflatoxin tolerance levels and testing procedures that are removed from the order's provisions as a result of the amendments.

The impact of the amendments to the order on producers and handlers has been analyzed in the Secretary's Decision published in the **Federal Register** on August 6, 2009, at 74 FR 39230. It may be generally concluded from the final regulatory impact analysis that the order amendments will improve the operation and functioning of the marketing order program and that all producers and handlers will benefit

regardless of size. The analysis examined the benefits and costs to producers and handlers as a result of the expansion of the production area to include Arizona and New Mexico and the regulation of handlers under the marketing order program, including aflatoxin certification requirements.

Many of the amendments in this rule simply change the location of the regulatory provisions concerning aflatoxin levels and testing from the order provisions to the regulations. Therefore, these changes should have no effect upon California pistachio handlers of any size since they are currently required to comply with those requirements. With regard to application of aflatoxin certification requirements on Arizona and New Mexico handlers, that impact is fully considered in the previously referenced final regulatory flexibility analysis. The minimum quality provisions of the order have been suspended since December 10, 2007 (72 FR 69141), so there will be no effect on handlers as a result of removing those provisions. The revision of certain language, redesignation of some sections, and references to redesignated sections of the order that will be made to conform to the amended order are administrative in nature and will have no effect on producers or handlers of any size.

The changes in this rule are necessary to conform to amendments to the order. With regard to alternatives, if the amendments had not been approved by producers voting in the referendum, these changes would not be made and the proposed rule would have been withdrawn.

This action will not impose any additional reporting or recordkeeping requirements on either small or large pistachio handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

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

USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this rule.

These changes were recommended by the committee on March 6, 2008, and submitted to AMS on May 28, 2008. The committee's meeting was widely publicized throughout the pistachio industry and all interested persons were invited to attend and participate. All

entities, both large and small, were able to express their views on the effects of the amendments contained herein.

A proposed rule concerning this action was published in the **Federal Register** on September 4, 2009 (74 FR 45772). Copies of the rule were provided to interested parties. The rule was also made available through the Internet by USDA and the Office of the Federal Register. A 10-day comment period ending on September 14, 2009, was provided to allow interested persons to respond to the proposal.

One comment was received during the comment period. The comment was submitted by the manager of the committee. The commenter requested that the implementation of the aflatoxin regulations be delayed for handlers in the States of Arizona and New Mexico (District 4). The commenter points out that these States will be added to the production area and subject to regulation as a result of amendments to the order. The commenter states that handlers in Arizona and New Mexico have not previously been subject to marketing order requirements and have not had access to the necessary inspection services and forms needed to comply with the marketing order requirements. In addition, the committee will need time to consider implementation of rules and regulations that could provide reimbursement to District 4 handlers for additional costs associated with aflatoxin testing and certification.

USDA agrees that it may take a period of time for the handlers in Arizona and New Mexico to be in a position to meet these marketing order requirements. California handlers have been operating under the requirements since 2005; however, the Arizona and New Mexico handlers will need some time to transition into the program.

USDA believes it is reasonable to implement the aflatoxin sampling, testing, and certification requirements for Arizona and New Mexico handlers in District 4. Therefore, a change is made in this final rule that will implement the aflatoxin regulations for Arizona and New Mexico handlers on or after October 30, 2009.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateN&page=MarketingOrdersSmallBusinessGuide>. Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant matters presented, including the information and recommendation submitted by the committee and other available information, it is hereby found that this rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

It is further found that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** (5 U.S.C. 553) because, as stated in the final rule amending the current order, the new production year began on September 1, and these regulations, which implement the order as amended, should be in place as soon as possible. Further, the effective date of this final rule corresponds to the effective date of the amended order.

#### 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.

#### § 983.138 [Removed]

■ 2. Section 983.138 is removed.

#### § 983.141 [Removed]

■ 3. Lift the December 10, 2007, suspension of § 983.141, and remove the section.

#### § 983.143 [Redesignated as § 983.155 and Amended]

■ 4. Redesignate § 983.143 as § 983.155, and amend paragraph (b) of that section

by removing the words “§ 983.170” and adding in their place the words “§ 983.92.”

#### § 983.147 [Redesignated as § 983.164]

■ 5. Lift the December 10, 2007, suspension of § 983.147(d), redesignate § 983.147 as § 983.164.

■ 6. Amend newly redesignated § 983.164 by revising paragraph (d) to read as follows:

#### § 983.164 Reports.

\* \* \* \* \*

(d) *ACP–5, Minimal Testing Form.* Each handler who handles less than 1,000,000 pounds of dried weight pistachios in a production year and who wishes to request permission to handle under the minimal quantities provisions (§ 983.53) of the order shall furnish this report to the committee office no later than August 1 of each production year.

\* \* \* \* \*

■ 7. Add new § 983.150 to read as follows:

#### § 983.150 Aflatoxin regulations.

(a) *Maximum level.* No handler shall ship for domestic human consumption, pistachios that exceed an aflatoxin level of 15 ppb; *Provided,* That the provisions of this section pertaining to aflatoxin levels, sampling, testing, and certification shall apply to handlers in District 4 on or after October 30, 2009. All shipments must also be covered by an aflatoxin inspection certificate. Pistachios that fail to meet the aflatoxin requirements shall be disposed in such manner as described in the Failed Lots/Rework Procedure of this part (§ 983.152).

(b) *Change in level.* The committee may recommend to the Secretary changes in the aflatoxin level specified in this section. If the Secretary finds, on the basis of such recommendation or

other information, that such an adjustment of the aflatoxin level would tend to effectuate the declared policy of the Act, such change shall be made accordingly.

(c) *Transfers between handlers.* Transfers between handlers within the production area are exempt from the aflatoxin regulation of this section.

(d) *Aflatoxin testing procedures.* To obtain an aflatoxin inspection certificate, each lot to be certified shall be uniquely identified, be traceable from testing through shipment by the handler, and be subjected to the following:

(1) *Samples for testing.* Prior to testing, a sample shall be drawn from each lot (“lot samples”) of sufficient weight to comply with Table 1 and Table 2 of this section.

(2) *Test samples for aflatoxin.* Prior to submission of samples to an accredited laboratory for aflatoxin analysis, three samples shall be created equally from the pistachios designated for aflatoxin testing in compliance with the requirements of Tables 1 and 2 of this paragraph (“test samples”). The test samples shall be prepared by, or under the supervision of, an inspector, or as approved under an alternative USDA-recognized inspection program. The test samples shall be designated by an inspector as Test Sample #1, Test Sample #2, and Test Sample #3. Each sample shall be placed in a suitable container, with the lot number clearly identified, and then submitted to an accredited laboratory. The gross weight of the inshell lot sample for aflatoxin testing and the number of incremental samples required are shown in Table 1. The gross weight of the kernel (shelled) lot sample for aflatoxin testing and the number of incremental samples required is shown in Table 2.

TABLE 1 TO § 983.150(D)(2)—INSHELL PISTACHIO LOT SAMPLING INCREMENTS FOR AFLATOXIN CERTIFICATION

Lot weight (lbs)	Number of incremental samples for the lot sample	Total weight of lot sample (kilograms)	Weight of the test sample (kilograms)
220 or less .....	10	3.0	1.0
221–440 .....	15	4.5	1.5
441–1,100 .....	20	6.0	2.0
1,101–2,200 .....	30	9.0	3.0
2,201–4,400 .....	40	12.0	4.0
4,401–11,000 .....	60	18.0	6.0
11,001–22,000 .....	80	24.0	8.0
22,001–150,000 .....	100	30.0	10.0

TABLE 2 TO § 983.150(D)(2)—SHELLED PISTACHIO KERNEL LOT SAMPLING INCREMENTS FOR AFLATOXIN CERTIFICATION

Lot weight (lbs)	Number of incremental samples for the lot sample	Total weight of lot sample (kilograms)	Weight of the test sample (kilograms)
220 or less .....	10	1.5	0.5
221–440 .....	15	2.3	0.75
441–1,100 .....	20	3.0	1.0
1,101–2,200 .....	30	4.5	1.5
2,201–4,400 .....	40	6.0	2.0
4,401–11,000 .....	60	9.0	3.0
11,001–22,000 .....	80	12.0	4.0
22,001–150,000 .....	100	15.0	5.0

(3) *Testing of pistachios.* Test samples shall be received and logged by an accredited laboratory and each test sample shall be prepared and analyzed using High Pressure Liquid Chromatograph (HPLC), Vicam Method (Aflatest), or other methods as recommended by not fewer than eight members of the committee and approved by the Secretary. The aflatoxin level shall be calculated on a kernel weight basis.

(4) *Certification of lots “negative” as to aflatoxin.* Lots will be certified as “negative” on the aflatoxin inspection certificate if Test Sample #1 has an aflatoxin level at or below 5 ppb. If the aflatoxin level of Test Sample #1 is above 25 ppb, the lot fails and the accredited laboratory shall fill out a failed lot notification report as specified in § 983.52. If the aflatoxin level of Test Sample #1 is above 5 ppb and below 25 ppb, the accredited laboratory may at the handler’s discretion analyze Test Sample #2, and the test results of Test Samples #1 and #2 will be averaged. Alternatively, the handler may elect to withdraw the lot from testing, rework the lot, and resubmit it for testing after reworking. If the handler directs the laboratory to proceed with the analysis of Test Sample #2, the lot will be certified as negative to aflatoxin and the laboratory shall issue an aflatoxin inspection certificate if the averaged results of Test Sample #1 and Test Sample #2 are at or below 10 ppb. If the averaged aflatoxin level of Test Samples #1 and #2 is at or above 20 ppb, the lot fails and the accredited laboratory shall fill out a failed lot notification report as specified in § 983.52. If the averaged aflatoxin level of Test Samples #1 and #2 is above 10 ppb and below 20 ppb, the accredited laboratory may, at the handler’s discretion, analyze Test Sample #3, and the results of Test Samples #1, #2, and #3 will be averaged. Alternatively, the handler may elect to withdraw the lot from testing, rework the lot, and resubmit it for testing after reworking. If the handler directs the

laboratory to proceed with the analysis of Test Sample #3, a lot will be certified as negative to aflatoxin and the laboratory shall issue an aflatoxin inspection certificate if the averaged results of Test Samples #1, #2, and #3 are at or below 15 ppb. If the averaged aflatoxin results of Test Samples #1, #2, and #3 are above 15 ppb, the lot fails and the accredited laboratory shall fill out a failed lot notification report as specified in § 983.52. The accredited laboratory shall send a copy of the failed lot notification report to the committee and to the failed lot’s owner within 10 working days of any failure described in this section. If the lot is certified as negative as described in this section, the aflatoxin inspection certificate shall certify the lot using a certification form identifying each lot by weight and date. The certification expires for the lot or remainder of the lot after 12 months.

(5) *Certification of aflatoxin levels.* Each accredited laboratory shall complete aflatoxin testing and reporting and shall certify that every lot of pistachios shipped domestically does not exceed the aflatoxin levels as required in paragraph (a) of this section or as provided under § 983.50. Each handler shall keep a record of each test, along with a record of final shipping disposition. These records must be maintained for three years beyond the production year of their applicability, and are subject to audit by the Secretary or the committee at any time.

(6) *Test samples that are not used for analysis.* If a handler does not elect to use Test Samples #2 or #3 for certification purposes, the handler may request that the laboratory return them to the handler.

■ 8. Add new § 983.152 to read as follows:

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

(a) *Inshell rework procedure for aflatoxin.* If inshell rework is selected as a remedy to meet the aflatoxin regulations of this part, then 100% of the product within that lot shall be

removed from the bulk and/or retail packaging containers and reworked to remove the portion of the lot that caused the failure. Reworking shall consist of mechanical, electronic, or manual procedures normally used in the handling of pistachios. After the rework procedure has been completed, the total weight of the accepted product and the total weight of the rejected product shall be reported to the committee. The reworked lot shall be sampled and tested for aflatoxin as specified in § 983.150, except that the lot sample size and the test sample size shall be doubled. If, after the lot has been reworked and tested, it fails the aflatoxin test for a second time, the lot may be shelled and the kernels reworked, sampled, and tested in the manner specified for an original lot of kernels, or the failed lot may be used for non-human consumption or otherwise disposed of.

(b) *Kernel rework procedure for aflatoxin.* If pistachio kernel rework is selected as a remedy to meet the aflatoxin regulations in § 983.150, then 100% of the product within that lot shall be removed from the bulk and/or retail packaging containers and reworked to remove the portion of the lot that caused the failure. Reworking shall consist of mechanical, electronic, or manual procedures normally used in the handling of pistachios. After the rework procedure has been completed, the total weight of the accepted product and the total weight of the rejected product shall be reported to the committee. The reworked lot shall be sampled and tested for aflatoxin as specified in § 983.150.

**§ 983.170 [Removed]**

■ 9. § 983.170 is removed.

■ 10. Amend § 983.253 by removing the word “California” in paragraph (a), and by revising paragraph (b) to read as follows:

**§ 983.253 Assessment rate.**

(a) \* \* \*

(b) Each handler who receives pistachios for processing shall furnish the Receipts/Assessment Report and pay all due assessments to the committee by December 15 of the applicable production year.

Dated: October 26, 2009.

**Rayne Pegg,**

*Administrator, Agricultural Marketing Service.*

[FR Doc. E9-26148 Filed 10-30-09; 8:45 am]

**BILLING CODE 3410-02-P**

## 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; Order Amending Marketing Order No. 983**

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

**ACTION:** Final rule.

**SUMMARY:** This final rule amends the marketing agreement and order for pistachios (order). The amendments were proposed by the Administrative Committee for Pistachios (Committee), which is responsible for local administration of the order. The amendments will: 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.

**DATES:** This rule is effective November 3, 2009.

#### **FOR FURTHER INFORMATION CONTACT:**

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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 documents 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); a Recommended Decision issued on April 29 and published in the May 5, 2009, issue of the **Federal Register** (74 FR 20630); and a Secretary's Decision and Referendum Order issued on July 29, 2009, and published in the August 6, 2009, issue of the **Federal Register** (74 FR 39230).

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**

This final rule was formulated on the record of a public hearing held on July 29 and 30, 2008, in Fresno, California. Notice of this hearing was issued on July 15, 2008, and published in the July 18, 2008, issue of the **Federal Register** (73 FR 41298). The hearing was held to consider proposed amendments to the order.

The hearing was held 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 Notice of Hearing contained several amendment proposals submitted by the Committee. Upon the basis of evidence introduced at the hearing and the record thereof, the Administrator of AMS on April 29, 2009, filed with the Hearing Clerk, U.S. Department of Agriculture, a Recommended Decision and Opportunity to File Written Exceptions thereto. This Recommended Decision was published in the May 5, 2009, issue of the **Federal Register** (74 FR 39230). No exceptions were filed.

A Secretary's Decision and Referendum Order was issued on July 29, 2009, and published in the August 6, 2009, issue of the **Federal Register**

(74 FR 39230). This document directed that a referendum among pistachio growers be conducted during the period August 10 through August 22, 2009 to determine whether they favor the proposed amendments to the order. To become effective, the amendments had to be approved by at least two-thirds of the volume of pistachios represented by voters in the referendum. All of the proposed amendments were favored by at least 94 percent of those voting in the referendum and by at least 96 percent of the volume represented in the referendum.

*The amendments included in this final order will:*

1. Expand the production area to include the States of Arizona and New Mexico. The production area covered under the order was previously limited to the State of California. This amendment will revise existing § 983.26, Production area, and redesignate it as § 983.25. It will 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 will also be redesignated as § 983.20 and § 983.41, respectively.

2. Authorize the Committee to reimburse handlers for travel and shipping costs related to aflatoxin inspection, under certain circumstances. This amendment will revise existing § 983.44, Inspection, certification and identification, and redesignate it as § 983.56.

3. Add a new § 983.46, Research, that will authorize the Committee to engage in research projects with the approval of USDA. This amendment will also require corresponding changes to existing § 983.34, Procedure, to establish voting requirements for Committee recommendations concerning research. It will 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 will also be redesignated as § 983.43, § 983.59, and § 983.72, respectively.

4. Provide broad authority for aflatoxin regulations by revising existing § 983.38, Aflatoxin levels, and redesignating it as § 983.50. This amendment also requires corresponding changes to existing § 983.40, and redesignating that section as § 983.52. It also requires corresponding changes to § 983.1, Accredited laboratory.

5. Provide broad authority for quality regulations by revising existing § 983.39, Minimum quality levels, and redesignating it as § 983.51. It also