

# 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

[Docket No. FV06-983-2 PR]

#### Pistachios Grown in California; Modification of Small Handler Exemption

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

**ACTION:** Proposed rule.

**SUMMARY:** This rule invites comments on modifications to the current handling requirements prescribed under the California pistachio marketing order (order). The order regulates the handling of pistachios grown in California and is administered locally by the Administrative Committee for Pistachios (committee). The proposed modification would increase the exemption threshold for pistachio handlers who handle small amounts of pistachios, primarily for home or personal use. Currently, handlers of 1,000 pounds or less of hulled and dried pistachios (assessed weight) are exempt from most handling requirements. Under this proposal, the exemption would be extended to handlers of less than 5,000 pounds of assessed weight pistachios. This change is not expected to have a significant impact on the overall quality of California pistachios found in the marketplace.

**DATES:** Comments must be received by July 10, 2006.

**ADDRESSES:** Interested persons are invited to submit written comments concerning this proposal. Comments must be sent to the Docket Clerk, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250-0237; Fax: (202) 720-8938, or e-mail: [moab.docketclerk@usda.gov](mailto:moab.docketclerk@usda.gov); or Internet: <http://www.regulations.gov>. All comments should reference the docket number and the date and page number

of this issue of the **Federal Register** and will be made available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: <http://www.ams.usda.gov/fv/moab.html>.

#### FOR FURTHER INFORMATION CONTACT:

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

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

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

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

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

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing USDA would rule on the petition. The Act provides that the district court of the United States in any district in which

the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This proposal invites comments on modifications to the current handling requirements prescribed under the California pistachio order. This proposed modification would increase the exemption threshold for pistachio handlers who handle small amounts of pistachios from the current level of 1,000 pounds or less of assessed weight pistachios to less than 5,000 pounds of assessed weight pistachios. Under this proposal, pistachio handlers who handle less than 5,000 pounds of assessed weight pistachios would be exempt from most handling requirements established under the order, including those relating to aflatoxin testing, minimum quality inspection, and payment of assessments.

Previous rules, one section of the order, and two sections of the rules and regulations refer to "dried pounds" or "dried weight" of pistachios. While these terms are not defined in the order, they are generally interchangeable with the defined term "assessed weight." For the purposes of this proposed rule, the term "assessed weight" will be used.

Section 983.70 of the pistachio order currently exempts any handler who handles 1,000 pounds or less of assessed weight pistachios in any production year from the requirements of §§ 983.38 through 983.45 and § 983.53 of the order. A "production year" begins on September 1 and ends the following August 31.

Section 983.38 of the order establishes a maximum aflatoxin level and the aflatoxin testing protocol, among other things.

Section 983.39 of the order establishes minimum quality levels in terms of maximum defects and minimum sizes.

Section 983.40 of the order establishes procedures for reworking pistachios that fail to meet the requirements prescribed in §§ 983.38 and 983.39.

Section 983.41 of the pistachio order authorizes alternative aflatoxin testing methods for handlers handling less than 1 million pounds of assessed weight pistachios per production year, and authorizes the committee to grant such handlers exemptions from minimum quality testing requirements.

Section 983.42 of the order permits commingling of inspected and certified lots with other inspected and certified lots.

Section 983.43 of the order authorizes rules and regulations to establish conditions under which pistachios would be subject to reinspection.

Under § 983.44 of the order, all pistachios required to be inspected and certified may be subject to container marking or other identification requirements.

Section 983.45 of the order requires the committee (with USDA's approval) to establish reporting and disposition procedures for substandard pistachios (those not meeting aflatoxin and minimum quality requirements).

Finally, § 983.53 of the order authorizes handler assessment to defray program administrative costs.

The committee met on March 1, 2006, and unanimously recommended increasing the current handler exemption from including handlers that handle 1,000 pounds or less of assessed weight pistachios to handlers that handle less than 5,000 pounds of assessed weight pistachios. This action is authorized under § 983.70 of the order, and would be implemented by adding a new section in the marketing order's rules and regulations (§ 983.170 Handler exemption). This rule would also make conforming changes to the order's rules and regulations to reflect the change in the exemption level.

Specifically, the new § 983.170 would exempt handlers who handle less than 5,000 pounds of assessed weight pistachios in a production year from the requirements of §§ 983.38 through 983.45 and § 983.53 of the order.

In addition, conforming changes would be necessary in § 983.143, paragraph (b)(2), as well as in § 983.147, paragraphs (c) and (g), to clarify that the handling exemption applies to handlers of less than 5,000 pounds of assessed weight pistachios rather than the currently-applicable level of 1,000 pounds or less of assessed weight pistachios.

The committee estimates that the amount of pistachios handled by handlers with less than 5,000 pounds of assessed weight pistachios is approximately 48,515 pounds of the total 283,419,713 pounds handled in the 2005–2006 production year, or less than 0.02 percent of all pistachios handled that production year. In the committee's opinion, quantities of pistachios that are less than 5,000 pounds are not commercially-significant and are unlikely to have an impact in the marketplace. These pistachios would likely be sold at local farmers' markets;

kept for home use; distributed to friends, neighbors, business associates, or others; or used for other non-commercial purposes, rather than enter the conventional channels of trade.

Exempt handlers would continue to file the required report, the ACP–4, with the committee by November 15 of each production year (§ 983.147 Reports). Also, under the authority contained in § 983.50, Random verification audits, and § 983.51, Verification of reports, the committee would maintain the right to spot-check these handlers to ensure marketing order compliance.

The committee noted that when the order was promulgated, there was limited information about pistachio handlers and the volumes of pistachios each handled. Thus, the initial order provided for what was believed to be a reasonable exemption level of 1,000 pounds or less of assessed weight pistachios. After operating under the marketing order regulations for approximately one year, the committee believes that the handling exemption level is too low and recommended this proposed relaxation.

#### Initial Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Agricultural Marketing Service (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 in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 50 handlers of California pistachios who are subject to regulation under the order and about 741 producers of pistachios in the production area. This proposal would result in about 28 of the current handlers being exempt from most regulatory provisions of the order. The number of known handlers has increased since the committee began operation because they now have the authority under the order to gather information about handlers.

The Small Business Administration (SBA) (13 CFR 121.201) defines small agricultural service firms as those having annual receipts of less than \$6,500,000 and defines small agricultural producers as those having

annual receipts of less than \$750,000. Thirty-three of the 50 handlers subject to regulation have annual pistachio receipts of less than \$6,500,000. In addition, 722 of the 741 producers have annual receipts less than \$750,000. Therefore, a majority of handlers (66 percent) and producers (97 percent) may be classified as small entities under the SBA standards.

This proposal would increase the current handling exemption level for handlers from 1,000 pounds or less of assessed weight pistachios to less than 5,000 pounds of assessed weight pistachios. Exempt handlers could handle their pistachios free from the requirements of §§ 983.38 through 983.45 and § 983.53 of the order.

The committee met on March 1, 2006, to consider the handling exemption and unanimously recommended revising the level from 1,000 pounds or less of assessed weight pistachios to less than 5,000 pounds of assessed weight pistachios handled per production year.

The committee estimates that the total volume of pistachios handled by the 28 handlers with less than 5,000 pounds of assessed weight pistachios is approximately 48,515 pounds of the total 283,419,713 pounds handled in the 2005–2006 production year. This represents less than 0.02 percent of all pistachios handled that production year. In the committee's opinion, 5,000 pounds of assessed weight pistachios is not commercially-significant and represents pistachios that are unlikely to enter conventional channels of trade.

The committee also noted that when the order was promulgated, there was very little information about pistachio handlers and their relative volumes. The initial order provided for what was believed to be a reasonable exemption level of 1,000 pounds or less of assessed weight pistachios. The committee now believes that the exemption level is too low and should be increased.

The committee recommendation on March 1, 2006, resulted from deliberations of its Technical Subcommittee (subcommittee), the subcommittee charged with compliance, quality, and inspection issues under the order. The March 1, 2006, meeting of the subcommittee was also a public meeting, where opinions and concerns of industry representatives were solicited, openly discussed, and deliberated at some length.

The subcommittee and committee discussed alternatives to this modification, including not making any changes or modifying the handling exemption for handlers of less than 10,000 pounds of assessed weight pistachios. Both the subcommittee and

the committee ultimately determined that exempting handlers of less than 5,000 pounds of assessed weight pistachios was prudent because only 14 additional handlers would be affected, and the total volume of exempted pistachios handled is relatively insignificant (less than 0.02 percent of total production). Thus, exempting an estimated total of 28 handlers with less than 5,000 pounds of assessed weight pistachios would not affect the overall quality of the pistachios handled as those pistachios are likely to be for home or personal use and will not compete in traditional markets.

Both the subcommittee and the committee noted that spot-checks on small handlers would be continued to ensure compliance with order requirements.

This action would reduce reporting requirements for pistachio handlers who fall below the 5,000 pound threshold. Such handlers would also be exempt from most of the other regulatory requirements imposed under the authority.

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.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the information collection requirements that are contained in this rule have previously been approved by the Office of Management and Budget (OMB), and have been assigned OMB No. 0581-0215.

AMS is committed to compliance with the Government Paperwork Elimination Act (GPEA), which requires Government agencies in general to provide the public the option of submitting information or transacting business electronically to the maximum extent possible.

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

Further, the committee's meetings are widely publicized throughout the pistachio industry and all interested persons are encouraged to attend the meetings and participate in the committee's deliberations. In this respect, the March 1, 2006, subcommittee and committee meetings regarding the handler exemption were public meetings and all entities, both large and small, were encouraged to express their views on this issue.

The committee recommendation on March 1, 2006, resulted from deliberations of its Technical

Subcommittee, which is charged with compliance, quality, and inspection issues under the marketing order. During the subcommittee meeting, the opinions and concerns of industry representatives were solicited, openly discussed, and deliberated at some length. The subcommittee made its unanimous recommendation to the committee, who agreed with the recommendation unanimously, as well.

Finally, interested persons are invited to submit information on the regulatory and informational impacts of this action on small businesses.

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

A 20-day comment period is provided to allow interested persons to respond to this proposal. Twenty days is deemed appropriate because this rule should be in place by September 1, 2006, the beginning of the crop year, and is a relaxation of current handling requirements. All written comments received by the end of the comment period will be considered before a final determination is made on this matter.

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

Marketing agreements, Pistachios, 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. In § 983.143, revise paragraph (b)(2) to read as follows:

##### § 983.143 Reinspection.

\* \* \* \* \*

(b) \* \* \*

(2) Handlers exempted from order requirements under § 983.170 are exempt from all reinspection requirements.

3. In § 983.147, paragraphs (c) and (g) are revised to read as follows:

##### § 983.147 Reports.

\* \* \* \* \*

(c) *ACP-4, Federal Marketing Order Exempt Handler Notification.* Each handler who handles less than 5,000 pounds of assessed weight pistachios in

a production year shall complete and furnish this report to the committee no later than November 15 of each production year.

\* \* \* \* \*

(g) *Exemptions.* Handlers who handle less than 5,000 pounds of assessed weight pistachios during any production year are exempt from filing all forms, with the exception of the ACP-4.

\* \* \* \* \*

4. In part 983, Subpart—Rules and Regulations is amended by adding new § 983.170 to read as follows:

##### § 983.170 Handler exemption.

Pursuant to § 983.70, any handler may handle pistachios within the production area free of the requirements in §§ 983.38 through 983.45 and § 983.53 if such pistachios are handled in quantities of less than 5,000 pounds of assessed weight in any production year.

Dated: June 12, 2006.

**Kenneth C. Clayton,**

*Acting Administrator, Agricultural Marketing Service.*

[FR Doc. E6-9539 Filed 6-16-06; 8:45 am]

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#### DEPARTMENT OF AGRICULTURE

##### Animal and Plant Health Inspection Service

##### 9 CFR Parts 145 and 147

[Docket No. APHIS-2006-0008]

##### National Poultry Improvement Plan and Auxiliary Provisions

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Proposed rule.

**SUMMARY:** We are proposing to amend the National Poultry Improvement Plan (the Plan) and its auxiliary provisions by providing new or modified sampling and testing procedures for Plan participants and participating flocks. The proposed changes were voted on and approved by the voting delegates at the Plan's 2004 National Plan Conference. These changes would keep the provisions of the Plan current with changes in the poultry industry and provide for the use of new sampling and testing procedures.

**DATES:** We will consider all comments that we receive on or before August 18, 2006.

**ADDRESSES:** You may submit comments by either of the following methods:

- Federal eRulemaking Portal: Go to <http://www.regulations.gov> and, in the