

before parties may file suit in court challenging this rule.

### Paperwork Reduction Act

This interim rule contains no new information collection or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

### List of Subjects in 7 CFR Part 301

Agricultural commodities, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Transportation.

■ Accordingly, we are amending 7 CFR part 301 as follows:

### PART 301—DOMESTIC QUARANTINE NOTICES

■ 1. The authority citation for part 301 continues to read as follows:

**Authority:** 7 U.S.C. 7701–7772; 7 CFR 2.22, 2.80, and 371.3.

Section 301.75–15 also issued under Sec. 204, Title II, Pub. L. 106–113, 113 Stat. 1501A–293; sections 301.75–15 and 301.75–16 also issued under Sec. 203, Title II, Pub. L. 106–224, 114 Stat. 400 (7 U.S.C. 1421 note).

■ 2. In § 301.50–3, paragraph (c), the entries for Indiana and New York are amended by adding new counties in alphabetical order to read as follows:

#### § 301.50–3 Quarantined areas.

\* \* \* \* \*

(c) \* \* \*

Indiana

\* \* \* \* \*

*Decatur County.* The entire county.

\* \* \* \* \*

*Jennings County.* The entire county.

\* \* \* \* \*

*Ripley County.* The entire county.

\* \* \* \* \*

New York

\* \* \* \* \*

*Franklin County.* The entire county.

\* \* \* \* \*

Done in Washington, DC, this 1st day of June 2004.

**Kevin Shea,**

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

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**BILLING CODE 3410–34–P**

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 996

[Docket No. FV03–996–2 FIR]

#### Minimum Quality and Handling Standards for Domestic and Imported Peanuts Marketed in the United States

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

**ACTION:** Final rule.

**SUMMARY:** The Department of Agriculture (USDA) is adopting as a final rule, without change, an interim final rule that changed peanut quality and handling standards for domestic and imported peanuts marketed in the United States. These provisions are intended to maximize handling efficiency and to provide peanut producers, handlers, and importers with flexibility in meeting current and new market demands, while maintaining peanut quality and wholesomeness for consumers.

**EFFECTIVE DATE:** June 8, 2004.

**FOR FURTHER INFORMATION CONTACT:** Dawana Clark or Kenneth G. Johnson, DC Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 4700 River Road, Room 2A04, Unit 155, Riverdale, Maryland 20737; telephone (301) 734–5243, Fax: (301) 734–5275 or George J. Kelhart, Technical Advisor, 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: [dawana.clark@usda.gov](mailto:dawana.clark@usda.gov), [kenneth.johnson@usda.gov](mailto:kenneth.johnson@usda.gov) or [george.kelhart@usda.gov](mailto:george.kelhart@usda.gov).

Small businesses may request information on complying with this rule by contacting Jay Guerber, at the same DC address as above, or E-mail: [jay.guerber@usda.gov](mailto:jay.guerber@usda.gov).

**SUPPLEMENTARY INFORMATION:** This rule is issued under section 1308 of the Farm Security and Rural Investment Act of 2002 (Pub. L. 107–171), 7 U.S.C. 7958, hereinafter referred to as the “Act.”

This rule has been determined to be not significant for purposes of Executive Order 12866 and has not been reviewed by the Office of Management and Budget.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect. This rule will not preempt any State or local laws,

regulations, or policies, unless they present an irreconcilable conflict with this rule.

There are no administrative procedures, which must be exhausted prior to any judicial challenge to the provisions of this rule.

### Background

This rule is based on recommendations of the Peanut Standards Board (Board) and comments received from its members and other industry sources. The standards and the Board were established by the Department of Agriculture (USDA), pursuant to section 1308 of the Farm Security and Rural Investment Act of 2002. This rule continues the following: Screen sizes specified in the outgoing quality standards to allow smaller peanut kernels of all varieties to be used in edible markets; provisions in the text of the standards specifying that financially interested persons may appeal quality inspection results and that “holders of the title” to any lot of peanuts may appeal aflatoxin test results; provisions allowing peanut lots which meet fall through, minimum damage and minor defects standards prior to blanching, but fail for some other reason, to be exempt from fall through, minimum damage and minor defects standards upon re-inspection after blanching; and the increase to 10 percent in the quantity of sound whole kernels that may be contained in a lot of splits for specified peanut varieties.

Section 1308 of the Act requires that USDA take several actions with regard to peanuts marketed in the United States: Ensure mandatory inspection on all peanuts marketed in the United States; establish the Board comprised of industry representatives to advise USDA; and develop peanut quality and handling standards; and to modify those quality and handling standards when needed. An interim final rule was published in the **Federal Register** (67 FR 57129) on September 9, 2002, terminating the previous peanut programs and establishing standards in Part 996 to ensure the continued inspection of 2002 crop year peanuts and subsequent crop year peanuts, 2001 crop year peanuts not yet inspected, and 2001 crop year failing peanuts that had not yet met disposition standards. The initial Board was selected and announced on December 5, 2002. A final rule finalizing the interim final rule was published in the **Federal Register** (68 FR 1145) on January 9, 2003, to continue requiring all domestic and imported peanuts marketed in the United States to be handled consistent with the handling standards and

officially inspected against the quality standards of the new program. The provisions of this new program continue in force and effect until modified, suspended, or terminated.

Pursuant to the Act, USDA consulted Board members in the review of the handling and quality standards for the 2003 and subsequent crop years. USDA conducted a meeting with Board members on April 30, 2003. The changes were raised and supported by Board members. In addition to the meeting, USDA received written comments from Board members and others on recommended changes to the peanut handling and quality standards.

This rulemaking action continues unchanged: (1) Screen sizes specified in the outgoing quality standards to allow smaller peanut kernels of all varieties to enter edible channels; (2) provisions in the text of the standards specifying that financially interested persons may appeal quality inspection results and that "holders of the title" to any lot of peanuts may appeal aflatoxin test results; (3) provisions allowing peanut lots which meet fall through, minimum damage and minor defects standards, but fail for other reasons, prior to blanching, to be exempt from fall through, minimum damage and minor defects standards upon re-inspection after blanching; and (4) the increase to 10 percent of sound whole kernels that may be contained in lots of splits for specified peanut varieties. These provisions are intended to maximize handling efficiency and to provide producers, handlers, and importers with flexibility to meet current and new market demands, while maintaining peanut quality and wholesomeness for consumers.

The quality and handling standards are intended to assure that satisfactory quality and wholesome peanuts are used in domestic markets. All peanuts intended for human consumption must be officially inspected and graded by the Federal or Federal-State Inspection Service and undergo chemical testing by a USDA laboratory or a private laboratory approved by USDA. The maximum allowable presence of aflatoxin is 15 parts per billion (ppb), the same standard as required under the three previous peanut programs. This tolerance has been in effect for more than 15 years and was in effect at the time the previous peanut programs were terminated. Once certified as meeting outgoing quality standards, peanuts may not be commingled with any other peanuts that have failed outgoing quality standards or any residual peanuts from reconditioning operations.

The interim final rule implementing these changes was effective August 8, 2003 (68 FR 46919; August 7, 2003). A correction to a table specifying minimum quality standards in that rule was published September 11, 2003 (68 FR 53490).

#### **Small Kernel Usage**

Prior to establishing the quality standards that were applied during the 2002–03 crop year, a few peanut handler members of the Board suggested changing the shape and size of the holes in screens used to sort out small kernels. The changes discussed would have increased the number of smaller kernels that rode the screens and that could have entered edible channels.

The shape of the opening, slotted vs. round, is a significant factor in the number of smaller kernels that fall through or ride the screens. Slotted screens resemble the shape of peanuts and allow kernels to fall through as they move down the screen during the sorting process. Kernels fall through round openings only when striking the opening on end or "standing up" as they move down the screen. When more kernels ride the screen, more are available for edible channels.

Proponents of smaller kernel use claimed that end product manufacturers now have markets for smaller, whole kernels. They also claimed that modern, electronic color sorting technologies can sort out smaller kernels that are moldy or defective. Opponents, including some handlers and grower representatives, claimed that the benefits of increased use of small kernels were not worth the increased risk of aflatoxin contamination. Based on studies conducted by the Agricultural Research Service (ARS) going back to at least 1979, the industry was aware that there is a higher incidence of aflatoxin contamination in smaller peanut kernels.

Most Board members agreed that new research was needed on small kernel sizes and aflatoxin contamination before any change was made. USDA decided not to change screen sizes for the 2002–03 crop year and asked ARS to conduct another analysis of the incidence of aflatoxin in small peanut kernels. ARS peanut size and aflatoxin studies using 2002 crop Segregation 3 farmers' stock runner type peanuts from the Southeast (the peanuts and region most likely to have aflatoxin contamination) measured the contamination of kernels that rode a 16/64 inch slotted screen and those that rode a 17/64 inch round screen. The completed results, received by Fruit and Vegetable Programs on January 21, 2003, indicated that there was a small, but not

significant, increase of aflatoxin associated with the smaller peanut kernel size.

Past research has demonstrated that three farmers stock grade components are associated with aflatoxin. These are damage, loose-shelled kernels, and small or other kernels, and are often called the aflatoxin risk components in farmers' stock peanuts. Very little aflatoxin is associated with high quality farmers stock peanuts associated with the farmers stock grade referred to as sound mature kernels and sound splits. Studies conducted by sampling 120 contaminated farmers stock lots, published in 1998, showed that these three risk components accounted for 93.1 percent of the total aflatoxin in a farmers stock lot, but only 18.4 percent of the lot kernel mass. Aflatoxin in sound mature kernels and sound splits, small and other kernels, loose shelled kernels, and damaged kernels represented 6.9, 7.9, 33.3, and 51.9 percent, respectively, of the total aflatoxin. The small and other kernels had the lowest risk of the three risk components. The findings of research performed in previous years were similar.

ARS believes that the results of the past studies are consistent with the current studies presented to the Board in April 2003. The peanuts that rode the 17/64 inch round screen were a mix of sizes from small to large (not only small kernels as in the past studies). The mix of sizes was used to better duplicate sheller milling lines and processing practices. The aflatoxin impact was minimal because small and other kernels have the lowest aflatoxin risk of the three risk components and the small kernels composed a small percentage of the different sizes riding the 17/64 inch round screen. The higher the percentage of small kernels riding a 17/64 inch round screen, the greater the aflatoxin impact that small kernels will have on the lot in question. The percentage of small kernels that fell through the 16/64 inch slotted screen and rode the 17/64 inch round screen varied greatly from lot to lot in the studies presented to the Board. They averaged about 7 and 21 percent in the current study, respectively. In the final analysis, the aflatoxin impact of the smaller kernels was not significant according to ARS.

The Board discussed the peanut size and aflatoxin study at its April 30, 2003, meeting, and recommended relaxation of quality standards to allow smaller peanut kernels to be used for human consumption because the increase in aflatoxin in small kernels was not determined to be significant. All Board members agreed that quality and

wholesomeness are paramount for producers, handlers, and importers, but the industry believes it can continue to provide buyers with high quality and wholesome peanuts with changed screen sizes.

Compliance officers report that out of approximately 70 shelling plants, a total of 60 have electronic sorting technology to sort out defective small kernels and further improve peanut quality and wholesomeness. The 10 plants without electronic sorting technology only shell seed peanuts, which are used for planting and not for shipment to the edible market. Based on more recent information, these numbers have been updated from those in the interim final rule.

As shown in the table in § 996.31(a) Minimum Quality Standards: Peanuts for Human Consumption—Whole Kernels and Splits: Maximum Limitations, this action continues in effect the change the screen size for Runner peanuts from a  $1\frac{5}{64}$  inch by  $\frac{3}{4}$  inch slotted to a  $1\frac{7}{64}$  inch round opening. These were the sizes and peanut variety used in the study presented to the Board.

Because Virginia, Spanish, and Valencia varieties do not routinely experience high aflatoxin content, smaller kernels of those varieties also are not expected to have significantly increased aflatoxin contamination. Therefore, for Virginia variety peanuts, the screen size continues to be a  $1\frac{7}{64}$  inch round opening (previously the opening was  $1\frac{5}{64}$  inch by 1 inch slotted). For the Spanish and Valencia varieties of peanuts, the change from a  $1\frac{5}{64}$  inch by  $\frac{3}{4}$  inch slotted opening to a  $1\frac{6}{64}$  inch round opening also is continued.

Corresponding changes are continued under the “Lots of splits” category for “Sound whole kernels”. For Runner variety split lots, the screen opening was changed from a  $1\frac{5}{64}$  inch by 1 inch slotted opening to a  $1\frac{7}{64}$  inch round opening. For Virginia variety split lots, the  $1\frac{4}{64}$  inch by 1 inch slotted opening was changed to a  $1\frac{7}{64}$  inch round opening. For the Spanish and Valencia varieties, the screen opening was changed from a  $1\frac{3}{64}$  inch by  $\frac{3}{4}$  inch slotted opening to a  $1\frac{6}{64}$  inch round opening.

Previously, the table included three columns for fall through. The first two columns included a maximum 3 percent tolerance for “Sound Split and Broken Kernels” and “Sound Whole Kernels”, and the third column included a total tolerance of 4 percent for these categories of peanuts, except all three columns allowed 6 percent for “No. 2 Virginia”. A comment received from a

handler association subsequent to the Board meeting suggested combining the three columns into one column and establishing a total tolerance of 6 percent for sound split, broken, and small kernels allowed in any lot to bring the tolerances into conformity with the U.S. Grade Standards for the various types of peanuts grown and marketed in the United States. These recommendations were adopted by USDA and implemented in the interim final rule.

This final rule continues the relaxation in the utilization of small peanut kernels for edible consumption by changing the screens from slotted to round holes for sound whole kernels and splits as noted. This relaxation is expected to increase market share for U.S. peanuts by enabling handlers to sell smaller peanuts to buyers who purchase less expensive peanuts from other origins for manufacturing into peanut butter and paste, or similar products.

The screen changes are being implemented at shelling facilities with minimal or no additional cost to the shellers—either large or small. The screens with smaller openings were already being used for split lots and no additional investment for screens should be necessary. Any adjustments to the packing line as far as screens are concerned should be easily implemented.

According to Federal-State Inspection Service, all plants in Georgia shelling Runners and Spanish and Valencia varieties were already using  $1\frac{7}{64}$  round screens on the Runners and  $1\frac{6}{64}$  screens on the Spanish and Valencia varieties. The Inspection Service has a supply of screens for smaller peanut kernels to cover the five new shelling plants which were expected to begin operations by January 2004. In addition, the Inspection Service will provide screens for peanut shellers that need them at a cost per screen of \$55.00, plus shipping.

#### Appeal Procedures

This action also continues in effect in § 996.40(c) provisions specifying that the “holder of the title” to any lot of peanuts may request an appeal inspection if it is believed that the original aflatoxin analysis is in error. Appeals for aflatoxin are handled following procedures specified in the Inspection Service’s Instructions for Milled Peanuts. The aflatoxin sample would be drawn by Federal or Federal-State Inspection Service inspectors and the appeal analysis would be performed, and the aflatoxin certificate issued, by USDA or USDA-approved laboratories.

This action also continues to specify in this section that any financially interested person may request an appeal inspection if it is believed that the original quality inspection was in error. These appeals also would continue to be handled following procedures specified in the Inspection Service’s Instructions for Milled Peanuts. Federal or Federal-State Inspection Service inspectors would sample and inspect the peanuts following procedures in the milled peanut instructions.

All costs involved in conducting appeal inspections are for the account of the “holder of the title” or the financially interested person requesting the appeal. Under the appeal process, appeals may be requested verbally. A written request is not necessary.

#### Re-Inspection of Blanched Lots

Peanut lots which meet quality (grade) standards, including fall through, damage and minor defects, but which fail on aflatoxin may be blanched to remove the contaminated kernels. Under the previous standards, blanched lots had to be re-inspected for damage and minor defects. In some cases, a peanut lot will pass aflatoxin requirements but fail damage and minor defect tolerances because the removal of the skins in the blanching process may expose additional instances of damage or minor defects that were hidden prior to blanching.

Previously, § 996.50(d) provided that peanut lots certified as meeting the “fall through” standards prior to blanching do not have to meet “fall through” standards when re-inspected after blanching. The Board recommended that a similar exception be applied for damage and minor defects to reduce handler-operating costs and to avoid a possible loss of peanuts. This action finalizes that rulemaking action.

#### Allow Handlers To Purchase Higher Moisture Peanuts

Section 996.30(b) *Moisture* specifies that “No handler or importer shall receive or acquire farmers stock peanuts for subsequent disposition to human consumption outlets containing more than 10.49 percent moisture: *Provided*, That peanuts of a higher moisture may be received and dried to not more 10.49 percent moisture prior to storing or milling: *Provided further*, That Virginia-type peanuts used for seed may be received or acquired containing up to 11.49 percent moisture.”

Handlers may receive high moisture peanuts, but cannot acquire them. Because of this, any high moisture deliveries from a producer cannot be mixed with other high moisture

deliveries. The inability to commingle high moisture peanut deliveries for drying slows producer deliveries and raises drying costs. It also raises inspection fees because the peanuts need to be inspected a second time to verify their moisture levels prior to acquisition.

The Board requested that the 10.49 percent moisture standard be changed to allow handlers to acquire farmers stock peanuts with a moisture content up to 25 percent. The Board also recommended the addition of a provision requiring the producer and handler both to agree to the sale and acquisition of the high moisture peanuts. The moisture requirements for Virginia type peanuts for seed were not recommended for change.

According to some Board members, such a change could make a significant difference in the efficient acquisition and warehousing of farmers' stock peanuts each fall. Allowing the acquisition of high moisture peanuts would allow the handlers to accumulate a number of loads and batch dry them at the same time. These Board members indicated that this could speed up the drying, grading, and movement of peanuts at harvest, which would be especially important when adverse weather conditions during harvest could cause peanut quality to deteriorate. It would also reduce drying and inspection costs.

After considering this request and input from the Inspection Service, USDA continues to believe that the Board's recommendation needs further review and analysis. The Inspection Service has indicated that its current shelling equipment cannot properly shell peanuts with a moisture content higher than 16 to 18 percent, and that it would have difficulty grading such peanuts. Under current inspection procedures, such peanuts are further dried by the producer before incoming inspection is completed.

Accordingly, USDA believes that the current standards and procedures should continue to allow the USDA, Board, and peanut industry time to study this issue further.

The Board met again on this issue in February 2004 and submitted another recommendation for 2004 and subsequent crop year peanuts. USDA is now reviewing that recommendation.

#### **Increase Sound Whole Kernel Tolerance**

This final rule continues to provide in § 996.31(a) that the sound whole tolerance for Runner, Spanish, and Valencia peanuts be not less than 10 percent splits, to bring all the tolerances

for sound whole kernels in lots of splits into conformity with the tolerance for Virginia variety peanuts. These tolerances are in the Minimum Quality Standards table for split kernel lots in that paragraph. Previously, the sound whole kernel content for Runner, Spanish, and Valencia variety peanuts in lots of splits was four percent. Continuation of this change is expected to result in fewer split lot rejections for Runner, Spanish, and Valencia variety peanuts, and reduce handlers' reconditioning costs.

#### **Effective Time**

Section 996.75, Effective time, is finalized to apply to 2003 and subsequent crop year peanuts, to 2002 and 2001 crop year peanuts not yet inspected, and to failing peanuts that have not yet met disposition standards.

#### **Final Regulatory Flexibility Analysis**

Pursuant to requirements set forth in the Regulatory Flexibility Analysis Act (RFA) 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. The following discussion addresses RFA concerns and some of the numbers used in the interim final rule have been changed to reflect the availability of more recent data.

There are approximately 55 peanut shelling entities, operating approximately 70 shelling plants, and 25 importers subject to regulation under the peanut program. An estimated two-thirds of the handlers and nearly all of the importers may be classified as small entities, based on the documents and reports received by USDA. Small agricultural service firms, which include handlers and importers, are defined by the Small Business Administration (13 CFR 121.201), as those having annual receipts of less than \$5,000,000.

An approximation of the number of peanut farms that could be considered small agricultural businesses under the SBA definition (less than \$750,000 in annual receipts from agricultural sales) can be obtained from the 1997 Agricultural Census, which is the most recent information on the number of farms categorized by size. There were 10,505 peanut farms with sales valued at less than \$500,000 in 1997, representing 86 percent of the total

number of peanut farms in the U.S. (12,221). Since the Agricultural Census does not use \$750,000 in sales as a category, \$500,000 in sales is the closest approximation. Assuming that most of the sales from those farms are attributable to peanuts, the percentage of small peanut farms in 1997 (less than \$750,000 in sales) was likely a few percentage points higher than 86 percent, and may have shifted a few percentage points since then. Thus, the proportion of small peanut farms is likely to be between 80 and 90 percent.

The two-year average peanut production for the 2001 and 2002 crop years was 3.799 billion pounds, harvested from 1.354 million acres, yielding 2,806 pounds per acre. The average value of production for the two-year period was \$797.469 million, as reported on the National Agricultural Statistics Service (NASS) Web site (<http://www.nass.usda.gov:81/idepd/report.htm>) in December 2003. The average grower price over the two-year period was \$0.21 per pound, and the average value per harvested acre was \$588. Dividing the two year average value of production (\$797.469 million) by the estimated 12,221 farms (1997 Agricultural Census) yields an estimated revenue per farm of approximately \$65,254.

The Agricultural Census presents farm sizes in ranges of acres, and median farm size in 1997 was between 50 and 99 acres. The median is the midpoint ranging from the largest to the smallest. Median farm size in terms of annual sales revenue was between \$100,000 and \$250,000.

Several producers may own a single farm jointly, or, conversely, a producer may own several farms. In the peanut industry, there is, on average, more than one producer per farm. Dividing the two year average value of production of \$797.469 million by an estimated 25,000 commercial producers (2003 Agricultural Statistics, USDA, Table 11-10) results in an estimate of average revenue per producer of approximately \$31,899. The figures in this paragraph were adjusted from those in the interim final rule to reflect more recent information.

The current 14 custom blanchers, 8 custom remillers, 4 oilmill operators, 4 USDA and 15 USDA-approved private chemical (aflatoxin) laboratories are subject to this rule to the extent that they must comply with reconditioning provisions under § 996.50 and reporting and recordkeeping requirements under § 996.71. These requirements are applied uniformly to these entities, whether large or small. In addition, there are currently 10 State inspection

programs (Inspection Service) that will perform inspection under this peanut program.

Importers of peanuts cover a broad range of business entities, including fresh and processed food handlers and commodity brokers who buy agricultural products on behalf of others. Under the 2003 import quotas, approximately 25 business entities have only imported approximately 44 percent of the 126.6 million pounds of low duty quota peanuts (sometimes called duty free quota peanuts) compared with 37 entities which had imported 100 percent of the quotas by April 5, 2002. The current import quota period began January 2, 2003, for Mexico, April 1, 2003, for Argentina and "Other countries", and September 23, 2003, for Israel. Some large, corporate handlers are also importers of peanuts. AMS is not aware of any peanut producers who imported peanuts during any of the recent quota years. The majority of peanut importers have annual receipts under \$5,000,000. Some importers use customs brokers' import services. These brokers are usually held accountable by the importer to see that entry requirements under § 996.60 and reporting and recordkeeping requirements under § 996.71 are met. These requirements are not applied disproportionately to small customs brokers.

In view of the foregoing, it can be concluded that the majority of peanut producers, handlers, importers, and above mentioned entities may be classified as small businesses. Also, financially interested persons who may appeal quality inspection results, and "holders of the title" to any lot of peanuts who may appeal aflatoxin test results may include small entities.

#### **Smaller Kernel Sizes**

Changing screen sizes used in handling peanuts will allow smaller kernels of all varieties to be used for edible purposes. Proponents of smaller kernel use claim that manufacturers of peanut products now have markets for smaller whole kernels, and that this rule change will enable them to take advantage of this recent shift in the marketplace. Market share for U.S. peanuts is expected to rise because the rule enables handlers to sell smaller peanuts to buyers who would otherwise purchase less expensive peanuts from other origins for manufacturing into peanut butter and paste, and other similar products. This rule continues to implement a relaxation in the utilization of small peanut kernels by changing the screens used for sorting sound whole kernels and kernels with splits from a

slotted screen to one with round holes. The equipment for this change is currently in use for split lots in most shelling facilities. This change should therefore require little or no additional investment for most shellers, large or small.

The Inspection Service has a supply of screens for smaller peanut kernels to cover the five new shelling plants which were expected to begin operations by January 2004. In addition, the Inspection Service will provide screens for peanut shellers who need them, at a cost per screen of \$55.00, plus shipping.

Although the chances of aflatoxin contamination in small kernels is not significant, proponents of the rule change claim that modern electronic color sorting technologies can sort out the moldy or defective kernels, thus ensuring that the new screens will not have a negative impact on the quality and wholesomeness of peanuts entering edible food channels. Shellers that already have this technology will have little or no additional cost.

Compliance officers report that out of approximately 70 shelling plants only 10 do not have electronic sorting technology. These latter plants only shell seed peanuts, which are used for planting and are not for shipment to the edible market.

#### **Re-Inspection of Blanched Lots**

This rule continues to allow shelled lots that are being reconditioned to be excluded from re-inspection for fall through, damaged kernels, and minor defects standards if the lot originally met these quality standards, but failed for aflatoxin. Such lots may be blanched to remove the aflatoxin contaminated kernels and do not have to be graded for fall through, damaged kernels, and minor defects upon reinspection. The primary benefit of this final rule is to reduce handler operating costs and avoid an additional loss of peanuts.

#### **Allow Handlers To Acquire High Moisture Peanuts**

This rule also maintains the longstanding maximum moisture tolerance for farmers stock peanuts received or acquired by handlers at 10.49 percent: *Provided*, That peanuts of a higher moisture content may be received and dried to not more than 10.49 percent prior to storing or milling; and *Provided further*, that Virginia-type peanuts used for seed may be received or acquired containing up to 11.49 percent moisture. As mentioned earlier, the Board met again to review this matter in February 2004 and made another recommendation to allow high moisture peanuts to be acquired. This

recommendation is being reviewed by USDA.

#### **Increased Sound Whole Kernel Tolerance**

The Minimum Quality Standards table in § 996.31(a) provides standards for split kernel lots by specifying the maximum percentage of sound whole kernels permitted in a lot. For Virginia variety peanuts, sound whole kernel content has been limited to 10 percent of the lot by weight. For Runner, Spanish, and Valencia varieties, the sound whole kernel content had been limited to four percent prior to the issuance of the interim final rule.

The interim final rule relaxed the Sound Whole Kernel tolerance for Runner, Spanish, and Valencia variety peanuts to 10 percent, the same tolerance that has applied to Virginia variety peanuts. The primary benefit of this rule change would be to lower costs and increase sales revenue by rejecting fewer lots of the Runner, Spanish, and Valencia varieties for splits. No adverse financial impact is expected from making this standard uniform for all four varieties.

The impact of this change is not expected to be different between large and small entities.

#### **Appeal Procedures**

Continuing the addition of procedures allowing handlers, shellers, buyers or manufacturers to appeal aflatoxin test results and any financially interested person to appeal quality inspection results will be useful to those requesting appeals and to the inspectors drawing the samples and performing the inspections and tests. With specified appeal procedures, all parties involved should benefit.

USDA has considered alternatives to the suggested changes to the quality and handling standards. The Act requires USDA to consult with the Board on these standards. An alternative would have been to continue the 2002–03 crop year standards for the 2003–04 crop year without finalizing any of the recommended changes suggested by the Board at its April 30, 2003, meeting. The Board's meeting was widely publicized throughout the peanut industry and as a public meeting both large and small entities were allowed to attend and express their views.

Because of the anticipated benefits of some of the Board's recommended changes, USDA believes that finalizing those changes is preferable to continuing without any changes.

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

business guide on complying with AMS' fresh fruit, vegetable, and specialty crop programs similar to this peanut program may be viewed at the following Web site: <http://www.ams.usda.gov/fv/moab.html>. Any questions about the compliance guide or compliance with this program should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

The interim final rule concerning these changes was published in the **Federal Register** (68 FR 46919) on August 7, 2003. A document correcting the table specifying minimum quality standards was published in the September 11, 2003, issue of the **Federal Register** (68 FR 53490). Copies of the rule were provided to all Board members and peanut handlers. In addition, the rule was posted on the AMS web site specified above and was available through the Internet by the Office of the Federal Register. The interim final rule provided that comments received by September 8, 2003, would be considered in finalizing the rulemaking action.

Four comments were received from a peanut shellers' association, a peanut sheller, a growers' cooperative marketing association, and a manufacturer of peanut products.

The representative of the peanut shellers' association stated that while the association supported the Board's recommendation allowing handlers to acquire farmers stock peanuts with a moisture content up to 25 percent, provided they were dried to not more than 10.49 percent moisture prior to storing or milling, they understood USDA's concern about problems of grading efficiency from too high a level of moisture. The commenter urged the Secretary to allow up to 16 percent moisture. USDA continues to believe that further industry dialogue is needed on this matter. The Board met in February 2004 to further discuss this matter and made another recommendation. USDA is reviewing that recommendation.

The peanut product manufacturer believes that the proposal to allow smaller peanut kernels of all varieties to enter the edible channels is a move in the wrong direction. The commenter is concerned that an added quantity of small kernels in each lot will increase the aflatoxin "hot spots" and add to manufacturer risk and processing costs. Secondly, this commenter expressed concern that a greater incidence of off flavors in peanut products is likely to result from increased quantities of small kernels and that this will give product manufacturers reasons to reformulate

their products using fewer peanuts. The representative of the peanut growers cooperative marketing association also mentioned the flavor characteristics of small kernels as a potential industry marketing problem.

The ARS study cited previously in this rule addressed the potential for increased aflatoxin arising from allowing more small kernels to be marketed for edible products. That study found that the aflatoxin impact of the smaller kernels was not significant enough to warrant concern.

With regard to the off flavor of small kernels, several industry representatives at last year's Board meeting also cited the flavor of small kernels as a quality factor that should weigh against the use of smaller peanut kernels. Such concerns were not mentioned or addressed at this year's Board meeting. However, as experience with the use of small kernels develops, further review of the matter may be appropriate.

The growers' association representative also reiterated concerns raised in writing to AMS in June 2003. The commenter contended that the farmers would not benefit from allowing smaller kernels because the rule change only applied to outgoing quality standards and not to incoming farmers stock.

This commenter believes that the screen sizes for incoming farmers stock peanuts should be changed to benefit producers. Currently, farmers stock peanuts are sampled and graded, resulting in a percentage of sound mature kernels and a percentage of other kernels. Under the outgoing screen size changes, some of the "other kernels" are allowed to be used by the sheller for edible higher valued purposes. The commenter stated that if the same screen sizes were applied to the farmers stock grade, then some of the "other kernels" which had been classified as such would become "sound mature kernels", and what were once 7 cents per pound peanuts would become 23–25 cents per pound peanuts as "sound mature kernels". That would substantially benefit the producer. The implementation of screen size changes for incoming farmers stock peanuts is outside the scope of this rulemaking action. Further, USDA believes that the Board should further review this issue.

An additional concern expressed by this commenter was that the benefit of additional small kernels purchased by handlers could be somewhat offset by subsequent reduced purchases of farmers stock peanuts, leading to forfeitures of peanuts under loan and increased government expenditures. The commenter estimated such a loss at

over \$18 million. However, USDA views this scenario as unlikely. The additional quantities of smaller kernels acquired by shellers are expected to be fully used by manufacturers to meet additional market needs, without offsetting other peanut sales. Accordingly, USDA continues to believe that the rule change will return a net benefit to the industry.

This commenter also reiterated earlier concerns raised in writing to AMS in June 2003 concerning the reinspection of blanched peanuts and the potential for allowing poor quality peanuts to enter edible consumption channels. The commenter contended that these changes would allow pickouts with any amount of damage or undersize kernels to meet requirements for human consumption. There are appropriate safeguards in the program procedures to prevent such occurrences. There is a paper trail that ties the pickouts resulting after blanching back to the original lot. This would help prevent a new lot of pickouts with any content of excess damage, undersized kernels, or other defects to be used for human consumption.

This commenter also questioned the fact that the changes implemented by the interim final rule applied to 2002 and 2001 crop year peanuts not yet inspected and to failing peanuts that had not yet met disposition standards. This commenter believes that the standards should be applied on a crop year basis, rather than on a continuing basis.

With application on a crop year basis, the commenter believes that handlers with old crop inventories would not benefit from the changes for the new crop, and those who have disposed of their inventories would not be unfairly treated. Under the prior peanut marketing agreement program, regulations were effective on a crop year basis. However, in implementing section 1308 of the 2002 Farm Bill, USDA concluded that a continuing regulation rather than one effective on a crop year basis would better serve the peanut industry. Not only would this allow industry members to better plan their business activities but also changes could be made if deemed appropriate at any given time. Accordingly, no change is made based upon this comment.

Finally, the commenter expressed concern that comments from all persons received by AMS must be considered. USDA considers all available information from any interested person and source in our deliberations concerning this program. Such information was taken into consideration in this action.

The sheller comment correctly pointed out several mistakes in the Minimum Quality Standards table following paragraph (a) in § 996.31. These errors were corrected in a document published in the **Federal Register** on September 11, 2003 (68 FR 53490).

#### Information Collection

The Act specifies in section 1604(c)(2)(A) that the standards established pursuant to the Act, may be implemented without regard to the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). Furthermore, this rule does not change the existing information collection burden.

After consideration of all relevant material presented, including the Board's recommendations, comments received, and other information, the interim final rule as published in the **Federal Register** on August 7, 2003 (68 FR 46919), together with the corrections published on September 11, 2003 (68 FR 53490) is finalized without change.

#### List of Subjects in 7 CFR Part 996

Food grades and standards, Imports, Peanuts, Reporting and recordkeeping requirements.

#### PART 996—MINIMUM QUALITY AND HANDLING STANDARDS FOR DOMESTIC AND IMPORTED PEANUTS MARKETING IN THE UNITED STATES

■ Accordingly, the interim final rule amending 7 CFR Part 996 which was published at 68 FR 46919 on August 7, 2003, and corrected at 68 FR 53490 on September 11, 2003, is adopted as a final rule without change.

Dated: June 2, 2004.

A.J. Yates,

Administrator, Agricultural Marketing Service.

[FR Doc. 04-12787 Filed 6-4-04; 8:45 am]

BILLING CODE 3410-02-P

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 1280

[No. LS-02-05]

#### Lamb Promotion, Research, and Information Program: Rules and Regulations

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

**ACTION:** Final rule.

**SUMMARY:** The Department of Agriculture (Department) is adopting, as

a final rule, without change, rules and regulations to implement the Lamb Promotion, Research, and Information Order (Order). The Order provides for the establishment of a national and industry-funded lamb promotion, research, and information program pursuant to the Commodity Promotion, Research, and Information Act of 1996 (Act). This final rule will implement Order provisions concerning the collection and remittance of assessments, procedures for obtaining a refund, reporting, and books and records.

**EFFECTIVE DATE:** July 7, 2004.

#### FOR FURTHER INFORMATION CONTACT:

Kenneth R. Payne, Chief; Marketing Programs Branch, Room 2638-S; Livestock and Seed Program; Agricultural Marketing Service (AMS), USDA; STOP 0251; 1400 Independence Avenue, SW., Washington, DC 20250-0251. Telephone number 202/720-1115, or by electronic mail at [Kenneth.Payne@usda.gov](mailto:Kenneth.Payne@usda.gov).

**SUPPLEMENTARY INFORMATION:** *Prior documents in this proceeding:* Invitation to submit proposals—November 23, 1999 (64 FR 65665) and January 12, 2000 (65 FR 1825); proposed Lamb Promotion, Research, and Information Order—September 21, 2001 (66 FR 48764); and final Lamb Promotion, Research, and Information Order—April 11, 2002 (67 FR 17848).

#### Executive Order 12866

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

#### Executive Order 12988

This rule has been reviewed under E.O. 12988, Civil Justice Reform. This rule is not intended to have a retroactive effect. Section 524 of the Act provides that the Act shall not affect or preempt any other Federal or State law authorizing promotion or research relating to an agricultural commodity.

Under section 519 of the Act, a person subject to the Order may file a petition with the Department stating that the Order, any provision of the Order, or any obligation imposed in connection with the Order, is not established in accordance with the law, and request a modification of the Order or an exemption from the Order. Any petition filed challenging the Order, any provision of the Order, or any obligation imposed in connection with the Order, shall be filed within 2 years after the effective date of the Order, provision, or obligation subject to challenge in the petition. The petitioner will have the

opportunity for a hearing on the petition. Thereafter, the Department will issue a ruling on the petition. The Act provides that the district court of the United States for any district in which the petitioner resides or conducts business shall have the jurisdiction to review a final ruling on the petition, if the petitioner files a complaint for that purpose not later than 20 days after the date of the entry of the Department's final ruling. Service of process in a proceeding may be made on the Department by delivering a copy of the complaint to the Department. If the court determines that the ruling is not in accordance with the law, the court shall remand the matter to the Department with direction to make such ruling as the court determining to be in accordance with the law or to take such further action as, in the opinion of the court the law requires. The pendency of a petition filed or an action commenced shall not operate as a stay of any action authorized by section 520 of the Act to be taken to enforce, including any rule, order, or penalty in effect.

#### Regulatory Flexibility Act and Paperwork Reduction Act

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), AMS has considered the economic effect of this final action on small entities. The purpose of RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly burdened.

There are approximately 51,800 producers, 15,000 seedstock producers, 100 feeders, 571 first handlers, and 15 exporters of lamb who will be subject to the program. Most of the lamb producers, seedstock producers, feeders, and exporters would be classified as small businesses under the criteria established by the Small Business Administration (SBA) (13 CFR 121.201). Most first handlers would not be classified as small businesses. SBA defines small agricultural service firms as those whose annual receipts are less than \$5 million and small agricultural producers are defined as those having annual receipts of less than \$750,000. This number and size data remains the same as it appeared in the earlier analyses for the Order. Further, for purposes of this discussion and the prior Order analyses, there are approximately 3,318 market agencies, which include commission merchants, auction markets, brokers, or livestock markets in the business of receiving lambs for sale or commission. Most market agencies would be classified under SBA criteria as small businesses.