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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 983

[Docket No. FV04-983-2 FR]

#### Pistachios Grown in California; Establishment of Continuing Assessment Rate and Reporting Requirements

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

**ACTION:** Final rule.

**SUMMARY:** This rule establishes a continuing assessment rate for the Administrative Committee for Pistachios (Committee) for the 2004-05 and subsequent fiscal periods of \$0.0014 per pound of pistachios received for processing and establishes assessment reporting requirements under the California pistachio marketing order (order). The order regulates the handling of pistachios grown in California and is administered by the Committee. Authorization to assess pistachio handlers enables the Committee to incur expenses that are reasonable and necessary to administer the program. The fiscal period began September 1 and ends August 31. The assessment rate will remain in effect indefinitely unless modified, suspended, or terminated. Requiring handlers to file annual reports with the Committee will facilitate the Committee's collection of handler assessments.

**DATES:** *Effective Date:* March 2, 2005.

**FOR FURTHER INFORMATION CONTACT:** Toni Sasselli, Program Analyst, or Rose Aguayo, Marketing Specialist, California Marketing Field Office, Fruit and Vegetable Programs, AMS, USDA, 2202 Monterey Street, Suite 102B, Fresno, California 93721; telephone: (559) 487-5901; Fax (559) 487-5906; or George 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.

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

**SUPPLEMENTARY INFORMATION:** This rule is issued under Marketing Agreement and Order No. 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 rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order now in effect, pistachio handlers are subject to assessments. Funds to administer the order are derived from such assessments. It is intended that the assessment rate as issued herein will be applicable to all assessable pistachios beginning September 1, 2004, and continue until amended, suspended, or terminated. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

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

the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This rule establishes the continuing assessment rate established for the Committee and for the 2004-05 and subsequent fiscal periods of \$0.0014 per pound of pistachios received for processing and establishes assessment reporting requirements under the California pistachio order. The quantity of pistachios received by the handler for processing is converted to an assessed weight pursuant to § 983.6 and the assessment rate is applied to that weight in determining a handler's assessment obligation for the fiscal period. Requiring handlers to file annual Receipts/Assessment Reports with the Committee will facilitate the Committee's collection of handler assessments.

#### Continuing Assessment Rate

Sections 983.52 and 983.53 of the pistachio order provide authority for the Committee, with the approval of USDA, to formulate an annual budget of expenses and to collect assessments from handlers to administer the marketing order. Each handler who receives pistachios for processing in each production year (fiscal year) is required to pay an assessment based on the pro rata share of the expenses authorized by USDA which are reasonable and likely to be incurred by the Committee during that year. The assessment obligation for each handler is computed by applying the assessment rate set by USDA to each handler's assessed weight computed pursuant to § 983.6 of the pistachio order.

The members of the Committee are producers and handlers of California pistachios. They are familiar with the Committee needs and with the costs for goods and services in their local area, and are, thus, in a position to formulate an appropriate budget and assessment rate. The assessment rate is formulated and discussed in a public meeting. Thus, all directly affected persons have an opportunity to participate and provide input.

The Committee met on August 17, 2004, and unanimously recommended 2004-05 expenditures of \$271,499 and an assessment rate of \$0.0014 per pound of pistachios received for processing. This was the first public meeting of the newly formed Committee since the pistachio marketing order became

effective on April 6, 2004 (69 FR 17944). The major expenditures recommended by the Committee for the 2004–05 fiscal period include \$110,249 for administrative expenses; \$34,500 for compliance expenses; \$101,750 for salaries; and \$25,000 for a contingency reserve.

Because this is a new order and there is no carry-in income, the Committee is borrowing funds from the California Pistachio Commission (Commission) until assessments are collected in March 2005. The Committee discussed the necessity of setting a relatively high assessment rate for the 2004–05 fiscal period because it is necessary to generate sufficient funds to reimburse the Commission, to cover the Committee's 2004–05 expenditures, and to build an adequate reserve to cover Committee expenditures until the 2005–06 fiscal period's assessments are available in December 2005.

The assessment rate recommended by the Committee was derived by dividing anticipated expenses plus funds to establish a reserve by expected receipts (the assessed weight) of pistachios grown in California during 2004–05 (\$271,499 plus \$190,501 divided by 330,000,000 pounds = \$0.0014). With pistachio receipts for the year estimated at 330,000,000 pounds, assessment income is expected to total of \$462,000.

The Committee may carry over excess funds into subsequent production years (fiscal years) as a reserve, provided that funds already in the reserve do not exceed approximately two production years' budgeted expenses. In the event that funds exceed two production years' budgeted expenses, future assessments will be reduced to bring the reserves to an amount that is less than or equal to two production years' budgeted expenses (§ 983.56). Funds in the reserve will be kept within the maximum permitted by the order.

Under § 983.53 the Committee, prior to the beginning of each production year, shall recommend and the Secretary shall set the assessment for the following production year, which shall not exceed one-half of one percent of the average price received by producers in the preceding production year. According to the Commission's Annual Report for the 2003–04 crop year, the average price received by producers was \$1.15 per pound. One-half of one percent equals \$0.005. Taking  $(\$0.005) \times (\$1.15) = \$0.00575$  for the maximum assessment rate allowed. The rates considered by the Committee ranged from \$0.001 to \$0.0014. The recommended assessment rate of \$0.0014 is less than the maximum provided for in the order.

The assessment rate established in this rule will continue in effect indefinitely unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other available information.

Although this assessment rate will be in effect for an indefinite period, the Committee will continue to meet prior to or during each fiscal period to recommend a budget of expenses and consider recommendations for modification of the assessment rate. The dates and times of Committee meetings are available from the Committee or USDA. Committee meetings are open to the public and interested persons may express their views at these meetings. USDA will evaluate Committee recommendations and other available information to determine whether modification of the assessment rate is needed. Further rulemaking will be undertaken as necessary. The Committee's 2004–05 budget and those for subsequent fiscal periods will be reviewed and, as appropriate, approved by USDA.

#### Reporting Requirements

Section 983.47 of the pistachio order provides authority for establishing reporting requirements. Under the order, the Committee may, with the approval of the Secretary, establish reporting requirements to collect necessary information or data.

At its first meeting, the Committee also unanimously recommended that handlers file a Receipts/Assessment Report with the Committee to facilitate the Committee's collection of handler assessments.

Handlers, including custom hullers, who receive pistachios for processing (removal of green hulls and drying pistachios to 5 percent moisture), will be required to pay an assessment attributable to the assessed weight of pistachios received by that handler and to report that assessed weight to the Committee on the Receipts/Assessment Form. Pursuant to § 983.6 of the order, the term "assessed weight" means the pounds of inshell pistachios, free of internal defects as defined in § 983.39(b)(4) and (5), with the weight computed at 5 percent moisture, received for processing by a handler within each production year: *Provided*, That for loose kernels, the actual weight shall be multiplied by two to obtain an inshell weight.

A final order published on July 26, 2004 (69 FR 44460), delayed the implementation date for § 983.39(b)(4) and (5), of the order until February 1, 2005. A final order published on

January 5, 2005 (70 FR 661), further delayed the implementation date for § 983.39(b)(4) and (5), of the order until August 12, 2005. Therefore, for the 2004–05 fiscal period, each handler who receives pistachios for processing will be required to furnish the Receipts/Assessment Report to the Committee and pay all due assessments to the Committee by March 15, 2005. For subsequent fiscal periods, each handler who receives pistachios for processing will be required to furnish the Receipts/Assessment Report and pay all due assessments to the Committee by December 15 of the applicable fiscal period.

The recommended reporting requirements are similar to those required by the Commission. Because the Commission is prohibited from sharing confidential handler information, the Committee recommended that a Receipt/Assessment Report be developed for Committee use and that the receipts information already compiled for the Commission be attached to the newly developed Committee form. Thus, handlers will not be duplicating their efforts and both agencies will receive necessary receipts/assessment data. The Committee estimates this action will affect 20 handlers of pistachios and further estimates that, on average, handlers will expend approximately 4 minutes per year to prepare and submit this report to the Committee. These actions are in the interest of producers and handlers.

#### Assessment Collection

To facilitate assessment collections under the order, the Committee unanimously recommended establishing § 983.253. This section sets the continuing assessment rate and establishes the reporting requirements necessary to verify that each handler has paid the correct assessment. Section 925.253 shall read as follows: § 983.253 Assessment rate. (a) On and after September 1, 2004, an assessment rate of \$0.0014 per pound of pistachios received for processing is established for California Pistachios. The assessment obligation of each handler will be computed by applying the assessment rate to the assessed weight computed pursuant to § 983.6. (b) For the 2004–05 fiscal period each handler who receives pistachios for processing shall furnish the Receipts/Assessment Report to the Committee and pay all due assessments to the Committee by March 15, 2005. For subsequent fiscal periods, 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 fiscal period.

### Final 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 rule 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 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 20 handlers of California pistachios subject to regulation under the order and approximately 741 producers in the production area. Small agricultural producers are defined by the Small Business Administration (13 CFR 121.201) as those having annual receipts less than \$750,000, and small agricultural service firms are defined as those whose annual receipts are less than \$5,000,000. Eight of the 20 handlers subject to regulation have annual pistachio receipts of at least \$5,000,000. In addition, 722 producers have annual receipts less than \$750,000. Thus, the majority of handlers and producers of California pistachios may be classified as small entities.

This rule establishes a continuing assessment rate for the Committee and collected from handlers for the 2004–05 and subsequent fiscal periods of \$0.0014 per pound of pistachios received for processing and establishes reporting requirements under the California pistachio order. Requiring handlers to file annual Receipts/Assessment Reports with the Committee will facilitate the Committee's collection of handler assessments. Pistachios harvested and received in August of any year shall be applied to the subsequent production year for order purposes.

### Continuing Assessment Rate

The California pistachio order provides authority for the Committee, with the approval of USDA, to formulate an annual budget of expenses and collect assessments from handlers to administer the program. The members of the Committee are producers and handlers of California pistachios. They are familiar with the Committee needs

and with the costs for goods and services in their local area, and are thus in a position to formulate an appropriate budget and assessment rate. The assessment rate is formulated and discussed in a public meeting. Thus, all directly affected persons have an opportunity to participate and provide input.

The Committee met on August 17, 2004, and unanimously recommended 2004–05 expenditures of \$271,499 and an assessment rate of \$0.0014 per pound of pistachios received for processing. This was the first public meeting of the newly formed Committee since the pistachio marketing order became effective on April 6, 2004 (69 FR 17944). The major expenditures recommended by the Committee for the 2004–05 fiscal period include \$110,249 for administrative expenses; \$34,500 for compliance expenses; \$101,750 for salaries; and \$25,000 for a contingency reserve.

Because this is a new order and there is no carry-in income, the Committee is borrowing funds from the Commission until assessments are collected in March 2005. The Committee discussed the necessity of setting a relatively high assessment rate for the 2004–05 fiscal period because it is necessary to generate sufficient funds to reimburse the Commission, to cover the Committee's 2004–05 expenditures, and to build an adequate reserve to cover Committee expenditures until the 2005–06 fiscal period's assessments are available in December 2005.

The assessment rate recommended by the Committee was derived by dividing anticipated expenses plus funds to establish a reserve by expected receipts of pistachios grown in California (\$271,499 plus \$190,501 divided by 330,000,000 pounds = \$0.0014). With pistachio receipts for the year estimated at 330,000,000 pounds, assessment income should total \$462,000.

The Committee may carry over such excess into subsequent production years as a reserve, provided that funds already in the reserve do not exceed approximately two production years' budgeted expenses. In the event that funds exceed two production years' budgeted expenses, future assessments will be reduced to bring the reserves to an amount that is less than or equal to two production years' budgeted expenses. Funds in the reserve will be kept within the maximum permitted by the order (§ 983.56).

The assessment rate in this rule will continue in effect indefinitely unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the

Committee or other available information.

Although this assessment rate will be in effect for an indefinite period, the Committee will continue to meet prior to or during each fiscal period to recommend a budget of expenses and consider recommendations for modification of the assessment rate. The dates and times of Committee meetings are available from the Committee or USDA. Committee meetings are open to the public and interested persons may express their views at these meetings. USDA will evaluate Committee recommendations and other available information to determine whether modification of the assessment rate is needed. Further rulemaking will be undertaken as necessary. The Committee's 2004–05 budget and those for subsequent fiscal periods will be reviewed and, as appropriate, approved by USDA.

The Committee discussed alternative 2004–05 expenditures of \$246,499, which did not include \$25,000 for a contingency reserve. However, the Committee believes that it is important to establish a contingency reserve for unforeseen expenditures, and, thus, unanimously recommended expenditures in the amount of \$271,499.

A review of historical information and preliminary information pertaining to the upcoming fiscal period indicates that the grower price for the 2004–05 season could range between \$1.30 and \$1.40 per pound of assessed weight pistachios. Therefore, the estimated assessment revenue for the 2004–05 fiscal period as a percentage of total grower revenue could range between .11 and .10 percent.

### Reporting Requirements

Section 983.47 of the pistachio order provides authority for establishing reporting requirements. Under the order, the Committee may, with the approval of the Secretary, establish reporting requirements to collect necessary information or data.

To facilitate the collection of handler assessments, the Committee also unanimously recommended that handlers file a Receipts/Assessment Report with the Committee. Both small and large handlers will be required to file the report and to pay assessments. The report will be filed by handlers (including custom hullers) who receive pistachios for processing (removal of green hulls and drying pistachios to 5 percent moisture).

Handlers who receive pistachios for processing, will be required to pay an assessment attributable to the assessed weight of pistachios received by that

handler and to report that assessed weight to the Committee on the Receipts/Assessment Form. The term "assessed weight" is defined in § 983.6 of the pistachio order.

#### Assessment Obligations

The computation of assessed weight involves requirements specified in §§ 983.39(b)(4) and (5). A final order published on July 26, 2004, (69 FR 44460), delayed the implementation date of those sections until February 1, 2005. A final order published on January 5, 2005, (70 FR 661), further delayed the implementation date for § 983.39(b)(4) and (5), of the order until August 12, 2005. Therefore, for the 2004–05 fiscal period, each handler who receives pistachios for processing will be required to furnish the Receipts/Assessment Report to the Committee and pay all due assessments to the Committee by March 15, 2005. For subsequent fiscal periods, each handler who receives pistachios for processing will be required to furnish the Receipts/Assessment Report and pay all due assessments to the Committee by December 15 of the applicable fiscal period.

While assessments impose some additional costs on handlers, the costs are minimal and uniform on all handlers. Some of the additional costs may be passed on to producers. However, these costs are offset by the benefits derived by the operation of the marketing order. In addition, the Committee's meeting was widely publicized throughout the pistachio industry and all interested persons were invited to attend the meeting and participate in Committee deliberations on all issues. Like all Committee meetings, the August 17, 2004, meeting was a public meeting and all entities, both large and small, were able to express views on this issue.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), AMS submitted to the Office of Management and Budget a revision to approved information collection OMB No. 0581–0215, "Pistachios Grown in California." This information collection has been approved by OMB.

This rule imposes no 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.

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

A proposed rule concerning this action was published in the **Federal Register** on December 10, 2004 (69 FR 71749). Copies of the proposed rule were also mailed or sent via facsimile to all pistachio handlers. Finally, the proposal was made available through the Internet by USDA and the Office of the Federal Register. A 60-day comment period ending February 8, 2005, was provided for interested persons to respond to the proposal.

One opposing comment was received. The commenter considered a continuing assessment rate for the Committee to be an outdated method for agricultural marketing. However, the establishment of the assessment rate is consistent with the marketing order and the Act under which the marketing order is implemented.

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.

After consideration of all relevant material 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.

Pursuant to 5 U.S.C. 553, it also found and determined that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because: (1) The fiscal year began September 1, 2004, and the assessment rate applies to all pistachios received during the 2004–05 and subsequent seasons; (2) handlers received the 2004–05 crop pistachios by October 2004; and (3) handlers are required to complete and submit the ACP–1 to the Committee by March 15, 2005. Further, handlers are aware of this rule which was unanimously recommended at a public meeting. Also a 60-day comment period was provided for in the proposed rule.

This rule will impose some additional reporting and recordkeeping on both small and large pistachio handlers. This action will require one new Committee form. 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 addition, USDA has

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

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

Pistachios, Marketing agreements, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, 7 CFR part 983 is 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 Part 983, a new Subpart—Assessment Rate and § 983.253 are added to read as follows:

#### Subpart—Assessment Rate

##### § 983.253 Assessment rate.

(a) On and after September 1, 2004, a continuing assessment rate of \$0.0014 per pound of assessed weight pistachios is established for California Pistachios. The assessment obligation of each handler shall be computed by applying the assessment rate to the assessed weight computed pursuant to § 983.6.

(b) For the 2004–05 fiscal period each handler who receives pistachios for processing shall furnish the Receipts/Assessment Report to the Committee and pay all due assessments to the Committee by March 15, 2005. For subsequent fiscal periods, 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 fiscal period.

Dated: February 24, 2005.

**Kenneth C. Clayton,**

*Acting Administrator, Agricultural Marketing Service.*

[FR Doc. 05–3928 Filed 2–24–05; 1:33 pm]

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#### DEPARTMENT OF AGRICULTURE

#### Agricultural Marketing Service

#### 7 CFR Part 1131

[Docket No. AO–271–837; DA–03–04–A]

#### Milk in the Arizona-Las Vegas Marketing Area; Interim Order Amending the Order

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

**ACTION:** Interim final rule.