

# Proposed Rules

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

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 983

[Doc. No. AMS-FV-09-0031; FV09-983-1 PR]

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

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

**ACTION:** Proposed rule.

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

**DATES:** Comments must be received by September 14, 2009.

**ADDRESSES:** Interested persons are invited to submit written comments concerning this proposed rule. 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 Internet: <http://www.regulations.gov>. Comments should reference the docket number and the date and page number of this issue of the **Federal Register**, and will be available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: <http://www.regulations.gov>. All

comments submitted in response to this rule will be included in the record and will be made available to the public. Please be advised that the identity of the individuals or entities submitting the comments will be made public on the Internet at the address provided above.

**FOR FURTHER INFORMATION CONTACT:**

Martin Engeler, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 2202 Monterey Street, Suite 102-B, Fresno, California 93721; Telephone: (559) 487-5110, Fax: (559) 487-5906, or E-mail: [Martin.Engeler@ams.usda.gov](mailto:Martin.Engeler@ams.usda.gov); or Laurel May, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., Stop 0237, Washington, DC 20250-0237; Telephone: (202) 205-2830, Fax: (202) 720-8938, or E-mail: [Laurel.May@ams.usda.gov](mailto:Laurel.May@ams.usda.gov).

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

**SUPPLEMENTARY INFORMATION:** This proposal is issued under Marketing Agreement and Order No. 983, both as amended (7 CFR part 987), regulating the handling of pistachios. The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act."

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

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect. 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, or any obligation imposed in connection with the order, is not in accordance with law and may request a

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

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

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

Proposed amendments to the order's provisions would expand the production area subject to regulation under the order to include the states of California, Arizona, and New Mexico. Additional amendments to the order would modify existing provisions regarding aflatoxin and quality regulations, revise various administrative procedures under the order, authorize the committee to recommend research projects, and make other related changes. A referendum of pistachio producers who would be affected by the amended order will be conducted to determine support for such changes. If the amendments are approved by producers participating in the referendum, conforming changes to the order's administrative rules and regulations would be necessary.

Among other things, specific regulatory language currently contained

in the order's aflatoxin and quality provisions would be removed if the amendments are approved. To avoid a lapse in regulation, the committee recommended that specific order provisions concerning aflatoxin tolerance levels and testing procedures be added to the order's administrative rules and regulations section at the same time the amendments are effectuated. This would provide a seamless transition and would assure that pistachios continue to be handled under the same regulations currently in place under the order. This rule addresses those conforming changes. If the proposed amendments are not approved by producers, this rule regarding conforming changes to the order's administrative rules and regulations would be withdrawn. It is intended that finalization of this rule would correspond with the issuance of the order amending order, both of which would be published in a future issue of the **Federal Register**, as appropriate.

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

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

If § 983.38 is amended, certain specific handling requirements concerning aflatoxin levels and testing procedures currently provided in that section would be moved to a new § 983.150—Aflatoxin Regulations,

which would be added to the order's rules and regulations. Section 983.150 would specify an aflatoxin tolerance level of 15 ppb, which is the aflatoxin tolerance currently provided under the order. Section 983.150 would also specify the same aflatoxin sampling, testing, and certification procedures currently contained in the order, with some modifications. For instance, the regulation would require that at least eight members of the committee recommend, and the Secretary approve, any alternative aflatoxin analysis methods. The regulation would also require accredited laboratories performing aflatoxin testing to certify that every lot of production area pistachios shipped domestically does not exceed the maximum aflatoxin tolerance level specified under the order. Additionally, handlers would be required to maintain testing and shipping records for three years beyond the production year of their applicability. Finally, section references throughout the section would be updated to reflect renumbered order provisions.

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

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

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

The formal rulemaking proceeding includes amendments to § 983.40 that would remove specific regulations regarding rework procedures for lots of pistachios failing aflatoxin and minimum quality testing. Those regulations would be replaced with

general authority to recommend rework procedures for failed lots. Specific regulations describing rework provisions for lots failing aflatoxin testing would be moved to a new § 983.152—Failed lots/rework procedure. Conforming changes to the text of the current regulations would be made in § 983.152 to reference aflatoxin regulations in the amended order provisions, and would revise references to renumbered sections.

The formal rulemaking proceeding includes an amendment to § 983.41 that would remove a quality testing exemption for handlers handling fewer than 1,000,000 pounds of pistachios annually and replace it with general authority to recommend testing procedures for minimum quantities. Section 983.41 would also be redesignated as § 983.53. Section 983.47 currently provides for the collection of necessary reports from regulated handlers. If the proposed amendments are approved by producers, § 983.47 would be redesignated as § 983.64. Paragraph (d) of § 983.147 describes Form ACP-5—"Minimal Testing Form," for use by handlers handling fewer than 1,000,000 pounds of pistachios annually. That paragraph has been suspended since December 10, 2007 (72 FR 69141), when the minimum quality provision of the order was also suspended. The committee recommended revising that paragraph to specify that handlers may use Form ACP-5 to request permission to handle minimum quantities of pistachios according to the provisions of redesignated § 983.53. To remain consistent with the redesignation of § 983.47 as § 983.64, this rule would redesignate § 983.147 as § 983.164.

The formal rulemaking proceeding includes amendments to § 983.70, which currently provides an exemption from certain handling regulations under the order for handlers of fewer than 1,000 pounds of pistachios and authorizes the committee to recommend revised exemption levels. The amendment would raise the exemption level to 5,000 pounds. The section would also be redesignated as § 983.92. As authorized under § 983.70, § 983.170 of the order's administrative rules and regulations currently provides an exemption for handlers of fewer than 5,000 pounds. If the proposed amendment to § 983.70 is approved by producers, § 983.170 would be redundant. Therefore, the committee recommended that § 983.170 be removed. Additionally, a reference to § 983.170 in § 983.143 would be revised to reference the exemption level in redesignated § 983.92. Finally, proposed

amendments to § 983.43 would redesignate that section as § 983.55. To remain consistent with that redesignation, this rule would redesignate § 983.143 as § 983.155.

Section 983.53 of the order authorizes the collection of assessments from handlers on receipts of pistachios. Such assessments are used to fund expenses of the committee. Section 983.253 specifies the current assessment rate established for California pistachios. As explained above, the formal rulemaking proceeding includes an amendment to the order that would expand the production area to include California, Arizona, and New Mexico. Therefore, the committee recommended that paragraph (b) of § 983.253 be revised to establish an assessment rate applicable to all production area pistachios. To conform to the definition of the committee's "production year" contained in the order, the language of paragraph (b) of § 983.253 would also be revised to specify that assessments are due to the committee by December 15 of the applicable production year.

#### Initial Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this 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 rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

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

There are approximately 24 handlers and 800 producers of pistachios in California, the production area currently regulated under the order. If proposed amendments to the order are approved by producers, the production area could expand to include the states of Arizona and New Mexico. According to information provided by the industry, there are two handlers and approximately 45 pistachio producers in

Arizona, and there are three handlers and approximately 30 producers in New Mexico.

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

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

Currently, the order regulates pistachios produced in California. The formal rulemaking proceeding includes amendments to the order that would expand the regulated production area to include Arizona and New Mexico, at the request of producers in those two states. Additional proposed amendments to the order would remove specific aflatoxin and quality regulations and testing procedures from the order's provisions and replace them with general authority for the committee to recommend aflatoxin and quality regulations. This proposed rule would make changes to the order's administrative rules and regulations by adding the specific aflatoxin regulations currently found in the order's provisions and clarifying that the regulations pertain to handlers throughout the expanded production area. Certain language in the administrative rules and regulations section that is currently suspended, or that would be redundant or obsolete if the amendments are approved, would be removed or revised. References to order sections that have been redesignated would be revised to reference the renumbered sections. These changes were recommended by the committee to ensure a seamless transition in aflatoxin regulation if the amendments are approved and to conform to various changes to the order's provisions. If the proposed amendments to the order are not approved by pistachio producers, this proposed rule would be withdrawn.

Specifically, this proposed rule would remove § 983.138—Samples for testing, § 983.141—Procedures for exempting handlers from minimum quality testing,

and § 983.170—Handler exemption, from the order's administrative rules and regulations. Conforming changes would be made to the language and references in §§ 983.143, 983.147, 983.253 to reflect amendments to the order, such as the expansion of the production area to include Arizona and New Mexico and the redesignation of several order sections. Sections 983.143 and 983.147 would be redesignated as §§ 983.155 and 983.164, respectively. Finally, two new sections, § 983.150—Aflatoxin regulations, and § 983.152—Failed lots/rework procedure, would be added to incorporate specific regulations concerning aflatoxin tolerance levels and testing procedures that would be removed from the order's provisions if the amendments are approved.

The impact of proposed amendments to the order on producers and handlers has been analyzed in the Secretary's Decision published in the **Federal Register** on August 6, 2009, at 74 FR 39230. It may be generally concluded from the final regulatory impact analysis that the order amendments would improve the operation and functioning of the marketing order program and that all producers and handlers would benefit regardless of size. The analysis examined the benefits and costs to producers and handlers as a result of the expansion of the production area to include Arizona and New Mexico and the regulation of handlers under the marketing order program, including aflatoxin certification requirements.

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

The changes in this proposed rule are necessary to conform to proposed amendments to the order. With regard to alternatives, if the amendments are approved by producers voting in the referendum, these changes should be made. As explained above, if the amendments are not approved by voters, this proposed rule would be withdrawn.

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

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

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

These proposed changes in this action were recommended by the committee on March 6, 2008, and submitted to AMS on May 28, 2008. The committee's meeting was widely publicized throughout the pistachio industry and all interested persons were invited to attend and participate. All entities, both large and small, were able to express their views on the effects of the proposed amendments contained herein.

Finally, interested persons are invited to submit comments on this proposed rule, including 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/AMSV1.0/ams.fetchTemplateData.do?template=TemplateN&page=MarketingOrdersSmallBusinessGuide>. Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

A 10-day comment period is provided to allow interested persons to respond to this proposal. Ten days is deemed appropriate because the proposed changes need to be made concurrently with any amendments made to the order

itself. All written comments timely received will be considered before a final determination is made on this matter.

A referendum is to be conducted on proposed amendments to the order on August 10–22, 2009.

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

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

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

#### PART 983—PISTACHIOS GROWN IN CALIFORNIA

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

Authority: 7 U.S.C. 601–674.

#### § 983.138 [Removed]

2. Section 983.138 is removed.

#### § 983.141 [Removed]

3. Lift the December 10, 2007 (published on Dec. 7, 2007, 72 FR 69141), suspension of § 983.141, and remove the section.

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

4. Redesignate § 983.143 as § 983.155, and amend paragraph (b) by removing the reference “§ 983.170” and adding in their place the reference “§ 983.92.”

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

5. Lift the December 10, 2007 (published on Dec. 7, 2007, 72 FR 69142), suspension of § 983.147(d), redesignate § 983.147 as § 983.164, and revise paragraph (d) of that section to read as follows:

#### § 983.164 Reports.

\* \* \* \* \*

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

\* \* \* \* \*

6. Add new § 983.150 to read as follows:

#### § 983.150 Aflatoxin regulations.

(a) *Maximum level*. No handler shall ship for domestic human consumption,

pistachios that exceed an aflatoxin level of 15 ppb. All shipments must also be covered by an aflatoxin inspection certificate. Pistachios that fail to meet the aflatoxin requirements shall be disposed in such manner as described in the Failed Lots/Rework Procedure of this part (§ 983.152).

(b) *Change in level*. The committee may recommend to the Secretary changes in the aflatoxin level specified in this section. If the Secretary finds, on the basis of such recommendation or other information, that such an adjustment of the aflatoxin level would tend to effectuate the declared policy of the Act, such change shall be made accordingly.

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

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

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

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

TABLE 1 TO § 983.150—INSHELL PISTACHIO LOT SAMPLING INCREMENTS FOR AFLATOXIN CERTIFICATION

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

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

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

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

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

averaged aflatoxin level of Test Samples #1 and #2 is at or above 20 ppb, the lot fails and the accredited laboratory shall fill out a failed lot notification report as specified in § 983.52. If the averaged aflatoxin level of Test Samples #1 and #2 is above 10 ppb and below 20 ppb, the accredited laboratory may, at the handler’s discretion, analyze Test Sample #3, and the results of Test Samples #1, #2, and #3 will be averaged. Alternatively, the handler may elect to withdraw the lot from testing, rework the lot, and resubmit it for testing after reworking. If the handler directs the laboratory to proceed with the analysis of Test Sample #3, a lot will be certified as negative to aflatoxin and the laboratory shall issue an aflatoxin inspection certificate if the averaged results of Test Samples #1, #2, and #3 are at or below 15 ppb. If the averaged aflatoxin results of Test Samples #1, #2, and #3 are above 15 ppb, the lot fails and the accredited laboratory shall fill out a failed lot notification report as specified in § 983.52. The accredited laboratory shall send a copy of the failed lot notification report to the committee and to the failed lot’s owner within 10 working days of any failure described in this section. If the lot is certified as negative as described in this section, the aflatoxin inspection certificate shall certify the lot using a certification form identifying each lot by weight and date.

The certification expires for the lot or remainder of the lot after 12 months.

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

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

7. Add new § 983.152 to read as follows:

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

(a) *Inshell rework procedure for aflatoxin.* If inshell rework is selected as a remedy to meet the aflatoxin regulations of this part, then 100% of the product within that lot shall be removed from the bulk and/or retail packaging containers and reworked to remove the portion of the lot that caused the failure. Reworking shall consist of mechanical, electronic, or manual procedures normally used in the

handling of pistachios. After the rework procedure has been completed, the total weight of the accepted product and the total weight of the rejected product shall be reported to the committee. The reworked lot shall be sampled and tested for aflatoxin as specified in § 983.150, except that the lot sample size and the test sample size shall be doubled. If, after the lot has been reworked and tested, it fails the aflatoxin test for a second time, the lot may be shelled and the kernels reworked, sampled, and tested in the manner specified for an original lot of kernels, or the failed lot may be used for non-human consumption or otherwise disposed of.

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

#### § 983.170 [Removed]

8. Section 983.170 is removed.

9. Amend § 983.253 by removing the word "California" in paragraph (a), and by revising paragraph (b) to read as follows:

#### § 983.253 Assessment rate.

\* \* \* \* \*

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

Dated: August 31, 2009.

**Rayne Pegg,**

*Administrator.*

[FR Doc. E9-21352 Filed 9-3-09; 8:45 am]

BILLING CODE 3410-02-P

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 25

[Docket No. FAA-2009-0810; Notice No. 09-10]

RIN 2120-AJ21

#### Design Maneuvering Speed Limitation Statement

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** The Federal Aviation Administration proposes to amend the airworthiness standards applicable to transport category airplanes to clarify that flying at or below the design maneuvering speed does not allow a pilot to make multiple large control inputs in one airplane axis or single full control inputs in more than one airplane axis at a time without endangering the airplane's structure. This proposed regulation is the result of an accident investigation and responds to a National Transportation Safety Board recommendation. The results of the accident investigation indicate that many pilots might have a general misunderstanding of what the design maneuvering speed ( $V_A$ ) is and the extent of structural protection that exists when an airplane is operated at speeds below its  $V_A$ . This action is being taken to prevent this misunderstanding from causing or contributing to a future accident.

#### DATES:

Send your comments on or before November 3, 2009.

**ADDRESSES:** You may send comments identified by Docket Number [*Insert docket number, for example, FAA-200X-XXXXX*] using any of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov> and follow the online instructions for sending your comments electronically.

- *Mail:* Send comments to Docket Operations, M-30; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Room W12-140, West Building Ground Floor, Washington, DC 20590-0001.

- *Hand Delivery or Courier:* Bring comments to Docket Operations in Room W12-140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

- *Fax:* Fax comments to Docket Operations at 202-493-2251.

For more information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

*Privacy:* We will post all comments we receive, without change, to <http://www.regulations.gov>, including any personal information you provide. Using the search function of our docket Web site, anyone can find and read the electronic form of all comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477-78) or you may visit <http://DocketsInfo.dot.gov>.

*Docket:* To read background documents or comments received, go to <http://www.regulations.gov> at any time and follow the online instructions for accessing the docket. Or, go to Docket Operations in Room W12-140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

#### FOR FURTHER INFORMATION CONTACT:

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**SUPPLEMENTARY INFORMATION:** Later in this preamble under the Additional Information section, we discuss how you can comment on this proposal and how we will handle your comments. Included in this discussion is related information about the docket, privacy, and the handling of proprietary or confidential business information. We also discuss how you can get a copy of this proposal and related rulemaking documents.

#### Authority for This Rulemaking

The FAA's authority to issue rules on aviation safety is found in Title 49 of the United States Code. Subtitle I, section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation