

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

Dated: October 26, 2009.

**Rayne Pegg,**

*Administrator, Agricultural Marketing Service.*

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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 983

[Doc. No. AO-FV-08-0147; AMS-FV-08-0051; FV08-983-1]

#### **Pistachios Grown in California; Order Amending Marketing Order No. 983**

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

**ACTION:** Final rule.

**SUMMARY:** This final rule amends the marketing agreement and order for pistachios (order). The amendments were proposed by the Administrative Committee for Pistachios (Committee), which is responsible for local administration of the order. The amendments will: Expand the production area covered under the order to include Arizona and New Mexico in addition to California; authorize the Committee to reimburse handlers for a portion of their inspection and certification costs in certain situations; authorize the Committee to recommend research projects; modify existing order authorities concerning aflatoxin and quality regulations; modify the authority for interhandler transfers of order obligations; redesignate several sections of the order; remove previously suspended order provisions, and make other related changes. The amendments are intended to improve the operation and functioning of the marketing order program.

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

**FOR FURTHER INFORMATION CONTACT:**

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**SUPPLEMENTARY INFORMATION:** Prior documents in this proceeding: Notice of Hearing issued on July 15, 2008, and published in the July 18, 2008, issue of the **Federal Register** (73 FR 41298); a Recommended Decision issued on April 29 and published in the May 5, 2009, issue of the **Federal Register** (74 FR 20630); and a Secretary's Decision and Referendum Order issued on July 29, 2009, and published in the August 6, 2009, issue of the **Federal Register** (74 FR 39230).

This action is governed by the provisions of sections 556 and 557 of Title 5 of the United States Code and is therefore excluded from the requirements of Executive Order 12866.

#### **Preliminary Statement**

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

The hearing was held pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act", and the applicable rules of practice and procedure governing the formulation of marketing agreements and orders (7 CFR part 900).

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

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

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

*The amendments included in this final order will:*

1. Expand the production area to include the States of Arizona and New Mexico. The production area covered under the order was previously limited to the State of California. This amendment will revise existing § 983.26, Production area, and redesignate it as § 983.25. It will also result in corresponding changes being made to existing § 983.11, Districts; § 983.21, Part and subpart; and existing § 983.32, Establishment and membership. Existing sections 983.21 and 983.32 will also be redesignated as § 983.20 and § 983.41, respectively.

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

3. Add a new § 983.46, Research, that will authorize the Committee to engage in research projects with the approval of USDA. This amendment will also require corresponding changes to existing § 983.34, Procedure, to establish voting requirements for Committee recommendations concerning research. It will also require corresponding changes to existing § 983.46, Modification or suspension of regulations, and § 983.54, Contributions. The existing § 983.34, § 983.46, and § 983.54 will also be redesignated as § 983.43, § 983.59, and § 983.72, respectively.

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

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

removes provisions from that section concerning specific quality regulations that are currently suspended. This amendment will also require corresponding changes by removing currently suspended language in § 983.6, Assessed weight; revising § 983.7, Certified pistachios; removing existing § 983.19, Minimum quality requirements and § 983.20, Minimum quality certificate; revising existing § 983.31, Shelled pistachios; revising existing § 983.41, Testing of minimal quantities, and removing currently suspended language in that section; revising existing § 983.42, Commingling; and revising existing § 983.45, Substandard pistachios. Sections 983.31, 983.41, 983.42, and 983.45 will be redesignated as sections 983.30, 983.53, 983.54, and 983.57, respectively.

6. Add a new § 983.58, Interhandler Transfers. This proposal will modify existing authority under the order by expanding the range of marketing order obligations that may be transferred between handlers when pistachios are transferred between handlers. This proposal will require a corresponding change to existing § 983.53, Assessments, and will redesignate § 983.53 as § 983.71.

7. As a result of the proposed amendments and corresponding changes to the order summarized above, numerous administrative changes to the order will also be required. Such changes include numerical redesignations to several sections of the order, changes to cross references of section numbers in regulatory text as a result of the numerical redesignations, and removal of obsolete provisions. The title of order will be revised to include the States of Arizona and New Mexico. In addition, a change will be made to amend existing § 983.70 and redesignate it as § 983.92.

In addition to these amendments to the order, AMS proposed to make any such additional changes as may be necessary to the order to conform to any amendment that may be adopted. To the extent necessary, conforming changes have been made to the amendments. These conforming changes have been identified in the above list of amendments.

An amended marketing agreement was subsequently provided to all pistachio handlers in the production area for their approval. The marketing agreement was approved by handlers representing more than 50 percent of the volume of pistachios handled by all handlers during the representative period of September 1, 2008 through August 31, 2009.

### Small Business Considerations

Pursuant to the requirements set forth in the Regulatory Flexibility Act (5 U.S.C. 601–612) (RFA), 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 so that small businesses will not be unduly or disproportionately burdened. Marketing orders and amendments thereto are unique in that they are normally brought about through group action of essentially small entities for their own benefit.

Small agricultural service 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 approximately 800 producers of pistachios in the State of California. It is estimated that approximately 50 percent of the processing handlers had annual receipts of less than \$7,000,000, according to information presented at the hearing. In addition, based on the number of producers, the size of the 2007 crop, and the average producer price per pound data reported by the National Agricultural Statistics Service (NASS), the average producer revenue for the 2007 crop was \$702,000. It is estimated that 85% of the producers in California produced less than \$750,000 worth of pistachios and would thus be considered small businesses according to the SBA definition.

Based on information presented at the hearing, it is estimated that there are approximately 40 to 50 growers of pistachios in Arizona and approximately 30 growers in New Mexico. It is also estimated that there are 2 handlers in Arizona and 3 handlers in New Mexico. Although no official data is available, based on hearing testimony it is estimated that the majority of producers in Arizona and New Mexico are small businesses according to SBA's definition. It is also estimated that all of the handlers in New Mexico are small businesses and one of the handlers in Arizona is a small business.

California accounts for the vast majority of pistachio acreage and production in the U.S. According to data from the National Agricultural Statistics Service (NASS), California's

total acreage in 2007 was reported at 176,400 acres. While no 2007 acreage data is available from NASS for Arizona and New Mexico, in 2006, Arizona acreage was reported at 2,500 acres while New Mexico acreage was reported at 1,350 acres in 2002. Two witnesses from New Mexico testified that they estimate acreage in New Mexico to be about 450 acres in 2007. Pistachios are also grown in small quantities in Texas, Utah, and Nevada. However, witnesses testified that pistachios produced in those States are considered to be the result of hobby farming and are not commercially significant in volume. California, Arizona, and New Mexico account for over 99.99 percent of domestic pistachio production and essentially all of the production used for commercial purposes, according to the record.

The order regulating the handling of pistachios grown in the State of California was established in 2004. The primary feature of the order is a quality provision that requires pistachios to be sampled and tested for aflatoxin prior to shipment to domestic markets. Such shipments of pistachios may not exceed a tolerance level for aflatoxin. Information collection and dissemination is also conducted under the order. The program is funded through assessments on handlers according to the quantity of pistachios handled. The order is administered by an industry committee of handlers and growers, and is designed to support both large and small pistachio handlers and growers. Committee meetings where regulatory recommendations and other decisions are made are open to the public. All members are able to participate in Committee deliberations, and each Committee member has an equal vote. Others in attendance at meetings are also allowed to express their views.

The Committee met on March 6, 2008, and requested that USDA conduct a public hearing to consider proposed amendments to the order. USDA reviewed the request and determined to proceed to a hearing. A hearing was conducted on July 29 and 30, 2008, in Fresno, California. The Committee's meeting and the hearing were both open to the public and all that attended were able to participate and express their views.

The amendments approved by producers in referendum will: Expand the production area to include the States of Arizona and New Mexico; authorize the Committee to reimburse handlers for certain inspection costs; authorize research activities under the order; provide broad authority for aflatoxin

regulation under the order, provide broad authority for quality regulation under the order; provide authority for interhandler transfer of marketing order obligations; and make corresponding administrative changes to the order as a result of the aforementioned proposed changes.

The amendments are intended to improve the operation and functioning of the marketing order program. Record evidence indicates that they are intended to benefit all producers and handlers under the order, regardless of size. All grower and handler witnesses at the hearing supported the amendments and while acknowledging the additional cost implications, they stated that they expected the benefits to outweigh the costs.

A description of the amendments and their anticipated economic impact on small and large entities is discussed below.

#### **Evaluation of the Potential Economic Impacts of the Amendments**

The key economic issues to examine in considering the amendments to the marketing order are the benefits and costs to growers and handlers of the expansion of the production area and the consequences of that expansion. The most significant change in terms of its potentially significant and immediate impact is the fact that expanding the production area to include Arizona and New Mexico will result in pistachio handlers in those two States being regulated under the order which will require them to meet the same aflatoxin certification requirements that apply to California handlers.

#### **Aflatoxin Requirements**

Pistachio handlers under the order must have all pistachio lots destined for the domestic market tested and certified that they do not exceed a maximum aflatoxin tolerance. To comply with the standard, handlers arrange for a sample to be taken from each lot that is to be shipped domestically and to have that sample tested for aflatoxin. Lots that meet the standard receive written certifications that allow shipment to the domestic market. Lots that exceed the aflatoxin tolerance cannot be shipped domestically. Handlers may rework the lots to remove contaminated nuts and then can begin the certification process again. There are costs associated with each of these steps, which were previously borne only by California handlers and will be borne by handlers in the other two States as a result of the amendment.

Before considering cost-related details, it is important to examine the

benefits associated with mandatory aflatoxin certification. Various grower and handler witnesses testified that they expected significant benefits to accrue from the mandatory requirements enforced through the marketing order, and increased consumer confidence in the quality of U.S. pistachios. Arizona and New Mexico handler witnesses indicated that they would willingly comply with all of the steps involved in meeting the aflatoxin standards. Grower witnesses from Arizona and New Mexico indicated awareness that at least part of the increased handler costs from aflatoxin certification would be passed onto them, but that they expected the net effect to be strongly positive. Grower witnesses from Arizona and New Mexico also stated they did not expect to have to undertake any significant changes in their pistachio production operations as a result of coming under the authority of the marketing order. Witnesses said that they believed that they would have overall improved returns and higher sales than would be the case without the marketing order regulation. They expected the benefits of the proposed amendments to far outweigh the costs.

A 2005 benefit cost analysis of federal marketing order mandatory aflatoxin requirements for California was submitted as evidence at the hearing. The analysis, prepared by agricultural economists at the University of California-Davis, was entitled "Economic Consequences of Mandated Grading and Food Safety Assurance: *Ex Ante* Analysis of the Federal Marketing Order for California Pistachios" (Richard S. Gray and others, University of California, Giannini Foundation Monograph 46, March 2005). In present-value terms, over a 20-year horizon, the benefits to producers in the study's baseline scenario were estimated to be \$75.3 million. The study reported a "most likely scenario" benefit cost ratio of nearly 6:1, with a range from about 4:1 to 9:1 under alternative scenarios representing low and high aflatoxin event impacts, respectively, on the pistachio market.

One witness noted that, depending on compliance cost and aflatoxin event assumptions under alternative scenarios in the study, the expected benefit cost ratio from implementation of mandatory aflatoxin standards under the California marketing order ranged between 5:1 and 17:1. Several grower and handler witnesses suggested that these significant benefit cost ratios for the California marketing order will also likely apply if the order is expanded to include Arizona and New Mexico.

The following section examines the cost impacts of the mandatory aflatoxin requirements in an expanded marketing order.

#### **Differences in Aflatoxin Inspection and Certification Costs**

Aflatoxin inspection and certification costs can be divided into the costs of: (1) Inspector travel time to pistachio handlers' premises; (2) time required for the inspector to draw samples from lots designated for domestic shipment; (3) cost of shipping samples to the testing laboratory; (4) aflatoxin analysis (testing cost); and (5) value of the destroyed pistachios used in the sampling and analysis.

Tables 1–3 that follow present estimated costs for representative handlers in California, Arizona, and New Mexico. Each table is designed to summarize handler costs for the lots being tested, including each of the five cost elements listed above. For clarity of the cost comparisons, the lot size to be sampled is assumed to be 50,000 pounds in the representative scenarios for all three States. The 50,000-pound lot size is most appropriate for California's handler plants, which are generally larger than the handler plants in Arizona and New Mexico. The impact in terms of higher unit cost for smaller lot sizes is discussed below.

Table 1 is a representation of the aflatoxin certification cost situation in California. It serves as a benchmark with which to compare the costs in the other two States, Arizona and New Mexico. Witnesses from the pistachio industry in each of the three States submitted as evidence the data used in the three tables, and stated that the data was representative of the situation that exists or would be faced by handlers in those States.

Witnesses pointed out that inspector travel costs and sample shipment costs were the most variable costs across the States. Inspector travel costs consist of the mileage reimbursement that inspectors need to be paid by the handlers, plus the time spent traveling to the handler's location. In California, inspectors are regularly in the plants, and there is no additional travel time associated with aflatoxin sampling. Witnesses testified that New Mexico inspector travel costs could be as high as \$485 per lot due to the large distances involved, but that the figure of \$432.50 was the most representative. Data presented at the hearing indicated that Arizona inspector travel cost could be as high as \$100 per lot, but that a lower figure of \$32.70 was more likely due to the closer proximity of Arizona Plant

Services inspectors, who may be certified to take the sample.

TABLE 1—CALIFORNIA PISTACHIOS: COST SCENARIO FOR SAMPLING AND AFLATOXIN TESTING FOR REPRESENTATIVE HANDLER

	50,000-pound lots		Description of cost elements
	Dollars per lot	Dollars per pound	
Inspector Travel Time to Plant .....	.....	.....	No inspector travel time; inspector regularly in plant.
Inspector Sampling Time .....	\$70.00	\$0.0014	[Cost of sampler time: 2 hours @ \$35/hour = \$70]; [2 hours to draw 100 samples for one lot <sup>2</sup> ].
Value of Pistachio Sample .....	44.00	0.0009	[10 kg (22-lb.) weight of sample from 100 sub-samples]; [22 lbs. @ \$2.00 per pound = 44].
Shipping Cost to Laboratory <sup>1</sup> .....	.....	.....	Onsite labs in plants; no shipping cost.
Aflatoxin Testing Cost <sup>2</sup> .....	90.00	0.0018	\$90 lab fee to determine aflatoxin level of sample.
Total Cost .....	204.00	0.0041	
Pct. of price received by handler .....	.....	0.2%	Industry estimate of CA handler sale price per pound=2.00.
Pct. of price received by grower .....	.....	0.3%	NASS estimate of 2007 CA grower price per pound = \$1.35.

<sup>1</sup> DFA laboratory in Fresno, CA.

<sup>2</sup> Aflatoxin analysis done in onsite laboratory; imputed cost of \$90 is based on cost in outside laboratory.  
Source: Testimony at pistachio federal marketing order hearing, July 29–30, 2008, in Fresno, CA.

TABLE 2—ARIZONA PISTACHIOS: COST SCENARIO FOR SAMPLING AND AFLATOXIN TESTING FOR REPRESENTATIVE HANDLER

	50,000-pound lots		Description of cost elements
	Dollars per lot	Dollars per pound	
Inspector Travel Time to Plant .....	\$32.70	\$0.0007	[24 miles <sup>1</sup> @ 0.40 per mile = \$9.60]; [Cost of sampler time: 40 min. (0.66 hours) @ \$35/hour = \$23.10].
Inspector Sampling Time .....	70.00	0.0014	[Cost of sampler time: 2 hours @ \$35/hour = \$70]; [2 hours to draw 100 samples for one lot <sup>2</sup> ].
Value of Pistachio Sample .....	60.50	0.0012	[(10 kg (22-lb.) weight of sample from 100 sub-samples]; [22 lbs. @ 2.75 per pound = 60.50].
Shipping Cost to Laboratory <sup>3</sup> .....	200.00	0.0040	Shipping cost per 10 kg sample.
Aflatoxin Testing Cost .....	90.00	0.0018	90 lab fee to determine aflatoxin level of sample.
Total Cost .....	453.20	0.0091	
Pct. of price received by handler .....	.....	0.3%	Industry estimate of AZ handler sale price per pound = \$2.75.
Pct. of price received by grower .....	.....	0.7%	USDA/NASS estimate of 2007 CA grower price per pound = \$1.35 (AZ price not available).

<sup>1</sup> 12 miles each way from pistachio handler plant in Bowie, AZ to the San Simon, AZ location of Arizona Plant Services inspectors (certified samplers).

<sup>2</sup> Three lots sampled per visit over a 6-hour period.

<sup>3</sup> DFA laboratory in Fresno, CA; handler witness expected to use overnight shipping, estimated at \$200 per 10 kg sample.

Source: Computed by USDA, based on evidence presented at pistachio federal marketing order hearing, July 29–30, 2008, in Fresno, CA.

TABLE 3—NEW MEXICO PISTACHIOS: COST SCENARIO FOR SAMPLING AND AFLATOXIN TESTING FOR REPRESENTATIVE HANDLER

	50,000-pound lots		Description of cost elements
	Dollars per lot	Dollars per pound	
Inspector Travel Time to Plant .....	\$432.50	\$0.0087	600 miles <sup>1</sup> @ \$0.40 per mile = \$240]; [Cost of sampler time: 5.5 hours <sup>2</sup> @ \$35/hour = \$192.50].
Inspector Sampling Time .....	70.00	0.0014	[Cost of sampler time: 2 hours) @ \$35/hour = \$70]; [2 hours to draw 100 samples for one lot].
Value of Pistachio Sample .....	44.00	0.0009	[10 kg (22-lb.) weight of sample from 100 sub-samples]; [22 lbs. @ \$2.00 per pound = \$44].
Shipping Cost to Laboratory <sup>3</sup> .....	105.00	0.0021	Shipping cost per 10 kg sample. <sup>4</sup>
Aflatoxin Testing Cost .....	90.00	0.0018	\$90 lab fee to determine aflatoxin level of sample.
Total Cost .....	741.50	0.0148	

TABLE 3—NEW MEXICO PISTACHIOS: COST SCENARIO FOR SAMPLING AND AFLATOXIN TESTING FOR REPRESENTATIVE HANDLER—Continued

	50,000-pound lots		Description of cost elements
	Dollars per lot	Dollars per pound	
Pct. of price received by handler .....	.....	0.7%	Industry estimate of NM handler sale price per pound = \$2.00.
Pct. of price received by grower .....	.....	1.1%	USDA/NASS estimate of 2007 CA grower price per pound = \$1.35 (NM price not available).

<sup>1</sup> Average of round trip travel distances to Alamogordo, NM, pistachio handler plant from two NM inspector (certified sampler) locations—Portales (416 miles round trip) and Farmington (782 miles).

<sup>2</sup> Average of driving time estimates to two inspector locations:  $(4 + 7)/2 = 5.5$  hours.

<sup>3</sup> DFA laboratory in Fresno, CA.

<sup>4</sup> Average of estimated range of shipping costs =  $(\$90 + \$120)/2 = \$105$ .

Source: Computed by USDA, based on evidence presented at pistachio federal marketing order hearing, July 29–30, 2008, in Fresno, CA.

Two cost elements that are uniform across the three States are sampling time and testing cost. The estimated time that it takes an inspector to draw a 10 kg (22 pound) sample for aflatoxin testing of a 50,000 pound lot, based on 100 sub-samples, is 2 hours. At a standard hourly rate of \$35 per hour, two hours of sampling time will cost the handler \$70. The testing cost for a laboratory to determine the aflatoxin level from a sample is \$90.

Witnesses indicated that the cost for the 22 pounds of pistachios used in the sample (handler sales revenue foregone) was \$2.00 per pound (\$44 total) in California and New Mexico and \$2.75 in Arizona (about \$61 total).

Given all of the assumptions that went into developing the cost summary in Table 1, the estimated cost per lot for a California handler for aflatoxin certification is \$204, which is less than one half cent per pound (about four tenths of a cent). This represents 0.2 percent of the \$2.00 pistachio value per pound at the handler level (estimate provided by industry witnesses) and 0.3 percent of the 2007 grower price per pound for California pistachios, estimated by NASS at \$1.35 per pound. A California pistachio industry witness pointed out that the unit price would be even lower with larger lot sizes and that the average lot size for “failed lots” in a recent year under the marketing order (those that exceeded the maximum aflatoxin tolerance) was nearly 67,000 pounds.

Table 2 shows that a representative Arizona handler would pay twice as much as a California handler—\$453 per lot, or nearly one cent per pound (about nine tenths of a cent). The data in Table 3 indicated that a New Mexico handler would pay even more for aflatoxin certification—\$742 per 50,000 pound lot, or about 1.5 cents per pound. Thus the certification costs for the smaller plants in Arizona and New Mexico

would be between two and four times higher, if lot sizes were the same.

Typical lot sizes may be smaller in Arizona and New Mexico; witnesses indicated that lot sizes could vary between 10,000 and 50,000 pounds. An Arizona handler witness presented evidence indicating that 40,000 pounds would be a more likely typical lot size, and that the sample size and related cost factors would be the same. With a smaller lot size, the Arizona handler cost per pound rises from nine tenths of a cent (50,000 pound lot) to 1.1 cents (40,000 pound lot). This cost per pound is nearly 3 times higher than the cost for a California handler with a 50,000 pound lot, but the percentage of the estimated handler sales price remains under one half of one percent (0.4%).

A New Mexico handler witness characterized their own operation as being quite a bit smaller than the main Arizona handler and most California handlers. If the typical lot size for a small New Mexico handler was 10,000 pounds, then the sample size would be smaller (13.2 pounds) and the inspector sampling time declines from two hours to one hour. The total cost would decline modestly, from \$742 for a 50,000 pound lot to \$689 for a 10,000 pound lot. However, since the costs are spread over fewer pounds, the unit cost for certification would rise to nearly seven cents per pound, about 3 percent of the handler sales price. If the small handler had a typical lot size of 30,000 pounds (the midpoint between 10,000 and 50,000 pounds) the certification cost would be about 2.5 cents per pound, just over one percent of the handler sale price.

However, the New Mexico handler witness indicated that they would try to organize their pistachio handling operation to keep the lot sizes for sampling and testing large enough to keep costs down. The 50,000 pound lot example shown in Table 3 therefore

provides a reasonable representation of small handler certification costs. The higher costs are due largely to the less developed aflatoxin testing infrastructure than is available in California, and related issues such as greater distances for inspector travel.

Additional costs are incurred if a lot exceeds the maximum aflatoxin tolerance. Witnesses estimated that in all three States the cost for reworking a lot to remove the contaminated nuts would be 25 cents per pound. After reworking the lot a handler would incur another round of the sampling and testing costs highlighted in the tables.

Grower witnesses stated that the aflatoxin certification costs as presented by handler and other industry witnesses, and illustrated by the three tables, appeared to be reasonable representations of the cost of compliance with the aflatoxin requirements under the marketing order.

#### Proposed Reimbursement to Account for Handler Cost Differences

The significant cost differences highlighted above is the reason that pistachio industry witnesses from all three States supported a proposed amendment to authorize the Committee to reimburse handlers in more remote locations within the production area for the excess costs due to lack of access to inspection and certification services. Reimbursing handlers for the excess costs would eliminate any differential impact and would equalize the aflatoxin certification costs across the proposed expanded production area.

Although the precise details of reimbursement would be established through the informal rulemaking process upon recommendation of the Committee, the following example illustrates one way to estimate the amount of reimbursement that may occur. With a 50,000 pound lot size, Table 3 shows the cost per lot for a New

Mexico handler is about \$742. The New Mexico handler would be expected to pay only the portion of the costs that are the same across the three States (\$70 for inspector sampling, plus \$90 testing cost, plus \$44 in revenue foregone from destroyed pistachios, for a total cost per lot of \$204). The handler represented by Table 3 would receive a reimbursement per lot of \$538 (\$742 minus \$204).

Using different cost assumptions, a pistachio industry witness provided an example with a somewhat higher estimate of the likely cost (\$605 per lot) that the Committee would reimburse New Mexico handlers. The witness estimated that with ten sampling trips per year, and one lot sampled per trip, the New Mexico reimbursements would total \$6,050. With an anticipated total of 100 lots tested in Arizona in the example presented by the witness, and with a reimbursement rate of \$235 per lot, the total Arizona cost would be \$23,500. The sum for the two States would be about \$30,000.

Based on similar assumptions used in developing the tables, the total current cost of marketing order aflatoxin certification for California handlers (excluding the Committee assessment) was estimated by an industry witness to be \$530,000. Based on this example, a \$30,000 reimbursement would be issued by the Committee to the Arizona and New Mexico handlers. The reimbursement would represent about a 6 percent increase above the \$530,000 currently paid by the California handlers. The witness also stated that when the reimbursement system is implemented, all handlers of like-size operations would have comparable inspection costs.

All California handler and grower witnesses expressed their support for such a reimbursement provision. In addition, all of the Arizona and New Mexico handler and grower witnesses also testified in favor of such a reimbursement.

Handler and grower witnesses indicated that the expected benefits from the operation of the expanded marketing order would substantially exceed costs.

#### **Other Proposed Amendments**

The addition of production, post harvest, and nutrition research authority to the order would have no immediate cost impact on the industry. This amendment would allow the Committee to recommend research activities to USDA. If approved, the projects would be funded through handler assessments. It is likely that program assessments would increase in order to fund any projects recommended, which would

increase costs to handlers. However, the order limits the total assessment that can be implemented under the order so that the entire assessment cannot exceed one half of one percent of the average price received by producers in the preceding crop year. To the extent that funds for research would only represent a portion of the assessment funds, the cost of any research that may be conducted would necessarily be less than one half of one percent of the average price received by producers. In addition, since assessments are collected from handlers based on the volume of pistachios handled, any cost associated with research projects would be proportionate to the size of the handlers.

Witnesses testified that the Committee would not undertake any research activities unless they expected the benefits to outweigh the costs. One witness testified that a presentation at a Symposium for Agricultural Research held on June 18 and 19, 2008, in Sacramento, California indicated that a benefit/cost ratio for agricultural research in California has been estimated at 30.7 to 1.

Handler and grower witnesses made positive comments in support of other order amendments, including the granting of broad authority for aflatoxin standards and for other quality regulations. Witnesses stated that there would be no immediate impact from the granting of these authorities, because there are no industry plans for changes in regulations. However, handler and grower witnesses stated that having such authority would be quite helpful to the future of the pistachio industry, and that if the authorities were exercised in the future, they expected that it would be done in a way that assured that benefits would outweigh costs. Since unanimity of the Committee would generally be required to make such changes, they expressed confidence that only regulations would be established that had very broad industry consensus. They expected additional improvements in product quality and improved returns to growers and handlers from the use of any such future regulations.

One other amendment, relating to interhandler transfers, merits discussion in the context of economic impact on handlers and growers, particularly small ones. When the marketing order was promulgated in 2004, authority was given for interhandler transfers of noncertified pistachios. Evidence presented at the hearing indicates that the amendment formalizes that authority and expands it to include other marketing order requirements, including the payment of assessments

on hulled and dried pistachios, when that processing is done by the producer. Under the marketing order, the entity which hulls and dries pistachios is responsible for assessments and inspections. This provision was included because in California producers normally deliver pistachios to a handler (processor) for hulling and drying as well as the subsequent handling functions.

However, conditions in Arizona and New Mexico are different due to the limited processing capacity of some handlers, the lack of processing access of producers, and the small size of some producing operations. It is necessary in these conditions for some producers to process (hull and dry) their pistachios prior to delivery to a handler. The hulling and drying is part of the harvest process, and it is not the intent of these producers to perform any other handling functions. The proposal would therefore allow the transfer of responsibility for assessments, inspections and other marketing order requirements to the handler who places the pistachios into the stream of commerce.

According to evidence presented at the hearing, this amendment will allow a small number of producers who hull and dry their own production, but perform no additional handling functions (estimated at less than ten), to limit their responsibility to filing a form at the time of pistachio delivery. This amendment will more clearly delineate the responsibilities of handlers and the small number of affected producers. Both will continue their current practices in virtually all cases, and the amendment neither increases or decreases returns. This amendment has the effect of assisting small business operations by removing them from paperwork and other burdens.

#### **Handler Assessment Costs**

Under the marketing order, handlers pay assessments to the Committee for costs associated with administering the program. Following is an evaluation of the impact these costs will have on handlers in Arizona and New Mexico.

The assessment rate authorized under the order is limited to one-half of one percent (.005) of the average grower price received in the preceding crop year. The current assessment rate under the order is \$.0007 per pound, or .07 cents per pound. This compares to an estimated average grower price for the 2007 crop year of \$1.35 per pound. The assessment rate for the 2007 crop year was .05 percent (5/100ths of one percent) of the grower price.

Although there are no NASS data available regarding New Mexico pistachio production, information presented by witnesses at the hearing indicates average annual production in New Mexico could be in the range of 300,000 to 350,000 pounds. At an assessment rate of \$.0007, this would equate to a total annual assessment ranging from \$210 to \$245 for all New Mexico handlers combined. Production from Arizona was 7 million pounds in 2007, according to NASS data. At the \$.0007 per pound assessment rate, this would equate to a total annual assessment of \$4,900 for all Arizona handlers combined. Assessments under the order present a cost to handlers, but as can be seen from the foregoing example, the cost is minimal. In addition, the costs are applied to handlers in proportion to the quantity of pistachios handled, so there is no differential impact anticipated for small and large handlers.

Interested persons were invited to present evidence at the hearing on the probable regulatory and informational impact of the proposed amendments to the order on small entities. The record evidence indicates that the amendments are intended to benefit all producers and handlers under the order, regardless of size. Further, the record shows that the costs associated with implementing regulations would be outweighed by the benefits expected to accrue to the pistachio industry.

USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this rule. These amendments are designed to enhance the administration and functioning of the order to the benefit of the pistachio industry.

#### **Paperwork Reduction Act**

Information collection requirements for Part 983 are currently approved by the Office of Management and Budget (OMB) under OMB No. 0581-0215, "Pistachios Grown in California." The information requirements generated by the amendments result in an increase in burden, which has been submitted to OMB for approval under OMB No. 0581-NEW. We have requested that this collection be merged into OMB No. 0581-0215 when approved.

Producers and handlers of pistachios located in the States of Arizona and New Mexico will be required to complete forms relating to committee nominations, background questionnaires, referendum and nomination ballots, and handler reports. The estimated number of respondents is 85. This will result in a burden of 29 hours. Additionally, handlers will have

to maintain related records and documentation for three full years following the end of the crop year.

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

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.

#### **Civil Justice Reform**

The amendments to Marketing Agreement and Order 983 proposed herein have been reviewed under Executive Order 12988, Civil Justice Reform. They are not intended to have retroactive effect.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, 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 no later than 20 days after the date of the entry of the ruling.

#### **Order Amending the Order Regulating the Handling of Pistachios Grown in California, Arizona, and New Mexico**

##### *Findings and Determinations*

The findings and determinations set forth hereinafter are supplementary and in addition to the findings and determinations previously made in connection with the issuance of the agreement and order; and all of said previous findings and determinations are hereby ratified and affirmed, except insofar as such findings and determinations may be in conflict with

the findings and determinations set forth herein.

##### *(a) Findings and Determinations Upon the Basis of the Hearing Record.*

Pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601-674) and the applicable rules of practice and procedure effective thereunder (7 CFR part 900), a public hearing was held upon the proposed amendments to Marketing Order No. 983 (7 CFR part 983), regulating the handling of pistachios grown in California.

Upon the basis of the evidence introduced at such hearing and the record thereof, it is found that:

(1) The marketing agreement and order, as amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(2) The marketing agreement and order, as amended, regulate the handling of pistachios grown in the production area in the same manner as, and are applicable only to, persons in the respective classes of commercial and industrial activity specified in the marketing agreement and order upon which a hearing has been held;

(3) The marketing agreement and order, as amended, are limited in their application to the smallest regional production area which is practicable, consistent with carrying out the declared policy of the Act, and the issuance of several orders applicable to subdivisions of the production area would not effectively carry out the declared policy of the Act;

(4) The marketing agreement and order, as amended, prescribe, insofar as practicable, such different terms applicable to different parts of the production area as are necessary to give due recognition to the differences in the production and marketing of pistachios grown in the production area; and

(5) All handling of pistachios grown in the production area as defined in the marketing agreement and order, is in the current interstate or foreign commerce or directly burdens, obstructs, or affects such commerce.

##### *(b) Additional Findings.*

It is necessary and in the public interest to make these amendments effective not later than one day after publication in the **Federal Register**. A later effective date would unnecessarily delay implementation of the amendments. These amendments should be in place as soon as possible as the new production year began on September 1.

In view of the foregoing, it is hereby found and determined that good cause exists for making these amendments effective one day after publication in the

**Federal Register**, and that it would be contrary to the public interest to delay the effective date for 30 days after publication in the **Federal Register** (Sec. 553(d), Administrative Procedure Act; 5 U.S.C. 551–559).

(c) *Determinations*. It is hereby determined that:

(1) The “Marketing Agreement Regulating the Handling of Pistachios Grown in California, Arizona, and New Mexico,” upon which the aforesaid public hearing was held, has been signed by handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping pistachios covered by the order) who during the period September 1, 2008, through August 31, 2009, handled not less than 50 percent of the volume of such pistachios covered by the order; and

(2) The issuance of this amendatory order, amending the aforesaid order, is favored or approved by at least two-thirds of the producers who participated in a referendum on the question of approval and who, during the period of September 1, 2008, through July 31, 2009, (which has been determined to be a representative period), have been engaged within the production area in the production of such pistachios, such producers having also produced for market at least two-thirds of the volume of such commodity represented in the referendum.

#### **Order Relative to Handling of Pistachios Grown in California, Arizona, and New Mexico**

*It is therefore ordered*, That on and after the effective date hereof, all handling of pistachios grown in California, Arizona, and New Mexico shall be in conformity to, and in compliance with the terms and conditions of the said order as hereby amended as follows:

The provisions of the proposed marketing agreement and order amending the order contained in the Secretary’s Decision issued on July 29, 2009, and published in the **Federal Register** on August 6, 2009, (74 FR 39230) shall be and are the terms and provisions of this order amending the order and are set forth in full herein.

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

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

#### **PART 983—PISTACHIOS GROWN IN CALIFORNIA, ARIZONA, AND NEW MEXICO**

■ For the reasons set forth in the preamble, Title 7 of Chapter XI of the Code of Federal Regulations is amended by amending part 983 to read as follows:

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

**Authority:** 7 U.S.C. 601–674.

■ 2. The heading for part 983 is revised to read as follows:

#### **PART 983—PISTACHIOS GROWN IN CALIFORNIA, ARIZONA, AND NEW MEXICO**

■ 3. Revise § 983.1 to read as follows:

##### **§ 983.1 Accredited laboratory.**

*An accredited laboratory* is a laboratory that has been approved or accredited by the U.S. Department of Agriculture.

■ 4. Lift suspension of § 983.6, published on December 7, 2007 (72 FR 69141) and effective on December 10, 2007, and revise the section to read as follows:

##### **§ 983.6 Assessed weight.**

*Assessed weight* means pounds of inshell pistachios, 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; *Provided further*, That the assessed weight may be based upon quality requirements for inshell pistachios that may be recommended by the Committee and approved by the Secretary.

■ 5. Lift suspension of § 983.7, published on December 7, 2007 (72 FR 69141) and effective on December 10, 2007, and revise the section to read as follows:

##### **§ 983.7 Certified pistachios.**

*Certified pistachios* are those that meet the inspection and certification requirements under this part.

■ 6. Revise § 983.8 to read as follows:

##### **§ 983.8 Committee.**

*Committee* means the Administrative Committee for Pistachios established pursuant to § 983.41.

##### **§ 983.11 [Amended]**

■ 7. Amend § 983.11 by adding a paragraph (a)(4) to read as follows:

##### **§ 983.11 Districts.**

(a) \* \* \*

(4) *District 4* consists of the States of Arizona and New Mexico.

\* \* \* \* \*

##### **§ 983.19 [Removed and Reserved]**

■ 8. Lift suspension of § 983.19, published on December 7, 2007 (72 FR 69141) and effective on December 10, 2007, and remove the section.

##### **§ 983.20 [Removed and Reserved]**

■ 9. Lift suspension of § 983.20, published on December 7, 2007 (72 FR 69141) and effective on December 10, 2007, and remove the section.

##### **§ 983.21 [Redesignated as § 983.20]**

■ 10. Redesignate § 983.21 as § 983.20, and revise the section to read as follows:

##### **§ 983.20 Part and subpart.**

*Part* means the order regulating the handling of pistachios grown in the States of California, Arizona and New Mexico, and all the rules, regulations and supplementary orders issued thereunder. The aforesaid order regulating the handling of pistachios grown in California, Arizona and New Mexico shall be a subpart of such part.

##### **§ 983.22 [Redesignated as § 983.21]**

■ 11. Redesignate § 983.22 as § 983.21.

##### **§ 983.23 [Redesignated as § 983.22]**

■ 12. Redesignate § 983.23 as § 983.22, and revise the section to read as follows:

##### **§ 983.22 Pistachios.**

*Pistachios* means the nuts of the pistachio tree of the genus and species *Pistacia vera* grown in the production area, whether inshell or shelled.

##### **§ 983.24 [Redesignated as § 983.23]**

■ 13. Redesignate § 983.24 as § 983.23.

##### **§ 983.25 [Redesignated as § 983.24]**

■ 14. Redesignate § 983.25 as § 983.24.

##### **§ 983.26 [Redesignated as § 983.25]**

■ 15. Redesignate § 983.26 as § 983.25, and revise the section to read as follows:

##### **§ 983.25 Production area.**

*Production Area* means the States of California, Arizona, and New Mexico.

##### **§§ 983.27 through 983.30 [Redesignated as §§ 983.26 through 983.29]**

■ 16. Redesignate §§ 983.27 through 983.30 as §§ 983.26 through 983.29, respectively.

**§ 983.31 [Redesignated as § 983.30]**

■ 17. Lift suspension of § 983.31, published on December 7, 2007 (72 FR 69141) and effective on December 10, 2007, redesignate § 983.31 as § 983.30, and revise the section to read as follows:

**§ 983.30 Substandard pistachios.**

*Substandard pistachios* means pistachios, inshell or shelled, which do not meet regulations established pursuant to §§ 983.50 and 983.51.

**§ 983.53 [Redesignated as § 983.71]**

■ 18. Redesignate § 983.53 as § 983.71, and revise paragraph (a) to read as follows:

**§ 983.71 Assessments.**

(a) Each handler who receives pistachios for processing in each production year, except as provided in § 983.58, shall pay the committee on demand, an assessment based on the *pro rata* share of the expenses authorized by the Secretary for that year attributable to the assessed weight of pistachios received by that handler in that year.

\* \* \* \* \*

**§ 983.54 [Redesignated as § 983.72]**

■ 19. Redesignate § 983.54 as § 983.72, and revise the section to read as follows:

**§ 983.72 Contributions.**

The committee may accept voluntary contributions but these shall only be used to pay for committee expenses unless specified in support of research under § 983.46. Furthermore, research contributions shall be free of additional encumbrances by the donor and the committee shall retain complete control of their use.

**§ 983.55 [Redesignated as § 983.73]**

■ 20. Redesignate § 983.55 as § 983.73.

**§ 983.56 [Redesignated as § 983.74]**

■ 21. Redesignate § 983.56 as § 983.74, and amend it by removing the reference to “§ 983.53” and adding in its place “§ 983.71” in paragraph (a)(1).

**§ 983.57 [Redesignated as § 983.75]**

■ 22. Redesignate § 983.57 as § 983.75, and revise the section to read as follows:

**§ 983.75 Implementation and amendments.**

The Secretary, upon the recommendation of a majority of the committee, may issue rules and regulations implementing or modifying §§ 983.64 through 983.74 inclusive.

**§§ 983.58 through 983.64 [Redesignated as §§ 983.80 through 983.86]**

■ 23. Redesignate §§ 983.58 through 983.64 and their corresponding undesignated heading as §§ 983.80 through 983.86, respectively.

**§ 983.65 [Redesignated as § 983.87]**

■ 24. Redesignate § 983.65 as § 983.87, and revise the section to read as follows:

**§ 983.87 Effective time.**

The provisions of this part, as well as any amendments, shall become effective at such time as the Secretary may declare, and shall continue in force until terminated or suspended in one of the ways specified in § 983.88 or § 983.89.

**§§ 983.66 through 983.69 [Redesignated as §§ 983.88 through 983.91]**

■ 25. Redesignate §§ 983.66 through 983.69 as §§ 983.88 through 983.91, respectively.

**§ 983.70 [Redesignated as § 983.92]**

■ 26. Redesignate § 983.70 as § 983.92, and revise the section to read as follows:

**§ 983.92 Exemption.**

Any handler may handle pistachios within the production area free of the requirements in §§ 983.50 through 983.58 and § 983.71 if such pistachios are handled in quantities not exceeding 5,000 dried pounds during any production year. The Secretary, upon recommendation of the committee, may issue rules and regulations changing the 5,000 pound quantity applicable to this exemption.

**§ 983.41 [Redesignated]**

■ 27. Lift suspension of § 983.41, published on December 7, 2007 (72 FR 69141) and effective on December 10, 2007, redesignate § 983.41 as § 983.53, and revise the section to read as follows:

**§ 983.53 Testing of minimal quantities.**

(a) *Aflatoxin*. Handlers who handle less than 1 million pounds of assessed weight per year have the option of utilizing both of the following methods for testing for aflatoxin:

(1) The handler may have an inspector sample and test his or her entire inventory of hulled and dried pistachios for the aflatoxin certification before further processing.

(2) The handler may segregate receipts into various lots at the handler's discretion and have an inspector sample and test each specific lot. Any lots that are found to have less aflatoxin than the level established by the committee and

approved by the Secretary can be certified by an inspector to be negative as to aflatoxin. Any lots that are found to have aflatoxin exceeding the level established by the committee and approved by the Secretary may be tested after reworking in the same manner as specified in § 983.50.

(b) *Quality*. The committee may, with the approval of the Secretary, establish regulations regarding the testing of minimal quantities of pistachios for quality.

**§ 983.42 [Redesignated as § 983.54]**

■ 28. Lift suspension of § 983.42, published on December 7, 2007 (72 FR 69141) and effective on December 10, 2007, redesignate § 983.42 as § 983.54, and revise the section to read as follows:

**§ 983.54 Commingling.**

Certified lots may be commingled with other certified lots, but the commingling of certified and uncertified lots shall cause the loss of certification for the commingled lots.

**§ 983.43 [Redesignated as § 983.55]**

■ 29. Redesignate § 983.43 as § 983.55.

**§ 983.44 [Redesignated as § 983.56]**

■ 30. Redesignate § 983.44 as § 983.56, and revise it to read as follows:

**§ 983.56 Inspection, certification and identification.**

Upon recommendation of the committee and approval of the Secretary, all pistachios that are required to be inspected and certified in accordance with this part shall be identified by appropriate seals, stamps, tags, or other identification to be affixed to the containers by the handler. All inspections shall be at the expense of the handler, *Provided*, That for handlers making shipments from facilities located in an area where inspection costs for inspector travel and shipment of samples for aflatoxin testing would otherwise exceed the average of those same inspection costs for comparable handling operations located in Districts 1 and 2, such handlers may be reimbursed by the committee for the difference between their respective inspection costs and such average, or as otherwise recommended by the committee and approved by the Secretary.

**§ 983.45 [Redesignated as § 983.57]**

■ 31. Lift suspension of § 983.45, published on December 7, 2007 (72 FR 69141) and effective on December 10, 2007, redesignate § 983.45 as § 983.57, and revise the section to read as follows:

**§ 983.57 Substandard pistachios.**

The committee shall, with the approval of the Secretary, establish such reporting and disposition procedures as it deems necessary to ensure that pistachios which do not meet the aflatoxin and quality requirements established pursuant to §§ 983.50 and 983.51 shall not be shipped for domestic human consumption.

**§ 983.46 [Redesignated as § 983.59]**

■ 32. Redesignate § 983.46 as § 983.59, and revise the section to read as follows:

**§ 983.59 Modification or suspension of regulations.**

(a) In the event that the committee, at any time, finds that by reason of changed conditions, any regulations issued pursuant to §§ 983.50 through 983.58 should be modified or suspended, it shall, pursuant to § 983.43, so recommend to the Secretary.

(b) Whenever the Secretary finds from the recommendations and information submitted by the committee or from other available information, that a regulation should be modified, suspended, or terminated with respect to any or all shipments of pistachios in order to effectuate the declared policy of the Act, the Secretary shall modify or suspend such provisions. If the Secretary finds that a regulation obstructs or does not tend to effectuate the declared policy of the Act, the Secretary shall suspend or terminate such regulation.

(c) The Secretary, upon recommendation of committee, may issue rules and regulations implementing §§ 983.50 through 983.58.

**§§ 983.47 through 983.51 [Redesignated as §§ 983.64 through 983.68]**

■ 33. Redesignate §§ 983.47 through 983.51 and their corresponding undesignated center heading as §§ 983.64 through 983.68, respectively.

**§ 983.52 [Redesignated as § 983.70]**

■ 34. Redesignate § 983.52 and its corresponding undesignated center heading as § 983.70.

■ 35. Add a new § 983.58 to read as follows:

**§ 983.58 Interhandler transfers.**

Within the production area, any handler may transfer pistachios to another handler for additional handling, and any assessments, inspection requirements, aflatoxin testing requirements, and any other marketing order requirements with respect to pistachios so transferred may be

assumed by the receiving handler. The committee, with the approval of the Secretary, may establish methods and procedures, including necessary reports, to maintain accurate records for such transfers.

**§ 983.32 [Redesignated as § 983.41]**

■ 36. Redesignate § 983.32 as § 983.41

■ 37. Amend newly designated § 983.41 by removing the words “eleven (11)” from the introductory paragraph and adding in their place the words “twelve (12),” and by revising paragraph (b) to read as follows:

**§ 983.41 Establishment and membership.**

(a) \* \* \*

(b) *Producers.* Nine members shall represent producers. Producers within the respective districts shall nominate four producers from District 1, three producers from District 2, one producer from District 3, and one producer from District 4. The Secretary, upon recommendation of the committee, may reapportion producer representation among the districts to ensure proper representation.

\* \* \* \* \*

**§ 983.33 [Redesignated as § 983.42]**

■ 38. Redesignate § 983.33 as § 983.42.

**§ 983.42 [Amended]**

■ 39. Amend newly designated § 983.42 by removing the word “grower” and adding in its place the word “producer” in paragraph (a), removing the reference to “§ 983.32” and adding in its place “§ 983.41” in paragraph (j), and by removing the reference to “§§ 983.32, 983.33, and 983.34” and adding in its place “§§ 983.41, 983.42, and 983.43” in paragraph (n).

**§ 983.34 [Redesignated as § 983.43]**

■ 40. Redesignate § 983.34 as § 983.43

■ 41. Amend newly designated § 983.43 by revising paragraph (a) to read as follows:

**§ 983.43 Procedure.**

(a) *Quorum.* A quorum of the committee shall be any seven voting committee members. The vote of a majority of members present at a meeting at which there is a quorum shall constitute the act of the committee: *Provided, That:*

(1) Actions of the committee with respect to the following issues shall require twelve (12) concurring votes of the voting members regarding any recommendation to the Secretary for adoption or change in:

- (i) Quality regulation;
- (ii) Aflatoxin regulation;
- (iii) Research under § 983.46; and
- (2) Actions of the committee with respect to the following issues shall require eight (8) concurring votes of the voting members regarding recommendation to the Secretary for adoption or change in:
  - (i) Inspection programs;
  - (ii) The establishment of the committee.

\* \* \* \* \*

**§ 983.35 [Redesignated as § 983.44]**

■ 42. Redesignate § 983.35 as § 983.44.

**§ 983.36 [Redesignated as § 983.45]**

■ 43. Redesignate § 983.36 as § 983.45.

**§ 983.37 [Redesignated as § 983.47]**

■ 44. Redesignate § 983.37 and its corresponding undesignated center heading as § 983.47.

**§ 983.38 [Redesignated as § 983.50]**

■ 45. Lift suspension of § 983.38, published on December 7, 2007 (72 FR 69141) and effective on December 10, 2007, redesignate § 983.38 and its corresponding undesignated center heading as § 983.50 and revise the section to read as follows:

**Regulations****§ 983.50 Aflatoxin regulations.**

The committee shall establish, with the approval of the Secretary, such aflatoxin sampling, analysis, and inspection requirements applicable to pistachios to be shipped for domestic human consumption as will contribute to orderly marketing or be in the public interest. No handler shall ship, for human consumption, pistachios that exceed an aflatoxin level established by the committee with approval of the Secretary. All domestic shipments must be covered by an aflatoxin inspection certificate.

**§ 983.39 [Redesignated as § 983.51]**

■ 46. Lift suspension of § 983.39, published on December 7, 2007 (72 FR 69141) and effective on December 10, 2007, redesignate § 983.39 as § 983.51, and revise the section to read as follows:

**§ 983.51 Quality regulations.**

For any production year, the committee may establish, with the approval of the Secretary, such quality and inspection requirements applicable to pistachios to be shipped for domestic human consumption as will contribute to orderly marketing or be in the public interest. In such production year, no handler shall ship pistachios for

domestic human consumption unless they meet the applicable requirements as evidenced by certification acceptable to the committee.

**§ 983.40 [Redesignated as § 983.52]**

■ 47. Lift suspension of § 983.40, published on December 7, 2007 (72 FR 69141) and effective on December 10, 2007, redesignate § 983.40 as § 983.52, and revise the section to read as follows:

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

(a) *Substandard pistachios*. Each lot of substandard pistachios may be reworked to meet aflatoxin or quality requirements. The committee may establish, with the Secretary's approval, appropriate rework procedures.

(b) *Failed lot reporting*. If a lot fails to meet the aflatoxin and/or the quality requirements of this part, a failed lot notification report shall be completed and sent to the committee within 10 working days of the test failure. This form must be completed and submitted to the committee each time a lot fails either aflatoxin or quality testing. The accredited laboratories shall send the failed lot notification reports for aflatoxin tests to the committee, and the handler, under the supervision of an inspector, shall send the failed lot notification reports for the lots that do not meet the quality requirements to the committee.

■ 48. Add a new § 983.46, preceded by an undesignated center heading, to read as follows:

**Research**

**§ 983.46 Research.**

The committee, with the approval of the Secretary, may establish or provide for the establishment of projects involving research designed to assist or improve the efficient production and postharvest handling of quality pistachios. The committee, with the approval of the Secretary, may also establish or provide for the establishment of projects designed to determine the effects of pistachio consumption on human health and nutrition. Pursuant to § 983.43(a), such research projects may only be established with 12 concurring votes of the voting members of the committee. The expenses of such projects shall be paid from funds collected pursuant to §§ 983.71 and 983.72.

Dated: October 26, 2009.

**Rayne Pegg,**

*Administrator, Agricultural Marketing Service.*

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**DEPARTMENT OF AGRICULTURE**

**Rural Utilities Service**

**7 CFR Part 1710**

**RIN 0572-AC15**

**Electric Program: Definition of Rural Area**

**AGENCY:** Rural Utilities Service, USDA.

**ACTION:** Direct final rule.

**SUMMARY:** The Rural Utilities Service (RUS) is amending its regulations to administer the Electric Program. This action implements the provision in the Food, Conservation, and Energy Act of 2008 hereinafter called the "2008 Farm Bill," amending the definition of "rural area." The 2008 Farm Bill revises the definition of rural to include any area other than a city, town, or unincorporated area that has a population of greater than 20,000 inhabitants. The 2008 Farm Bill also includes in the revised rural definition those service areas of borrowers having an outstanding loan under Titles I through V of the Rural Electrification Act of 1936. The intended effect is to update agency regulations to reflect current statutory authority. No adverse comments are expected.

**DATES:** This rule will become effective December 17, 2009 unless the Agency receives written adverse comments or a written notice of intent to submit adverse comments on or before December 2, 2009. If we receive adverse comments or notices, the Agency will publish a timely document in the **Federal Register** withdrawing the rule. Comments received will be considered under the proposed rule published in this edition of the **Federal Register** in the proposed rule section. A second public comment period will not be held. Written comments must be received by the Agency or carry a postmark or equivalent no later than December 2, 2009.

**ADDRESSES:** Submit adverse comments or notice of intent to submit adverse comments by any of the following methods:

- Federal eRulemaking Portal: Go to <http://www.regulations.gov>. In the "Search Documents" box, enter RUS-09-Electric-0002, check the box under the Search box labeled "Select to find documents accepting comments or submissions," and click on the GO>> key. To submit a comment, choose "Send a comment or submission," under the Docket Title. In order to submit your comment, the information requested on the "Public Comment and

Submission Form," must be completed. (If you click on the hyperlink of the docket when the search returns it, you will see the docket details. Click on the yellow balloon to receive the "Public Comment and Submission Form.") Information on using Regulations.gov, including instructions for accessing documents, submitting comments, and viewing the docket after the close of the comment period, is available through the site's "How to Use this Site" link.

- Postal Mail/Commercial Delivery: Please send your comment addressed to Michele Brooks, Director, Program Development and Regulatory Analysis, USDA Rural Development, STOP 1522, Room, 5159 1400 Independence Avenue, SW., Washington, DC 20250-1522. Please state that your comment refers to Docket No. RUS-09-Electric-0002.

*Other Information:* Additional information about RUS and its programs is available at <http://www.rurdev.usda.gov/index.html>.

**FOR FURTHER INFORMATION CONTACT:**

Chris Tuttle, Economist, Electric Programs, Rural Utilities Service, USDA Rural Development, 1400 Independence Avenue, STOP 1570, Room 5038 South Building, Washington, DC 20250-1570. Telephone: (202) 205-3655; FAX: (202) 690-0717; e-mail: [chris.tuttle@wdc.usda.gov](mailto:chris.tuttle@wdc.usda.gov).

**SUPPLEMENTARY INFORMATION:**

**Executive Order 12866**

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

**Executive Order 12372**

The program is not subject to the provisions of Executive Order 12372, "Intergovernmental Review of Federal Programs," as implemented under USDA's regulations at 7 CFR part 3015.

**Executive Order 12988**

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. The Agency has determined that this rule meets the applicable standards provided in section 3 of the Executive Order. In addition, all state and local laws and regulations that are in conflict with this rule will be preempted; no retroactive effect will be given to the rule; and in accordance with section 212(e) of the Department of Agriculture Reorganization Act of 1994, (7 U.S.C. 6912(e)), administrative appeal procedures, if any, must be exhausted before litigation against the Department or its agencies may be initiated.