

# Rules and Regulations

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## DEPARTMENT OF AGRICULTURE

### Grain Inspection, Packers and Stockyards Administration

#### 7 CFR Parts 800 and 801

RIN 0580-AA95

#### Official Fees and Tolerances for Barley Protein Testing

**AGENCY:** Grain Inspection, Packers and Stockyards Administration, USDA.

**ACTION:** Interim rule with request for comment.

**SUMMARY:** The Grain Inspection, Packers and Stockyards Administration (GIPSA) previously extended its official inspection program to include testing of barley protein. Testing is provided using near-infrared spectroscopy analyzers that were previously approved for different grains. GIPSA is establishing in the fee schedule a generic fee for all near-infrared measurements (NIR) and nuclear magnetic resonance (NMR) analyses, which is identical to existing fees. The fee for barley protein testing is included in this fee and is identical to the fees already established for other measurements (wheat protein; soybean oil and protein; and corn oil, protein, and starch). Also, GIPSA is amending regulations under the United States Grain Standards Act (USGSA) to establish performance tolerances for protein analyzers used to predict the percentage of protein in barley.

**DATES:** Effective Date: November 9, 2006.

**Comment Date:** Comments must be received on or before January 8, 2007.

**ADDRESSES:** We invite you to submit comments on this interim rule. You may submit comments by any of the following methods:

- **E-mail:** Send comments via electronic mail to [comments.gipsa@usda.gov](mailto:comments.gipsa@usda.gov).

- **Mail:** Send hardcopy written comments to Tess Butler, GIPSA, USDA, 1400 Independence Avenue, SW., Room 1647-S, Washington, DC 20250-3604.

- **Fax:** Send comments by facsimile transmission to (202) 690-2755.

- **Hand Deliver or Courier:** Deliver comments to: Tess Butler, GIPSA, USDA, 1400 Independence Avenue, SW., Room 1647-S, Washington, DC 20250-3604.

- **Federal eRulemaking Portal:** Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.

**Instructions:** All comments should make reference to the date and page number of this issue of the **Federal Register**.

**Read Comments:** All comments will be available for public inspection in the above office during regular business hours (7 CFR 1.27(b)).

**FOR FURTHER INFORMATION CONTACT:** John C. Giler, Acting Director, Field Management Division, at his e-mail address: [John.C.Giler@usda.gov](mailto:John.C.Giler@usda.gov) or telephone him at (202) 720-0228.

#### SUPPLEMENTARY INFORMATION:

#### Executive Order 12866 and Regulatory Flexibility Act

This interim 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).

The Administrator of GIPSA has determined that this rule will not have a significant impact on a substantial number of small entities as defined in the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

Currently, near-infrared spectroscopy analyzers are being used to determine wheat protein; soybean oil and protein; and corn oil, protein, and starch in both domestic and export markets. This rule establishes tolerances to expand the use of currently approved near-infrared spectroscopy analyzers to test barley protein and establishes a generic fee for all NIR and NMR testing that is identical to current fees. Testing for barley protein is included in this fee. There are 58 official agencies (46 private entities, 12 States) that are designated and/or delegated by GIPSA to perform official grain inspection services. Most of the agencies could be considered small entities under Small Business Administration criteria.

The extent to which these agencies will choose to provide this service is difficult to quantify because GIPSA is offering this service on a request basis, and locations where service is requested infrequently may make arrangements with neighboring agencies to provide the service (7 CFR 800.196(g)(1)). GIPSA believes that offering this service would have a beneficial effect on those agencies electing to provide the service.

For the 2006/2007 Market Year (June to May), USDA's Economic Research Service estimated the U.S. Barley Supply to be 303,000,000 bushels. Between June 2006 and September 2006 (the months for which we have data), 20,010,000 bushels of barley were tested for protein. Of the Official Agencies, 10 performed barley protein tests in the first 11 months of fiscal year 2006. There were 5,176 barley protein tests performed; of those 2,624 were tests performed for trucks and rail cars, 2,546 were tests performed on submitted samples, and 6 were performed locally, such as within a grain elevator.

According to USDA's National Agricultural Statistics Service, there are 24,747 farms (producers) in the barley for grain category. We do not have estimates for the number of grain handlers, exporters, and feedlot operators that may be involved in submitting barley for protein testing. In general, many producers, grain handlers, exporters, and feedlot operators may be considered small entities under Small Business Administration criteria. Further, grain handlers and exporters often use testing results to determine value and premiums. The extent to which these entities will request the official barley protein or the impact of offering this service is difficult to quantify. GIPSA believes that barley producers, feedlot operators, grain handlers, and exporters will rely on the official system to provide reliable testing procedures and accurate results that the market can rely on to negotiate price, value, and premiums.

Fees currently are charged for NIR testing. The fees charged by GIPSA are \$2.25 per test when the service is performed at an applicant's facility in an onsite FGIS laboratory, and when an inspection service is performed at a location other than an applicant's facility in an FGIS laboratory the fees are \$10.00 per test for an original

inspection service and \$17.70 for an appeal inspection service. The generic fee is the same as fees charged for current individual tests and their impact on applicants for services will vary depending upon usage since these tests are on a request basis.

#### **Executive Order 12988**

Executive Order 12988, Civil Justice Reform, instructs each executive agency to adhere to certain requirements in the development of new and revised regulations in order to avoid unduly burdening the court system. This interim rule has been reviewed under this Executive Order. This interim rule is not intended to have a retroactive effect. The United States Grain Standards Act provides in Section 87g that no State or subdivision may require or impose any requirements or restrictions concerning the inspection, weighing, or description of grain under the Act. Otherwise, this interim rule will not preempt any State or local laws, regulations, or policies unless they present irreconcilable conflict with this rule. There are no administrative procedures which must be exhausted prior to any judicial challenge to the provisions of this interim rule.

#### **Paperwork Reduction Act**

In accordance with the Paperwork Reduction Act of 1995, the recordkeeping and reporting burden imposed by Parts 800 and 801 were previously approved by OMB under control number 0580-0013 and will not be affected by this rule.

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

#### **Background**

On November 4, 2004, GIPSA issued a **Federal Register** notice (69 FR 64269-64270), announcing an intent to implement barley protein measurement as official criteria under the United States Grain Standards Act (USGSA) effective July 1, 2005. The **Federal Register** notice is available on the GIPSA Web site at <http://www.gipsa.usda.gov>.

This provides the barley industry with accurate results for protein that the market can rely on to negotiate price, value, and premium.

#### **Fees**

GIPSA collects fees for providing official testing services to cover, as

nearly as practicable, GIPSA's costs for performing the service, including related administrative and supervisory costs. Testing procedures and time necessary to determine protein in barley using the approved near-infrared transmittance (NIRT) analyzers are the same as those required for NIRT wheat protein; soybean oil and protein; and corn oil, protein, and starch determinations. Accordingly, the fee to test barley is the same as for tests for the above cited commodities. The fee is \$2.25 per test when the service is performed at an applicant's facility in an onsite FGIS laboratory, and for services performed at a location other than an applicant's facility in an FGIS laboratory the fees will be \$10.00 per test for an original inspection service and \$17.70 per test for an appeal inspection service.

Further, since the fees for near-infrared (NIR) analysis are the same as the fees for nuclear magnetic resonance (NMR) analysis, these fees are included in a generic NIR and NMR analysis fee. This should simplify the fee schedule and will not require a regulatory fee change when new NIR and NMR analysis are available for other grain products. Specifically, in 7 CFR 800.71, in tables 1 and 2, we will add a single new fee for "NIR and NMR analysis (protein, oil, starch, etc.)" to replace the individual fees currently listed for the following 4 categories: (1) Corn oil, protein, and starch (one of any combination), (2) soybean protein and oil (one or both), (3) wheat protein (per test), and (4) sunflower (per test). We will renumber the remaining fees listed in table 1, section 2 and table 2, sections 1 and 2. We are not making any other changes to the remaining fee amounts or categories at this time.

#### **Tolerances**

We run standard reference samples through the equipment to evaluate the accuracy of the equipment; for barley, the standard reference samples sets typically weigh between 650 and 750 grams. Due to the natural variation in individual kernels of barley and other sources of variability, each time we test the barley the testing equipment is likely to produce slightly different results. Therefore, we determine the allowable amount of differences between the test results from the standard reference sample and the expected outcome. We refer to this amount as the tolerance, which is the variation we allow for the equipment to produce accurate results.

We determined that, based upon the performance of the instruments and calibration, the maintenance tolerance

will be 0.20 percent mean deviation from the national standard NIRS instruments for the NIRS analyzers used in performing official inspections. We determined that this level of accuracy will provide reliable testing procedures and accurate results to meet prospective official customer needs and that the market can rely on to negotiate price, value, and premium. We will apply this tolerance according to testing instructions found in the GIPSA Near-Infrared Transmittance (NIRT) Handbook.

We are adding this tolerance as a new paragraph (b)(4) in 9 CFR 801.7. Currently, 7 CFR 801.7 includes tolerances for (1) NIRS wheat protein analyzers, (2) NIRS soybean oil and protein analyzers, and (3) NIRS corn oil, protein, and starch analyzers.

As with other commodities for which NIRS analyzers are used, we will use the chemical reference protein determinations to reference and calibrate official NIRS instruments in accordance with the Combustion Method, AOAC International Method 992.23, which we previously incorporated by reference into 7 CFR 801.7. No change to the incorporation is required for barley protein testing.

#### **Immediate Action**

Immediate action is necessary for good cause under 5 U.S.C. 553. The Administrator has determined that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice prior to putting this rule in effect and good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because (1) the rule simplifies the current fee schedule by establishing a generic fee for all NIR and NMR testing that is the same as fee charged for individual tests and (2) includes in Part 801 maintenance tolerances for NIRS barley protein analyzers.

We will consider all comments we receive during the comment period for this interim rule (see **DATES** above). After the comment period closes, we will publish another document in the **Federal Register**. The document will include a discussion of any comments we received and any amendments we are making to the rule.

#### **List of Subjects**

##### **7 CFR Part 800**

Administrative practice and procedure, Conflict of interests, Exports, Freedom of information, Grains, Intergovernmental relations, Penalties,

Reporting and recordkeeping requirements.

7 CFR Part 801

Exports, Grains, Scientific equipment.

■ For the reasons set out in the preamble, we are amending 7 CFR parts 800 and 801 as follows:

**PART 800—GENERAL REGULATIONS**

■ 1. Revise the authority citation for part 800 to read as follows:

**Authority:** 7 U.S.C. 71–87k.

■ 2. Amend § 800.71 by revising Table 1(2) (i through xi) and revising Table 2(1)(v) and (2)(ii) in Schedule A of paragraph (a) to read as follows:

**§ 800.71 Fees Assessed by the Service.**

(a) \* \* \*

**TABLE 1.—FEES FOR OFFICIAL SERVICES PERFORMED AT AN APPLICANT'S FACILITY IN AN ONSITE FGIS LABORATORY<sup>1</sup>**  
**Schedule A.—Fees for Official Inspection and Weighing Services Performed in the United States**

*	*	*	*	*	*	*	*
(2) Additional Tests (cost per test, assessed in addition to the hourly rate): <sup>3</sup>							
(i) Aflatoxin (rapid test kit method) .....							\$10.00
(ii) NIR or NMR Analysis (protein, oil, starch, etc.) .....							2.25
(iii) Vomitoxin (qualitative) .....							12.50
(iv) Vomitoxin (quantitative) .....							18.50
(v) Waxy corn (per test) .....							2.25
(vi) Fees for other tests not listed above will be based on the lowest noncontract hourly rate .....							
(vii) Other services .....							
(a) Class Y Weighing (per carrier)							
(1) Truck/container .....							0.30
(2) Railcar .....							1.25
(3) Barge .....							2.50
*	*	*	*	*	*	*	*

**TABLE 2.—SERVICES PERFORMED AT OTHER THAN AN APPLICANT'S FACILITY IN AN FGIS LABORATORY<sup>1,2</sup>**

(1) Original Inspection and Weighing (Class X) Services \* \* \*

(v) Additional tests (excludes sampling):

(a) Aflatoxin (rapid test kit method) .....		\$30.00
(b) NIR or NMR Analysis (protein, oil, starch, etc.) .....		10.00
(c) Vomitoxin (qualitative) .....		31.00
(d) Vomitoxin (quantitative) .....		38.50
(e) Waxy corn (per test) .....		10.00
(f) Canola (per test_00 dip test) .....		10.00
(g) Pesticide Residue Testing: <sup>3</sup>		
(1) Routine Compounds (per sample) .....		216.00
(2) Special Compounds (per hour per service representative) .....		115.00

(h) Fees for other tests not listed above will be based on the lowest noncontract hourly rate from Table 1.

(2) Appeal inspection and review of weighing service.<sup>4</sup> \* \* \*

(ii) Additional tests (assessed in addition to all other applicable tests):

(a) Aflatoxin (rapid test kit method) .....		\$30.00
(b) NIR or NMR Analysis (protein, oil, starch, etc.) .....		17.70
(c) Vomitoxin (per test-qualitative) .....		41.00
(d) Vomitoxin (per test-quantitative) .....		47.00
(e) Vomitoxin (per test-HPLC Board Appeal) .....		141.00
(f) Pesticide Residue Testing: <sup>3</sup>		
(1) Routine Compounds (per sample) .....		216.00
(2) Special Compounds (per hour per service representative) .....		115.00

(g) Fees for other tests not listed above will be based on the lowest noncontract hourly rate from Table 1.

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**PART 801—[AMENDED]**

■ 3. Revise the authority for part 801 to read as follows:

**Authority:** 7 U.S.C. 71–87k

■ 4. Amend § 801.7 by adding a new paragraph (b)(4) to read as follows:

**§ 801.7 Reference methods and tolerances for near-infrared spectroscopy (NIRS) analyzers.**

 \*

(b) \* \* \*

(4) NIRS barley protein analyzers. The maintenance tolerances for the NIRS analyzers used in performing official

inspections for determination of barley protein content are 0.20 percent mean deviation from the national standard NIRS instruments, which are referenced and calibrated to the Combustion method, AOAC International Method 992.23.

**Pat Donohue-Galvin,**  
*Acting Administrator, Grain Inspection, Packers and Stockyards Administration.*

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**BILLING CODE 3410-KD-P**

**DEPARTMENT OF AGRICULTURE**

**Agricultural Marketing Service**

**7 CFR Part 981**

[Docket No. FV06-981-2 FR]

**Almonds Grown in California; Changes to Incoming Quality Control Requirements**

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

**ACTION:** Final rule.