

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 91

[Document Number AMS-ST-09-0016]

Changes in Hourly Fee Rates for Science and Technology Laboratory Services—Fiscal Years 2010–2012

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule with request for comments.

SUMMARY: The Agricultural Marketing Service (AMS) proposes changes in annual standard, appeal, overtime, and holiday hourly fee rates for fiscal years 2010–2012 for Science and Technology (S&T) Laboratory Services in order to recover anticipated laboratory program costs. The Agency is proposing to raise these rates to reflect, among other factors, national and locality pay increases for Federal employees and inflation, operating costs, instrumentation and training, equipment maintenance costs, and program and agency administrative overhead costs. This action also proposes miscellaneous changes for clarity.

Comments: Comments must be received on or before November 25, 2009.

ADDRESSES: Send comments to James V. Falk, Docket Manager, USDA, AMS, Science and Technology Programs, 1400 Independence Avenue, SW., Mail Stop 0272, Washington, DC 20250–0272; telephone (202) 690–4089; fax (202) 720–4631, or *Internet*: <http://www.regulations.gov> or *e-mail*: James.falk@ams.usda.gov.

Comments should reference the document number and the date and page number of this issue of the **Federal Register**.

Submitted comments will be available for public inspection during regular business hours in Room 1090 South Building, U.S. Department of Agriculture, 1400 Independence

Avenue, SW., Washington, DC or can be viewed at: <http://www.regulations.gov>. All comments submitted in response to this proposed 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: Dr. Robert L. Epstein, Deputy Administrator, Science and Technology Programs, Agricultural Marketing Service, United States Department of Agriculture, Mail Stop 0270, 1400 Independence Avenue, SW., Washington, DC 20250–0270, telephone number (202) 720–5231; fax (202) 720–6496, and *e-mail*: Robert.epstein@ams.usda.gov.

SUPPLEMENTARY INFORMATION:

Background

Science and Technology (S&T) Programs has been performing voluntary laboratory services under the Agricultural Marketing Act of 1946 (AMA), as amended (7 U.S.C. 1621–1627), for the AMS commodity programs (Fruit and Vegetable, Cotton and Tobacco, Livestock and Seed, Poultry, and Dairy) and applicable stakeholders in these industries since its inception on August 17, 1988. Before that time, voluntary laboratory testing was provided for on a separate user fee basis under the various AMS commodity programs. The current standard hourly rate of \$67.00, the appeal or overtime hourly rate of \$78.00 and the holiday hourly rate of \$89.00 have been in effect since the March 30, 2007 final rule (72 FR 15011) was published. The standard fee rate for laboratory services is proposed to be increased to \$78.00 per hour in fiscal year 2010, \$81.00 per hour in fiscal year 2011, and \$83.00 per hour in fiscal year 2012. The appeal and overtime hourly fee rate for laboratory services outside the normal business hours are proposed to increase to \$93 in FY 2010, to \$96 in FY 2011, and to \$99 in FY 2012. The holiday hourly fee rate for laboratory services during designated federal holidays are proposed to increase to \$108 in FY 2010, to \$111 in FY 2011, and to \$115 in FY 2012. An increase in the premium hourly rates over the three fiscal years for laboratory services performed on appeal samples, overtime

basis, and holidays is also needed since Science and Technology laboratory personnel may be required to work extended hours of service at the time and a half pay or the double hourly pay on legal holidays to accommodate clients. This is due to stakeholder demand for immediate test results. Generally, the processing of all laboratory samples is continuous over a 24/7 timeframe due to the recent introduction of automated devices on several sample process equipment and analytical instruments.

The Agency proposes to recover the actual cost of services for multiple fiscal years (FY 2010 through FY 2012) covered by this proposed rule. This proposed rule updates S&T Programs' facility addresses. It clarifies that results of analyses and laboratory determinations provided by AMS laboratory services apply to the submitted samples only and do not represent the quality, condition or disposition of the lot from which the sample was derived.

Federal salaries with national and locality pay adjustments and choices in benefits are made available on an annual basis by the Office of Personnel Management (OPM). Operational costs include expenses for rents, communications, utilities, medical examinations, safety equipment, sample preparation equipment, training, trash and hazardous waste disposal, travel and transportation costs. There have been certain large capital improvement expenditures in the laboratories in recent years due to unfunded legal mandates. These expenditures include costs for the counter-terrorism Food Emergency Response Network (FERN) and the capital improvements for the Environmental Management Systems (EMS) in accordance with the applicable mandates for Federal laboratories of Executive Order 13423 of January 24, 2007, Strengthening Federal Environmental, Energy, and Transportation Management (72 FR 3919). These capital improvement costs are included in the normal operations of the Science and Technology field service laboratories. In addition, operational costs include expenses for office and laboratory supplies, chemicals, reagents, hazardous waste removal, and a Laboratory Information Management System (LIMS). Infrastructure costs are mainly

laboratory instruments and capital equipment with service and maintenance contracts and replacement spare parts. Infrastructure expenses include consumable supply costs associated directly with the proper operation of analytical instruments and laboratory equipment. Stakeholders demand that AMS provide cost effective and timely product testing requiring modern and sometimes automated instrumentation. These instruments are expensive and undergo equipment capitalization for determining costs. Equipment capitalization is the determined cost per year to replace the equipment after its useful service life has been established. Agency overhead is the pro-rated share, attributable to a particular service, of the agency's management and support costs. Overhead expenditures are allocated across the Agency for each direct hour of laboratory service.

There are essentially three standard hourly fee rate increases being proposed for the basic laboratory services—\$67 to \$78 per hour or 16.4 percent in fiscal year 2010, \$78 to \$81 per hour or 3.8 percent in fiscal year 2011 and \$81 to \$83 per hour or 2.5 percent in fiscal year 2012. The rate increases for overtime and appeals are \$78 to \$93 per hour or 19.2 percent, \$93 to \$96 per hour or 3.2 percent, and \$96 to \$99 per hour or 3.1 percent in fiscal years 2010, 2011, and 2012, respectively. The rate increases for legal holiday service are \$89 to \$108 per hour or 21.3 percent, \$108 to \$111 per hour or 2.8 percent, and \$111 to \$115 per hour or 3.6 percent in fiscal years 2010, 2011, and 2012, respectively. This is a voluntary program and the costs to each user would be proportional to their use of laboratory services each year. The increased fees will cover inflation and national and locality pay raises but will not support any new budgetary initiative. The revised hourly fee rates will apply to voluntary laboratory services that are provided for five types of analytical testing: microbiological, physical, residue chemistry, proximate analysis for composition, and biomolecular (DNA-based) testing. A user fee system, using set hourly rates for three fiscal years, is proposed by this

rulemaking to ensure that AMS properly recovers its full costs for providing voluntary laboratory services in a timely manner, and that all stakeholders have advance notice of their estimated laboratory fees so that they can make reasonable cost assumptions when formulating their annual budgets.

The largest cost of operations for the AMS laboratory programs is payroll and employee benefits. This obligation is projected to amount to \$3,848,000 or 57.6 percent of the total laboratory costs for FY 2010. Recent cross-training of the employees in the laboratories has resulted in the reduction of staff from 67 individuals in FY 2007 to 50 current individuals in FY 2009 as ongoing efforts to limit program costs are implemented. AMS calculated its projected increases in salaries and inflation in fiscal years 2010 through 2012. The estimate for increases in salaries for fiscal year 2009 as the base year and the succeeding years are from the Office of Management and Budget's (OMB) "Federal Pay Raise

Assumptions" table. The fiscal year pay adjustments are increased by 3 percent in the following tables of calculated proposed new hourly fee rates for laboratory program services for FY 2010 through FY 2012. The OMB Federal pay raise assumptions (including geographical pay differentials) state that in the development of civilian government personnel costs a yearly percentage (3%) increase shall be used. This information comes from the table, "Federal Pay Raise Assumptions", of the Office of Management and Budget's Fiscal Year 2007 Budget and beyond which is available at <http://www.whitehouse.gov/omb/memoranda/fy2007/m07-02.pdf>.

Inflation for FY 2009 and subsequent years is estimated to be 3.5 percent. In Tables 2 through 10 below a yearly 3.5 percent inflation rate is used in the calculations for hourly fee rate determinations for laboratory program services because the 2007 annual average for the base Consumer Price Index for all Urban Consumers (CPI-U): U.S. city average for service costs is listed as 246.848 in Table 3A. of the referenced Web site and there is a most recent annual increase of 3.5%

to 255.498 for the CPI-U provided for the change in service costs. This estimate for inflation percent (3.5%) can be obtained from Table 3A, "Consumer Price Index for all Urban Consumers (CPI-U): U.S. city average, detailed expenditure categories", which is available at <http://www.bls.gov/cpi/cpid08av.pdf>.

The Agency will initiate, when necessary, another rulemaking to adjust any fee established, if estimated increases for pay and inflation do not adequately cover the Agency's costs of providing the services. The cost of providing laboratory services includes both direct and not explicit overhead costs. Direct costs include the cost of salaries, employee benefits, operation costs, equipment service and replacements, security, training needs, and infrastructure cost. The Agency is able to estimate the employee benefits attributable to overtime work and has included these in the fee rate calculations.

The current and proposed fees for standard, appeal, overtime and legal holiday voluntary laboratory services are listed by type of service in Table 1 below. The first increases ranging from 16.4 to 21.3 percent, from the current rates to the fiscal year 2010 rates, are larger than the subsequent 2011 and 2012 fiscal year increases (2.5 to 3.8 percent range) because these are the first hourly rate increases proposed since last set on March 30, 2007. Therefore, it includes the actual increases in salaries and inflation that have occurred since that date. It also includes changes in personnel numbers and the promotions and within-grade pay step increases for General Schedule (GS) salaries granted worthy employees, and new employee position pay costs.

With this proposed action, the AMS would amend its regulations to provide for three annual differing fee increases in one action. Table 1 shows the summary of the current rates and the proposed hourly fee rates for fiscal years 2010 through 2012 for the four different types of services (regular laboratory, appeal, overtime, and legal holiday work) that Science and Technology Programs employees perform.

TABLE 1—CURRENT AND NEW HOURLY FEE RATES (PER HOUR) BY TYPE OF SERVICE

Service	Current rate	FY 2010 rate ¹	FY 2011 rate ²	FY 2012 rate ³
Laboratory	\$67.00	\$78.00	\$81.00	\$83.00
Appeal	78.00	93.00	96.00	99.00
Overtime	78.00	93.00	96.00	99.00
Legal Holiday	89.00	108.00	111.00	115.00

¹²³ Hourly values for FY 2010–FY 2012 are rounded off to nearest whole dollar.

With this proposed action, the AMS would amend its regulations to provide for three annual fee increases in one action. In AMS's analysis of projected costs set forth in Tables 2 through 10 below, AMS has identified the basis for

the increases in the cost of voluntary hourly fee rates for laboratory services for fiscal year 2010 through fiscal year 2012. These fee increases are essential for the continued sound financial management of the Agency's budget. In

order to enhance the transparency of the hourly fee rates in the aforementioned Tables 2 through 10 for fiscal year 2010, fiscal year 2011 and fiscal year 2012, a description is provided of each fee charge category.

TABLE 2—CALCULATIONS FOR THE STANDARD HOURLY RATE FOR LABORATORY PROGRAM SERVICES FOR FY 2010

Laboratory services	Apportioned fee rate
Base Time:	
Actual FY 2009 Salaries ¹ @ \$3,029,744	\$29.13
FY 2010 Pay Adjustment ² = [Actual FY 2009 Salaries (\$29.13)] × 0.03 (3%)	0.87
Benefits ³	6.99
Operational Costs ⁴	22.38
Infrastructure Cost ⁵	13.08
Agency Overhead ⁶	4.81
FY 2010 Inflation ⁷ (3.5%) = [Costs excluding infrastructure and payroll = \$34.18] × 0.035	1.20
Total Rate Per Hour—Base Time	78.46

¹ Actual cost of FY 2009 salaries (\$3,029,744) ÷ (2,080 program hours times 50 program employees) = \$29.13 unit cost.

² Actual cost of FY 2010 pay adjustment (\$90,892) ÷ (2,080 program hours times 50 program employees) = \$0.87 unit cost.

³ Actual cost of benefits (\$727,364) ÷ (2,080 program hours times 50 program employees) = \$6.99 unit cost.

⁴ Actual cost of operational costs (\$2,328,000) ÷ (2,080 program hours times 50 program employees) = \$22.38 unit cost.

⁵ Actual cost of infrastructure (\$1,360,000) ÷ (2,080 program hours times 50 program employees) = \$13.08 unit cost.

⁶ Actual cost of Agency overhead (\$500,000) ÷ (2,080 program hours times 50 program employees) = \$4.81 unit cost.

⁷ Cost of FY 2010 Inflation (\$125,000) ÷ (2,080 program hours times 50 program employees) = \$1.20 unit cost.

In order to project the hourly fee rates for the laboratory program services for fiscal years 2010 through 2012, the current fiscal year 2009 is used as a base. The total base time hourly fee rate calculation (Table 2) for fiscal year 2010 begins with the actual salaries for fiscal year 2009 (\$3,029,744) and adds the fiscal year 2010 projected pay adjustments (3 percent) and the fiscal year 2010 cost of employee benefits (\$727,364). Table 2 contains footnotes 1–7 that provide the common mathematical formula used to calculate the apportioned rate for each fee charge category for fiscal year 2010. The

formula uses the actual cost or projected cost in dollars for the applicable fiscal year for each individual fee charge category divided by the available program hours (2,080 hours) and further divided by the number of laboratory service program employees (50 people). The formula derives the apportioned fee rate for each fee charge category (salaries with pay adjustment, benefits, operational costs, infrastructure cost, agency overhead and inflation factor at 3.5 percent rate). The same formula that is used in Table 2 and that is indicated in its footnotes is also applied in the other tables to derive each category unit

rate with the different actual costs or variable projected costs to be inserted in the formula equation for the applicable fiscal year. See Table 3 through Table 10 below for additional proposed hourly fee rate calculations for laboratory program services for fiscal years 2010 through 2012 to be rounded off to whole number dollar amounts.

Table 3 through Table 4 shows the calculations of the total standard hourly fee rates to be rounded off to \$81 and \$83 for fiscal years 2011 through 2012, respectively.

TABLE 3—CALCULATIONS FOR THE STANDARD HOURLY RATE FOR LABORATORY PROGRAM SERVICES FOR FY 2011

Laboratory services	Apportioned fee rate
Base Time:	
Projected FY 2010 Salaries = Actual FY 2009 (\$29.13) + FY 2010 Pay Adjustment (\$0.87)	\$30.00
FY 2011 Pay Adjustment = [FY 2010 Salaries (\$30.00)] × 0.03 (3%)	0.90
Benefits	6.99
Operational Costs	22.38
Infrastructure Cost	13.08
Agency Overhead	4.81
FY 2010 Inflation (3.5%) = [Costs excluding infrastructure and payroll = \$34.18] × 0.035	1.20
FY 2011 Inflation (3.5%) = [Costs excluding infrastructure and payroll = \$34.18] × 0.035	1.20
Total Rate Per Hour—Base Time	80.56

TABLE 4—CALCULATIONS FOR THE STANDARD HOURLY RATE FOR LABORATORY PROGRAM SERVICES FOR FY 2012

Laboratory services	Apportioned fee rate
Base Time:	
Projected FY 2011 Salaries = FY 2010 (\$30.00) + FY 2011 Pay Adjustment (\$0.90)	\$30.90
FY 2012 Pay Adjustment = [FY 2011 Salaries (\$30.90)] × 0.03 (3%)	0.93

TABLE 4—CALCULATIONS FOR THE STANDARD HOURLY RATE FOR LABORATORY PROGRAM SERVICES FOR FY 2012—Continued

Laboratory services	Apportioned fee rate
Benefits	6.99
Operational Costs	22.38
Infrastructure Cost	13.08
Agency Overhead	4.81
FY 2010 Inflation (3.5%) = [Costs excluding infrastructure and payroll = \$34.18] \times 0.035	1.20
FY 2011 Inflation (3.5%) = [Costs excluding infrastructure and payroll = \$34.18] \times 0.035	1.20
FY 2012 Inflation (3.5%) = [Costs excluding infrastructure and payroll = \$34.18] \times 0.035	1.20
Total Rate Per Hour—Base Time	82.69

Table 5 through Table 7 show the calculations of the total appeal and total overtime hourly fee rates to be rounded off to whole dollar amounts for fiscal years 2010 through 2012. These tables incorporate the differentials in costs associated with the necessity of

laboratory personnel to work extended hours of service at the time and a half pay doing either overtime or appeal sample testing. Federal employee rates of premium pay are described in part 551 of Title 5 of the Code of Federal Regulations (CFR) for the Office of

Personnel Management (OPM). Section 551.512(a) specifies that Federal employees are entitled to receive overtime premium pay, when overtime work is performed, at one and one-half times the employee's hourly rate of basic pay.

TABLE 5—CALCULATIONS FOR THE APPEAL AND OVERTIME HOURLY RATES FOR LABORATORY PROGRAM SERVICES FOR FY 2010

Laboratory services	Apportioned fee rate
Appeal and Overtime Rates: Projected Salaries @ 1.5 (time and a half) FY 2009 Salaries @ 1.5 = [Actual 2009 Salaries (\$29.13)] \times 1.5	
FY 2010 Pay Adjustment = FY 2009 Salaries @ 1.5 (\$43.70) \times 0.03 (3%)	\$43.70
Benefits	1.31
Operational Costs	6.99
Infrastructure Cost	22.38
Agency Overhead	13.08
FY 2010 Inflation (3.5%) = [Costs excluding infrastructure and payroll = \$34.18] \times 0.035	4.81
Total Rate Per Hour—Appeal and Overtime	1.20
	93.47

TABLE 6—CALCULATIONS FOR THE APPEAL AND OVERTIME HOURLY RATES FOR LABORATORY PROGRAM SERVICES FOR FY 2011

Laboratory services	Apportioned fee rate
Appeal and Overtime Rates: Projected Salaries @ 1.5 (time and a half) FY 2010 Salaries @ 1.5 = [Actual FY 2009 Salaries (\$29.13) + FY 2010 Pay Adjustment (\$0.87)] \times 1.5	
FY 2011 Pay Adjustment = FY 2010 Salaries @ 1.5 (\$45.00) \times 0.03 (3%)	\$45.00
Benefits	1.35
Operational Costs	6.99
Infrastructure Cost	22.38
Agency Overhead	13.08
FY 2010 Inflation (3.5%)	4.81
FY 2011 Inflation (3.5%) = [Costs excluding infrastructure and payroll = \$34.18] \times 0.035	1.20
Total Rate Per Hour—Appeal and Overtime	1.20
	96.01

TABLE 7—CALCULATIONS FOR THE APPEAL AND OVERTIME HOURLY RATES FOR LABORATORY PROGRAM SERVICES FOR FY 2012

Laboratory services	Apportioned fee rate
Appeal and Overtime Rates: Projected Salaries @ 1.5 (time and a half) FY 2011 Salaries @ 1.5 = [Projected FY 2010 Salaries (\$30.00) + FY 2011 Pay Adjustment (\$0.90)] \times 1.5	
FY 2012 Pay Adjustment = FY 2011 Salaries @ 1.5 (\$46.35) \times 0.03 (3%)	\$46.35
Benefits	1.39
Operational Costs	6.99
Infrastructure Cost	22.38
	13.08

TABLE 7—CALCULATIONS FOR THE APPEAL AND OVERTIME HOURLY RATES FOR LABORATORY PROGRAM SERVICES FOR FY 2012—Continued

Laboratory services	Apportioned fee rate
Agency Overhead	4.81
FY 2010 Inflation (3.5%)	1.20
FY 2011 Inflation (3.5%)	1.20
FY 2012 Inflation (3.5%) = [Costs excluding infrastructure and payroll = \$34.18] × 0.035	1.20
Total Rate Per Hour—Appeal and Overtime	98.60

Table 8 through Table 10 shows the calculations of the total legal holiday hourly fee rates to be rounded off to whole dollar amounts for fiscal years 2010 through 2012. These tables incorporate the differentials in costs

associated with the necessity of laboratory personnel to work extended hours of service at the double hourly pay rate doing sample testing on a Federal holiday or a designated day for the Federal holiday. Accordingly, 5

CFR, part 532, section 532.507 (a) specifies that Federal employees are entitled to receive holiday premium pay, which is not overtime work, at double the employee's hourly rate of basic pay.

TABLE 8—CALCULATIONS FOR THE FEDERAL HOLIDAY HOURLY RATE FOR LABORATORY PROGRAM SERVICES FOR FY 2010

Laboratory services	Apportioned fee rate
Holiday Rate: Projected Salaries @ 2.0 (double time). FY 2009 Salaries @ 2.0 = [Actual 2009 Salaries (\$29.13)] × 2.0	\$58.26
FY 2010 Pay Adjustment = FY 2009 Salaries @ 2.0 (\$58.26) × 0.03 (3%)	1.75
Benefits	6.99
Operational Costs	22.38
Infrastructure Cost	13.08
Agency Overhead	4.81
FY 2010 Inflation (3.5%) = [Costs excluding infrastructure and payroll = \$34.18] × 0.035	1.20
Total Rate Per Hour—Holidays	108.47

TABLE 9—CALCULATIONS FOR THE FEDERAL HOLIDAY HOURLY RATE FOR LABORATORY PROGRAM SERVICES FOR FY 2011

Laboratory services	Apportioned fee rate
Holiday Rate: Projected Salaries @ 2.0 (double time). FY 2010 Salaries @ 2.0 = [Actual FY 2009 Salaries (\$29.13) + FY 2010 Pay Adjustment (\$0.87)] × 2.0	\$60.00
FY 2011 Pay Adjustment = FY 2010 Salaries @ 2.0 (\$60.00) × 0.03 (3%)	1.80
Benefits	6.99
Operational Costs	22.38
Infrastructure Cost	13.08
Agency Overhead	4.81
FY 2010 Inflation (3.5%)	1.20
FY 2011 Inflation (3.5%) = [Costs excluding infrastructure and payroll = \$34.18] × 0.035	1.20
Total Rate Per Hour—Holidays	111.46

TABLE 10—CALCULATIONS FOR THE FEDERAL HOLIDAY HOURLY RATE FOR LABORATORY PROGRAM SERVICES FOR FY 2012

Laboratory services	Apportioned fee rate
Holiday Rate: Projected Salaries @ 2.0 (double time). FY 2011 Salaries @ 2.0 = [Projected FY 2010 Salaries (\$30.00) + FY 2011 Pay Adjustment (\$0.90)] × 2.0	\$61.80
FY 2012 Pay Adjustment = FY 2011 Salaries @ 2.0 (\$61.80) × 0.03 (3%)	1.85
Benefits	6.99
Operational Costs	22.38
Infrastructure Cost	13.08
Agency Overhead	4.81
FY 2010 Inflation (3.5%)	1.20
FY 2011 Inflation (3.5%)	1.20
FY 2012 Inflation (3.5%) = [Costs excluding infrastructure and payroll = \$34.18] × 0.035	1.20

TABLE 10—CALCULATIONS FOR THE FEDERAL HOLIDAY HOURLY RATE FOR LABORATORY PROGRAM SERVICES FOR FY 2012—Continued

Laboratory services	Apportioned fee rate
Total Rate Per Hour—Holidays	114.51

Executive Order 12866

This proposed 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).

Civil Justice Reform (Executive Order 12988)

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. It is not intended to have retroactive effect. There are no administrative procedures which must be exhausted prior to any judicial challenge to this rule or the application of its provisions.

Regulatory Flexibility Act

Pursuant to the requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612) AMS has considered the economic impact of this action on small entities and has determined that its implementation will not have a significant economic impact on a substantial number of small businesses. The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions so that small businesses will not be disproportionately burdened. There are 499 current stakeholders who voluntarily use the AMS laboratory services annually. Such users of services include food processors, handlers, growers, government agencies, and exporters. The majority of these firms, organizations, and individuals are small businesses under the criteria established by the Small Business Administration (13 CFR 121.201). The increases in annual hourly fee rates as stated will not significantly affect these small businesses as defined in the RFA because this is a voluntary program and the costs to each user would be proportional to their use of laboratory services each year. Any decision by the current stakeholders to discontinue the use of the AMS laboratory services because of increased fees would not hinder the food processors or industry members from marketing their products, since stakeholders may contract for services with other government agencies or private laboratories. The AMS laboratory testing programs are

voluntary, user fee services, conducted under the authority of the AMA.

The AMA authorizes the Secretary of Agriculture to provide Federal analytical testing services that facilitate marketing and trade with the financial necessity that reasonable fees be collected from the users of the services to cover as nearly as possible the costs of maintaining the programs. AMS regularly reviews its user-fee-supported laboratory service programs to determine if the voluntary fees are adequate and reasonable to cover expenses. The most recent review determined that the existing hourly fee rates, which have been in place since March 30, 2007, will not generate sufficient revenue to recover annual operating costs of laboratory programs and will not maintain adequate end-of-year operating reserve balances in FY 2010, FY 2011, and FY 2012. This decline in revenues is due to lower numbers of samples and a reduction in the number of clients by 312 that is attributable mainly to a shift in usage patterns on the part of applicants for testing services and change to government programs. For example, several federal commodity purchasing programs are now relying heavily on vendor certification rather than government laboratory testing; a larger percentage of aflatoxin analyses and microbiological testing are performed by approved or designated private laboratories; and food and fiber product testing is decreasing due to changing importer country requirements. For analytical purposes, projected collections are based on calculations using an effective date of October 1, 2009 for the proposed fiscal year 2010 user fees. Without a fee increase, FY 2010 revenues are projected at \$6,421,000; obligations are projected at \$6,676,000, for a fiscal year loss of \$256,000 and a depleted trust fund to an 8.0 month end-of-year reserve balance of \$4,449,000. In fiscal years 2011 and 2012 additional operating losses for the laboratories are projected. If there are no proposed hourly rate changes agreed upon, the FY 2011 and FY 2012 end-of-year reserve balances will decline from \$4,449,000 to \$3,984,000 (6.9 months operating reserve), and \$3,568,000 (6.0 months operating reserve), respectively.

However, a minimum operating reserve of 11.1 months or an end-of-year trust fund balance amount of \$6,173,000 is needed for FY 2010 based on the current shut down analysis and prior experiences, including the permanent closing of the S&T Midwestern Laboratory in Chicago, Illinois on June 30, 2000. The AMS estimates that the raised hourly fee rates in this proposed rule will yield \$1,228,000 overall in additional laboratory testing program revenues during FY 2010. This will increase the end-of-year available capital assets in the trust fund from \$4,704,000 or 8.8 months of permitted operations in FY 2009 to \$5,677,000 or 10.2 months of permitted operations in FY 2010. By forgoing the purchase of new models of analytical equipment and instruments employing up to date technology to replace aging ones in the laboratories, a \$500,000 savings in the costs of operations could take place in FY 2010. This will enable AMS to replenish program reserves to an 11 month level, \$6,177,000, for FY 2010 that is called for by Agency policy and prudent financial management. With increased revenue from the hourly rate changes, program reserves can be maintained at this level in subsequent fiscal years 2011 and 2012.

This proposed action will raise the fees charged to users of AMS laboratory program services. The Agency expects this rule will yield revised revenues at an estimated \$7,649,000 in FY 2010, \$7,986,000 in FY 2011, and \$8,211,000 in FY 2012 attributable to the increased fee changes to cover the full cost of routine laboratory services, appeal requests, overtime, and legal holiday services for Science and Technology customers and other program stakeholders. This proposal would allow AMS to continue to offer laboratory testing services under the Agricultural Marketing Act of 1946 as amended, to facilitate marketing and allow products to obtain grade designations or meet marketing standards. As such, the program provides a viable option for a wide variety of stakeholders by delivering scientific and analytical support services to the diversified agricultural and food processing community and provides a valuable resource for those

businesses and industries that wish to use a USDA shield. By proposing a three year fee increase over FYs 2010, 2011, and 2012 the Agency would help ensure that the fee increases are effective at the beginning of each fiscal year on October 1. An increase over three fiscal years would permit customers and other program stakeholders an opportunity to plan for annual changes in costs of laboratory service and to incorporate them into their budgetary plans.

Finally, this proposed rule updates S&T Programs' facility addresses. It provides clarification that results of analyses and laboratory determinations provided by AMS laboratory services apply to the submitted sample only and do not represent the quality, condition or disposition of the lot from which the sample was derived.

Paperwork Reduction Act

This proposed rule contains no new information collection or recordkeeping requirements that are subject to the Office of Management and Budget (OMB) approval under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). AMS is committed to implementation of the Government Paperwork Elimination Act which provides for the use of information resources to improve the efficiency and effectiveness of governmental operations, including providing the public with the option of submitting information or transacting business electronically to the extent practicable. USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

Unfunded Mandate Analysis

Title II of the Unfunded Mandate Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of UMRA, the Department generally must prepare a written statement, including a cost benefit analysis, for proposed and final rules with “Federal mandates” that may result in expenditures to State, local, or tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. When such a statement is needed for a rule, section 205 of UMRA generally requires that the Department identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective or least burdensome alternative that achieves the objectives of the rule.

This rule contains no Federal mandates (under the regulatory

provisions of Title II of the UMRA) that impose costs on State, local, or tribal governments or to the private sector of \$100 million or more in any one year. Thus, this rule is not subject to the requirements of section 202 and 205 of UMRA.

Comments

A thirty day comment period is provided for interested persons to comment on this proposed action. All comments received by November 25, 2009 will be considered. Thirty days is deemed appropriate because it's preferable to have any fee increase, if adopted, to be in place as close as possible to the beginning of the 2010 fiscal year, October 1, 2009.

List of Subjects in 7 CFR Part 91

Administrative practice and procedure, Agricultural commodities, Laboratories, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, the Agricultural Marketing Service proposes to amend part 91 of Title 7, chapter I, subchapter E, of the Code of Federal Regulations as follows:

PART 91—SERVICES AND GENERAL INFORMATION

1. The authority citation part 91 continues to read as follows:

Authority: 7 U.S.C. 1622, 1624.

2. Section 91.5 is revised to read as follows:

§ 91.5 Where services are offered.

(a) Services are offered to applicants at the Science and Technology laboratories and facilities as listed below.

(1) *Science and Technology Programs National Science Laboratory.* A variety of proximate for composition, chemical, physical, microbiological and biomolecular (DNA-based) tests and laboratory analyses performed on fruits and vegetables, poultry, dairy and dairy products, juices, fish, vegetative seed and oilseed, honey, meat and meat products, fiber products and processed foods are performed at the Science and Technology Programs (S&T) laboratory located at: USDA, AMS, Science and Technology Programs, National Science Laboratory (NSL), 801 Summit Crossing Place, Suite B, Gastonia, North Carolina 28054–2193.

(2) *Science and Technology (S&T) Programs Science Specialty Laboratories.* The specialty satellite laboratories performing aflatoxin and other testing on peanuts, peanut products, dried fruits, grains, edible seeds, tree nuts, shelled corn products,

oilseed products, olive oil, vegetable oils, juices, citrus products, and other commodities are located as follows:

(i) USDA, AMS, Science & Technology, Citrus Laboratory, 98 Third Street, SW., Winter Haven, Florida 33880–2905.

(ii) USDA, AMS, Science & Technology, Science Specialty Laboratory, 6567 Chancery Mill Road, Blakely, Georgia 39823–2785.

(3) *Program laboratories.* Laboratory services are available in all areas covered by cooperative agreements providing for this laboratory work and entered on behalf of the Department with cooperating Federal or State laboratory agencies pursuant to authority contained in Act(s) of Congress. Also, services may be provided in other areas not covered by a cooperative agreement if the Administrator determines that it is possible to provide such laboratory services.

(4) *Other alternative laboratories.* Laboratory analyses may be conducted at alternative Science and Technology Programs laboratories and can be reached from any commodity market in which a laboratory facility is located to the extent laboratory personnel are available.

(5) *The Plant Variety Protection (PVP) Office.* The PVP office and plant examination facility of the Science and Technology programs issues certificates of protection to developers of novel varieties of plants which reproduce sexually. The PVP office is located as follows: USDA, AMS, Science & Technology Programs, Plant Variety Protection Office, National Agricultural Library Building, Room 401, 10301 Baltimore Boulevard, Beltsville, MD 20705–2351.

(6) *Science and Technology Programs Headquarters Offices.* The examination, licensure, quality assurance reviews, laboratory approval/certification and consultation services are provided by headquarters staff located in Washington, DC. The main headquarters office is located as follow: USDA, AMS, Science and Technology Programs, Office of the Deputy Administrator, South Agriculture Bldg., Mail Stop 0270, 1400 Independence Ave., SW., Washington, DC 20250–0270.

(7) *Statistics Branch Office.* The Statistics Branch office of Science and Technology Programs (S&T) provides statistical services to the Agency and other agencies within the USDA. In addition, the Statistics Branch office generates sample plans and performs consulting services for research studies in joint efforts with or in a leading role with other program areas of AMS or of

the USDA. The Statistics Branch office is located as follows: USDA, AMS, S&T Statistics Branch, 0603 South Agriculture Bldg., Mail Stop 0223, 1400 Independence Ave., SW., Washington, DC 20250-0223.

(8) *Technical Services Branch Office.* The Technical Services Branch office of Science and Technology (S&T) provides technical support services to all Agency programs and other agencies within the USDA. In addition, the Technical Services Branch office provides certification and approval services of private and State government laboratories as well as oversees quality assurance programs; import and export certification of laboratory tested commodities. The Technical Services Branch mailing address is as follows: USDA, AMS, S&T Technical Services Branch, South Agriculture Bldg., Mail Stop 0272, 1400 Independence Ave., SW., Washington, DC 20250-0272. The Technical Services Branch office is located as follows: USDA, AMS, Science and Technology Technical Services Branch, Room 0604 South Agriculture Bldg., 1400 Independence Ave., SW., Washington, DC 20250.

(9) *Monitoring Programs Office.* Services afforded by the Pesticide Data Program (PDP) and Microbiological Data Program (MDP) are provided by USDA, AMS, Science and Technology Monitoring Programs Office, 8609 Sudley Road, Suite 206, Manassas, VA 20110-8411.

(10) *Pesticide Records Branch Office.* Services afforded by the Federal Pesticide Record Keeping Program for restricted-use pesticides by private certified applicators are provided by USDA, AMS, Science and Technology, Pesticide Records Branch, 8609 Sudley Road, Suite 203, Manassas, VA 20110-8411.

(b) The addresses of the various laboratories and offices appear in the pertinent parts of this subchapter. A prospective applicant may obtain a current listing of addresses and telephone numbers of Science and Technology Programs laboratories, offices, and facilities by addressing an inquiry to the Administrative Officer, Science and Technology Programs, Agricultural Marketing Service, United States Department of Agriculture (USDA), 1400 Independence Ave., SW., Room 0725 South Agriculture Building, Mail Stop 0271, Washington, DC 20250-0271.

3. Section 91.24 is revised to read as follows:

§ 91.24 Reports of test results.

(a) Results of analyses are provided, in writing, by facsimile, by e-mail or other electronic means to the applicant.

(b) Results of analyses and laboratory determinations provided by AMS laboratory services apply to the submitted sample only and do not represent the quality, condition or disposition of the lot from which the sample was derived.

(c) Applicants may call the appropriate Science and Technology laboratory for interim or final results prior to issuance of the formal report. The advance results may be telegraphed, e-mailed, telephoned, or sent by facsimile to the applicant. Any additional expense for advance information shall be borne by the requesting party.

(d) A letter report in lieu of an official certificate of analysis may be issued by a laboratory representative when such action appears to be more suitable than a certificate: Provided, that, issuance of such report is approved by the Deputy Administrator.

4. Section 91.25 is revised to read as follows:

§ 91.25 Certificate requirements.

Certificates of analysis and other memoranda concerning laboratory service and the reporting of results should have the following requirements:

(a) Certificates of analysis shall be on standard printed forms approved by the Deputy Administrator;

(b) Shall be printed in English;

(c) Shall have results typewritten, computer generated, or handwritten in ink and shall be clearly legible;

(d) Shall show the results of laboratory tests in a uniform, accurate, and concise manner with abbreviations identified on the form;

(e) Shall show the information required by §§ 91.26–91.29; and

(f) Show only such other information and statements of fact as are provided in the instructions authorized by the Deputy Administrator.

5. Section 91.37 is revised to read as follows:

§ 91.37 Standard hourly fee rate for laboratory testing, analysis, and other services.

(a) The standard hourly fee rate in this section for the individual laboratory analyses cover the costs of Science and Technology laboratory services, including issuance of certificates and personnel and overhead costs other than the commodity inspection fees referred to in 7 CFR 52.42 through 52.46, 52.48 through 52.51, 55.510 through 55.530, 55.560 through 55.570, 58.38 through

58.43, 58.45 through 58.46, 70.71 through 70.72, and 70.75 through 70.78. The hourly fee rates in this part 91 apply to all commodity and processed commodity products. The new fiscal year for Science and Technology Programs commences on October 1 of each calendar year. The rate for laboratory services is \$78.00 per hour in fiscal year 2010, \$81.00 per hour in fiscal year 2011, and \$83.00 per hour in fiscal year 2012.

(b) Printed updated schedules of the laboratory testing fees for processed fruits and vegetables (7 CFR part 93), poultry and egg products (7 CFR part 94), and meat and meat products (7 CFR part 98) will be available for distribution to Science and Technology's constituents and stakeholders by the individual Laboratory Directors of Science and Technology laboratories listed in § 91.5. These single test laboratory fee schedules are based upon the applicable hourly fee rate stated in § 91.37 (a).

(c) Except as otherwise provided in this section, charges will be made at the applicable hourly rate stated in § 91.37 (a) for the time required to perform the service. A charge will be made for service pursuant to each request or certificate issued.

(d) When a laboratory test service is provided for AMS by a commercial or State government laboratory, the applicant will be assessed a fee which covers the costs to the Science and Technology program for the service provided.

(e) When Science and Technology staff provides applied and developmental research and training activities for microbiological, physical, chemical, and biomolecular analyses on agricultural commodities the applicant will be charged a fee on a reimbursable cost to AMS basis.

6. Section 91.38 is revised to read as follows:

§ 91.38 Additional fees for appeal of analysis.

(a) The applicant for appeal sample testing will be charged a fee at the hourly rate for laboratory service that appears in this paragraph. The new fiscal year for Science and Technology Programs commences on October 1 of each calendar year. The appeal rate for laboratory service is \$93.00 per hour in fiscal year 2010, \$96.00 per hour in fiscal year 2011, and \$99.00 per hour in fiscal year 2012.

(b) The appeal fee will not be waived for any reason if analytical testing was completed in addition to the original analysis.

7. Section 91.39 is revised to read as follows:

§ 91.39 Premium hourly fee rates for overtime and legal holiday service.

(a) When analytical testing in a Science and Technology facility requires the services of laboratory personnel beyond their regularly assigned tour of duty on any day or on a day outside the established schedule, such services are considered as overtime work. When analytical testing in a Science and Technology facility requires the services of laboratory personnel on a Federal holiday or a day designated in lieu of such a holiday, such services are considered holiday work. Laboratory analyses initiated at the request of the applicant to be rendered on Federal holidays, and on an overtime basis will be charged fees at hourly rates for laboratory service that appear in this paragraph. The new fiscal year for Science and Technology Programs commences on October 1 of each calendar year. The laboratory analysis rate for overtime service is \$93.00 per hour in fiscal year 2010, \$96.00 per hour in fiscal year 2011, and \$99.00 per hour in fiscal year 2012. The laboratory analysis rate for Federal holiday or designed holiday service is \$108.00 per hour in fiscal year 2010, \$111.00 per hour in fiscal year 2011, and \$115.00 per hour in fiscal year 2012.

(b) Information on legal holidays or what constitutes overtime service at a particular Science and Technology laboratory is available from the Laboratory Director or facility manager.

Dated: October 20, 2009.

Rayne Pegg,

Administrator, Agricultural Marketing Service.

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DEPARTMENT OF AGRICULTURE

Grain Inspection, Packers and Stockyards Administration

9 CFR Part 206

RIN 0580-AB06

Swine Contract Library

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

ACTION: Proposed rule.

SUMMARY: On August 11, 2003, the Grain Inspection, Packers and Stockyards Administration (GIPSA) implemented new Subtitle B of Title II of the Packers

and Stockyards Act which was added by the Livestock Mandatory Reporting Act of 1999 (1999 Act), by establishing the Swine Contract Library (SCL). The statutory authority for the library lapsed on September 30, 2005. On October 5, 2006, the Livestock Mandatory Reporting Reauthorization Act (Reauthorization Act) reauthorized the 1999 Act until September 30, 2010, and also amended the swine reporting requirements of the 1999 Act. This proposed rulemaking would re-establish the regulatory authority for the library's continued operation and incorporate certain changes contained within the Reauthorization Act that impact the SCL, as well as make other changes to enhance the library's overall effectiveness and efficiency in response to input from regulated entities and the public. We also intend to request a 3-year extension of and revision to the currently approved information collection in support of the reporting and recordkeeping requirements for the SCL program. This approval is required under the Paperwork Reduction Act.

DATES: We will consider comments we receive by December 28, 2009.

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

- *E-Mail:* comments.gipsa@usda.gov.
- *Mail:* Tess Butler, GIPSA, USDA, 1400 Independence Avenue, SW., Room 1643-S, Washington, DC 20250-3604.
- *Fax:* (202) 690-2173.
- *Hand Deliver or Courier:* Tess Butler, GIPSA, USDA, 1400 Independence Avenue, SW., Room 1643-S, Washington, DC 20250-3604.
- *Internet:* Go to <http://www.regulation.gov> and follow the on-line instructions.

Instructions: All comments should make reference to the date and page number of this issue of the **Federal Register**. Regulatory analyses and other documents relating to this action will be available for public inspection in Room 1643-S, 1400 Independence Avenue, SW., Washington, DC 20250-3604, during regular business hours (7 CFR 1.27(b)). Please call a member of the GIPSA Management Support Staff at (202) 720-7486 to view the comments reviewed.

FOR FURTHER INFORMATION CONTACT: S. Brett Offutt, Director, Policy and Litigation Division, P&SP, GIPSA, 1400 Independence Ave., SW., Washington, DC 20250, (202) 720-7363, or via E-mail at s.brett.offutt@usda.gov.

SUPPLEMENTARY INFORMATION:

Background

GIPSA is responsible for the enforcement of the Packers and Stockyards Act of 1921 (7 U.S.C. 181 *et seq.*) (P&S Act or Act). Under authority delegated to GIPSA by the Secretary of Agriculture (Secretary) in Section 407(a) of the P&S Act (7 U.S.C. 228), we are authorized to create regulations necessary to carry out the provisions of the Act.

The 1999 Act (Pub. L. 106-78) amended Title II of the P&S Act to include Subtitle B—Swine Packer Marketing Contracts. The 1999 Act mandated the creation and maintenance of a library of marketing contracts offered by certain packers to producers for the purchase of swine. To implement this legislation, GIPSA established the SCL and promulgated SCL regulations (9 CFR Part 206) requiring that packers, as defined in Subtitle B, Title II, of the P&S Act, file example marketing contracts with GIPSA along with monthly estimates of the number of swine to be delivered under contract. GIPSA compiles this information and makes summary reports available to the public.

On October 22, 2004, the 1999 Act expired and was not reauthorized until December 3, 2004 (Pub. L. 108-444). Authority for the 1999 Act was extended, however, to September 30, 2005. The 1999 Act lapsed again in 2005 and was reauthorized and amended on October 5, 2006, when the Reauthorization Act (Pub. L. 109-296) was signed into law. The 1999 Act is scheduled to once again expire on September 30, 2010.

When the 1999 Act expired in October 2004, GIPSA asked swine packers to continue to comply with the SCL regulations voluntarily. With the information submitted voluntarily by packers, GIPSA has continued to make summary reports available to the public.

This proposed rule would re-establish authority for the SCL regulations (9 CFR Part 206) by amending the regulations' authority citation to include Subtitle B of Title II of the P&S Act (7 U.S.C. 198-198b). In addition to amending the SCL regulations to make them consistent with the Reauthorization Act, we would also amend the SCL regulations to incorporate suggestions received from the public and regulated entities.

Specifically, we propose to:

- (1) Revise the definition of "packer" to be consistent with the Reauthorization Act;
- (2) Revise the definitions of several contract types;
- (3) Add definitions of terms used in several contract types to describe the