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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 983

[Doc. No. AMS-FV-10-0099; FV11-983-1 FR]

Pistachios Grown in California, Arizona, and New Mexico;

Order Amending Marketing Order No. 983

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule amends Marketing Agreement and Order No. 983 (order), which regulates the handling of pistachios grown in California, Arizona, and New Mexico. The amendments were proposed by the Administrative Committee for Pistachios (Committee), which is responsible for local administration of the order. The amendments will provide authority to establish aflatoxin and quality regulations for pistachios shipped to export markets, including authority to establish different regulations for different markets; change a related section of the order concerning substandard pistachios to conform to the proposed addition of export authority; and correct an erroneous cross-reference to another section of the order.

These amendments are intended to provide authority to ensure uniform and consistent aflatoxin and quality regulations in the domestic and various export markets.

DATES: This rule is effective [INSERT DATE 1 DAY AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Martin Engeler, Marketing Order and Agreement Division, Fruit and Vegetable Program, AMS, USDA, 2202 Monterey Street, Fresno, California, 93721; Telephone: (559)487-5110, Fax: (559) 487-5906; or Kathleen M. Finn, Marketing Order and Agreement Division, Fruit and Vegetable Program, AMS, USDA, 1400 Independence Avenue SW, Stop 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491, Fax: (202) 720-8938, or E-mail: Martin.Engeler@ams.usda.gov or Kathy.Finn@ams.usda.gov.

Small businesses may request information on complying with this regulation by contacting Laurel May, Marketing Order and Agreement Division, Fruit and Vegetable Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491, Fax: (202) 720-8938, or E-mail: Laurel.May@ams.usda.gov.

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Agreement and Order No. 983, both as amended (7 CFR part 983), regulating the handling of pistachios

produced in California, Arizona, and New Mexico, hereinafter referred to as the "order." The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act." The applicable rules of practice and procedure governing the formulation of marketing agreements and orders (7 CFR part 900) authorize amendment of the order through this informal rulemaking action.

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

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect.

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

court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

Section 1504 of the Food, Conservation, and Energy Act of 2008 (2008 Farm Bill) (Pub. L. 110-246) made changes to section 18c(17) of the Act, which in turn required the addition of supplemental rules of practice to 7 CFR part 900 (73 FR 49307; August, 21, 2008). The changes to section 18c(17) of the Act and additional supplemental rules of practice authorize the use of informal rulemaking (5 U.S.C. 553) to amend federal fruit, vegetable, and nut marketing agreements and orders if certain criteria are met.

AMS considered the nature and complexity of the proposed amendments, the potential regulatory and economic impacts on affected entities, and other relevant matters, and determined that amending the order as proposed by the Committee could appropriately be accomplished through informal rulemaking.

The proposed amendments were unanimously recommended by the Committee following deliberations at a public

meeting on July 9, 2010. A proposed rule soliciting comments on the proposed amendments was issued on June 5, 2011, and published in the **Federal Register** on June 13, 2011 (76 FR 34181). One comment was received in support of the proposed amendments. A proposed rule and referendum order was issued on September 12, 2011, and published in the **Federal Register** on September 15, 2011 (76 FR 57001). This document directed that a referendum among pistachio producers be conducted during the period October 3 through October 14, 2011, 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 producers voting, or two-thirds of the volume of pistachios represented by voters in the referendum. All of the proposed amendments were favored by at least 97 percent of those voting in the referendum and by at least 98 percent of the volume represented in the referendum.

The amendments included in this final rule will:

(1) Provide authority to establish aflatoxin sampling, analysis, and inspection requirements for shipments of pistachios to export markets, including authority to establish different regulations for different markets;

(2) Provide authority to establish quality and inspection requirements for shipments of pistachios to export markets, including authority to establish different regulations for different markets;

(3) Change a related section of the order concerning substandard pistachios to conform to the proposed addition of export authority; and

(4) Correct an erroneous cross-reference to another section of the order.

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 covered under the order.

Final Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that

small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 900 producers and 25 handlers of pistachios in the production area encompassing California, Arizona, and New Mexico. The Small Business Administration (SBA) (13 CFR 121.201) defines small agricultural producers as those having annual receipts of less than \$750,000, and small agricultural service firms are defined as those having annual receipts of less than \$7,000,000.

Based on Committee data, it is estimated that over 70 percent of the handlers ship less than \$7,000,000 worth of pistachios and would thus be considered small business under the SBA definition. It is also estimated that over 80 percent of the growers in the production area produce less than \$750,000 worth of pistachios and would thus be considered small businesses under the SBA definition.

The amendments will provide authority to establish aflatoxin sampling, analysis, and inspection requirements for shipments of pistachios to export markets, including

authority to establish different regulations for different markets; provide authority to establish quality and inspection requirements for shipments of pistachios to export markets, including authority to establish different regulations for different markets; change a related section of the order concerning substandard pistachios to conform to the proposed addition of export authority; and correct an erroneous cross-reference to another section of the order.

These amendments were unanimously recommended at a public meeting of the Committee held on July 10, 2010. None of the amendments will have an immediate impact on handlers or producers because they will not establish any requirements or regulations on handlers. However, the amendments that will add authority to the order to regulate exports could impact growers and handlers in the industry if the authority is implemented. Therefore, the potential costs that may be associated with future regulation of exports is discussed below. In the event implementing regulations are subsequently recommended by the Committee, additional analysis of the potential costs and benefits will be conducted as part of the informal rulemaking process.

Under section 983.50 of the order and section 983.150 of the administrative rules and regulations, sampling, analysis, and inspection of pistachios for aflatoxin is required prior to shipment to domestic markets. Specific procedures and requirements for handlers to follow are prescribed. It is anticipated that any requirements recommended for export shipments would be similar to those in effect for domestic shipments. Thus, the associated costs would be similar.

The costs of complying with aflatoxin regulations can be broken into three basic elements: sampling of the product, the market value of the product samples that are used in testing, and the cost of the aflatoxin analysis performed by laboratories. These costs can vary among handlers depending on their particular operations. In recognition of this, the Committee provided estimates of the various cost elements for purposes of this discussion.

The cost of drawing samples from lots is estimated to range from \$50.00 to \$75.00 per lot. The variation in this cost can be attributed to factors such as the type of inspection program utilized by handlers. For purposes of this evaluation a cost factor of \$70.00 per lot is utilized. The cost of the product used in sampling and

testing varies depending upon the market price for pistachios. For purposes of this evaluation a value of \$3.00 per pound as estimated by the Committee is utilized. At \$3.00 per pound and a 44-pound sample, the cost of product used in sampling is \$132.00 per lot. Laboratory costs for analyzing aflatoxin content are estimated to be \$100.00 per test; with two tests per lot, the cost is \$200.00 per lot.

Pistachio lots tested for aflatoxin can vary in size, but for purposes of this evaluation, a lot size of 50,000 pounds is used as that is a reasonable representative size for a typical handler operation. Applying the above cost estimates to a lot size of 50,000 pounds results in the following cost estimates on a per pound basis:

1. Sampling cost: \$0.0014 per pound (\$70.00 per lot divided by 50,000 pounds)
2. Value of product used in sampling: \$0.0026 per pound (\$132.00 per lot divided by 50,000 pounds)
3. Analytical cost of aflatoxin testing: \$0.0040 per pound (\$200 per sample divided by 50,000 pounds)

This results in a total estimated per pound cost of \$0.0080 (\$0.0014 + \$0.0026 + \$0.0040), or 0.8 cents per pound.

When compared to the market price for pistachios, the direct costs associated with an aflatoxin program are proportionately small. Utilizing a market price of \$3.00 per pound as used in the above cost estimates, the costs of aflatoxin sampling and testing represent 0.27 percent of the market price. Even if the market price for pistachios was \$1.00 per pound, the aflatoxin sampling and testing costs would be well below one percent of the price.

Most handlers who shipped pistachios to export markets in the past were signatories to a state marketing agreement that required aflatoxin sampling and analysis. That program was terminated in 2010. Since then, most handlers reportedly conduct aflatoxin testing and certification on export shipments to satisfy the requirements of the various markets. Therefore, the costs discussed above are already being borne by handlers.

While difficult to quantify, one of the primary benefits of an aflatoxin program is the reduced risk of a potential food incident. For example, in the late 1990's, high aflatoxin levels were detected in pistachios in European markets. This led to a 60 percent decrease in pistachio imports in Europe, and it took several years for the market to return to more normal levels. The U.S was

not dominant in the European market at that time, but in recent years, Europe has become an increasingly significant market for U.S. pistachios. Regardless of the location of the market, this example demonstrates the devastating effect a food quality or food safety issue can have on the marketing of a product.

Another benefit of an aflatoxin testing program is the resulting reduction in the incidence of rejected shipments at their destination. Many countries test product prior to allowing its importation. Product that does not meet the importing country's standards can be rejected and returned to the shipper. It is estimated that the cost of handling or returning a rejected lot is between \$12,000 and \$15,000 per lot. Product that has been tested prior to shipment based on the requirements of its market destination is less likely to be rejected and would not incur the associated costs.

Avoiding a disruption in the marketing of pistachios in export markets is important in maintaining the viability of the industry. Shipments of open inshell pistachios increased dramatically in recent years; from 95,761,666 pounds in the 2004-05 shipping season to 192,436,136 pounds in the 2009-10 season, according to Committee data.

Exports represented approximately 63 percent of total U.S. pistachio shipments during the 2009-10 season. According to statistics reported by the Committee, total acreage in California increased from 117,773 acres in 2004 to 215,336 acres in 2010, representing an 83 percent increase. Much of this newer acreage is non-bearing and will come into production in the near future. These statistics demonstrate that domestic production of pistachios will continue to increase in the future, and export markets must be maintained to accommodate the increased supplies.

Expanding order authority to include establishing aflatoxin requirements applicable to export shipments will provide an additional tool to aid in the marketing of pistachios covered under the order. In the event the authority is implemented, the potential costs associated with a mandatory aflatoxin program for exports are expected to be more than offset by the potential benefits discussed above.

An analysis of the potential costs of adding authority to the order to establish quality regulations is not possible because no quality regulations are currently in effect under the order, and none are being contemplated. Quality regulations were in effect for domestic shipments

from 2004 through 2007, but were suspended because they were no longer meeting the industry's needs. However, the order still contains broad authority for domestic quality regulations and the industry may desire to reinstate them if circumstances warrant. As a result of the increasing importance of the export market as demonstrated above, the Committee recommended adding authority to the order for quality regulation for export shipments in the event circumstances in the future warrant their implementation.

A unanimous action of the Committee will be required to recommend the establishment of any export quality regulations. In addition, informal rulemaking will be required for implementation, and an analysis of the potential costs and benefits will need to be conducted during that process.

The remaining amendments are administrative in nature and will have no economic impact on growers or handlers. One of the proposed amendments adds conforming language to another section of the order as a result of approval of other amendments, and another proposed amendment will correct an incorrect section reference in the order.

Alternatives to these proposals include making no changes at this time. However, the Committee believes it

will be beneficial to have the means necessary to apply regulations to the export markets if circumstances warrant.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the order's information collection requirements have been previously approved by the Office of Management and Budget (OMB) and assigned OMB No. 0581-0215, "Pistachios Grown in California". No changes in those requirements as a result of this proceeding are anticipated. Should any changes become necessary, they will be submitted to OMB for approval.

As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

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

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.

The Committee's meeting, at which these proposals were discussed, was widely publicized throughout the pistachio industry. All interested persons were invited to attend the meeting and encouraged to participate in Committee deliberations on all issues. Like all Committee meetings, the meeting was public, and all entities, both large and small, were encouraged to express their views on these proposals.

A proposed rule concerning this action was issued on June 5, 2011, and published in the **Federal Register** on June 13, 2011 (76 FR 34181). Copies of the rule were mailed or sent via facsimile to all Committee members and pistachio handlers. Finally, the rule was made available through the Internet by USDA and the Office of the Federal Register. A 30-day comment period ending July 13, 2011, was provided to allow interested persons to respond to the proposal. One comment was received in response to the proposal. The comment, submitted on behalf of a pistachio trade association, was supportive of the proposed amendments. No changes were made to the proposed amendments, based on the comment received.

A proposed rule and referendum order was then issued on September 12, 2011, and published in the **Federal**

Register on September 15, 2011 (74 FR 57001). This document directed that a referendum among pistachio producers be conducted during the period October 3 through October 14, 2011, 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 producers voting, or two-thirds of the volume of pistachios represented by voters in the referendum. All of the proposed amendments were favored by at least 97 percent of those voting in the referendum and by at least 98 percent of the volume represented in the referendum.

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 covered under the order.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at:
www.ams.usda.gov/MarketingOrdersSmallBusinessGuide. Any questions about the compliance guide should be sent to

Laurel May at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

Order Amending the Order Regulating the Handling of Pistachios Grown in California, Arizona, and New Mexico Findings and Determinations

(a) Findings and Determinations Upon the Basis of the Rulemaking Record.

The findings hereinafter set forth are supplementary to the findings and determinations which were previously made in connection with the issuance of the marketing agreement and order; and all 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.

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 California, Arizona, and New Mexico 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;

3. The marketing agreement and order, as amended, are limited in 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 produced or packed in the production area; and

5. All handling of pistachios produced in the production area as defined in the marketing agreement and order is in the current of 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 so that any regulations recommended as a result of these amendments can be in place prior to the next production year, which begins 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," has been signed by handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping pistachios covered under the order) who during the period September 1, 2010, through August 31, 2011, handled not less than 50 percent of the volume of such pistachios covered under 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, 2010, through August 31, 2011, 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

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 order amending the order contained in the proposed rule issued by the Administrator on September 12, 2011, and published in the **Federal Register** on September 15, 2011 (76 FR 57001), 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, 7 CFR Part 983 is amended as follows:

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

Authority: 7 U.S.C. 601-674.

2. Revise § 983.50 to read as follows:

§ 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. The committee may also establish, with the approval of the Secretary, such requirements for pistachios to be shipped for human consumption in export markets. No handler shall ship, for human consumption in domestic, or if applicable, export markets, pistachios that exceed an aflatoxin level established by the committee and approved by the Secretary. All shipments to markets for which requirements have been established must be covered by an aflatoxin inspection certificate. The committee may, with the approval of the

Secretary, establish different sampling, analysis, and inspection requirements, and different aflatoxin level requirements, for different markets.

3. Revise § 983.51 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 shipped for human consumption in domestic or export markets as will contribute to orderly marketing or be in the public interest. In such production year, no handler shall ship pistachios for human consumption in domestic, or if applicable, export markets unless they meet the applicable requirements as evidenced by certification acceptable to the committee. The committee may, with the approval of the Secretary, establish different quality and inspection requirements for different markets.

4. Amend § 983.53 by removing the reference to "§ 983.50" and adding in its place "§ 983.52" in paragraph (a) (2).

5. Revise § 983.57 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 aflatoxin and quality requirements are not shipped for human consumption in those markets for which such requirements exist pursuant to § 983.50 and § 983.51.

Dated: June 13, 2012

David R. Shipman
Administrator
Agricultural Marketing Service

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