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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 983

[Doc. No. AMS-FV-12-0068; FV13-983-1 FR]

Pistachios Grown in California, Arizona, and New Mexico;

Modification of Aflatoxin Regulations

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule revises the aflatoxin sampling regulations currently prescribed under the California, Arizona, and New Mexico pistachio marketing order (order). The order regulates the handling of pistachios grown in California, Arizona, and New Mexico, and is administered locally by the Administrative Committee for Pistachios (Committee). This rule allows the use of mechanical samplers (auto-samplers) for in-line sampling as a method to obtain samples for aflatoxin analysis. The use of auto-samplers is expected to reduce handler costs by providing a more efficient and cost-effective process.

DATES: Effective Date: [INSERT DATE 30 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Andrea Ricci, Marketing Specialist, or Martin Engeler, Regional Director, California Marketing Field Office, Marketing Order and

Agreement Division, Fruit and Vegetable Program, AMS, USDA;
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Small businesses may request information on complying with this regulation by contacting Jeffrey Smutny, 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: Jeffrey.Smutny@ams.usda.gov.

SUPPLEMENTARY INFORMATION: This final rule is issued under Marketing Agreement and Order No. 983, both as amended (7 CFR part 983), regulating the handling of pistachios grown 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 Department of Agriculture (USDA) is issuing this rule in conformance with Executive Orders 12866, 13175, and 13563.

This final 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.

This final rule revises the aflatoxin sampling regulations currently prescribed under the order. This rule allows the use of mechanical samplers (auto-samplers) as an additional method to obtain lot samples for aflatoxin analysis. All auto-samplers will need to be approved by and be subject to procedures and requirements established by the USDA Federal-State Inspection Service prior to their use. This rule will be in effect indefinitely until

amended, suspended, or terminated, and was unanimously recommended by the Committee at its meeting held on August 19, 2013.

Section 983.50 of the order provides authority for aflatoxin regulations that establish aflatoxin sampling, analysis, and inspection requirements applicable to pistachios to be shipped for human consumption in domestic and export markets. Aflatoxin regulations are currently in effect for pistachios shipped to domestic markets.

Section 983.150 of the order's rules and regulations contains specific requirements regarding sampling and testing of pistachios for aflatoxin. Paragraph (d)(1) of that section provides that a sample shall be drawn from each lot of pistachios and such samples shall meet specific weight requirements according to the size of the lot.

The current method of collecting samples of pistachios to be tested requires hand sampling of static lots by, or under the supervision of, an inspector of the Federal-State Inspection Service (inspector). This process requires handler personnel to stage the lots to be sampled, which requires moving large containers around with a forklift. This process utilizes a considerable amount of time and warehouse space. Inspectors are then required to manually

conduct the sampling by drawing samples from the containers, which is very labor intensive. Once the lot sample is collected, the inspector prepares test samples for aflatoxin analysis.

Since the order's promulgation in 2004, the volume of open inshell pistachios processed annually has increased significantly, from 165 million pounds to 385 million pounds in the 2012-13 production year. This change in volume has significantly increased the amount of warehouse space and handler labor needed to stage lots for sampling. It has also driven up the total labor costs associated with sampling, as the number of lots to be sampled has increased significantly.

With the implementation of this rule, handlers will have the option of using mechanized sampling instead of manual sampling. Automatic samplers in handlers' processing facilities will mechanically draw samples of pistachios as they are being processed. This will make the sampling process more efficient by eliminating the extra warehouse space and handler labor needed for staging static lots for sampling. In addition, the labor costs of manual sampling will be eliminated, further reducing handler

costs. A discussion of the costs is included in the Final Regulatory Flexibility Analysis section of this document.

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 businesses 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 20 handlers of California, Arizona, and New Mexico pistachios subject to regulation under the order and approximately 1,040 pistachio producers in the regulated area. Small agricultural service firms are defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of less than \$7,000,000, and small agricultural producers are defined as those having annual receipts of less than \$750,000.

Currently, about 70 percent of handlers ship less than \$7,000,000 worth of pistachios on an annual basis and would be considered small businesses under the SBA definition. Data provided by the Committee regarding the 2013 crop indicates that approximately 80 percent of producers delivered less than 300,000 pounds of assessable dry weight pistachios. Using an estimated price of \$2.50 per pound of pistachios, this would equate to less than \$750,000 in receipts; thus, 80 percent of producers would be considered small businesses according to the SBA definition.

This final rule modifies the aflatoxin sampling regulations currently prescribed under § 983.150(d) of the order's rules and regulations. This rule allows the use of auto-samplers as a method to obtain samples for aflatoxin analysis. Previously, only manual hand-drawn sampling from static lots was permitted. Allowing the use of auto-samplers for in-line sampling will streamline the sampling process for pistachios. It is expected to make the sampling process more efficient by eliminating the time and space needed for staging and inspecting static lots, reducing the amount of labor, and therefore reducing handler costs. Authority for this action is provided in § 983.50 of the order.

The Committee estimates the current method of sampling to range in cost from \$135 to \$170 per lot. This expense includes the warehouse space and employee labor needed to stage a lot for inspection and the costs of the inspection. The initial expense of purchasing an auto-sampler ranges from as low as \$1,000 to as high as \$5,000. The cost of collecting samples with the auto-sampler is estimated at about \$5 per lot, which is significantly lower than the static lot sampling method, which ranges from \$135 to \$170 per lot.

The following example is used to illustrate potential savings for a handler that processes 3,000,000 pounds of pistachios per year. Assuming a lot size of 50,000 pounds, this handler would require inspection on 60 lots of pistachios ($3,000,000 / 50,000$). Under the current manual sampling method, this would result in a total sampling cost of \$8,100 ($60 \times \135). If this handler purchased an automatic sampler for \$5,000, the total sampling cost (including equipment) would be \$5,300 ($\$5,000 + \5 cost per lot to pull the samples). Thus, in this example the handler would save \$2,800 in the first year of operation. After the first year, the savings would increase because there would be no additional equipment cost. Applying this

on an industry-wide basis, the aggregate cost savings could be significant, considering recent shipment levels have exceeded 300,000,000 pounds of pistachios.

Based on these cost estimates and the example provided, use of automatic samplers can provide a significant cost saving to the industry. The potential cost savings for individual handlers will vary, depending on the size and structure of their operation. Each handler will need to evaluate their operation to determine which method of sampling best fits their needs. This rule will provide an additional option for sampling that does not currently exist for handlers.

The Committee discussed alternatives to this change, including continuing to operate under the current aflatoxin sampling procedures. However, the Committee unanimously agreed that adding the option to use mechanical sampling equipment will provide handlers with a more efficient and cost-effective sampling alternative to the manual sampling process.

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, Arizona, and New Mexico. No changes in those requirements as a result of this action are necessary. Should any changes become necessary, they would be submitted to OMB for approval.

This final rule modifies aflatoxin sampling regulations currently prescribed under the California, Arizona, and New Mexico pistachio marketing order. Accordingly, this action will not impose any additional reporting or recordkeeping requirements on either small or large pistachios handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

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.

In addition, the Committee's meeting was widely publicized throughout the pistachio industry and all interested persons were invited to attend the meeting and

participate in Committee deliberations on all issues. Like all Committee meetings, the August 19, 2013, meeting was a public meeting and all entities, both large and small, were able to express views on this issue.

A proposed rule concerning this action was published in the **Federal Register** on March 18, 2014 (79 FR 15050). Copies of the rule were emailed 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 April 17, 2014, was provided to allow interested persons to respond to the proposal. One comment was received after the designated comment period closed. Accordingly, no changes were made to the rule as proposed.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at:
<http://www.ams.usda.gov/MarketingOrdersSmallBusinessGuide>. Any questions about the compliance guide should be sent to Jeffrey Smutny at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant matter presented, including the information and recommendation submitted by

the Committee and other available information, it is hereby found that this rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

List of Subjects in 7 CFR Part 983

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

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

PART 983-PISTACHIOS GROWN IN CALIFORNIA, ARIZONA, AND NEW MEXICO

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

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

2. Section 983.150 is amended by revising paragraph (d)(1) to read as follows:

§ 983.150 Aflatoxin regulations.

* * * * *

(d) * * *

(1) Samples for testing. Prior to testing, each handler shall cause a representative sample to be drawn from each lot ("lot samples") of sufficient weight to comply with Tables 1 and 2 of this section.

(i) At premises with mechanical sampling equipment (auto-samplers) approved by the USDA Federal-State Inspection Service, samples shall be drawn by the handler in a manner acceptable to the Committee and the USDA Federal-State Inspection Service.

(ii) At premises without mechanical sampling equipment, sampling shall be conducted by or under the supervision of an inspector, or as approved under an alternative USDA-recognized inspection program.

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Dated: June 27, 2014.

Rex A. Barnes,
Associate Administrator,
Agricultural Marketing Service.

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