

DEPARTMENT OF AGRICULTURE**Agricultural Marketing Service****7 CFR Part 983**

[Docket No. FV05-983-2 FR]

Pistachios Grown in California; Establishment of Additional Inspection Requirements**AGENCY:** Agricultural Marketing Service, USDA.**ACTION:** Final rule.

SUMMARY: This rule establishes additional inspection requirements authorized under the California pistachio marketing order (order). The order regulates the handling of pistachios grown in California and is administered locally by the Administrative Committee for Pistachios (committee). This rule modifies sampling procedures for dark-stained pistachios which are intended to be dyed or color-coated. It also establishes reinspection requirements for lots of pistachios which are materially changed after meeting initial aflatoxin and quality requirements. This action is expected to assure the quality of pistachios, improve the marketability of pistachios, and provide handlers more marketing flexibility. The benefits of this action are expected to offset the increased inspection costs.

DATES: *Effective Date:* October 22, 2005.

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

SUPPLEMENTARY INFORMATION: This final rule is issued under Marketing Order No. 983 (7 CFR part 983), regulating the handling of pistachios grown in California, 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 Order 12866.

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

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 rule modifies sampling procedures for dark-stained pistachios which are intended to be dyed or color-coated. It also establishes reinspection requirements for lots of pistachios, which are materially changed after meeting initial aflatoxin, quality, and size requirements. This action is expected to improve the quality and marketability of pistachios, provide handlers more marketing flexibility, and improve the marketability of pistachios. The benefits of this action are expected to offset the increased inspection costs.

For the purposes of this final rule, the terms "marketing year" and "production year" are synonymous.

Section 983.46 of the order authorizes the committee to recommend that the Secretary modify or suspend the order provisions contained in §§ 983.38 through 983.45. These sections took effect August 1, 2005.

Sampling Procedures

Sections 983.38 and 983.39 of the order specify maximum aflatoxin, and minimum quality and size requirements, respectively, that must be met prior to the shipment of pistachios.

Sections 983.38(d)(1) and 983.39(e)(1) of the order specify that a sample must

be drawn from each lot, and that this lot sample must be divided into two samples—one portion for aflatoxin testing and one for minimum quality and size testing.

Section 983.39(b)(3)(iv) of the order currently defines dark stain and specifies that pistachios that are dyed or color-coated to improve their marketing quality are not subject to the maximum permissible defects for dark stain.

Pistachios grow on trees in grape-like clusters and are encased in an outer skin or hull. During the pistachio harvest process, the nuts, which contain a significant amount of moisture when harvested, must arrive at the handling facility as soon as possible and the hulls covering the shell must be removed. If the hulls are not removed from the nuts within 24 hours of their removal from the tree, staining of the outer shell occurs.

After being hulled, the pistachios are then dried, and placed in storage containers. When the nuts are removed from storage, they are sorted, sized, graded, and mechanically separated into open and closed shell product (pin-picked), and placed into lots for aflatoxin and minimum quality and size testing. Some handlers have the pistachios tested for aflatoxin prior to these processes. A "lot" is any quantity of pistachios that is designated for testing.

During the sorting process, the inshell pistachios are separated by the color of the shells and the amount of stain on the shells. On average, approximately 95 percent of the harvested inshell pistachios are placed into lots designated as non-stained or light-stained pistachios. Such pistachios are typically marketed without any treatment to cover the stains. The remaining 5 percent are placed into lots consisting primarily of dark-stained inshell pistachios.

Handlers typically dye or color-coat the dark-stained inshell pistachios to cover the stains, as the staining limits their marketability and detracts from their appearance.

The color-coating process usually consists of applying a white coating or a flavoring to the shells of the pistachios. The dyeing process consists of applying a dye to the shells. These pistachios are marketed after either of these processes is performed by the handler.

Under the regulatory requirements of the order, one test sample will be drawn per lot and divided into two portions—one for aflatoxin testing and the other for minimum quality and size testing. Handlers or the inspection service will draw this sample while the pistachios

are in their natural state (prior to dyeing or color-coating) because false-positive aflatoxin test results may occur when dyed or color-coated pistachios are used in conducting aflatoxin tests.

Lots of badly-stained, natural-condition pistachios would likely exceed the maximum permissible 3 percent by weight tolerance for dark stain. Thus, they would fail to meet existing voluntary minimum quality requirements under the U.S. Grade Standards for Pistachios in the Shell (7 CFR 51.2540 through 51.2549) or the minimum quality requirements under the order that became effective on August 1, 2005.

On dark stained lots, it is common practice for handlers to use or submit the portion of the initial natural sample designated for aflatoxin testing at a USDA or USDA-approved laboratory. If the sample meets the aflatoxin requirements, handlers then return the sample portion designated for the minimum quality and size testing to the lot, dye or color-coat the lot, and draw or have drawn a second representative dyed or color-coated sample for minimum quality and size inspection. The second representative sample is taken after the pistachios have been dyed or color-coated to assure that the coloring is uniform and adequately covers the stained pistachios.

Because the inspection requirements do not provide for a second sample after dyeing or color-coating, the committee, on December 15, 2004, recommended modifying the order's sampling procedures and establishing a new section entitled "§ 983.138—Samples for testing." The vote was unanimous.

For those lots that consist of primarily light-stained or non-stained inshell pistachios, one sample would continue to be drawn as specified in §§ 983.38(d)(1) and 983.39(e)(1) of the order.

The committee estimated that the total 2005–06 inshell pistachio crop will be approximately 200 million pounds and that approximately 5 percent (6 million pounds or 600 lots) of all inshell pistachios marketed domestically would be dyed or color-coated to cover dark-stained shells.

While this modification to sampling procedures under the order is expected to result in a slight increase in inspection costs for lots which are dyed or color-coated, the improvements in marketability of these pistachios are expected to offset the additional costs. When dark-stained pistachios are currently shelled out, the kernels generally have an approximate value of \$1.00 per pound, which is substantially

less than the \$2.00 per pound value of dyes or color-coated pistachios.

Producers, handlers, and consumers benefit from dyeing or color-coating inshell pistachios because dyeing and color-coating dark-stained pistachios results in nuts having a more desirable color appearance. This makes the nuts more appealing to retailers and consumers. Thus, retailers are willing to pay an average of \$2.00 per pound for these previously unmarketable dark-stained, inshell pistachios. This increased value is also expected to contribute to improved or maintained producer returns.

Reinspection

Sections 983.38 and 983.39 of the order specify maximum aflatoxin and minimum quality and size requirements, respectively. These sections took effect August 1, 2005.

Section 983.39(e) of the pistachio order provides minimum quality testing and inspection procedures; and requires each lot of pistachios to be certified, uniquely identified, and traceable from testing through shipment by the handler.

Section 983.41 of the pistachio order provides that handlers who handle less than 1 million pounds of assessed weight (dried weight) pistachios per marketing year (September 1–August 31) with certain aflatoxin testing options and allows such handlers to apply to the committee for an exemption from minimum quality testing. Handlers granted an exemption will be required to pull the samples, make them available for review by the committee, and maintain these samples in their handling facilities for 90 days. Handlers who do not apply or who are not granted an exemption from minimum quality and size testing must test all lots for aflatoxin, quality, and size requirements under the order.

Section 983.42 of the pistachio order provides that handlers may commingle aflatoxin and minimum quality certified lots with other certified lots.

Section 983.43 of the pistachio order provides authority for the committee to recommend the establishment of rules and regulations to specify conditions under which pistachios would be subject to reinspection.

Section 983.70 of the pistachio order exempts handlers who handle 1,000 pounds or less of dried weight pistachios (dried to 5 percent moisture) during any production year within the production area from all aflatoxin and minimum quality and size requirements.

As mentioned earlier, during the production year, handlers typically hull

and dry pistachios, and place the nuts into storage containers. These nuts usually remain in storage until sold. When the nuts are removed from storage, handlers have the option of sampling and testing the nuts for aflatoxin prior to further processing (*i.e.*, sorting, sizing, grading, and pin-picking (segregating the split- and closed-shell pistachios)), or placing the nuts into lots for aflatoxin and minimum quality and size testing after these processes have been performed.

The first option is expected to be used primarily by those handlers who have been granted an exemption from minimum quality and size testing pursuant to § 983.41(b). Most handlers are expected to perform these processes, segregate the pistachios into lots, and then draw or have drawn the samples for the required aflatoxin, quality, and size tests.

Typically, handlers who handle a million or more pounds of assessed weight pistachios per marketing year further process the nuts prior to testing for aflatoxin, quality, and size requirements. Such handlers, pursuant to § 983.38(d) are required to uniquely identify each lot so that it can be traced from the point of testing through shipment.

After certification for aflatoxin, quality, and size or pulling and retaining required samples for smaller handlers, the majority of these lots are shipped directly into the channels of commerce. However, some certified lots are readied and retained in the handler's facility in anticipation of future orders.

When handlers receive new orders, they typically either resort or resize existing stored certified lots of inshell pistachios or create new lots from uncertified stored nuts. When existing certified lots are used, they generally have to be reworked to meet specific buyer needs. For instance, lightly-stained nuts, dark-stained nuts, insect-infested nuts, smaller- or larger-sized nuts, closed shell, or open shell nuts may have to be removed via hand-sorting, color-sorting, pin-picking, and/or resizing. Removal of these nuts results in new lots which no longer have representative inspection certificates. Such lots would then be considered to have been "materially changed."

Pistachio handlers who handle more than 1,000 pounds and less than a million pounds of assessed weight pistachios per marketing year, and whose pistachios pass aflatoxin testing requirements would not have to comply with the traceability procedures set forth in § 983.38(d). Furthermore, pursuant to § 983.41(a) of the order, such handlers may test their entire

inventory (maximum lot size of 150,000 pounds) or segregate receipts into various sized lots and have an inspector sample and test each specified lot for aflatoxin and may also, pursuant to § 983.41(b) of the order, apply to the committee for an exemption from minimum quality testing.

Because it is more economical for smaller handlers to test larger lots for aflatoxin and to be exempt from minimum quality testing, it is expected that the majority, if not all, such handlers, will apply for the exemption from minimum quality testing.

Exempted handlers, who handle more than 1,000 pounds and less than a million pounds of assessed weight pistachios per marketing year, would draw or have one sample drawn per lot. This sample would be divided into two portions, one for aflatoxin and one for minimum quality testing. Typically, when such handlers receive notice that the lots have passed aflatoxin testing requirements, they return the sample portion designated for minimum quality testing to the lot. Such lots are then further processed (*i.e.*, sized, sorted, air-legged, pin-picked, and graded). Handlers would then draw a new sample, which is required to be maintained for 90 days at the handler's facilities and required to be made available for review or auditing by the committee.

Those handlers who handle more than 1,000 pounds and less than a million pounds and who are not granted such an exemption by the committee are required to meet the traceability procedures as specified in § 983.38(d) of the order, and the aflatoxin, quality, and size requirements under the order for each lot of pistachios.

Thus, the committee at its November 3, 2004, meeting, unanimously recommended establishing a new section entitled “§ 983.143—Reinspection” to define the term “materially changed” and to specify handler reinspection requirements to assure the quality of pistachios entering market channels.

The committee, at its April 12, 2005, meeting, reconsidered and further clarified its previous recommendation. The committee unanimously recommended that, effective August 1, 2005, lots which are color-sorted, hand-sorted, pin-picked, and/or resized after being initially certified for aflatoxin, quality, and size requirements under the order be considered “materially changed” and that any portion of a lot (the portion resorted or resized to meet buyer specifications or the portion that was removed from the original lot) be inspected as new lots.

The committee clarified that § 983.42, which provides that previously certified lots can be commingled with other certified lots, does not apply to portions of lots which are materially changed under the order, as such newly-formed lots may no longer contain the same quantity or quality of inshell pistachios as the original lots.

Final Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), AMS has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses would not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 24 handlers of California pistachios subject to regulation under the order and approximately 741 producers in the production area. Small agricultural producers are defined by the Small Business Administration (13 CFR 121.201) as those having annual pistachio receipts less than \$750,000, and small agricultural service firms are defined as those whose annual receipts are less than \$6,000,000. Seventeen of the 24 handlers subject to regulation have annual pistachio receipts of less than \$6,000,000. In addition, 722 producers have annual receipts less than \$750,000. Thus, the majority of handlers and producers of California pistachios may be classified as small entities.

This rule modifies sampling procedures for dark-stained pistachios which are intended to be dyed or color-coated. It also establishes reinspection requirements for lots of pistachios which are materially changed after meeting initial aflatoxin, quality, and size requirements. This action is expected to assure the quality of pistachios, provide handlers more marketing flexibility, improve the marketability of pistachios, and enhance the marketability for reworked pistachios. These benefits are expected to offset the increased inspection costs.

Section 983.46 of the order authorizes the committee to recommend that the Secretary modify or suspend order provisions contained in §§ 983.38

through 983.45. These provisions took effect August 1, 2005.

Sampling Procedures

Sections 983.38 and 983.39 of the order specify maximum aflatoxin, minimum quality and size requirements, respectively, that must be met prior to the shipment of pistachios.

Sections 983.38(d)(1) and 983.39(e)(1) of the order specify that a sample must be drawn from each lot and that this lot sample must be divided into two subsamples—one portion for aflatoxin testing and one for minimum quality and size testing.

Section 983.39(b)(3)(iv) of the order defines “dark stain,” and specifies that pistachios that are dyed or color-coated to improve their marketing quality are not subject to the maximum permissible defects for dark stain.

Pistachios grow on trees in grape-like clusters and are encased in an outer skin, or hull. During the pistachio harvest process, the nuts, which contain a significant amount of moisture when harvested, must arrive at the handling facility as soon as possible and the hulls covering the shell must be removed. If the hulls are not removed from the nuts within 24 hours of their removal from the tree, staining of the outer shell occurs. After being hulled, the pistachios are then dried, and placed in storage containers.

When the nuts are removed from storage, they are sorted, sized, graded, mechanically separated into open- and closed-shell product (pin-picked), and placed into lots for aflatoxin and minimum quality testing. A “lot” is any quantity of pistachios that is segregated for testing.

During the sorting process, the inshell pistachios are separated by the color of the shells and the amount of staining on the shells. On average, approximately 95 percent of the harvested inshell pistachios are placed into lots designated as non-stained or light-stained pistachios. Such pistachios are typically marketed without any treatment to cover or remove the stains. The remaining 5 percent are placed into lots consisting primarily of dark-stained inshell pistachios. Handlers typically dye or color-coat the dark-stained inshell pistachios to cover the stains because they are generally not marketable in their natural state.

The color-coating process usually consists of applying a white coating or a flavoring to the shells of the pistachios. The dyeing process consists of applying a dye to the shells.

Prior to placing pistachios into the domestic channels of commerce on August 1, 2005, or later, handlers will

be required to draw or have drawn a sample and test or have tested each sample for aflatoxin, quality, and size requirements, unless exempted under §§ 983.41 or 983.70 of the order.

Under the regulatory requirements of the order, one test sample will be drawn per lot and divided into two portions—one for aflatoxin testing and the other for minimum quality and size testing. Handlers will draw this sample while the pistachios are in their natural state (prior to dyeing or color-coating) because false positive test results may occur when dyed or color-coated pistachios are used in conducting aflatoxin tests. When handlers believe that lots of natural condition pistachios exceed the maximum permissible 3 percent by weight tolerance for dark stain under the existing voluntary minimum quality requirements of the U.S. Grade Standards for Pistachios in the Shell (7 CFR 51.2540 through 51.2549), or the minimum quality requirements under the order, they will have the natural condition portion of the sample designated for aflatoxin testing tested. If the sample meets the aflatoxin requirements, handlers then return the sample portion designated for the minimum quality and size testing to the lot, dye or color-coat the lot, and draw or have drawn a second representative dyes or color-coated sample to be tested for minimum quality and size. This second sample is taken after the pistachios have been dyed or color-coated to assure that the color is uniform and adequately covers the staining.

Because the inspection requirements do not provide for sampling and inspections at this stage of the process, the committee, on December 15, 2004, recommended modifying the order's sampling procedures and establishing a new section entitled "§ 983.138 Samples for testing." The vote was unanimous.

The first alternative considered was to leave the order provisions unchanged, but this alternative was not adopted, as handlers, producers, and consumers would benefit from permitting the orderly marketing of pistachios containing edible nutmeats that fail minimum quality for external cosmetic reasons.

The committee also considered providing handlers with more flexibility in removing dark-stained inshell pistachios from lots, but decided that modifying the sampling procedures for lots intended for dyeing or color-coating would allow handlers to market these dark-stained pistachios without having to implement lengthy and costly removal processes.

The committee estimated that the total 2005–06 inshell pistachio crop will be approximately 200 million pounds and that approximately 5 percent (6 million pounds or 600 lots) of all inshell pistachios marketed domestically would be dyed or color-coated to cover dark-stained shells.

While this modification to sampling procedures under the order is expected to result in a slight increase in inspection costs for lots which are dyed or color-coated, the improvement in the marketability of these pistachios is expected to offset the additional costs. When the dark-stained pistachios are shelled out, the kernels are expected to have an approximate value of \$1.00 per pound, which is substantially less than the \$2.00 per pound value of dyed or color-coated inshell pistachios.

Accordingly, producers, handlers, and consumers would benefit, as dyeing and color-coating dark-stained inshell pistachios results in nuts with a more pleasing appearance. Covering the dark stain would permit these edible pistachios to meet minimum quality requirements under the order and also make the pistachios more appealing to retailers and consumers. Retailers are expected to be willing to pay on average \$2.00 per pound for these nuts that were previously unmarketable as inshell nuts. This increased value also is expected to contribute to improved or maintained producer returns and offset the slight increase in inspection costs.

Reinspection

Sections 983.38 and 983.39 of the order specify maximum aflatoxin requirements, and minimum quality and size requirements, respectively.

Section 983.39(e) of the pistachio order provides minimum quality testing and inspection procedures and requires that each lot of pistachios to be certified, uniquely identified, and traceable from testing through shipment by the handler.

Section 983.41 of the pistachio order provides handlers who handle more than a 1,000 pounds and less than a million pounds of assessed weight (dried weight) pistachios per production year (September 1–August 31) with certain aflatoxin testing options and allows such handlers to apply to the committee for an exemption from minimum quality testing. Handlers granted an exemption must pull the samples and maintain these samples in their handling facilities for 90 days for review and audit by the committee when requested. Handlers who are not granted an exemption from minimum quality testing must test all lots for

aflatoxin, quality, and size requirements under the order.

Section 983.42 of the pistachio order provides that handlers may commingle aflatoxin and minimum quality certified lots with other certified lots.

Section 983.43 of the pistachio order provides authority for the committee to recommend the establishment of rules and regulations to specify conditions under which pistachios would be subject to reinspection.

Section 983.70 of the pistachio order exempts handlers who handle 1,000 pounds or less of dried weight pistachios during any marketing year (dried to 5 percent moisture) within the production area from all aflatoxin and minimum quality requirements.

As mentioned earlier, during the production year handlers typically hull and dry pistachios and place the nuts into storage containers. These nuts usually remain in storage until sold. When the nuts are removed from storage, handlers have the option of testing the nuts for aflatoxin prior to further processing (i.e., sorting, sizing, grading, pin-picking (segregating the split- and closed-shell nuts)), or placing the nuts into lots for aflatoxin and minimum quality and size testing after these processes have been completed.

Typically, handlers who handle a million or more pounds of assessed weight pistachios per marketing year further process the nuts prior to testing for aflatoxin and quality requirements. Such handlers, pursuant to § 983.38(d) are required to uniquely identify each lot so that it can be traced from the point of testing through shipment.

After certification for aflatoxin, quality and size or pulling and retaining required samples, the majority of these lots are shipped directly into the channels of commerce. However, some certified lots are readied and retained in the handler's facility in anticipation of future orders.

When handlers receive new orders, they typically either resort or resize existing certified lots of inshell pistachios or create new lots from uncertified stored nuts. When existing certified lots are used, they generally have to be reworked to meet specific buyer needs. For instance, light-stained nuts, dark-stained nuts, insect infested nuts, smaller- or larger-sized nuts, closed shell, or open shell nuts may have to be removed via hand-sorting, color-sorting, pin-picking and/or resizing. Removal of these nuts results in new lots which no longer have representative inspection certificates. Such lots would be considered to have been "materially changed".

Pistachio handlers who handle less than a million pounds of assessed weight pistachios per marketing year and whose pistachios pass aflatoxin testing requirements would not have to comply with the traceability procedures set forth in § 983.38(d). Furthermore, pursuant to § 983.41(a) of the order, such handlers may test their entire inventory (maximum lot size of 150,000 pounds) or segregate receipts into various sized lots and have an inspector sample and have each specified lot tested for aflatoxin and may also, pursuant to § 983.41(b) of the order, apply to the Committee for exemption from minimum quality and size testing.

Because it is more economical for smaller handlers to test larger lots for aflatoxin and to be exempt from minimum quality testing, it is expected that the majority, if not all such handlers, will apply for the exemption from minimum quality and size testing.

Thus, those exempted handlers, who handle more than 1,000 pounds and less than a million pounds of assessed weight pistachios per marketing year, would draw or have one sample drawn per lot. This sample would be divided into two portions, one for aflatoxin and one for minimum quality testing. Typically, when such handlers receive notice that the lots have passed aflatoxin testing requirements, they return the sample portion designated for minimum quality testing to the lot. Such lots are then further processed (sized, sorted, air-legged, pin-picked, and graded). Handlers would then draw a new quality sample, which is required to be maintained for 90 days at the handler's facilities and made available for review or auditing by the committee.

Those handlers who handle more than 1,000 pounds and less than a million pounds and who are not granted such an exemption by the committee are required to meet the traceability procedures as specified in § 983.38(d) of the order and the aflatoxin, quality, and size requirements under the order for each lot of pistachios.

Thus, the committee at its November 3, 2004, meeting, unanimously recommended establishing a new section entitled “§ 983.143—Reinspection” to define the term “materially changed” and to specify handler reinspection requirements.

The committee, at its April 12, 2005, meeting, reconsidered and further clarified its previous recommendation. The committee unanimously recommended that, effective August 1, 2005, lots which are color-sorted, hand-sorted, pin-picked, and/or resized after being initially certified for aflatoxin, quality, and size requirements under the

order be considered “materially changed” and that any portion of a lot (the portion resorted and resized to meet buyer specifications or the portion that was removed from the original lot) be inspected as new lots. The committee clarified that § 983.42 which provides that previously certified lots can be commingled with other certified lots, does not apply to portions of lots which are materially changed under the order, as such newly formed lots may no longer contain the same quantity or quality of inshell pistachios as the original lots.

Lastly, the committee recommended that some handlers be exempt from reinspection requirements under the order. As previously mentioned, § 983.70 of the pistachio order exempts handlers who handle 1,000 pounds or less of dried weight pistachios during any marketing year (dried to 5 percent moisture) from all aflatoxin and minimum quality requirements. Thus, the committee recommended that such handlers also be exempt from any reinspection requirements under the order.

Additionally, § 983.41 of the pistachio order provides that handlers who handle less than 1 million pounds of assessed weight (dried weight) pistachios per production year (September 1–August 31) with certain aflatoxin testing options and allows such handlers to apply to the committee for an exemption from minimum quality and size testing. The order further provides that handlers, who are granted an exemption, shall pull and maintain for 90 days representative lot samples of any lots intended to be shipped into the domestic channels of commerce for review and audit by the committee as requested.

The committee recommended exempting such handlers from reinspection requirements, as typically such handlers pull or have pulled representative lot samples immediately prior to shipment, do not materially change the lots, and ship such lots directly into the domestic channels of commerce and because the committee believed such smaller handlers could be negatively impacted by the additional cost of reinspection.

However, because such handlers could materially change their lots prior to shipment into the domestic channels of commerce, USDA is requiring such handlers to pull or have pulled representative samples of the materially changed lots to assure both the aflatoxin and quality of the pistachios, and to keep the sampling and inspection procedures consistent with order authority. As noted in this document,

the costs for reinspection are expected to be small compared to the benefit of assuring the quality of the pistachios entering commercial channels.

Such representative lot samples would be divided into two parts, one part would be retested for aflatoxin and the other part would be maintained for 90 days at the handler's facilities. Such samples would be stored in the handler's facility and should not add to the handler's cost. Additionally, handlers would be required to make those samples maintained for 90 days available for auditing by the committee.

While handlers who handle more than 1,000 pounds and less than a million pounds may apply to the committee for a minimum quality testing exemption, there may be occasions when the committee does not grant these handlers such an exemption. The committee unanimously recommended that such handlers and any handler who handles more than a million pounds of assessed weight pistachios during the marketing year and who materially changes any lot of pistachios shall test or have tested such lots for aflatoxin and minimum quality and size requirements under the order before shipping such pistachios into the domestic channels of commerce, when the order requirements took effect on August 1, 2005.

The committee also discussed alternatives to this change, including not establishing these reinspection requirements, but believes that consumers should be provided with assurance of a certified high quality product that does not currently exist when a certified lot is “materially changed”. Also, the committee discussed but decided not to include the following processes in the definition of “materially changed”: (1) Roasting, salting, flavoring, dyeing, color-coating, were discussed but not included in the definition as these processes do not alter a lot's minimum quality or maximum aflatoxin levels; (2) cleaning was considered but not included because cleaning typically is accomplished prior to the initial inspection; and (3) air-legging which is performed to remove loose shells, was considered but not included because this process does not significantly change a lot.

Lastly, the committee discussed whether tracing a lot would provide assurance that materially changed lots would continue to meet the order's maximum aflatoxin and minimum quality requirements and believed that it would not provide such assurance. It is of the view that the best way to assure the quality of materially changed lots was through resampling and retesting.

The committee also discussed the slight increase in the cost of inspection and the benefits of this action for handlers, consumers, and producers. Typically, nuts removed from materially changed lots are blended into other lots of uninspected inshell pistachios, shelled out into kernels, dyed or color-coated, or discarded. Very few inshell pistachios are discarded, as handlers typically further process the nuts to obtain as many marketable nuts as possible.

Closed-shell pistachios that are not blended into other uninspected lots are typically shelled out into kernels. Kernels are marketed on average of \$1.00 per pound on the domestic market and can be marketed in some export markets for \$2.00 to \$3.00 per pound. Ordinarily, the dark-stained pistachios that are not blended into other uninspected lots are dyed or color-coated and are marketed for \$2.00 per pound in the domestic market, slightly less than the price received for natural condition, inshell pistachios. Dyed or color-coated nuts occasionally can be marketed in export markets, as well. The committee mentioned that the cost of resorting and resizing lots varies from lot to lot, and that such costs are dependent upon whether the product is hand sorted or mechanically sorted, the size of the lot, the percentage of the lot removed, and other similar factors. The committee believes that the overall handler cost for resorting and/or resizing such lots is typically insignificant compared to the prices received for better quality lots.

In reviewing inspection costs, the committee believes that a typical initial aflatoxin certification costs approximately \$70 per lot and an initial minimum quality inspection costs \$100 per lot. Buyers and consumers are willing to pay more for more appealing pistachios. Therefore, the committee expects that handlers will market these materially changed lots at prices that will offset the combined costs of initial inspection, reprocessing, and reinspection.

Thus, this action is expected to benefit handlers, buyers, and consumers. Handlers and buyers would be able to offer higher quality lots, and consumers would receive more appealing, higher-quality pistachios. These higher quality lots should also contribute to improved grower returns.

The committee does not foresee any industry problems that may result from implementation of this final rule.

This action will not impose any additional reporting or recordkeeping requirements on either small or large pistachio 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.

As noted in the initial regulatory flexibility analysis, USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this final rule. Further, the public comments received concerning the proposed rule did not address the initial regulatory flexibility analysis.

In addition, the committee's meetings were widely publicized throughout the pistachio industry and all interested persons were encouraged to attend the meetings and participate in the committee's deliberations on all issues. Like all committee meetings, the November 3, 2004; December 15, 2004; and April 12, 2005; meetings, were public meetings and all entities, both large and small, were encouraged to express their views on these issues.

A proposed rule concerning this action was published in the **Federal Register** on August 25, 2005 (70 FR 49885). Copies of the rule were provided to all the committee members and pistachio handlers. Finally, the rule was made available through the Internet by USDA and the Office of the Federal Register. A seven-day comment period ending September 1, 2005, was provided to allow interested persons to respond to the proposal.

One comment was received during the comment period in response to the proposal. The commenter, representing the Administrative Committee for Pistachios, was concerned that the committee's recommendation on reinspection had been misinterpreted in the proposed rule. The commenter expressed concerns that the rule requires reinspection of lots of pistachios for handlers who handle more than a 1,000 pounds and less than a million pounds of pistachios after "further processing" pistachios, and that the costs of this would burden smaller handlers. The commenter went on to recommend a change to § 983.143(b)(1) which would include an exemption from reinspection requirements if a handler was exempt from minimum quality testing under § 981.41(b).

We disagree. In promulgating § 983.41 of the order concerning the testing of minimal quantities, the procedures for aflatoxin testing were separated from those concerning minimum quality. The consideration given in § 983.41(b) applies solely to testing for minimum quality and size requirements, rather than for aflatoxin. As required under § 983.41, handlers handling less than a

million pounds of pistachios are afforded the option of utilizing two methods of aflatoxin testing. Thus, the impact of this change should be minimal especially given the potentially small number of handlers and pistachios that could be affected. The committee estimates that 14 handlers could be affected and they handle less than 1 percent of the inshell pistachios produced in California. The quantities handled of all 14 (except one) fall well short of one million pounds.

This rule requires reinspection only if the lot is "materially changed" (pin-picked, hand-sorted, color-sorted, and/or resized) after sampling and inspection. If other further processing (sizing, sorting, roasting, salting, etc.) occurs, reinspection is not required.

Accordingly, no changes will be made to the rule, as proposed, based on the comment received.

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/fv/moab.html>. Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant matters presented, including the information and recommendations 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.

It is further found that good cause exists for not postponing the effective date of this rule until 30 days after the publication in the **Federal Register** (5 U.S.C. 553) because the 2005 harvest has begun and this rule should be in place as soon as possible so that it can be applied to the pistachios handled in this production year. Further, handlers are aware of this rule, which was discussed in a public meeting. Also, a seven-day comment period was provided for in the proposed rule, and the comment received has been considered.

List of Subjects in 7 CFR Part 983

Pistachios, Marketing agreements and orders, 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

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

Authority: 7 U.S.C. 601–674.

■ 2. In part 983, Subpart—Rules and Regulations is amended by adding new § 983.138 to read as follows:

§ 983.138 Samples for testing.

Prior to testing, a sample shall be drawn from each lot and divided into two subsamples to be used to test pistachios for aflatoxin and for minimum quality. The lot subsamples shall be of sufficient weight to comply with Tables 1 and 2 of § 983.38 and Table 4 of § 983.39: *Provided*, That lots of pistachios which are intended for dyeing or color-coating shall be sampled for minimum quality after the dyeing or color-coating process.

■ 3. In part 983, Subpart—Rules and Regulations is amended by adding § 983.143 to read as follows:

§ 983.143 Reinspection.

(a) Any lot of inshell pistachios that is pin-picked, hand-sorted, color-sorted, and/or resized is considered to be “materially changed.” Pistachios which are roasted, salted, flavored, air-legged, dyed, color-coated, cleaned, and otherwise subjected to similar processes are not considered to be materially changed.

(b) Each handler who handles pistachios shall cause any lot or portion of a lot initially certified for aflatoxin, quality, and size requirements, and subsequently materially changed, to be reinspected for aflatoxin, quality, and size, and certified as new lots: *Provided*, That:

(1) Pursuant to § 983.41(b) handlers exempted from minimum quality testing shall pull or have pulled representative lot samples for aflatoxin testing of any materially changed lots intended to be shipped into the domestic channels of commerce. Such representative lot samples shall be divided into two parts, one part shall be retested for aflatoxin and the other part shall be maintained for 90 days at the handler’s facilities. Handlers shall make the samples maintained for 90 days available for auditing by the Administrative Committee for Pistachios; and

(2) Handlers exempted from order requirements under § 983.70 are exempted from all reinspection requirements.

Dated: October 18, 2005.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

[FR Doc. 05–21167 Filed 10–20–05; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Part 77

[Docket No. 04–068–3]

Tuberculosis in Cattle and Bison; State and Zone Designations; New Mexico

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Affirmation of interim rule as final rule.

SUMMARY: We are adopting as a final rule, without change, an interim rule that amended the bovine tuberculosis regulations regarding State and zone classifications by removing New Mexico from the list of modified accredited advanced States, adding portions of two counties in New Mexico to the list of modified accredited advanced zones, and adding the remainder of the State to the list of accredited-free zones. We took this action based on our determination that New Mexico met the requirements of the regulations for zone recognition and that one of the zones met the criteria for designation as accredited-free.

EFFECTIVE DATE: The interim rule became effective on July 22, 2005.

FOR FURTHER INFORMATION CONTACT: Dr. M.J. Gilsdorf, Director, Ruminant Health Programs, National Center for Animal Health Programs, VS, APHIS, 4700 River Road Unit 43, Riverdale, MD 20737–1231; (301) 734–6954.

SUPPLEMENTARY INFORMATION:

Background

In an interim rule effective and published in the **Federal Register** on July 22, 2005 (70 FR 42259–42261, Docket No. 04–068–1), we amended the tuberculosis regulations in 9 CFR part 77 by removing New Mexico from the list of modified accredited advanced States in § 77.9(a), adding portions of two counties in New Mexico to the list of modified accredited advanced zones in § 77.9(b), and adding the remainder of the State to the list of accredited-free zones in § 77.7(b).

On August 12, 2005, we published a document in the **Federal Register** (70 FR 47078, Docket No. 04–068–2), correcting an error in the above-mentioned rule. When we set out the revised § 77.9(a) in the July 2005 interim rule, we inadvertently included California on the list of modified accredited advanced States. California was added to the list of accredited free States in § 77.7(a) in an interim rule

published in the **Federal Register** on April 15, 2005 (70 FR 19877–19878, Docket No. 05–010–1). Our August 2005 document corrected that error by removing California from the list of modified accredited advanced States in § 77.9(a).

Comments on the interim rule were required to be received on or before September 20, 2005. We received one comment by that date. The comment was from a State agricultural agency. The commenter supported the interim rule. Therefore, for the reasons given in the interim rule, we are adopting the interim rule as a final rule.

This action also affirms the information contained in the interim rule concerning Executive Order 12866 and the Regulatory Flexibility Act, Executive Orders 12372 and 12988, and the Paperwork Reduction Act.

Further, for this action, the Office of Management and Budget has waived its review under Executive Order 12866.

List of Subjects in 9 CFR Part 77

Animal diseases, Bison, Cattle, Reporting and recordkeeping requirements, Transportation, Tuberculosis.

PART 77—TUBERCULOSIS

■ Accordingly, we are adopting as a final rule, without change, the interim rule that amended 9 CFR part 77 and that was published at 70 FR 42259–42261 on July 22, 2005, as corrected by the correcting amendment published at 70 FR 47078 on August 12, 2005.

Done in Washington, DC, this 17th day of October 2005.

W. Ron DeHaven,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 05–21082 Filed 10–20–05; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2005–21086; Directorate Identifier 2004–NM–217–AD; Amendment 39–14344; AD 2005–21–06]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 737–600, –700, –700C, –800, and –900 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.