Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 51

[Docket Number FV–04–310]

RIN# 0581–AC46

Revision of Fees for the Fresh Fruit and Vegetable Terminal Market Inspection Services

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This proposed rule revises regulations governing the inspection and certification for fresh fruits, vegetables and other products by increasing by approximately 15 percent certain fees charged for the inspection of these products at destination markets. These revisions are necessary in order to recover, as nearly as practicable, the costs of performing inspection services at destination markets.

DATES: Comments must be postmarked, courier dated, or sent via the Internet on or before September 26, 2005.

ADDRESSES: Interested persons are invited to submit written comments concerning this proposal. Comments can be sent to: (1) U.S. Department of Agriculture, Agricultural Marketing Service, Fruit and Vegetable Programs, Fresh Products Branch, 1400 Independence Ave., SW., Room 0640–S, Washington, DC 20250–0295; (2) faxed to (202) 720–5136; (3) via e-mail to *FPB.DocketClerk@usda.gov.;* or (4) Internet: *http://www.regulations.gov.* Comments should make reference to the date and page number of this issue of the **Federal Register** and will be made available for public inspection in the above office during regular business hours.

FOR FURTHER INFORMATION CONTACT: Rita Bibbs-Booth, USDA, 1400 Independence Ave., SW., Room 0640–S, Washington, DC 20250–0295, or call (202) 720–0391.

SUPPLEMENTARY INFORMATION:

Executive Order 12866 and Regulatory Flexibility Act

This rule has been determined to be ''non-significant'' for the purposes of Executive Order 12866, and therefore, has not been reviewed by the Office of Management and Budget.

Also, pursuant to the requirement set forth in the Regulatory Flexibility Act (RFA), AMS has considered the economic impact of this action on small entities. Accordingly, AMS proposes this initial 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. The proposed action described herein is being taken for several reasons, including that additional user fee revenues are needed to cover the costs or: (1) Providing current program operations and services: (2) improving the timeliness in which inspection services are provided; and (3) improving the work environment.

AMS regularly reviews its user-fee financed programs to determine if the fees are adequate. The Fresh Products Branch (FPB) has and will continue to seek out cost saving opportunities and implement appropriate changes to reduce its costs. Such actions can provide alternatives to fee increases. However, even with these efforts, FPB's existing fee schedule will not generate sufficient revenue to cover program costs while maintaining the Agency mandated reserve balance. Current revenue projections for FPB's destination market inspection work during FY 2005 are $14.6 million with costs projected at $20.9 million and an end-of-year reserve balance of $16.4 million. However, this reserve balance is due to appropriated funding received in October 2001, for infrastructure, workplace, and technological improvements. FPB's costs of operating the destination market program are expected to increase to approximately $22.4 million during FY–06 and $23.1 million during FY–07. The current fee structure with the infusion of the appropriated funding is expected to fund the terminal market inspection program until FY–2008, when FPB will fall below the Agency's mandated four-month reserve level.

This proposed fee increase should result in an estimated $1.8 million in additional revenues per year (effective in FY–2006, if the fees are implemented by October 1, 2005). This will not cover all of FPB's costs. FPB will need to continue to increase fees in order to cover the program's operating cost and maintain the required reserve balance. FPB believes that increasing fees incrementally is appropriate at this time. Additional fee increases beyond FY–2006 will be needed to sustain the program in the future.

Employee salaries and benefits are major program costs that account for approximately 80 percent of FPB's total operating budget. A general and locality salary increase for Federal employees, ranging from 3.71 to 4.87 percent depending on locality, effective January 2005, has significantly increased program costs. In addition, general and locality salary increases for Federal employees ranging from 3.90% to 4.92% depending on locality, effective from January 2004, also significantly increased program costs. This salary adjustment will increase FPB's costs by over $700,000 per year. Increases in health and life insurance premiums, along with workers compensation will also increase program costs. In addition, inflation also impacts FPB's non-salary costs. These factors have increased FPB's costs of operating this program by over $600,000 per year.

Additional funds of approximately $155,000 are necessary in order for FPB to continue to cover the costs associated with additional staff and to maintain office space and equipment. Additional revenues are also necessary to improve the work environment by providing training and purchasing needed equipment. In addition, FPB began in 2001, developing (with appropriated funds) the Fresh Electronic Inspection Reporting/Resource System (FEIRS) to replace its manual paper and pen inspection reporting process. FEIRS was implemented in 2004. This system has been put in place to enhance and streamline FPB's fruit and vegetable inspection process, however additional revenue is required to maintain FEIRS.

This proposed rule should increase user fee revenue generated under the destination market program by approximately 15 percent. This action is authorized under the Agricultural Marketing Act of 1946 (AMA of 1946)

(See 7 U.S.C. 1622(h)), which provides that the Secretary of Agriculture may assess and collect ''such fees as will be reasonable and as nearly as may be to cover the costs of services rendered * * *'' There are more than 2,000 users of FPB's destination market grading services (including applicants who must meet import requirements [1]—inspections which amount to under 2.5 percent of all lot inspections performed). A small portion of these users are small entities under the criteria established by the Small Business Administration (13 CFR 121.201). There would be no additional reporting, recordkeeping, or other compliance requirements imposed upon small entities as a result of this proposed rule. In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the information collection and recordkeeping requirements in part 51 have been approved previously by OMB and assigned OMB No. 0581–0125. FPB has not identified any other Federal rules which may duplicate, overlap or conflict with this proposed rule.

The destination market grading services are voluntary (except when required for imported commodities) and the fees charged to users of these services vary with usage. However, the impact on all businesses, including small entities, is very similar. Further, even though fees will be raised, the increase is not excessive and should not significantly affect these entities. Finally, except for those persons who are required to obtain inspections, most of these businesses are typically under no obligation to use these inspection services, and, therefore, any decision on their part to discontinue the use of the services should not prevent them from marketing their products.

Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. This action 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. There are no administrative procedures which must be exhausted prior to any judicial challenge to the provisions of this rule.

Proposed Action

The AMA of 1946 authorizes official inspection, grading, and certification, on a user-fee basis, of fresh fruits, vegetables and other products such as raw nuts, Christmas trees and flowers. The AMA of 1946 provides that reasonable fees be collected from the users of the services to cover, as nearly as practicable, the cost of the services rendered. This proposed rule would amend the schedule for fees and charges for inspection services rendered to the fresh fruit and vegetable industry to reflect the costs necessary to operate the program.

The Agricultural Marketing Service (AMS) regularly reviews its user-fee programs to determine if the fees are adequate. While the Fresh Products Branch (FPB) of the Fruit and Vegetable Programs, AMS, continues to search for opportunities to reduce its costs, the existing fee schedule will not generate sufficient revenues to cover program costs while maintaining the Agency mandated reserve balance. Current revenue projections for destination market inspection work during FY–05 are $14.6 million with costs projected at $20.9 million and an end-of-year reserve of $17.9 million. However, this reserve balance is due to appropriated funding received from Congress in October of 2001. These funds were established to build up the terminal market inspection reserve fund and for infrastructure improvements including development and maintenance of the inspector training center, workplace and technological improvements, including digital imaging and automation of the inspection process. However, by FY–08, without increasing fees, FPB's trust fund balance for this program will be below the agency mandated four-months of operating reserve (approximately $4.6 million) deemed necessary to provide an adequate reserve balance in light of increasing program costs. Further, FPB's costs of operating the destination market program are expected to increase to approximately $22 million in FY–06 and to approximately $22.8 million during FY–07. These cost increases (which are outlined below) will result from inflationary increases with regard to current FPB operations and services (primarily salaries and benefit), increased inspection demands, and the acquisition and maintenance of computer technology (*i.e.* FEIRS).

Employee salaries and benefits are major program costs that account for approximately 80 percent of FPB's total operating budget. A general and locality salary increase for Federal employees, ranging from 3.71 to 4.87 percent depending on locality, effective January 2005, has significantly increased program costs. In addition, general and locality salary increases for Federal employees ranging from 3.90% to 4.92% depending on locality, effective from January 2004, also significantly increased program costs. This salary adjustment will increase FPB's costs by over $700,000 per year. Increases in health and life insurance premiums, along with workers compensation will also increase program costs. In addition, inflation also impacts FPB's non-costs. These factors have increased FPB's costs of operating this program by over $600,000 per year.

Additional revenues (approximately $155,000) are necessary in order for FPB to continue to cover the costs associated with additional staff and to maintain office space and equipment. Additional revenues are also necessary to continue to improve the work environment by providing training and purchasing needed equipment. In addition, FPB began in 2001, developing (with appropriate funds) an automated system known as FEIRS, to replace its manual paper and pen inspection reporting process. Approximately $10,000 in additional revenue per month will be needed to maintain the system. This system has been put in place to enhance FPB's fruit and vegetable inspection processes.

Based on the aforementioned analysis of this program's increasing costs, AMS proposes to increase the fees for destination market inspection services. The following table compares current fees and charges with the proposed fees and charges for fresh fruit and vegetable inspection as found in 7 CFR 51.38. Unless otherwise provided for by regulation or written agreement between the applicant and the Administrator, the charge in the schedule of fees as found in § 51.38 are:

[1] Section 8e of the Agriculture Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), requires that whatever the Secretary of Agriculture issues grade, size, quality or maturity regulations under domestic marketing orders for certain commodities, the same or comparable regulations on imports of those commodities must be issued. Import regulations apply during those periods when domestic marketing order commodities must be issued. Import regulations apply during those periods when domestic marketing order regulations are in effect. Section 1308 of the Farm Security and Rural Investment Act of 2002 (Pub. L. 107–171), 7 U.S.C. 7958, requires USDA among other things to develop new peanut quality and handling standards for imported peanuts marketing in the United States.

Currently, there are 14 commodities subject to 8e import regulations: avocados, dates (other than dates for processing), filberts, grapefruits, kiwifruit, olives (other than Spanish-style green olives), onions, oranges, potatoes, prunes, raisins, table grapes, tomatoes and walnuts. A current listing of the regulated commodities can be found under 7 CFR parts 944, 980, 996, and 999.

Service	Current	Proposed
Quality and condition inspections of products each in quantities of 51 or more packages and unloaded from the same land or air conveyance:		
—Over a half carlot equivalent of each product	$99.00	$114.00
—Half carlot equivalent or less of each product	83.00	95.00
—For each additional lot of the same product	45.00	52.00
Condition only inspections of products each in quantities of 51 or more packages and unloaded from the same land or air conveyance:		
—Over a half carlot equivalent of each product	83.00	95.00
—Half carlot equivalent or less of each product	76.00	87.00
—For each additional lot of the same product	45.00	52.00
Quality and condition and condition only inspections of products each in quantities of 50 or less packages unloaded from the same land or air conveyance:		
—For each product	45.00	52.00
—For each additional lot of any of the same product	45.00	52.00
—Lots in excess of carlot equivalents will be charged proportionally by the quarter carlot	....	....
Dock side inspections of an individual product unloaded directly from the same ship:		
—For each package weighing less than 30 pounds	[1] 2.5	[1] 2.9
—For each package weighing 30 or more pounds	[1] 3.8	[1] 4.4
—Minimum charge per individual product	99.00	114.00
—Minimum charge for each additional lot of the same product	45.00	52.00
Hourly rate for inspections performed for other purposes during the grader's regularly scheduled work week	49.00	56.00
—Hourly rate for other work performed during the grader's regular scheduled work week will be charged at a reasonable rate	....	....
Audit based services	....	75.00
Overtime or holiday premium rate (per hour additional) for all inspections performed outside the grader's regularly scheduled work week	25.00	29.00
Hourly rate for inspections performed under 40 hour contracts during the grader's regularly scheduled work week	49.00	56.00
Rate for billable mileage	1.00	1.00

[1] Cents.

A thirty day comment period is provided for interested persons to comment on this proposed action. Thirty days is deemed appropriate because it is preferable to have any fee increase, if adopted, to be in place as close as possible to the beginning of the fiscal year, October 1, 2005.

List of Subjects in 7 CFR Part 51

Agricultural commodities, Food grades and standards, Fruits, Nuts, Reporting and record keeping requirements, Trees, Vegetables.

For reasons set forth in the preamble, 7 CFR part 51 is proposed to be amended as follows:

PART 51—[AMENDED]

1. The authority citation for 7 CFR part 51 continues to read as follows:

Authority: 7 U.S.C. 1621–1627.

2. Section 51.38 is revised to read as follows:

§ 51.38 Basis for fees and rates.

(a) When performing inspections of product unloaded directly from land or air transportation, the charges shall be determined on the following basis:

(1) Quality and condition inspections of products in quantities of 51 or more packages and unloaded from the same air or land conveyance:

(i) $114 for over a half carlot equivalent of an individual product;

(ii) $95 for a half carlot equivalent or less of an individual product;

(iii) $52 for each additional lot of the same product.

(2) Condition only inspection of products each in quantities of 51 or more packages and unloaded from the same land or air conveyance:

(i) $95 for over a half carlot equivalent of an individual product;

(ii) $87 for a half carlot equivalent or less of an individual product;

(iii) $52 for each additional lot of the same product.

(3) For quality and condition inspection and condition only inspection of products in quantities of 50 or less packages unloaded from the same conveyance:

(i) $52 for each individual product;

(ii) $52 for each additional lot of any of the same product. Lots in excess of carlot equivalents will be charged proportionally by the quarter carlot.

(b) When performing inspections of palletized products unloaded directly from sea transportation or when palletized product is first offered for inspection before being transported from the dock-side facility, charges shall be determined on the following basis:

(1) Dock side inspections of an individual product unloaded directly from the same ship:

(i) 2.9 cents per package weighing less than 30 pounds;

(ii) 4.4 cents per package weighing 30 or more pounds;

(iii) Minimum charge of $114 per individual product;

(iv) Minimum charge of $52 for each additional lot of the same product.

(2) [Reserved].

(c) When performing inspections of products from sea containers unloaded directly from sea transportation or when palletized products unloaded directly from sea transportation are not offered for inspection at dock-side, the carlot fees in paragraph (a) of this section shall apply.

(d) When performing inspections for Government agencies, or for purposes other than those prescribed in paragraphs (a) through (c) of this section, including weight-only and freezing-only inspections, fees for inspections shall be based on the time consumed by the grader in connection with such inspections, computed at a rate of $56 per hour: *Provided,* That:

(1) Charges for time shall be rounded to the nearest half hour.

(2) The minimum fee shall be two hours for weight-only inspections, and one-half hour for other inspections.

(3) When weight certification is provided in addition to quality and/or condition inspection, a one hour charge shall be added to the carlot fee.

(4) When inspections are performed to certify product compliance for Defense Personnel Support Centers, the daily or weekly charge shall be determined by multiplying the total hours consumed to

conduct inspections by the hourly rate. The daily or weekly charge shall be prorated among applicants by multiplying the daily or weekly charge by the percentage of product passed and/or failed for each applicant during that day or week. Waiting time and overtime charges shall be charged directly to the applicant responsible for their incurrence.

(e) When performing inspections at the request of the applicant during periods which are outside the grader's regularly scheduled work week, a charge for overtime or holiday work shall be made at the rate of $29.00 per hour or portion thereof in addition to the carlot equivalent fee, package charge, or hourly charge specified in this subpart. Overtime or holiday charges for time shall be rounded to the nearest half hour.

(f) When an inspection is delayed because product is not available or readily accessible, a charge for waiting time shall be made at the prevailing hourly rate in addition to the carlot equivalent fee, package charge, or hourly charge specified in this subpart. Waiting time shall be rounded to the nearest half hour.

Dated: August 18, 2005.

Kenneth C. Clayton,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 05–16863 Filed 8–24–05; 8:45 am]

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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 983

[Docket No. FV05–983–2 PR]

Pistachios Grown in California; Establishment of Additional Inspection Requirements

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This rule invites comments on the establishment of 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 would modify sampling procedures for dark-stained pistachios which are intended to be dyed or color-coated. It would also establish 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, 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: Comments must be received by September 1, 2005.

ADDRESSES: Interested persons are invited to submit written comments concerning this proposal. Comments must be sent to the Docket Clerk, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250–0237; Fax: (202) 720–8938, or E-mail: *moab.docketclerk@usda.gov,* or Internet: *http://www.regulations.gov.* All comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be made available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: *http://www.ams.usda.gov/fv/moab.html.*

FOR FURTHER INFORMATION CONTACT: Rose Aguayo or Terry Vawter, Marketing Specialists, California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA; Telephone: (559) 487–5901, Fax: (559) 487–5906; or George Kelhart, Technical Advisor, 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.

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 proposal 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 proposal has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect. This proposal 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 would modify sampling procedures for dark-stained pistachios which are intended to be dyed or color-coated. It would also establish 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, and improve the marketability of pistachios. The benefits of this action are expected to offset the increased inspection costs. For the purposes of this proposed 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, minimum quality and minimum 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