

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]

BILLING CODE 3410-02-P

## 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](mailto: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](mailto: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

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 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, because they are generally not marketable in their natural state. The staining 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 are 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 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 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 for the 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 minimum 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 testing. 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 8 in favor and 0 opposed.

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 improvement in the marketability of these pistachios is expected to offset the additional costs. When the dark-stained pistachios are 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 dyed or color-coated inshell pistachios.

Producers, handlers, and consumers benefit from dyeing or color-coating, because dyeing or color-coating dark-stained inshell pistachios results in nuts having a more desirable color. This makes the nuts more appealing to retailers and consumers. Thus, retailers are willing to pay on average \$2.00 per

pound for these previously unmarketable dark-stained inshell pistachios. This increased value also is expected to contribute to improved or maintained producer returns.

### Reinspection

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

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

Section 983.41 of the pistachio order provides 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 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 testing, must test all lots for aflatoxin, quality, and size requirements under the order. This section also took effect August 1, 2005.

Section 983.42 of the pistachio order provides that handlers may commingle aflatoxin and minimum quality certified lots with other certified lots. This section took effect August 1, 2005.

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. This section, too, took effect August 1, 2005.

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 an order is received from a buyer. When the nuts are removed from storage, handlers have the option of sampling and having the nuts tested 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.

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 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.

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".

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 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.

### Initial 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 initial 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 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 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, improve the marketability of pistachios, and enhance the marketability of reworked pistachios. These benefits are expected to offset 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 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 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 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 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 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, and 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 part 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 minimum size testing to the lot, dye or color-coat the lot, and draw or have drawn a second representative dyed 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 8 in favor and 0 opposed.

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 allow 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.

#### Reinspection

Sections 983.38 and 983.39 of the order specify maximum aflatoxin requirements, and minimum quality and minimum 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 be uniquely identified and traceable from testing through shipment by the handler.

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 983.41 of the pistachio order provides 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 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. This section took effect August 1, 2005.

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. This section, too, took effect August 1, 2005.

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 an order is received from a buyer. 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, 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.

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 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 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.

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".

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–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 proposing to require such handlers to pull or have pulled representative samples of the materially changed lots to assure the 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 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 per 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 for \$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 also should contribute to improved grower returns.

The Committee does not foresee any industry problems that may result from implementation of this recommendation.

This action would 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.

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

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, December 15, 2004, and April 12, 2005, meetings, were public meetings and all entities, both large and small, were able to express their views on these issues. Finally, interested persons are invited to submit information on the regulatory and informational impacts of this action on small businesses.

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.

A 7-day comment period is provided to allow interested persons to respond to this proposal. Seven days is deemed appropriate because any changes resulting from this proposed rule should be in place by mid-September. The beginning of harvest for the 2005-06 season is expected to start at the end of August and handlers are expected to begin reworking their lots of pistachios by mid-September. All written comments timely received will be considered before a final determination is made on this matter.

#### **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 proposed to be 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 and 983.143 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.

#### § 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: August 22, 2005.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

[FR Doc. 05-16981 Filed 8-23-05; 11:52 am]

BILLING CODE 3410-02-P

## FEDERAL RESERVE SYSTEM

### 12 CFR Part 205

[Regulation E; Docket No. R-1234]

#### Electronic Fund Transfers

**AGENCY:** Board of Governors of the Federal Reserve System.

**ACTION:** Proposed rule; official staff interpretation.

**SUMMARY:** The Board is publishing for comment a proposal to amend Regulation E, which implements the

Electronic Fund Transfer Act (EFTA). The proposal would also revise the official staff commentary to the regulation. The commentary interprets the requirements of Regulation E to facilitate compliance primarily by financial institutions that offer electronic fund transfer services to consumers.

The proposed revisions would clarify the disclosure obligations of automated teller machine (ATM) operators with respect to fees imposed on a consumer for initiating an electronic fund transfer or a balance inquiry at an ATM. The Board is withdrawing previously proposed revisions to the Regulation E staff commentary that would have addressed this issue.

**DATES:** Comments must be received on or before October 7, 2005.

**ADDRESSES:** You may submit comments, identified by Docket No. R-1234, by any of the following methods:

- Agency Web site: <http://www.federalreserve.gov>. Follow the instructions for submitting comments at <http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm>.

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

- E-mail: [regs.comments@federalreserve.gov](mailto:regs.comments@federalreserve.gov). Include docket number in the subject line of the message.

- FAX: 202/452-3819 or 202/452-3102.

- Mail: Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551.

All public comments are available from the Board's Web site at <http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm> as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper in Room MP-500 of the Board's Martin Building (20th and C Streets, NW.) between 9 a.m. and 5 p.m. on weekdays.

**FOR FURTHER INFORMATION CONTACT:** Ky Tran-Trong, Senior Attorney, or Daniel G. Lonergan, David A. Stein, Natalie E. Taylor or John C. Wood, Counsels, Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System, Washington, DC 20551, at (202) 452-2412 or (202) 452-3667. For users of Telecommunications Device for the Deaf (TDD) only, contact (202) 263-4869.

**SUPPLEMENTARY INFORMATION:**

#### I. Background

The Electronic Fund Transfer Act (EFTA or Act) (15 U.S.C. 1693 *et seq.*), enacted in 1978, establishes the rights, liabilities, and responsibilities of participants in electronic fund transfer (EFT) systems. The Board's Regulation E (12 CFR part 205) implements the EFTA. Examples of types of transfers covered by the Act and regulation include transfers initiated through an automated teller machine (ATM), point-of-sale (POS) terminal, automated clearinghouse (ACH), telephone bill-payment plan, or remote banking service. The Act and regulation require disclosure of terms and conditions of an EFT service; documentation of electronic transfers by means of terminal receipts and periodic account activity statements; limitations on consumer liability for unauthorized transfers; procedures for error resolution; and certain rights related to preauthorized EFTs.

The Official Staff Commentary (12 CFR part 205 (Supp. I)) is designed to facilitate compliance and provide protection from liability under sections 915 and 916 of the EFTA for financial institutions and persons subject to the Act. 15 U.S.C. 1593m(d)(1). The commentary is updated periodically, as necessary, to address significant questions that arise.

#### II. Summary of Proposed Revisions

Section 205.16 provides that an ATM operator that imposes a fee on a consumer for initiating an EFT or a balance inquiry must post notices at ATMs that a fee will be imposed. Section 205.16(b) would be revised to clarify the operation of the ATM signage rule when fees are not imposed by the ATM operator on all consumers. The revised language specifically clarifies the intent of the rule that ATM operators may provide a notice that a fee *may* be imposed if there are circumstances in which an ATM fee will not be charged for a particular transaction, such as where the card has been issued by a foreign bank or the card issuer has entered into a contractual relationship with the ATM operator regarding surcharges.

Section 205.16 does not require that any sign be posted if no fee is charged to the consumer by the ATM operator. The rule is intended to allow consumers to identify immediately ATMs that generally charge a fee for use. It is not intended to represent a complete disclosure to the consumer regarding the fees associated with the particular type of transaction the consumer seeks to conduct. Rather, a more detailed