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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 983

[Docket No. FV05-983-4 FIR]

#### **Pistachios Grown in California; Establishment of Procedures for Exempting Handlers From Minimum Quality Testing**

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** The Department of Agriculture (USDA) is adopting, as a final rule, without change, an interim final rule that established procedures for exempting handlers from quality requirements, including maximum limits for quality defects and minimum size, prescribed 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). These procedures will be used by the committee in considering handler requests for exemptions from minimum quality testing requirements and when considering revocations of such exemptions. Additionally, this final rule continues in effect the establishment of an appeals process for handlers who have been denied an exemption or had an approved exemption revoked.

**EFFECTIVE DATE:** November 28, 2005.

**FOR FURTHER INFORMATION CONTACT:** Terry Vawter, 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 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 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 continues in effect the establishment of procedures for use by the committee in exempting handlers from minimum quality (maximum limits for quality defects and minimum

size) testing requirements prescribed under the order. The committee, or its duly authorized agents, will also use these procedures when considering the revocation of exemptions for good cause, and when considering appeals of handlers who have had exemptions denied or revoked.

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

Section 983.41 of the pistachio order authorizes exemptions from minimum quality testing requirements for handlers handling less than 1 million pounds of assessed weight pistachios per production year (September 1-August 31) and specifies that the committee may grant handler exemptions. For the purposes of this document, the term "production year" is synonymous with "marketing year".

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

Section 983.147 of the pistachio order establishes handler reporting requirements (ACP Forms 2-7) and exempts handlers who handle 1,000 pounds or less of dried weight pistachios from all reporting requirements with the exception of ACP Form-4. Handlers who have handled or intend to handle 1,000 pounds or less of dried weight pistachios during the production year (September 1-August 31) must submit ACP Form-4 by November 15 each year to the committee.

The recommended decision, published on August 4, 2003, (68 FR 45990), indicated that implementing regulations would effectuate the declared policy of the Act by establishing the specific procedures for exempting handlers who handle more than 1,000 pounds and less than 1 million pounds of assessed weight pistachios per production year (September 1-August 31) from minimum quality testing requirements.

Under these authorities, the committee at its April 12, 2005, meeting, unanimously recommended establishing a new section entitled,

“§ 983.141—Procedures for Exempting Handlers from Minimum Quality Testing” to specify appropriate exemption, revocation, and appeal procedures. The committee believes that standardized procedures would ensure equitable treatment of applicants for exemptions and those handlers subject to the revocation of such exemptions.

The committee also recommended that handler exemptions under § 983.41(b) not be granted if a handler failed to file required reports, shipped substandard pistachios, or failed to comply with the requirements specified in § 983.41 on exemptions for minimum quality testing. Revocation of approved exemptions could be implemented by the committee, or its duly authorized agents, for the same reasons.

Additionally, the committee recommended that any handler who believes that he/she has been improperly denied an exemption or improperly had an exemption revoked by the committee should be allowed to appeal the committee's action to USDA. The committee recommended that the USDA review any appeals and determine their merit. All appeals must be submitted in writing, and the committee will provide USDA the complete file on each appeal.

The recommended exemption procedures require the committee, or its duly authorized agents, to timely notify all handlers of the opportunity to apply to be exempted from minimum quality testing so that all interested handlers can submit applications on forms provided by the committee by the August 1 deadline; promptly review all requests for exemption; verify that the quantity of assessed weight pistachios handled by any applicants during the prior production year was less than 1 million pounds of assessed weight and that applicants are in compliance with the order's inspection, quality, and reporting requirements; approve or disapprove requests for exemptions by August 20 of each year; maintain complete files concerning the approval or disapproval of each handler's application; and notify handlers by August 30 of approval or disapproval.

A handler's exemption would be revoked by the committee, or its duly authorized agents, if the handler fails to provide reports required under this part, or has not complied with the provisions on minimal quantity testing in § 983.41. Additionally, the committee, or its duly authorized agents, would revoke an approved exemption when a handler audit reveals that a handler has handled a million pounds or more of assessed weight pistachios during the applicable production year. The revocation of a

handler's exemption would be made in writing to the handler and specify the reason(s) for and the effective date of the revocation.

Any handler who believes that he/she has been improperly denied an exemption or improperly had an exemption revoked may appeal to USDA for reconsideration within 20 days after notification of the committee's findings. All appeals must be in writing.

The committee, or its duly authorized agents, shall forward all pertinent information related to the handler's appeal to USDA. USDA shall inform the handler and all interested persons of the Secretary's decision.

As previously mentioned, under § 983.70 of the order, this rule continues in effect the application to handlers handling more than 1,000 pounds and less than 1 million pounds because handlers who handle 1,000 pounds or less of dried weight pistachios are exempt from assessment, aflatoxin, and minimum quality requirements and from all reporting requirements under § 983.147 of the order's administrative rules and regulations, with the exception of filing ACP Form-4.

#### **Final Regulatory Flexibility Analysis**

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities.

Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and 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 who are subject to regulation under the order and about 741 producers of pistachios in the production area. The Small Business Administration (SBA) (13 CFR 121.20) defines small agricultural service firms as those having annual receipts of less than \$6,000,000, and small agricultural producers are defined as those having annual receipts of less than \$750,000. Seventeen of the 24 handlers subject to regulation have annual pistachio receipts of less than \$6,000,000. In addition, 722 of the 741 producers have annual receipts less than \$750,000. Therefore, a majority of handlers and

producers may be classified as small entities under the SBA standards.

This rule continues in effect the establishment of procedures for exempting handlers from minimum quality (maximum limits for quality defects and minimum size) testing requirements prescribed under the order. These procedures will be used by the committee when considering handler requests for exemptions from minimum quality testing requirements and when considering revocations of such exemptions. Additionally, this rule continues in effect the establishment of an appeals process for handlers who have been denied an exemption or had an exemption revoked.

Section 983.41(a) of the pistachio order permits handlers who handle less than 1 million pounds of assessed weight pistachios each production year (September 1–August 31) to use optional aflatoxin testing methods. The optional methods permit the sampling and testing of a handler's entire inventory before further processing, and allow handlers to segregate their receipts into various lots for sampling and testing.

Section 983.41(b) of the pistachio order authorizes handler exemptions from minimum quality testing for handlers who handle less than 1 million pounds of assessed weight pistachios per production year, and specifies that the committee may grant such handler exemptions.

Section 983.70 of the pistachio order exempts handlers who handle 1,000 pounds or less of dried weight (assessed weight) pistachios (dried to 5 percent moisture) during any marketing year from all assessment, aflatoxin, and minimum quality requirements. For the purposes of this document, the term “marketing year” is synonymous with “production year” and represents the period September 1 through August 31.

The recommended decision, published on August 4, 2003, (68 FR 45990), indicated that implementing regulations would effectuate the declared policy of the Act by establishing the specific procedures for exempting handlers who handle more than 1,000 pounds and less than 1 million pounds of assessed weight pistachios per production year (September 1–August 31) from minimum quality testing requirements.

Under these authorities, the committee at its April 12, 2005, meeting, unanimously recommended establishing standardized procedures for granting and revoking handler exemption requests, and considering handler appeals on exemption decisions. This action will have a

positive impact on small and large handlers by assuring that all exemption applications and reviews are handled equitably following approved standardized procedures.

The committee discussed alternatives to this change, including not making any changes, but determined that specific procedures were needed to facilitate: (1) Exempting handlers from minimum quality testing; (2) revoking exemptions when handlers violate requirements under the marketing order; and (3) processing appeals to the committee's actions. These procedures are expected to ensure that all such requests are treated equitably. The committee's vote was unanimous.

The information collection requirements for the ACP Form-5, which handlers will complete and forward to the committee to request exemption from minimum quality requirements under the order, was previously submitted to the Office of Management and Budget (OMB) and approved under OMB No. 0581-0230. Thus, 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. In addition, USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this rule.

The AMS is committed to compliance with the Government Paperwork Elimination Act, which requires government agencies in general to provide the public the option of submitting information or transacting business electronically to the maximum extent possible.

Further, the committee's meetings are widely publicized throughout the pistachio industry and all interested persons are encouraged to attend the meetings and participate in the committee's deliberations. Like all committee meetings, the April 12, 2005, meeting was a public meeting and all entities, both large and small, were encouraged to express their views on these issues.

An interim final rule concerning this action was published in the **Federal Register** on July 22, 2005 (70 FR 42256). Copies of the rule were provided to the committee and handlers by the committee staff. In addition, the rule was made available through the Internet by USDA and the Office of the Federal Register. That rule provided for a 60-day comment period, which ended

September 20, 2005. No comments were 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 material presented, including the committee's recommendation and other information, it is found that this finalizing the interim final rule, without change, as published in the **Federal Register** (70 FR 42256, July 22, 2005), will tend to effectuate the declared policy of the Act.

#### List of Subjects in 7 CFR Part 983

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

#### PART 983—PISTACHIOS GROWN IN CALIFORNIA

■ Accordingly, the interim final rule amending 7 CFR part 983, which was published at 70 FR 42256 on July 22, 2005, is adopted as a final rule without change.

Dated: October 24, 2005.

Lloyd C. Day,

*Administrator, Agricultural Marketing Service.*

[FR Doc. 05-21489 Filed 10-27-05; 8:45 am]

BILLING CODE 3410-02-P

#### FEDERAL DEPOSIT INSURANCE CORPORATION

##### 12 CFR Part 330

RIN 3064-AC90

#### Deposit Insurance Coverage; Accounts of Qualified Tuition Savings Programs Under Section 529 of the Internal Revenue Code

**AGENCY:** Federal Deposit Insurance Corporation (FDIC).

**ACTION:** Final rule.

**SUMMARY:** The FDIC is adopting a final rule governing the insurance coverage of deposits of qualified tuition savings programs under section 529 of the Internal Revenue Code. The final rule makes no substantive changes to a previous interim final rule. Under the rule, the deposits of a qualified tuition savings program will be insured on a "pass-through" basis to the program participants. In other words, the deposits will be insured up to \$100,000

for the interest of each participant in aggregation with the participant's other deposits (if any) at the same insured depository institution.

**DATES:** The final rule will be effective on December 27, 2005.

**FOR FURTHER INFORMATION CONTACT:** Christopher L. Hencke, Counsel, Legal Division, (202) 898-8839, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

#### SUPPLEMENTARY INFORMATION:

##### I. Qualified Tuition Programs

Section 529 of the Internal Revenue Code provides tax benefits for "qualified tuition programs." See 26 U.S.C. 529(a). Such programs include prepaid tuition programs (which may be created by states or educational institutions) as well as tuition savings programs (which must be sponsored by states or public instrumentalities). See 26 U.S.C. 529(b)(1). A tuition savings program is defined by section 529 as a program under which a person "may make contributions to an account which is established for the purpose of meeting the qualified higher education expenses of the designated beneficiary of the account" (and which meets certain requirements). 26 U.S.C. 529(b)(1)(A)(ii).

Under laws administered by the Securities and Exchange Commission (SEC), interests in a qualified tuition savings program must be sold by a public instrumentality (such as a state investment trust) so that the interests in the program will be exempt from registration under section 2(b) of the Investment Company Act. See 15 U.S.C. 80a-2(b). This means that a participant in a state qualified tuition savings program cannot acquire an asset through the program or public instrumentality. Rather, the participant must acquire an interest or account in the public instrumentality.

Some state 529 programs have provided participants with the option of investing their funds directly in bank deposits. Other state programs have expressed an interest in creating such an option. As stated above, participants in a 529 program must acquire an interest in the public instrumentality. They cannot acquire a particular asset. This means that the public instrumentality, not the participant, will be the legal owner of any bank deposit purchased by or through the public instrumentality.

The fact that any bank deposit will belong to the public instrumentality raises issues under the FDIC's insurance regulations. These issues are discussed below.