

# Rules and Regulations

Federal Register

Vol. 68, No. 163

Friday, August 22, 2003

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 51

[Docket Number FV-98-304]

#### United States Standards for Grades of Pistachio Nuts in the Shell, and United States Standards for Grades of Shelled Pistachio Nuts

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

**ACTION:** Final rule.

**SUMMARY:** This rule revises the United States Standards for Grades of Pistachio Nuts in the Shell and the United States Standards for Grades of Shelled Pistachio Nuts. The revisions will modify the standards to more closely align grade names with other tree-nut commodities and current industry-recognized marketing terms, reduce the tolerance for internal defects for the purpose of providing a higher degree of quality assurance, relax tolerances of the level of light stain on the shell in the various grade levels based on consumer preferences, more objectively define when nuts are damaged by various factors, and include two in-shell grade specifications which reflect the industry's byproduct. These standards are issued under the Agricultural Marketing Act of 1946. These changes will promote greater uniformity and consistency in the standards, as well as provide consistency with current marketing practices.

**EFFECTIVE DATE:** September 22, 2003.

**FOR FURTHER INFORMATION CONTACT:** David L. Priester, Standardization Section, Fresh Products Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, U.S. Department of Agriculture, 1400 Independence Avenue, SW., Room 1661, South Building, STOP 0240, Washington, DC

20250-0240, fax (202) 720-8871, e-mail [David.Priester@usda.gov](mailto:David.Priester@usda.gov).

#### SUPPLEMENTARY INFORMATION:

##### Executive Orders 12988 and 12866

This 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 the rule. The Office of Management and Budget has waived the review process required by Executive Order 12866 for this action.

##### Regulatory Flexibility Act

Pursuant to the requirements set forth in the Regulatory Flexibility Act (RFA), AMS has considered the economic impact of this action on small entities. The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions so that small businesses will not be unduly or disproportionately burdened. Accordingly, AMS has prepared this initial regulatory flexibility analysis. Interested parties are invited to submit information on the regulatory and informational impacts of this action on small businesses.

Available information provided by the California Pistachio Commission (CPC) show that there are 647 California pistachio producers and 19 California handlers of pistachio nuts, most of which are also growers or have grower members. Additional information provided by CPC show that 445 California pistachio producers (69% of the total) produce less than 100,000 pounds per year; 100 producers (15%) produce more than 100,000 and less than 250,000 pounds; 43 growers (7%) produce more than 250,000 and less than 500,000 pounds; and 59 producers (9%) grow more than 500,000 pounds. U.S. grade standards for pistachios would normally be used at the sales level of marketing, which is ordinarily carried out at the processor/packer level or after processing has been completed. Pistachio nuts may be marketed by multiple commodity marketing firms.

The California Department of Food and Agriculture Resource Directory 2002, reports that California accounted

for more than 99 percent of domestic pistachio production. More current information available to the Department indicates that California has 97 percent of domestic production with Arizona at 2 percent and New Mexico with less than 1 percent.

Small agricultural service firms, which include handlers (packers, brokers, distributors, importers, etc.), have been defined by the Small Business Administration (SBA) (13 CFR 121.601) as those having annual receipts of less than \$5,000,000 and small agricultural producers are defined as those having annual receipts of less than \$750,000. The pistachio industry is characterized by growers that produce from .1 to more than 500 acres. Approximately 9 percent of the California pistachio growers receive more than \$550,000 annually. Only a portion of these producers would meet SBA's definition of a small agricultural producer. At least 12 of the California pistachio handlers (or 63 percent of the total) could be considered small businesses under SBA's definition. We would expect that similar size determinations would hold for the remainder of domestic production.

This rule will: More closely align the grade names with other tree nut commodities and current industry recognized marketing terms, reduce the tolerance for internal defects for the purpose of providing a higher degree of quality assurance to consumers, relax the level of light stain on the shell, more objectively define when nuts are damaged by various factors, and establish two additional grades which reflect the industry's marketing of in-shell byproducts. The benefits of this rule are not expected to be disproportionately greater or smaller for small handlers or producers than for large entities.

This action will make the standards more consistent and uniform with current industry terms and practices. This action would not impose substantial direct economic cost, record keeping, or personnel workload changes on small entities, and it would not alter the market share or competitive position of these entities relative to large businesses. USDA has not identified any Federal rules that currently duplicate, overlap, or conflict with this rule. In addition, under the Agricultural

Marketing Act of 1946, the use of these standards is voluntary.

Alternatives were considered for this action. One alternative would be to not issue a rule. However, the need for revisions have increased as a result of changing marketing characteristics by industry, several years of work with the industry to assess market and grower implications, and other input from all sectors of the pistachio industry and government. Since the purpose of these standards is to expedite the marketing of pistachio nuts in the U.S., not revising the standards would result in disuse of national standards and confusion in terms of industry marketing and the proper application of the grade standards.

The proposed rule, the United States Standards for Grades of Pistachio Nuts in the Shell and the United States Standards for Grades of Shelled Pistachio Nuts was published in the **Federal Register** on May 23, 2003 (68 FR 28141). A comment period of thirty days was issued which closed on June 23, 2003.

#### Final Rule and Comments

One e-mail comment was received. The commenter stated that the United States Standards for Grades of Pistachio Nuts in the Shell contain a tolerance for "damage by other means," but do not contain a definition for "damage by other means." However, "damage by other means" is not a specific defect. This tolerance is provided for all defects that are not specifically covered by other tolerances. Therefore, a definition for "damage by other means" is not necessary.

This rule would revise the United States Standards for Grades of Pistachio Nuts in the Shell and the United States Standards for Grades of Shelled Pistachio Nuts that were issued under the Agricultural Marketing Act of 1946. These standards are voluntarily used by industry as a common trading language to market pistachio nuts under established and known specifications. In some transactions, the buyer and seller may establish their own specifications for the sale, use portions of the U.S. standards while altering other portions to fit the sale and needs of the parties, or use the U.S. standards as written.

At the time of its 1998 request to AMS, the CPC issued "industry standards" based on the requested changes and encouraged California pistachio nuts to be marketed under those standards. The use of the voluntary "industry standards" for national and international marketing with official certification by USDA

inspectors based on these standards has continued for three marketing seasons. The changes herein are based on the standards currently being used by the industry to market U.S. grown pistachio nuts nationally and internationally.

#### Background

The United States Standards for Grades of Pistachio Nuts in the Shell and the United States Standards for Grades of Shelled Pistachio Nuts were developed in 1986 and 1990, respectively. At that time, the U.S. pistachio industry was beginning to compete in a global market. As the industry has grown in numbers of growers and processors and in volume, the current grade standards have been regularly used as a basis of marketing. In recent years, foreign and domestic buyers have developed customers that have uses for nuts which have specifications outside the scope of the U.S. grade standards. In addition, U.S. marketers have begun to offer for sale byproduct forms of pistachio nuts for which there are no uniform marketing specifications in the form of recognized grade standards.

AMS received a request to update and revise the United States Standards for Grades of Pistachio Nuts in the Shell and the United States Standards for Grades of Shelled Pistachio Nuts from the CPC. The CPC is the State-approved marketing agent for the California pistachio industry and represents nearly all commercial pistachio producers and handlers in California. AMS and its State cooperator in California have been closely working with CPC and its members since 1994 to review and update the industry grade standards. Official inspection services, with these U.S. grade standards as the basis, have been used by the industry since the inception of the standards.

Currently, the majority of U.S. pistachio production, and more than 30 percent of worldwide pistachio production, originates from California. The California industry, in cooperation with the CPC, began a comprehensive review of the current standards in 1994. As this process evolved, the industry tested possible revision theories through hands-on testing in the packing plants, through consumer preference studies, and through public meetings with processors, growers and other interested parties. This was initiated in order to review the standards and meet the marketing needs of the U.S. pistachio industry and the preferences of industry buyers and the general public. As a result of this study, the CPC, acting on behalf of California growers and

shippers, requested an amendment to the standards.

This rule revises the standards to more closely align the grade names with other tree nut commodities and current industry recognized marketing terms, reduce the tolerance for internal defects for the purpose of providing a higher degree of quality assurance to consumers, relax the level of light stain on the shell, more objectively define when nuts are damaged by various factors, and establish two additional grades which reflect the industry's marketing of in-shell byproducts. These changes are intended to update the standards to maintain their usefulness as they are applied to today's marketing challenges, both nationally and internationally.

Therefore, AMS amends the United States Standards for Grades of Pistachio Nuts in the Shell and the United States Standards for Grades of Shelled Pistachio Nuts as follows:

#### List of Subjects in 7 CFR Part 51

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

#### PART 51—[AMENDED]

- For reasons set forth in the preamble, 7 CFR part 51 is amended as follows:
- 1. The authority citation for part 51 continues to read as follows:

**Authority:** 7 U.S.C. 1621–1627.

- 2. Section 51.2541 is revised to read as follows:

#### Subpart—United States Standards for Grades of Pistachio Nuts in the Shell Grades

##### § 51.2541 U.S. Fancy, U.S. Extra No. 1, U.S. No. 1 And U.S. Select Grades.

"U.S. Fancy," "U.S. Extra No. 1," "U.S. No. 1," and "U.S. Select" consists of pistachio nuts in the shell which meet the following requirements:

- (a) Basic requirements:
  - (1) Free from:
    - (i) Foreign material;
    - (ii) Loose kernels;
    - (iii) Shell pieces;
    - (iv) Particles and dust; and,
    - (v) Blanks.
  - (b) Shells:
    - (1) Free from:
      - (i) Non-split shells; and,
      - (ii) Shells not split on suture.
    - (2) Free from damage by:
      - (i) Adhering hull material;
      - (ii) Light stained;
      - (iii) Dark stained; and,
      - (iv) Other External (shell) defects.
  - (c) Kernels:

(1) Well dried, or, very well dried when specified in connection with the grade.  
 (2) Free from damage by:  
 (i) Immature kernels;  
 (ii) Kernel spotting; and,  
 (iii) Other Internal (kernel) defects.  
 (3) Free from serious damage by:  
 (i) Minor insect or vertebrate injury;  
 (ii) Insect damage;  
 (iii) Mold;  
 (iv) Rancidity;  
 (v) Decay; and,  
 (vi) Other Internal (kernel) defects.  
 (d) The nuts are of a size not less than <sup>30</sup>/<sub>64</sub> inch in diameter as measured by a round hole screen.  
 (e) For tolerances, see § 51.2544.

■ 3.—4. Section 51.2542 is revised to read as follows:

**§ 51.2542 U.S. Artificially Opened.**

“U.S. Artificially Opened” consists of artificially opened pistachio nuts in the shell which meet the following requirements:

- (a) Basic Requirements:
  - (1) Free from:
    - (i) Foreign material;
    - (ii) Loose kernels;
    - (iii) Shell pieces;
    - (iv) Particles and dust; and,
    - (v) Blanks.
  - (b) Shells:
    - (1) Free from:
      - (i) Non-split shells; and,

(ii) Shells not split on suture.  
 (2) Free from damage by:  
 (i) Adhering hull material;  
 (ii) Light stained;  
 (iii) Dark stained; and,  
 (iv) Other External (shell) defects.  
 (c) Kernels:  
 (1) Well dried, or, very well dried when specified in connection with the grade.  
 (2) Free from damage by:  
 (i) Immature kernels;  
 (ii) Kernel spotting; and,  
 (iii) Other Internal (kernel) defects.  
 (3) Free from serious damage by:  
 (i) Minor insect or vertebrate injury;  
 (ii) Insect damage;  
 (iii) Mold;  
 (iv) Rancidity;  
 (v) Decay; and,  
 (vi) Other Internal (kernel) defects.  
 (d) The nuts are of a size not less than <sup>30</sup>/<sub>64</sub> inch in diameter as measured by a round hole screen.  
 (e) For tolerances, see § 51.2544.

■ 5. Section 51.2543 is revised to read as follows:

**§ 51.2543 U.S. Non-Split.**

“U.S. Non-Split” consists of non-split pistachio nuts in the shell which meet the following requirements:

- (a) Basic requirements:
  - (1) Free from:
    - (i) Foreign material;
    - (ii) Loose kernels;

(iii) Shell pieces;  
 (iv) Particles and dust; and,  
 (v) Blanks.  
 (b) Shells:  
 (1) Free from damage by:  
 (i) Adhering hull material; and,  
 (ii) Dark stain.  
 (c) Kernels:  
 (1) Well dried, or very well dried when specified in connection with the grade.  
 (2) Free from damage by:  
 (i) Immature kernels;  
 (ii) Kernel spotting; and,  
 (iii) Other internal (kernel) defects.  
 (3) Free from serious damage by:  
 (i) Minor insect or vertebrate injury;  
 (ii) Insect damage;  
 (iii) Mold;  
 (iv) Rancidity;  
 (v) Decay; and,  
 (vi) Other Internal (kernel) defects.  
 (d) The nuts are of a size not less than <sup>30</sup>/<sub>64</sub> inch in diameter as measured by a round hole screen.  
 (e) For Tolerances, see § 51.2544.

■ 6. Section 51.2544 is revised to read as follows:

**§ 51.2544 Tolerances.**

(a) In order to allow for variations incident to proper grading and handling, the tolerances in Tables I, II, and III of this section are provided.

TABLE I.—TOLERANCES  
[Percent]

Factor	U.S. fancy	U.S. extra No. 1	U.S. No. 1	U.S. select	U.S. artificially opened	U.S. non-split
External (shell) Defects (tolerances by weight):						
(a) Non-split and not split on suture .....	2	3	6	10	10	N/A
(1) Non-split included in (a) .....	1	2	3	4	4	N/A
(b) Adhering hull material .....	1	1	1	2	2	2
(c) Light stained .....	7	12	25	N/A	N/A	N/A
(1) Dark stained, included in (c) .....	2	3	3	3	3	3
(d) Damage by other means .....	1	1	2	3	10	N/A
(e) Total External Defects .....	9	16	N/A	N/A	N/A	N/A
(f) Undersized (Less than <sup>30</sup> / <sub>64</sub> inch in diameter) ....	5	5	5	5	4	5

TABLE II.—TOLERANCES  
[Percent]

Factor	U.S. fancy	U.S. extra No. 1	U.S. No. 1	U.S. select	U.S. artificially opened	U.S. non-split
Internal (Kernel) Defects (tolerances by weight):						
(a) Damage .....	3	6	6	6	6	6
(b) Serious Damage .....	3	4	4	4	4	4
(1) Insect Damage, Mold, Rancid, Decay, included in (b) .....	1	2	2	2	2	2
(c) Total Internal Defects .....	4	8	9	9	9	9

TABLE III.—TOLERANCES  
[Percent]

Factor	U.S. fancy	U.S. extra No. 1	U.S. No. 1	U.S. select	U.S. artificially opened	U.S. non-split
Other Defects (tolerances by weight):						
(a) Shell pieces and blanks .....	2	2	2	2	2	2
(1) Blanks, included in (a) .....	1	1	1	1	1	1
(b) Foreign material (No glass, metal or live insects shall be permitted) .....	.25	.25	.25	.25	.25	.25
(c) Particles and dust .....	.25	.25	.25	.25	.25	.25
(d) Loose kernels .....	4	5	6	6	6	6

■ 7. Section 51.2545 is revised to read as follows:

**§ 51.2545 Application of tolerances.**

The tolerances for the grades apply to the entire lot and shall be based on a composite sample drawn from containers throughout the lot. Any container or group of containers which have nuts obviously different in quality or size from those in the majority of the containers shall be considered a separate lot and shall be sampled separately.

■ 8. Section 51.2546 is revised to read as follows:

**§ 51.2546 Size.**

Nuts may be considered as meeting a size designation specified in Table IV or a range in number of nuts per ounce, provided, the weight of 10 percent, by count, of the largest nuts in a sample does not exceed 1.50 times the weight of 10 percent, by count, of the smallest and the average number of nuts per ounce is not more than one-half nut above or below the extremes of the range specified.

TABLE IV.—NUT SIZE

Size designations	Average number of nuts per ounce <sup>1</sup>
Colossal .....	Less than 18.
Extra Large .....	18 to 20.
Large .....	21 to 25.
Medium .....	26 to 30.
Small .....	More than 30.

<sup>1</sup> Before Roasting.

■ 9. Section 51.2547 is revised to read as follows:

**§ 51.2547 Definitions.**

(a) *Well dried* means the kernel is firm and crisp.

(b) *Very well dried* means the kernel is firm and crisp and the average moisture content of the lot does not exceed 7.00 percent or is specified. (See § 51.2548.)

(c) *Loose kernels* means edible kernels or kernel portions which are out of the

shell and which cannot be considered particles and dust.

(d) *External (shell) defects* means any blemish affecting the hard covering around the kernel. Such defects include, but are not limited to, non-split shells, shells not split on suture, adhering hull material, light stained, or dark stained.

(1) *Damage by external (shell) defects* means any specific defect described in paragraphs (d)(1) (i) through (v) of this section, or an equally objectionable variation of any one of these defects, any other defect, or any combination of defects, which materially detracts from the appearance or the edible or marketing quality of the individual shell or of the lot. (For tolerances see § 51.2544, Table I.)

(i) *Non-split shells* means shells are not opened or are partially opened and will not allow an 18/1000 (.018) inch thick by ¼ (.25) inch wide gauge to slip into the opening.

(ii) *Not split on suture* means shells are split other than on the suture and will allow an 18/1000 (.018) inch thick by ¼ (.25) inch wide gauge to slip into the opening.

(iii) *Adhering hull material* means an aggregate amount covers more than one-eighth of the total shell surface, or when readily noticeable on dyed shells.

(iv) *Light stained on raw or roasted nuts*, means an aggregate amount of yellow to light brown or light gray discoloration is noticeably contrasting with the predominate color of the shell and affects more than one-fourth of the total shell surface or, on dyed nuts, when readily noticeable.

(v) *Dark stained on raw or roasted nuts*, means an aggregate amount of dark brown, dark gray or black discoloration affects more than one-eighth of the total shell surface, or, on dyed nuts, when readily noticeable, provided that speckled appearing stain located within the area of one-fourth of the shell nearest the stem end shall be disregarded.

(e) *Internal (kernel) defects* means any blemish affecting the kernel. Such defects include, but are not limited to

evidence of insects, immature kernels, rancid kernels, mold, or decay.

(1) *Damage by internal (kernel) defects* means any specific defect described in paragraphs (e)(1)(i) through (ii) of this section; or an equally objectionable variation of any one of these defects, any other defect, or any combination of defects, which materially detracts from the appearance or the edible or marketing quality of the individual kernel or of the lot. (For tolerances see § 51.2544, Table II.)

(i) *Immature kernels* are excessively thin or when a kernel fills less than three-fourths, but not less than one-half the shell cavity.

(ii) *Kernel spotting* refers to dark brown or dark gray spots aggregating more than one-eighth of the surface of the kernel.

(2) *Serious damage by internal (kernel) defects* means any specific defect described in paragraphs (e)(2)(i) through (v) of this section; or an equally objectionable variation of any one of these defects, any other defect, or any combination of defects, which seriously detracts from the appearance or the edible or the marketing quality of the individual kernel or of the lot. (For tolerances see § 51.2544, Table II.)

(i) *Minor insect or vertebrate injury* means the kernel shows conspicuous evidence of feeding.

(ii) *Insect damage* is an insect, insect fragment, web or frass attached to the kernel. No live insects shall be permitted.

(iii) *Mold* which is readily visible on the shell or kernel.

(iv) *Rancidity* means the kernel is distinctly rancid to taste. Staleness of flavor shall not be classed as rancidity.

(v) *Decay* means one-sixteenth or more of the kernel surface is decomposed.

(f) *Other defects* means defects which cannot be considered internal defects or external defects. Such defects include, but are not limited to shell pieces, blanks, foreign material or particles and dust. The following shall be considered other defects. (For tolerances see § 51.2544, Table III.)

(1) *Shell pieces* means open in-shell nuts not containing a kernel, half shells or pieces of shell which are loose in the sample.

(2) *Blank* means a non-split shell not containing a kernel or containing a kernel that fills less than one-half the shell cavity.

(3) *Foreign material* means leaves, sticks, loose hulls or hull pieces, dirt, rocks, insects or insect fragments not attached to nuts, or any substance other than pistachio shells or kernels. Glass, metal or live insects shall not be permitted.

(4) *Particles and dust* means pieces of nut kernels which will pass through a 5/64 inch round opening.

(5) *Undersize* means pistachio nuts in the shell which fall through a 30/64 inch round hole screen.

■ 10. Section 51.2548 is added to read as follows:

**§ 51.2548 Average moisture content determination.**

(a) Determining average moisture content of the lot is not a requirement of the grades, except when nuts are specified as "very well dried." It may be carried out upon request in connection with grade analysis or as a separate determination.

(b) Nuts shall be obtained from a randomly drawn composite sample. Official certification shall be based on

the air-oven method or other officially approved methods or devices. Results obtained by methods or devices not officially approved may be reported and shall include a description of the method or device and the owner of any equipment used.

■ 11. Section 51.2549 is added to read as follows:

**§ 51.2549 Metric conversion table.**

Use the following table for metric conversion:

Inches	Millimeters
5/64 .....	1.98
18/100 .....	.46
1/4 .....	6.35
30/64 .....	11.88
Ounces	Grams
1 .....	28.35
2 .....	56.70

**Subpart—United States Standards for Grades of Shelled Pistachio Nuts**

■ 12. In § 51.2555, paragraph (b) is revised to read as follows:

**§ 51.2555 General.**

\* \* \* \* \*

(b) These standards are applicable to raw, roasted, salted or salted/roasted pistachio kernels.

■ 13. Section 51.2556 is revised to read as follows:

**§ 51.2556 Grades.**

(a) "U.S. Fancy," "U.S. Extra No. 1," and "U.S. No. 1" consist of pistachio kernels which meet the following requirements:

(1) Well dried, or very well dried when specified in connection with the grade.

(2) Free from:

(i) Foreign material, including in-shell nuts, shells, or shell fragments.

(3) Free from damage by:

(i) Immature kernels;  
(ii) Kernel spotting; and  
(iii) Other defects.

(4) Free from serious damage by:

(i) Mold;  
(ii) Minor insect or vertebrate injury;  
(iii) Insect damage;  
(iv) Rancidity;  
(v) Decay; and,  
(vi) Other defects.

(5) Unless otherwise specified, kernels shall meet the size classification of Jumbo Whole Kernels (See § 51.2559).

(b) [Reserved]

■ 14. In § 51.2557, Table 1 is revised to read as follows:

**§ 51.2557 Tolerances.**

\* \* \* \* \*

TABLE 1.—TOLERANCES  
[Percent]

Factor (tolerances by weight)	U.S. fancy	U.S. extra No. 1	U.S. No. 1
(a) Damage .....	2.0	2.5	3.0
(b) Serious Damage .....	1.5	2.0	2.5
(1) Insect Damage, mold, rancid, decay, included in (b) .....	.3	.4	.5
(c) Foreign Material .....	.03	.05	.1

■ 15. Section 51.2559 is revised to read as follows:

**§ 51.2559 Size classifications.**

(a) The size of pistachio kernels may be specified in connection with the grade in accordance with one of the following size classifications.

(1) Jumbo Whole Kernels: 80 percent or more by weight shall be whole kernels and not more than 5 percent of the total sample shall pass through a 2 3/64 inch round hole screen with not more than 1 percent passing through a 1 5/64 inch round hole screen.

(2) Large Whole Kernels: 80 percent or more, by weight, shall be whole kernels and not more than 2 percent of the total sample shall pass through a 1 5/64 inch round hole screen.

(3) Large Split Kernels: 75 percent or more, by weight, shall be half kernels split lengthwise and not more than 5 percent of the total sample shall pass through a 1 5/64 inch round hole screen.

(4) Whole and Broken Kernels: means a mixture of any combination of whole kernels or pieces. The percentage of whole kernels and/or pieces may be specified. Not more than 5 percent of the total sample shall pass through a 5/64 inch round hole screen.

(b) [Reserved]

■ 16. Section 51.2560 is revised to read as follows:

**§ 51.2560 Definitions.**

(a) *Well dried* means the kernel is firm and crisp.

(b) *Very well dried* means the kernel is firm and crisp and the average

moisture content of the lot does not exceed 7 percent or is specified (See § 51.2561).

(c) *Foreign material* means leaves, sticks, in-shell nuts, shells or pieces of shells, dirt, or rocks, or any other substance other than pistachio kernels. No allowable tolerances for metal or glass.

(d) *Whole kernel* means 3/4 of a kernel or more.

(e) *Splits* means more than 3/4 of a half kernel split lengthwise.

(f) *Damage* means any specific defect described in paragraph (f) (1) through (2) of this section or an equally objectionable variation of any one of these defects, any other defect, or any combination of defects, which materially detracts from the appearance or the edible or marketing quality of the

individual kernel or of the lot. (For tolerances, see § 51.2557, Table I.)

(1) *Immature kernels* are excessively thin kernels and can have black, brown or gray surface with a dark interior color and the immaturity has adversely affected the flavor of the kernel.

(2) *Kernel spotting* refers to dark brown or dark gray spots aggregating more than one-eighth of the surface of the kernel.

(g) *Serious damage* means any specific defect described in paragraph (g) (1) through (5) of this section, or an equally objectionable variation of any one of these defects, any other defect, or any combination of defects, which seriously detracts from the appearance or the edible or marketing quality of the individual kernel or of the lot. (For tolerances see § 51.2557 Table I.)

(1) *Mold* which is readily visible on the kernel.

(2) *Minor insect or vertebrate injury* means the kernel shows conspicuous evidence of feeding.

(3) *Insect damage* is an insect, insect fragment, web or frass attached to the kernel. No live insects shall be permitted.

(4) *Rancidity* means the kernel is distinctly rancid to taste. Staleness of flavor shall not be classed as rancidity.

(5) *Decay* means one-sixteenth or more of the kernel is decomposed.

■ 17. Section 51.2562 is added to read as follows:

**§ 51.2562 Metric Conversion Table.**

Use the following table for metric conversion:

Inches	Millimeters
5/64	1.98
19/64	6.35
24/64	9.53
Ounces	Grams
1	28.35
2	56.7

Dated: August 19, 2003.

**A.J. Yates,**

*Administrator, Agricultural Marketing Service.*

[FR Doc. 03-21547 Filed 8-21-03; 8:45 am]

**BILLING CODE 3410-02-P**

**DEPARTMENT OF AGRICULTURE**

**Agricultural Marketing Service**

**7 CFR Part 1030**

[Docket No. DA-01-03; AO-361-A35]

**Milk in the Upper Midwest Marketing Area: Order Amending the Order**

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

**ACTION:** Final rule.

**SUMMARY:** This document adopts as a final rule, without change an interim final rule concerning pooling provisions of the Upper Midwest Federal milk order. Specifically, this final rule continues to prohibit the ability to simultaneously pool the same milk on the Upper Midwest Federal milk order and a State-operated milk order that has market-wide pooling. Additionally, the final rule limits the amount of milk that can be diverted to nonpool plants from pool distributing plants regulated under the order. More than the required number of producers in the Upper Midwest marketing area have approved the issuance of the final order amendments.

**EFFECTIVE DATE:** September 1, 2003.

**FOR FURTHER INFORMATION CONTACT:** Gino Tosi, Marketing Specialist, USDA/AMS/Dairy Programs, Order Formulation and Enforcement Branch, Stop 0231-Room 2971, 1400 Independence Avenue, SW., Washington, DC 20250-0231, (202) 690-1366, e-mail: [gino.tosi@usda.gov](mailto:gino.tosi@usda.gov).

**SUPPLEMENTARY INFORMATION:** This administrative rule is governed by the provisions of Sections 556 and 557 of Title 5 of the United States Code and, therefore, is excluded from the requirements of Executive Order 12866.

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

The Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), 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 request modification or exemption from such order by filing with the Department of Agriculture (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 the law. A handler is afforded the opportunity for a hearing on the petition. After a hearing, the Department 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 its principal place of business, has jurisdiction in equity to review the Department's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

**Regulatory Flexibility Act and Paperwork Reduction Act**

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Agricultural Marketing Service has considered the economic impact of this action on small entities and has certified that this rule will not have a significant economic impact on a substantial number of small entities. For the purpose of the Regulatory Flexibility Act, a dairy farm is considered a "small business" if it has an annual gross revenue of less than \$750,000, and a dairy products manufacturer is a "small business" if it has fewer than 500 employees.

For the purposes of determining which dairy farms are "small businesses," the \$750,000 per year criterion was used to establish a production guideline of 500,000 pounds per month. Although this guideline does not factor in additional monies that may be received by dairy producers, it should be an inclusive standard for most "small" dairy farmers. For purposes of determining a handler's size, if the plant is part of a larger company operating multiple plants that collectively exceed the 500-employee limit, the plant will be considered a large business even if the local plant has fewer than 500 employees.

In June 2001, there were 12,748 producers pooled on, and 57 handlers regulated by, the Upper Midwest order. Based on these criteria, the vast majority of the producers and handlers would be considered as small businesses. The adoption of the proposed pooling standards serves to revise established criteria that determine those producers, producer milk, and plants that have a reasonable association with, and are consistently serving the fluid needs of, the Upper Midwest milk marketing area and are not associated with other market-wide pools concerning the same milk. Criteria for pooling are established on the basis of performance levels that are considered adequate to meet the Class I fluid needs and, by doing so, determine those that are eligible to share in the revenue that arises from the