DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 983

[Docket No. AO–F&V–983–2; FV02–983–01]

Pistachios Grown in California; Recommended Decision and Opportunity To File Written Exceptions to Proposed Marketing Agreement and Order No. 983

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule and opportunity to file exceptions.

SUMMARY: This recommended decision proposes the issuance of a marketing agreement and order (order) for pistachios grown in California. The proposed order would set standards for the quality of pistachios produced and handled in California by establishing a maximum aflatoxin tolerance level, maximum limits for defects, a minimum size requirement, and mandatory inspection and certification. An eleven-member committee, consisting of eight producers, two handlers, and one public member, would locally administer the program. The program would be financed by assessments on handlers of pistachios grown in the production area. The objective of the program would be to enhance grower returns through the delivery of higher-quality pistachios to consumers. This rule also announces the Agricultural Marketing Service's intention to request approval by the Office of Management and Budget of new information collection requirements to implement this program.

DATES: Written exceptions must be filed by September 3, 2003. Pursuant to the Paperwork Reduction Act, comments on the information collection burden must be received by October 3, 2003.

ADDRESS: Four copies of all written exceptions should be filed with the Hearing Clerk, U.S. Department of Agriculture, room 1081–S, Washington, DC 20250–9200, Facsimile number (202) 720–9776. All comments should reference the docket number and the date and page number of this issue of the **Federal Register**. Comments will be made available for public inspection in the Office of the Hearing Clerk during regular business hours, or can be viewed at: *http://www.ams.usda.gov/fv/moab.html.*

FOR FURTHER INFORMATION CONTACT: Melissa Schmaedick, Marketing Order Administration Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, USDA, Post Office Box 1035, Moab, UT 84532, telephone: (435) 259–7988, fax: (435) 259–4945; or Anne M. Dec, 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 this proceeding 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.

SUPPLEMENTARY INFORMATION: Prior documents in this proceeding: Notice of Hearing issued on June 19, 2002, and published in the June 26, 2002, issue of the **Federal Register** (67 FR 43045).

This action is governed by the provisions of sections 556 and 557 of title 5 of the United States Code and is therefore excluded from the requirements of Executive Order 12866.

Preliminary Statement

Notice is hereby given of the filing with the Hearing Clerk of this recommended decision with respect to the proposed marketing agreement and order regulating the handling of pistachios grown in California, and the opportunity to file written exceptions thereto. Copies of this decision can be obtained from Melissa Schmaedick, whose address is listed above.

This recommended decision is issued pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*), hereinafter referred to as the ''Act,'' and the applicable rules of practice and procedure governing the formulation of marketing agreements and orders (7 CFR part 900).

The proposed marketing agreement and order are based on the record of a public hearing held July 23–25, 2002, in Fresno, California. The hearing was held to receive evidence on the proposed marketing order from producers, handlers, and other interested parties located throughout the proposed production area. Notice of this hearing was published in the **Federal Register** on June 26, 2002.

This proposal is the result of nearly three years of efforts undertaken by the Proponents Committee (proponents), a group representing the majority of producers and handlers of pistachios in California. The Proponents Committee was established in 2000 as a result of renewed industry interest in a Federal marketing order.

An earlier attempt to establish a Federal marketing order in 1996 on behalf of the pistachio industry by the California Pistachio Commission (CPC or Commission) and the Western Pistachio Association (Association) was terminated in 2000 due to a lack of industry support for certain proposed provisions. The current proposal is different from that which was previously proposed since many controversial issues have either been removed or resolved through more exacting specifications in the proposed order. The Proponents Committee is independent of the Commission and the Association.

Witnesses at the hearing explained that the provisions of this proposal aim to provide the California pistachio industry with a tool to regulate the quality of pistachios handled in California. This would include preventing pistachios containing aflatoxin above the proposed permitted maximum tolerance level of 15 parts per billion (ppb) from entering the market place. The proposed order would also preclude defective and small pistachios from being sold. Under the proposed order, testing and certification of pistachios for quality (including aflatoxin) would be mandatory. A mandatory regulatory program would provide the industry with an effective means of ensuring product quality, thereby enhancing customer satisfaction.

At the conclusion of the hearing, the Administrative Law Judge fixed September 23, 2002, as the final date for interested persons to file proposed findings and conclusions or written arguments and briefs based on the evidence received at the hearing. One brief was filed on behalf of the Proponents Committee in support of the proposed program and its provisions. The brief also recommended certain changes in the regulatory text of the proposed order as a result of the public hearing held in Fresno, California from July 25 through July 27, 2002. These changes are discussed as appropriate later in this document.

Material Issues

The material issues presented on the record of hearing are as follows:

1. Whether the handling of pistachios produced in the production area is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects such commerce;

2. Whether the economic and marketing conditions are such that they justify a need for a Federal marketing agreement and order which would tend

to effectuate the declared policy of the Act;

3. What the definition of the production area and the commodity to be covered by the order should be;

4. What the identity of the persons and the marketing transactions to be regulated should be;

5. What the specific terms and provisions of the order should be, including:

(a) The definitions of terms used therein which are necessary and incidental to attain the declared objectives and policy of the Act and order;

(b) The establishment, composition, maintenance, procedures, powers and duties of an administrative committee for pistachios that would be the local administrative agency for assisting USDA in the administration of the order;

(c) The authority to incur expenses and the procedure to levy assessments on handlers to obtain revenue for paying such expenses;

(d) The establishment of mandatory inspection and certification for aflatoxin, quality and size requirements for California pistachios;

(e) The establishment of requirements for handler reporting and recordkeeping;

(f) The requirement for compliance with all provisions of the order and with any regulations issued under it;

(g) The requirement for periodic continuance referenda;

(h) An exemption for handlers of non-commercial quantities of pistachios;

(i) Coordination of administration with the California Pistachio Commission program;

(j) Additional terms and conditions as set forth in § 983.59 through § 983.69 of the Notice of Hearing published in the **Federal Register** of June 26, 2002, which are common to all marketing agreements and orders, and other terms and conditions published at § 983.90 through § 983.92 that are common to marketing agreements only; and

6. Whether the proposed marketing order and its provisions, if approved in grower referendum, should be implemented in two phases.

Findings and Conclusions

The following findings and conclusions on the material issues are based on the record of the hearing.

Material Issue Number 1—Whether the Handling of California Pistachios is in the Current of Interstate or Foreign Commerce

The record indicates that the handling of pistachios grown in California is in the current of interstate or foreign commerce or directly burdens, obstructs or affects such commerce.

Witnesses testifying at the hearing stated that over 97 percent of the pistachios produced in the United States are grown in California orchards. There are minor amounts of commercial plantings in eastern Arizona and New Mexico. However, it is estimated that these States account for only 2 and less than 1 percent of national production, respectively.

The record shows that domestic consumption of California pistachios is well established, with the U.S. market representing an estimated 70 percent of total production distributed in 1999–2000. Pistachios grown in the proposed production area are shipped throughout the United States, and the California industry, through the Commission, conducts a national promotion program for its product.

The record also shows that export markets are increasingly important to California producers and handlers. About 30 percent of the crop is sold in foreign markets in more than 40 countries. According to the 2000–2001 CPC Annual Report, Germany, Japan, Canada and Hong Kong are California's largest pistachio export destinations. Exports to Germany alone accounted for 20 percent of total inshell pistachio exports in 1999–2000.

Evidence presented at the hearing confirmed that any handling of California pistachios in market channels, including intrastate shipments, exerts an influence on all other handling of such pistachios. Thus, it is concluded that the handling of pistachios grown in the proposed production area is in the current of interstate and foreign commerce and directly affects such commerce.

Material Issue Number 2—The Need for a Pistachio Marketing Order

The record evidence demonstrates that there is a need for a marketing order for California pistachios.

Farming pistachios is a costly investment with a significant delay in benefits and an unreliable crop yield. Increasing yields have led to an increasing overall value of California pistachio production. However, to remain economically viable, producers must maintain a level of return per pound harvested that covers their cost of production. Witnesses of the proposed order assert that maintaining a high level of quality product in the market will lead to increasing consumer demand and stability in producer returns.

Poor quality pistachios impact demand, and the potential growth of demand, for pistachios. Characteristics routinely deemed as ''poor quality'' by customers of the California pistachio industry include small size, and excessive internal and external blemishes. Market studies and references to customer comment databases presented by witnesses at the hearing demonstrate that the presence of poor quality pistachios in the marketplace significantly impacts demand in a negative way.

According to record evidence, minimizing the level of aflatoxin in California pistachios is another significant quality factor, since aflatoxin is a known carcinogenic. Consumer concerns over aflatoxin can impact their perception of the quality of pistachios, and therefore negatively impact demand. Moreover, any market disturbances related to aflatoxin in pistachios, regardless of the origin of those pistachios, could have a detrimental effect on the California pistachio industry. A regulatory program limiting the amount of aflatoxin tolerated in pistachios would be useful to bolster consumer confidence in the quality of California pistachios.

Pistachio acreage has consistently increased in California, from just over 20,000 bearing acres in 1979 to 78,000 bearing acres in 2001. The number of non-bearing acres (*i.e.*, acres less than 7 years old, not yet in full production) has also shown consistent growth, increasing from 17,062 acres in 1997 to 23,500 acres in 2001. Yield per acre has also been steadily rising. Over the 1976–1980 period, average yield per bearing acre measured 1,097 pounds; by 1996–2000, this average increased to 2,418 pounds.

Higher yields and increasing acreage have resulted in increasing production. According to information submitted by the California Pistachio Commission, production in 2000 totaled 242 million pounds, a 64 percent increase over 1995 production, which totaled 148 million pounds. Moreover, witnesses at the hearing indicated that maturing acreage, absent any additional new plantings, will likely result in a 60 percent increase in California pistachio production over the coming years.

Several witnesses at the hearing testified that, in light of increasing production, future stability of market returns is reliant on continually increasing consumer demand for pistachios. These witnesses stated that strong consumer demand, which is ultimately related to consumer perceptions of product quality, is

essential to the continued economic well-being of the California pistachio industry. Moreover, witnesses discussed the importance of implementing a marketing order program that would provide a regulatory structure to monitor and ensure that minimum quality standards are not compromised as production of California pistachios increases. One of the most important quality characteristics cited by witnesses is the regulation of aflatoxins as these carcinogenic molds can be found in improperly handled pistachios.

The proposed order would set quality standards for pistachios produced and handled in California by establishing a maximum aflatoxin tolerance level, maximum limits for defects, a minimum size requirement, and mandatory inspection and certification. Witnesses of the proposed marketing order argued that this regulatory program would bolster consumer demand for pistachios.

The relationship among product quality, consumer demand, and producer returns in the pistachio industry was demonstrated at the hearing. Pistachio production is not only costly in terms of initial investment and cultural costs, but it is highly unpredictable in terms of returns. Between the initial processes of cleaning, hulling, sorting and drying, a significant portion of the initial volume harvested is reduced. This volume is further reduced as the handling process reaches its final stages of further sorting for quality and final preparation for market. As such, witnesses explained that ultimate pistachio sales are based on approximately 30 percent of the volume initially harvested from the field. Because of this, witnesses stated that the process of extracting the highest quality portion of the harvest, and ensuring consumer satisfaction with that product, is crucial to determining the value of the crop.

Pistachio production is similar to other nut crops in that yield and total production are impacted by the alternate bearing nature of pistachio trees (meaning cyclical high and low production years). In addition, producer returns and total crop value are dependent on the overall quality of the crop. One example is the percentage of harvest that is either ''open shell'' or ''closed shell.'' Each harvest yields a certain percentage of nuts that have not naturally opened prior to harvest. These nuts are classified as ''closed shell,'' ''shelling stock'' or ''non-splits,'' and have a lower market value than those nuts that are naturally split, or ''open shell.'' As the percentage of open-shells varies, the total value of production can change significantly from one year to the next.

Total value and value per acre are generally higher in high yielding years. An economic analysis of the California pistachio industry presented at the hearing by Dr. Dan Sumner of the University of California, Davis, indicates that trends for total crop value and value per bearing acre have been increasing over the past 20 years. In 1980, the total value of the pistachio crop in California was $55.8 million. By 2000, total crop value had increased more than four-fold, reaching $236.72 million. These gains are attributed to increases in both total pistachio producing acreage and yield per acre. Average value per bearing acre increased from $1,642 per acre in 1980–1984 to $2,658 per acre in 1996–2000.

Conversely, grower return per pound is generally higher in low yielding years. According to CPC historical price data, price per pound has gradually decreased over the past 20 years, ranging from a high of $2.05 per pound in 1980 to a low of $0.98 per pound in 2000. Thus, in terms of current producer ability to reconcile production costs with receipts, yield per acre must be sufficiently high to compensate for low returns in price per pound. According to the record, the proposed order would assist in stabilizing, if not increasing, producer returns for pistachios. The quality requirements proposed herein would not only assist in fortifying consumer demand by ensuring consumer satisfaction with product quality, but mandatory quality standards would also boost domestic prices by culling poor product, which tends to have price-depressing effects, from the market.

The record evidence is that total costs of production can be divided into three categories: the costs of orchard establishment, cultural costs and administrative costs. Establishment costs, or the overall cost to develop an acre of pistachios until revenues exceed growing expenses, are estimated at between $10,000 and $15,000, with an average tree maturation period of 7 years. In order to recover these investment costs, the hearing record indicates that producers generally target an 11 per cent return on investment, estimated at between $1,100 and $1,650 per acre. Annual per acre cultural costs average between $1,100 and $1,600, once the trees are productive. Administrative costs include the cost of farm management and crop financing, and range from $150 to $200 per acre.

Given the cost estimates above, a producer would need to harvest an average of 2,000 pounds per acre to cover total production costs. This calculation assumes an average field price of $1.25 per pound, which is based on 24 years of CPC crop value statistics. For example, minimum estimated cultural costs plus administrative costs and an 11 percent return on investment results in a minimum total production cost of $2,350 per acre per year. Total production costs less the targeted 11 percent return on investment equals $1,250 per acre, or an average harvest of 1,000 pounds per acre to cover production costs without a return on investment.

While the CPC 2002 Annual Report indicates a State average of $2,619 per acre in gross receipts over the last four years, 1998–2001 CPC yield per acre information reveals that only 6 out of 26 California counties with pistachio production yield on average more than 2,000 pounds per acre. These counties include Colusa, Sutter, Madera, Fresno, Kings and Kern, and together represent over 88 percent of total California pistachio production between the years 1998 to 2001. Glenn, Butte, Placer, Yolo, Contra Costa, San Joaquin, Calaveras, Stanislaus, Merced, Tulare and Santa Barbara counties yield on average between 1,000 to 2,000 pounds per acre and represent roughly 12 percent of total State production. Shasta, Tehama, Yuba, Solano, Sacramento, San Luis Obispo, Los Angeles, San Bernardino and Riverside counties yield on average less than 1,000 pounds per acre and represent less than one percent of California pistachio production.

Given the assumptions made above, approximately 88 percent of the industry is covering total costs of production. Conversely, roughly 12 percent of the industry is currently covering cultural costs but not generating a return on their investment.

In 1996, high levels of aflatoxin were detected in foreign pistachios imported into the European Union (EU). Publicity about the presence of aflatoxin at high levels first led to a total ban on imports and has since reduced the number of pistachios imported from all sources into the EU by 45 percent. In Germany the drop was 60 percent, and by 2000 imports were still only 53 percent of 1997 levels.

Witnesses testifying at the hearing used this case of pistachios contaminated with aflatoxin, and the subsequent damage to consumer confidence and demand for pistachios in the EU, to demonstrate the industry's need to safeguard against similar findings in California pistachios. According to those who testified, mandatory inspection and certification

against high levels of aflatoxin would be the most effective means of preventing such an event with pistachios handled in California.

Similarly, witnesses stressed the need to have a mandatory regulatory system in place in the event that aflatoxin were found in non-California pistachios, but were to universally impact the demand of all pistachios, regardless of origin. If such an event were to occur, witnesses of the order stressed the usefulness of having a federally regulated program for aflatoxin in order to maintain consumer confidence with regard to California pistachios.

Evidence presented at the hearing supports a Federal marketing order for pistachios grown in California. In view of the foregoing, and based on the record of the proceeding, it is concluded that current economic and marketing conditions justify a need for a marketing order for California pistachios. The order would meet many needs of the industry and would tend to effectuate the declared policy of the Act.

Material Issue Number 3—Definition of Pistachio and Production Area

Definitions of the terms ''pistachio'' and ''production area'' should be included in the order to delineate the commodity and the area that would be regulated under the provisions of the proposed program.

''Pistachio'' should be defined to mean the nut or nuts of the pistachio tree, genus Pistacia Vera. The term ''pistachio'' would cover all fruits of the Pistcaia Vera grown in the production area, whether inshell or shelled. Pistachios grown outside the production area would not be covered by the proposed order.

Record evidence explains that the pistachio nut is the seed of a semidry drupaceous fruit, or stone fruit, much like peaches and mangos. However, while peach flesh is eaten and the seed discarded, the opposite is true of the pistachio; the flesh or ''hull'' is discarded and the seed, once it has been freed from protection of the thin, bony shell, is eaten.

Pistachio development starts with a seedling being grown in a pot in a nursery for nearly two years. The seedlings are then transplanted into the field at a rate of 130 to 160 seedlings per acre, usually in January or February when the seedlings are dormant. Toward the end of the first growing season these seedlings are then grafted or budded in the field to Pistacia Vera, both male and female. The pistachio tree is dioecious, meaning there are both ''male'' and ''female'' trees, and is pollinated by the wind. The typical California pistachio orchard requires one male tree for every 8–24 females.

Pistachio trees typically require six years of maturation after budding to produce a commercial crop. During the maturation period, young trees require considerable care, including yearly pruning, irrigation, fertilizer application and pest control, thus contributing to the considerable investment costs of establishing a pistachio orchard. Harvest of a tree's first commercial-sized crop typically occurs in the tree's seventh year. The crop and tree continue to grow in size for another seven to eight years until the tree is considered fully mature and has reached a height of approximately 25 to 30 feet.

Pistachio trees require a significant dormant period, currently estimated to be 800 hours below 45°F, followed by long, hot, dry summers. The trees are pruned during dormancy, and once they bloom, in late March or early April, they need to be irrigated, fertilized and treated for various pests during the rest of the year. The major input is usually water, as each acre requires approximately 36'' of water to be applied during the growing season if the trees are to produce a full crop.

Currently there is no consensus as to the useful commercial life of a tree. Pistachio trees in the Middle East have lived for thousands of years. Trees appear to be long lived in California, although producers must replace 2 to 3 percent of their trees that die from disease or other causes every year. The overall cost to develop an acre of pistachios until revenues exceed growing expenses is between $10,000 and $15,000 per acre, and does not differ significantly due to the size of the planting.

The term ''production area'' should be defined to mean the State of California. The record shows that the production area defined in the proposed order is the major pistachio producing area in the United States.

Witnesses testifying at the hearing stated that over 97 percent of the pistachios produced in the United States are grown in California orchards. Production is concentrated in six counties in the San Joaquin Valley, in the central part of the State. However, commercial production is reported in an additional 20 counties throughout California. While there are some counties in the State in which no pistachios are currently produced, witnesses testified that the production area should be defined to allow for coverage of any new pistachio development outside current plantings within California.

Witnesses also proposed coverage of the entire State because the industry (through the California Pistachio Commission) finances national and international promotion programs to expand demand for California pistachios. Thus, buyers of California pistachios consider the entire State to be the pistachio producing area.

While the proposed Federal order and the State commission would operate independently of each other, witnesses testified that the quality assurance standards implemented under the proposed order would complement the promotion activities undertaken by the Commission. Thus, they believed that having the two programs would benefit the California pistachio industry.

Record evidence indicates that there are minor amounts of commercial plantings in eastern Arizona and New Mexico. However, it is estimated that these states produce only 2 and less than one percent of national production, respectively.

Witnesses explained that Arizona and New Mexico had been considered as part of the production area during the initial stages of drafting the proposed order. According to record testimony, although there is some interest in the proposed marketing order among Arizona and New Mexico pistachio producers, support in those States is not strong enough to warrant including them in the proposed production area.

Record evidence also indicates that pistachios produced in Arizona and New Mexico are mainly consumed within the respective State boundaries and have a relatively limited presence in national and international markets. Moreover, acreage in both States is neither increasing, nor is it expected to increase in the future, as climate factors limit the growth potential of existing pistachio orchards. Pistachio production from these States is not considered to represent a significant portion of total domestic production. It is also unlikely that Arizona and New Mexico pistachios will hold a significant presence in domestic and international markets in the future.

Lastly, information presented at the hearing indicates that California nurserymen have sold a limited amount of pistachio trees into other western states, such as Nevada, Utah and Texas, but there is no known significant commercial production in these States. Production from these States is not believed to enter into the current of interstate commerce.

The Act requires that marketing orders be limited in their application to the smallest regional production area found practicable. For the reasons given

above, it is concluded that covering pistachios grown in California (and not those grown in other States) under the proposed order is consistent with carrying out the declared policy of the Act and, therefore, the production area should be defined as hereinafter set forth.

Material Issue Number 4—Definition of Handler and Handle

The term ''handler'' should be defined to identify the persons who would be subject to regulation under the order. Such term should apply to any person who handles pistachios within the production area, or places pistachios in the current of commerce within the production area, or in the current of commerce between the production area and any point outside thereof. A handler could be an individual, a joint venture, partnership, corporation, or other business entity.

The definition of ''handler'' identifies persons who would be responsible for meeting the requirements of the order, including paying assessments, complying with testing and certification provisions of the order, and submitting reports and other information required for the administration of the proposed program. The term is also used to identify those persons who are eligible to vote for, and serve as, handler members and alternate members on the committee.

The term ''handle'' should be defined in the order to establish the specific functions that would place pistachios in the current of commerce within the production area, or between the production area and any point outside thereof, and to provide a basis for determining which functions are subject to regulation under the authority of the proposed marketing order.

''Handle'' should be defined to mean engaging in: (a) Receiving pistachios, (b) hulling and drying pistachios, (c) further preparing pistachios by sorting, sizing, shelling, roasting, cleaning, salting, and/or packaging for marketing in or transporting to any and all markets in interstate or foreign commerce, and (d) placing pistachios into the current of commerce between the production area and any point outside that area.

The record evidence is that the handling of pistachios is a multi-step process. Witnesses described the harvest and initial processing (hulling and drying) of pistachios as an intense period of activity, typically beginning in early September, when the pistachio nuts are mature, and lasting for a period of 20 to 30 days.

The trees are deemed ready for harvest when the ''hull'' slips on the shell when pressure is applied. By this time, approximately 75 percent of the nuts have naturally ''split,'' meaning that the shell has naturally opened to give its characteristic ''open mouth'' appearance. This splitting of the shell typically will not be apparent, as the hull or outer layer remains intact, protecting the kernel from fungal infection and insect infestation. The hulls of some pistachios, however, may split, thereby revealing the tender pistachio nut inside. These pistachios, referred to as ''early splits,'' are more prone to mold or insect infestation.

The balance of the pistachio harvest has not naturally opened. These are referred to as ''closed shell'' or ''non-split'' pistachios.

According to record testimony, pistachios must be rapidly harvested when mature in order to prevent insect infestation and staining of the shell, and to avoid difficulty of handling an overripe product. During the harvest process, each tree is mechanically shaken to cause the pistachio nuts to fall into a catching frame. This method of harvesting allows the California pistachio industry to harvest pistachios without the nuts having to touch the ground, thereby avoiding possible contamination from soil-borne molds or insects. The nuts are then dumped from the catching frames into bins or trucks and readied for transport to the handler.

The nuts, which contain a significant amount of moisture when harvested, must arrive at the handling facility as soon as possible after harvest. If the nuts are not hulled within 24 hours of their removal from the tree, staining of the outer shell occurs, and this is considered detrimental in the marketplace. Due to the short harvest period and the significant investment in equipment at the handling facility, witnesses explained that pistachio harvest will typically take place 24 hours a day 7 days a week until harvest is complete.

At the handling facility, the nuts are weighed and emptied from the trailers. As the emptying of bins or trucks takes place, usually through bottom dump trailers into a pit, the nuts are sampled. This sampling of wet product is used to determine the quality and payable weight of the nuts being delivered.

Once the nuts have been sampled and the trash (*i.e.*, leaves, twigs, *etc.*) has been removed, the hull or the outer layer covering the shell is removed by equipment that resembles large potato peelers. Once hulled, the pistachios are then moved through various dewatering devices prior to entering a dryer. Some handlers do some initial quality sorting between hulling and drying, but this is not universal. The nuts are then dried in high-powered dryers to about 14 percent moisture. After drying, they are placed in storage in containers that vary from 500-pound bins to 1,000,000-pound silos. During the initial phase of storage, the nuts continue to be dried by air circulation, to get them down to a safe, long-term storage moisture content of around 6 percent. At this stage, the nuts are stable and can remain in storage for up to two years.

The sample taken at delivery is processed like the rest of the nuts, *i.e.*, the trash is removed and the nuts in the sample are hulled and then dried before sorting. An assessment of the quality of the sample is then made. The assessment may include such things as a determination of the percentage of naturally split nuts, the color of the shells, and the amount of insect infestation (if any). This delivery sample may be used to determine payment to the producer, and to give the handler some idea of the characteristics of the crop he or she has to process.

The record shows that producers often commit their nuts to more than one handler. The normal practice in the industry is to have contracts between producers and handlers, many of them multi-year and often with premiums for quality. Many of the contracts also have minimum prices. Apart from this minimum price, the producer often does not know what final price he/she will receive for the pistachios. The handler makes interim payments throughout the year culminating in a final payment, usually in August following the previous September's harvest. The amount paid by the handler will depend in large part on the price that he or she obtained for the processed crop, and the costs of handling the pistachios.

When the nuts are removed from storage, the nuts are sorted, sized, graded and mechanically separated into open and closed shell product. These activities can take place in different sequences and the process varies among handling facilities. As part of this process, a considerable amount of trash, bad nuts, loose shells, etc., are removed from the product stream. At this stage, the nuts may be ready for market. However, some California pistachios are then roasted and salted by the handler prior to being placed in consumer or industrial size packages to be marketed.

Once the nuts have been roasted and salted, their shelf life is reduced as they can become rancid or stale, and they need to be stored at temperatures approximating 35 degrees Fahrenheit in order to remain completely stable. If they are not placed in cold storage, they

have a shelf life of approximately nine months.

The record shows that all of these activities, from initial receipt of the pistachios at the handling facility, to final packaging of the product, should be included in the definition of ''handle.'' These activities were identified as those necessary to prepare pistachios for entering the stream of commerce and, as such, should be included in the definition of the process which makes a person a ''handler,'' and, thus, subject to regulation under the proposed order.

In addition, the hearing record indicates that placing California pistachios into the current of commerce from within the production area to points outside thereof for the purpose of hulling and drying, or further processing would also constitute handling. In such cases, the individual responsible for placing California pistachios into the current of commerce would be considered a handler and would be subject to the provisions of the proposed order.

USDA recommends adding a paragraph (d) to § 983.14 of the proposed order as it appeared in the Notice of Hearing. To clarify the definition of ''handle,'' the following language is proposed to be added: ''Placing California pistachios into the current of commerce from within the production area to points outside thereof.''

According to the record, the acts of transporting pistachios from a producer's orchard to a processing plant within the production area and of transporting pistachios between handlers within the production area should be excluded from the definition of ''handle.''

The transportation of pistachios from the orchard to the handling facility is typically either performed by the producer him or her self, or contracted out to third parties. Given that neither the producer nor the contract hauler would be engaged in the process of preparing pistachios for market in this capacity, their activities should be excluded from those considered as part of ''handling.''

Similarly, witnesses stated that pistachios are customarily traded among handlers, and that this activity should not be considered part of the definition of ''handling.'' Trade among handlers predominantly occurs as a means for individual handlers to buy or sell surplus pistachios and to meet the demands of their respective customers. Witnesses also explained that some handlers are better equipped to handle pistachios that present processing problems. For example, pistachios requiring re-working to meet industry quality standards may be transferred from one handler to another for more efficient processing.

The record evidence is that most producers do not handle their own pistachios. However, a producer would become a handler if the producer performs any handling functions. For example, a producer that hulls and dries pistachios before shipment for further preparation for marketing would be considered a handler. Once a producer becomes a handler, he or she would be subject to the proposed order provisions.

Material Issue Number 5(a)—Other Definitions

(a) Certain terms should be defined for the purpose of specifically designating their applicability and limitations whenever they are used in the order.

''Accredited laboratory'' should be defined to mean a USDA laboratory or any other laboratory that has been approved or accredited by the U.S. Department of Agriculture for testing aflatoxin in pistachios. Witnesses testified that the aflatoxin testing and certification provisions of the proposed order are key components of the quality control program deemed necessary by the California pistachio industry. In order for the testing and certification process to be credible, the order should provide that the laboratories performing these functions must be accredited or approved by USDA.

''Act'' should be defined as the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674). This is the statute under which the proposed regulatory program would be operative, and this definition avoids the need to refer to the citation throughout the order.

According to record evidence, ''affiliation'' should be defined, as it is important within the context of proposed eligibility requirements for committee members and their alternates. Witnesses testified that ''affiliation'' should be defined to mean a person who is: (1) A producer or handler that directly or indirectly, through one or more intermediaries, owns or controls, or is controlled by or is under common control with the producer or handler specified; or, (2) a producer or handler who directly or indirectly through one or more intermediaries, is connected in a proprietary capacity or shares the ownership or control of the specified producer or handler with one or more other producers or handlers.

According to the hearing record, the term ''control'' should be further defined to mean ''the possession, direct or indirect, of the power to direct or cause the direction of the management of policies of a handler or a producer whether through voting securities, membership in a cooperative, by contract or otherwise.''

Witnesses explained that this definition of ''affiliation'' is proposed to ensure that persons who are in business together as handlers or producers are limited in their representation on the administrative committee. Further discussion of affiliation and its intended use under the provisions of the proposed order appears under material issue 5(b), the establishment of an agency to locally administer the order.

''Aflatoxin'' should be defined as one of the several carcinogenic mycotoxins produced by naturally occurring molds. Aflatoxin can be found, and can spread, in improperly processed and stored nuts, dried fruits and grains. According to information presented at the hearing, this group of fungal toxins is produced by the molds Aspergillus flavus and Aspergillus parasiticus. Aflatoxin is a known carcinogen and potential contaminant for pistachios.

Proposed § 983.38 sets forth a maximum aflatoxin level of 15 parts per billion (ppb) for California pistachios. This threshold was substantiated by testimony from experts in the field of aflatoxin and food contaminants, and is further discussed under material issue 5(d).

''Aflatoxin inspection certificate'' should be defined to mean a certificate issued by a laboratory that is accredited or approved by USDA to indicate that a lot of pistachios was tested for and met the aflatoxin quality requirements proposed in this order. In particular, an ''aflatoxin inspection certificate'' would indicate that the pistachios have been tested for aflatoxin and the aflatoxin in the nuts, if any, did not exceed a level of 15 ppb. Under the provisions of this proposed order, no handler could ship pistachios for domestic human consumption that exceed an aflatoxin level of 15 ppb. Witnesses explained that any handler placing California pistachios into the stream of domestic commerce for the purpose of human consumption would be required to obtain an aflatoxin inspection certificate for each lot of pistachios handled. Aflatoxin certificates would also be important for committee record-keeping and auditing responsibilities with regard to local administration of the order.

''Assessed weight'' should be defined to mean the weight of all pistachios,

clear of debris, hulled and measured at 5 percent moisture, that are received for processing by a handler within each production year. Calculation of the assessed weight would be based on the weight of the pistachios received from the field. As the handler receives pistachios, a delivery sample would be taken, and the nuts in that sample cleaned, hulled and dried to 5 percent moisture content. The actual weight of the pistachios received would then be adjusted to reflect the characteristics of the delivery sample and its final weight when dried to 5 percent moisture content. According to the record, the 5 percent moisture content is an industry standard used by all handlers.

In calculating the ''assessed weight'' for loose kernels, witnesses explained that the calculation method proposed in the order reflects current industry practices. To determine the weight of the kernels without shells, the weight of the kernel would be multiplied by two as it is generally accepted that the shell accounts for approximately half of the weight of a whole pistachio nut.

Witnesses also explained that assessments placed on pistachio handlers would be based on the volume of pistachios received by each handler for processing during a production year. Hence, the term ''assessed weight'' is essential to the committee's assessment collection. This term is further discussed in connection with proposed § 983.53, ''Assessments.''

The definition contained in the Notice of Hearing defined assessed weight as ''* * * edible inshell pistachios received for processing by a handler * * * .'' USDA recommends deleting the word ''edible'' from the definition. This would correct a conflict between the Notice of Hearing definition of ''assessed weight'' and the proposed definition of ''edible pistachios,'' § 983.13. The definition proposed under § 983.13, discussed later in this document, states that edible pistachios are pistachios that do not exceed aflatoxin and other quality provisions of the order described under §§ 983.38 and 983.39. Pistachios received from the field for processing by the handler have yet to be tested and certified as having met the proposed provisions of §§ 983.38 and 983.39. Therefore, USDA recommends the modified definition described above.

According to the hearing record, the definition of assessed weight could be modified based on a recommendation of the committee and approval by the Department through the public rulemaking process. Witnesses supported this authority so the industry would be able to take advantage of any better standard developed to determine the assessable weight of pistachios received by handlers.

''Certified pistachios'' should be defined to mean those pistachios for which aflatoxin inspection certificates and minimum quality certificates have been issued. Under the provisions of the proposed order, California pistachios shipped for domestic human consumption would be required to be certified. The definition of ''certified pistachios'' is further discussed under material issue 5(d) related to proposed quality (including aflatoxin) requirements.

''Committee'' should be defined to mean the administrative committee, which would be established pursuant to the proposed provisions of § 983.32. The Act authorizes USDA to appoint an agency or agencies to assist in the administration of a marketing order program. This definition would identify the agency to locally administer the proposed pistachio order. The committee would be comprised of eight pistachio producers, two handlers, and one public member. The establishment of a committee would be important to ensure representation of the industry and consumers to USDA.

''Confidential data or information'' should be defined to mean reports and records furnished or submitted by handlers to the committee which include data or information constituting trade secrets or disclosing the trade position, financial condition, or business operations of a particular handler or its customers. This term is relevant to proposed § 983.48 pertaining to disclosure of handler information. The confidentiality requirements in that provision of the order, discussed under material issue 5(e) are consistent with those contained in the Act.

''Department'' or ''USDA'' should be defined to mean the United States Department of Agriculture, which is the governmental body responsible for oversight of Federal marketing orders and agreements. This definition allows the usage of the USDA acronym, or reference to the USDA as the Department throughout the language of the proposed order.

''District'' should be defined to mean each geographic subdivision of the proposed production area described in the marketing order. The district delineations defined would be important for the purposes of committee nominations and producer representation of the regional areas of the production area.

The record supports dividing the production area into three districts. District 1 would consist of 11 counties in Southern California (Tulare, Kern, San Bernardino, San Luis Obispo, Santa Barbara, Ventura, Los Angeles, Orange, Riverside, San Diego, and Imperial Counties). District 2 would be comprised of four counties in Central California where pistachio production is most highly concentrated (Kings, Fresno, Madera, and Merced Counties). District 3 would consist of the remaining 43 California counties, primarily in the Northern portion of the State. The record shows that dividing the production area into these three districts would provide for adequate producer representation on the committee.

Allocation of producer membership among the districts would be based, in large part, on the relative levels of acreage and production among the districts, as well as the number of producers in each of the districts. Allocation of producer membership among the districts is discussed further under material issue 5(b).

Testimony indicated that authority should be provided to allow the committee to recommend to USDA the re-establishment of district boundaries and reapportionment of producer membership among the districts. This would allow changes in producer representation on the committee to reflect any future shifts in pistachio acreage and production within the production area.

Witnesses also stated that district changes under the California Pistachio Commission should be a criterion used in adjusting the district boundaries under the proposed order. It may be reasonable to assume that changes in the distribution of pistachio producers, acreage and production would justify district reestablishment under both the State and Federal programs. However, any recommended change in the district boundaries under the order would be evaluated on its own merits.

The definition of ''district'' contains authority to reestablish district boundaries. Redistricting would require a recommendation of the committee and approval by USDA through the rulemaking process. Authority for reallocation of producer membership among the districts is contained in proposed § 983.32 and is discussed later in this document.

''Domestic shipments'' should be defined to mean shipments to the 50 United States and to the territories of the United States. This term is important as the proposed quality requirements (including those pertaining to aflatoxin and size) would only apply to domestic shipments. The proposed quality requirements would

not apply to exports. The regulatory text of proposed § 983.12 is recommended to be modified from what appeared in the Notice of Hearing to include shipments to the District of Columbia as domestic shipments. Omission of Washington, DC as a domestic market was an oversight on the part of the proponent group, and its inclusion in the order is consistent with the record evidence.

''Edible pistachios'' should be defined to mean pistachios that meet the quality requirements (including those pertaining to aflatoxin and size) set forth under the proposed provisions of § 983.38, ''Aflatoxin levels,'' and § 983.39, ''Minimum quality and size levels.'' In particular, edible pistachios are pistachios that have been certified that they do not exceed the maximum level for aflatoxin and that they meet the minimum requirements for shell and kernel quality (including those relating to size).

''Inshell pistachios'' should be defined to mean pistachios that have a shell that has not been removed. This is to distinguish an inshell pistachio from a pistachio kernel or shelled pistachio. This term is further discussed in the context of proposed order provisions relating to quality standards under material issue 5(d).

''Inspector'' should be defined to mean any inspector authorized or approved by the USDA to inspect pistachios. This term is used in connection with the quality requirements proposed to be included in the order. An inspector, for example, would pull samples for aflatoxin testing by accredited laboratories. Inspectors would also be responsible for inspecting and certifying that pistachios meet the other quality requirements of the order.

The record shows that the Federal or Federal-State Inspection Service would be designated as the agency responsible for conducting these activities. To provide maximum flexibility, however, the order should provide that any inspector so authorized or approved by the Department may perform these functions.

''Lot'' should be defined to mean any quantity of pistachios that is submitted for testing for certification under the minimum quality requirements (including aflatoxin and size) of this proposed order. Specifically, a ''lot'' would be an identifiable quantity of pistachios handled by a handler at one time. A lot could have common characteristics, such as origin, type of packing, packer, consignor, or markings.

The record shows that the definition of lot is important in the context of traceability, as each lot tested would be issued a unique identification number. Traceability would allow handlers to respond to any sub-quality or aflatoxin issues that would necessitate preventing pistachios from entering the stream of commerce. The definition of ''lot'' is further discussed under material issue 5(d) in connection with the testing and certification provisions contained in proposed §§ 983.38 and 983.39.

''Minimum quality requirements'' should be defined to mean those requirements specified under the proposed provisions of § 983.39, which prescribe the permissible maximum defects and minimum size for inshell pistachios and pistachio kernels handled and shipped from and within the proposed production area. Regulation of quality is central to the proposed marketing order. This term is further discussed under material issue 5(d).

In conjunction with the definition of minimum quality requirements given above, ''minimum quality certificate'' should be defined to mean a certificate issued by an inspector that would indicate that a lot of pistachios was tested for the quality requirements proposed in this order and whether it met those requirements. Under the provisions of this program, no handler could ship pistachios for domestic human consumption that exceeded the percentage of defects or small-sized nuts allowed under § 983.39. Witnesses explained that any handler placing California pistachios into the stream of domestic commerce for the purpose of human consumption would be required to obtain a minimum quality certificate to this effect. Therefore, minimum quality certificates are also important to the committee record-keeping and auditing responsibilities.

''Part'' should be defined to mean the order regulating the handling of pistachios grown in the State of California, and all rules and regulations issued under the order. The order itself would be defined as a subpart of the part, as would individual rules and regulations.

According to record evidence ''person'' should be defined to mean an individual, partnership, limited liability corporation, corporation, trust, association, or any other business unit. This definition is consistent with the definition contained in the Act.

''Processing'' should be defined to mean hulling and drying of pistachios grown in the production area in preparation for market. This term covers the first steps of the handling process that occurs after the pistachios are harvested.

Witnesses describing the assessment collection aspects of the proposed order explained that handler assessments would be based on the volume of pistachios initially received from the field. Record evidence suggests that it is important to differentiate between processing activities and further preparing pistachios for market, as different handlers may perform these different functions. That is, one handler may perform the initial handling function of processing (hulling and drying), while another handler performs the remaining steps in the handling process.

Witnesses stated that only those handlers conducting the initial processing activities would be responsible for paying assessments to the committee. This would preclude the same pistachios from being assessed more than once. This term is included in the discussion of proposed § 983.53, ''Assessments'' which appears under material issue 5(c).

''Producer'' should be defined to identify those persons who are eligible to vote for, and serve as, producer members and alternate members of the committee, and those who are eligible to vote in any referendum. The term should mean any person engaged within the production area in a proprietary capacity in the production or growing of pistachios for sale.

Each business unit (such as a corporation or partnership) should be considered a single grower and should have a single vote in nomination proceedings and referenda. The term ''producer'' should include any person who owns or shares in the ownership of pistachios. For example, a person who rents land and produces pistachios resulting in that person's ownership of all or part of the pistachios produced on that land would be considered a producer.

Also, any person who owns land, which that person does not farm, but as rental for such land obtains ownership of a portion of the pistachios produced thereon, should be regarded as a producer for that portion of the pistachios received as rent. The tenant on such land should be regarded as a producer for the remaining portion produced on such land.

A joint venture is one whereby several persons contribute resources to a single endeavor to produce and market a pistachio crop. In such venture, one party may be the farmer who contributes one or more factors such as labor, time, production facilities or cultural skills, and the other party may be a handler who contributes money and cultural, harvesting, and marketing supervision. Normally, a husband and wife operation would be considered a partnership. Any

individual, partnership, family enterprise, organization, estate, or other business unit currently engaged in the production of pistachios for market would be considered a producer under the order, and would be entitled to vote in referenda and committee nominations. Each party would have to have title to at least part of the crop produced, electing its disposition, and receiving the proceeds there from. This control would come from owning and farming land producing pistachios, payment for farming services performed, or a landlord's share of the crop for the use of the producing land. A landlord who only receives cash for the land would not be eligible to vote. A business unit would be able to cast only one vote regardless of the number and location of its orchards, but each legal entity would be entitled to vote.

''Production year'' should be defined to mean the period beginning on September 1st and ending on August 31st of each year, or such other period as may be recommended by the committee and approved by the Department. This period starts with the typical beginning of the harvest season for pistachios and would prescribe a period of conduct for the committee's administrative activities, such as preparing an annual budget of expenses and accounting for receipts and expenditures of funds. Thus, the term ''production year'' would be synonymous with the term ''fiscal period.''

Witnesses at the hearing also supported the September 1 through August 31 period because it coincides with the California Pistachio Commission's accounting year. Having the same fiscal periods could facilitate the joint management of the two programs, which could yield administrative efficiencies to the industry's benefit.

As discussed under material issue 5(c), assessments would be based on the volume of pistachios received by a handler in each production year. Witnesses at the hearing stated that, although rare, there are some instances when pistachio harvest begins earlier than September 1. Record evidence suggests that this has happened in 2 out of the past 10 production years. In an effort to reconcile potential accounting differences within the context of the proposed Federal program, witnesses suggested that any pistachios harvested as much as four weeks earlier than the beginning of September be attributed to the new year's production total. Thus, this definition would also state that pistachios harvested and received in August of any year would be counted as part of the subsequent production year for assessment and other marketing order purposes. The inclusion of pistachios harvested and received within four weeks prior to September 1 represents a modification of the order language contained in the Notice of Hearing.

''Proprietary Capacity'' should be defined to mean the capacity or interest of a producer or handler that, either directly or through an intermediary, is a property owner together with the rights of an owner including the right to vote the interest in that capacity as an individual, shareholder, member of a cooperative, partner, trustee, or in any other capacity with respect to any other business unit.

Witnesses explained that this term is important to the proposed order and its provisions in that this language would make persons who are sharing ownership of a common business entity ''affiliated'' (see previous definition) for purposes of eligibility to serve on the committee. The term ''proprietary capacity'' is intended to imply ownership of a business as compared to an employee status only.

''Secretary'' means the Secretary of Agriculture of the United States or any officer or employee of the United States Department of Agriculture who is, or who may hereafter be, authorized to act in the Secretary's stead. The term includes any other officer or employee of the United States Department of Agriculture who has been delegated or who may be delegated the authority to act on behalf of the Secretary.

''Shelled pistachio'' should be defined to mean a pistachio kernel or part thereof and is distinct from an ''inshell pistachio.'' This term is relevant to the discussion of quality requirements set forth in proposed §§ 983.38 and 983.39, ''Aflatoxin levels'' and ''Minimum quality levels,'' and proposed §§ 983.40 and 983.43, ''Failed lots/rework procedures'' and ''Reinspection.''

''Substandard pistachios'' should be defined to mean shelled or inshell pistachios that do not meet the proposed quality requirements (including those related to size and aflatoxin) of the proposed order. According to the record, substandard pistachios should not be marketed for domestic human consumption. The proposed order contains specific provisions regarding the disposition of substandard pistachios. These provisions appear in proposed §§ 983.40 and 983.43, ''Failed lots/rework procedures'' and ''Reinspection,'' and are discussed under material issue 5(d).

Material Issue Number 5(b)—Administrative Committee

Pursuant to the Act, it is necessary to establish an agency to administer the order locally and to provide for effective and efficient operation of the order. The establishment and membership of an administrative committee is addressed in §§ 983.32 and 983.33 of the proposed order.

The hearing record shows that the committee should consist of 11 members. Eight members should be producers, two members should be handlers, and one member should be selected from the general public. Each member should have an alternate member who, possessing the same qualifications as the member, could serve in that member's place and stead in the event that the committee member could not fulfill his or her duties.

Allocation of Producer Membership

For the purpose of producer representation, the proposed order provides that the production area be divided into three districts. District 1 would consist of Tulare, Kern, San Bernardino, San Luis Obispo, Santa Barbara, Ventura, Los Angeles, Orange, Riverside, San Diego and Imperial Counties. District 2 would consist of Kings, Fresno, Madera, and Merced Counties. District 3 would consist of all other Counties in California not included in Districts 1 and 2.

As mentioned previously, the record indicates that producer representation from each district should be based, in large part, on the relative number of producers, bearing acreage, and volume of production in each district. According to record evidence, District 1 had 227 producers, 38,396 acres, and production totaling 95,889,846 pounds in 2001. This represents 35 percent of the total number of California pistachio producers (647), 49 percent of the State's bearing acreage (78,000) and 60 percent of total production in 2001 (160,295,282 pounds). District 2 had 358 producers (55 percent) and 36,330 acres (47 percent), and produced a total of 57,453,864 pounds (36 percent) in 2001. District 3 had 62 producers (10 percent), 3,274 acres (4 percent) and 6,951,572 pounds of production (4 percent).

Given the relative volumes and to ensure that each district's producers are represented on the committee, witnesses testified that of the eight producer members, four should be from District 1, three should represent District 2, and one should be a pistachio grower in District 3.

As discussed under material issue 5(a), § 983.11 of the proposed order

(which defines the three districts) should contain authority for the reestablishment of those districts. This would enable producer representation on the committee to reflect any future shifts in pistachio production among the districts.

The record also supports authority for reapportionment of producer membership among the districts. This authority would complement the authority to reestablish districts, and would serve to allow for changes in representation in producer membership on the committee. Producer membership could be reapportioned whether or not the districts were reestablished. The record supports allowing producer membership to be reapportioned among the districts upon a two-thirds recommendation of the committee and approval of the Department (through the rulemaking process).

While the record supports the ability to reapportion producer membership, the proposed order as it appeared in the Notice of Hearing did not contain such a provision. USDA recommends adding language to § 983.32(b) of the proposed order to provide authority to reapportion producer membership among the districts.

Allocation of Handler Membership

While the record shows that producer representation on the committee should be allocated among geographic districts, such allocation is not needed for the two handler members on the committee. The two handler members would represent the production area-at-large. For one of the handler members, each pistachio handler would be entitled to cast one vote in the nomination process. For the second handler member, each pistachio handler would be entitled to cast one vote for each ton of assessed weight of pistachios processed by that handler during the two production years preceding the year in which nominations are made.

The record shows that there are 19 pistachio handlers in California, and that 1 of these handlers accounts for more than half of the volume of pistachios processed in California each year. Under the proposed provisions of the order, one of the handler members would likely represent the largest handler in the industry, since voting in the nomination process for that member would be weighted by volume. All remaining handlers would then nominate the other handler member, since any one handling entity would not be eligible to fill both handler member positions. (This limitation is discussed below.) Witnesses supported this method of allocating handler membership as adequate to ensure appropriate representation of the interests of California pistachio handlers in committee deliberations.

In weighting the nomination votes for one of the handler members, the record shows that each handler would be entitled to cast one vote for each ton (or portion thereof) of assessed weight of pistachios processed by that handler during the two production years preceding the production year in which nominations are made. Calculating the assessed weight based on two years of production is intended to take into account the alternate bearing nature of pistachio trees. Furthermore, the assessed weight of pistachios would be credited to the handler responsible under the order for the payment of the assessments. This provision would address the fact that pistachios are often traded or sold by one handler to another after they are harvested. Attributing the volume of pistachios to the first handler of those pistachios would preclude double counting of nuts that are transferred from one handler to another. It would also provide the most accurate measure of the relative volumes of pistachios handled by each handler.

Witnesses at the hearing testified that all handlers currently process (hull and dry) pistachios. Thus, all handlers would be able to participate in the nomination of both handler members on the committee.

The record supports authority in the proposed order to revise handler representation on the committee to ensure that industry representation remains appropriate. This provision would allow for flexibility in the order to accommodate for future changes in industry structure. For example, if a significant number of handlers in the industry ceased to process pistachios, it could be appropriate to weight their votes in the nomination process on some other basis than the assessed weight of pistachios. Any change in handler representation would require a recommendation by the committee and approval by USDA through the rulemaking process.

Committee Member Affiliations

The order should provide that not more than two members of the committee, and not more than two alternate members, could be employed by or affiliated with the same handler and/or producer. Additionally, only one producer member and alternate in any one district and only one handler member and alternate could be affiliated.

The record evidence is that the membership of the committee should be representative of the industry as a whole. No one group of people who share common business interests should be able to gain control of committee decision making. To accomplish this goal, the order should limit the number of positions the members of any one affiliated group could hold.

As previously mentioned, one handler in the industry accounts for more than half of the California pistachios handled annually. The record shows that the two-member limitation is in large part intended to prevent any entity, and its many affiliates, from dominating committee actions. The limitation is designed to assure fair representation on the committee, given the current nature and structure of the California pistachio industry.

As discussed under Material Issue 5(a), the term ''affiliation'' should be defined broadly so that it encompasses the many different relationships through which people have common business interests.

Witnesses at the hearing gave several examples to illustrate their view of how this limitation on committee membership should work. In the case of a corporate handler, all of its shareholders should be considered an affiliated group because they would be connected in a proprietary capacity and share in the ownership and control of the corporate handler. In this scenario, the shareholders and employees of the corporation would be limited to one handler member on the committee; they could not hold both handler member positions. If the corporation was also a pistachio producer, a producer member could also represent the affiliated group. In no case could more than two committee members represent that affiliated group.

Another example offered by witnesses described one corporation owned by one set of shareholders and a second corporation with a separate set of shareholders that jointly own a handling entity. In this case, the employees of the handling entity and both of the corporations, and both sets of shareholders, would be considered as one affiliated group. As such, this combination of two corporations and one handler would be limited to a maximum of two committee positions.

A third scenario described by witnesses entailed a corporation, owned by its shareholders, and a producer cooperative that jointly own a handling entity. The cooperative was comprised of producer members who grow pistachios and share in the proceeds of the sale of all of the pistachios of the

members pooled together. In this case, the corporation (owned by its shareholders) and the cooperative (owned by its members) would be affiliated through their common control of the handler. Therefore, this combination of corporate employees and shareholders, cooperative employees and members, and handler employees, would constitute a single affiliated group. The entire group would be entitled to no more than two representatives on the committee.

Witnesses also testified about a producer who sells pistachios to a handler for cash or a fixed price plus bonuses but has no ownership or proprietary interest in that handler. In such a case, the producer would not be affiliated with that handler for purposes of committee membership.

In a final illustration, if a producer is a shareholder or a member of, or directly or indirectly owns a handler, that producer would be considered a part of the handler's affiliated group. This would be true even if that producer sells part of his or her crop to another handler that is not part of the affiliated group.

Cooperative Affiliation

As discussed above, members of a producer cooperative would constitute an affiliated group for purposes of committee membership. The record shows that the order should contain a provision to clarify when a person ceases to be affiliated with a cooperative for those purposes.

As explained for the record, cooperatives usually retain from their profits, which would otherwise be paid pro rata to its members, such amount as is needed for its capital needs and reserves. These ''retains'' are allocated and then paid pro rata to each member whenever the capital needs change or are replaced by new retains in subsequent years. This is known as ''revolving capital.''

Paragraph (f) of proposed § 983.33 should provide that a producer who has not marketed pistachios through a cooperative during the current and one preceding production year would no longer be considered ''affiliated'' with that cooperative. This would be true even if the cooperative continued to hold that producer's retains. If the cooperative holds none of the producer's retains, that producer would become unaffiliated with that cooperative at the time his or her membership is terminated.

The record supports an additional clarification concerning producer cooperatives. There may be an occasion where a producer cooperative has, as a member, another producer cooperative that handles pistachios. While the members of both cooperatives would be considered affiliated, the producer cooperatives would still qualify as producers for purposes of voting for producer members on the committee.

Qualifications of the Public Member

At the hearing, witnesses supported having a public member on the committee. The appointment of a public member would offer many advantages. One such advantage would be that the committee would have an impartial individual, having no economic interest in the pistachio industry, with whom to discuss industry problems and concerns. Such a person could offer a unique perspective in committee deliberations.

As such, witnesses recommended that the public member and alternate public member should not be permitted to have a financial interest in the production, processing, financing, buying, packing, or marketing of pistachios, except as a consumer. This member and his or her alternate would also be precluded from being a director, officer, employee or affiliate of any firm or business entity engaged in the pistachio industry. The public member should be willing to devote sufficient time to regularly attend committee meetings and become familiar with the background and economics of the industry, as well as the provisions of the proposed order. Testimony indicated that the committee could be able to establish (with the approval of USDA) further qualifications the public member and alternate member should possess, if deemed necessary.

Nominations

For the proposed committee to function, a mechanism is required by which members and alternate members would be nominated by their peers, and selected and appointed by the Department. Nomination procedures are set forth in the proposed provisions of §§ 983.32 and 983.33.

The order should provide that USDA would conduct nominations for initial producer and handler members of the committee. Such nominations could be made either at industry meetings, or by mail. The provisions also state that the first nominees must meet the same qualifications as required for their successors. While the Department would have discretion in determining a reasonable process to conduct initial committee nominations, the committee should be established as provided in § 983.22 of the proposed order.

A revision in paragraph (a) of § 983.33 is recommended. This revision would clarify that USDA would conduct the initial nominations of producer and handler members and alternates only. The initial public member and alternate would be nominated by the industry members of the committee, as described later in this document.

Successor Producer and Handler Members

The record evidence is that the committee staff should conduct subsequent nominations for producer and handler members of the committee. To facilitate maximum participation in the process, nominations would be conducted by mail ballot.

The record evidence shows that producer and handler member nominations would entail several steps. First, individuals seeking nomination would be required to establish their qualifications to serve as a California pistachio producer or handler, and to identify the district (for producer seats) they are seeking to represent. Candidates would also be required to identify whether they intend to seek nomination as a producer or handler member. Considering that many pistachio handlers are also producers, witnesses recommended that individuals be limited to seeking nomination as one or the other. In other words, the same individual would not be allowed to simultaneously seek a producer and a handler seat; his or her name could only appear on the producer or the handler ballot, not both.

The record shows that individuals seeking to fill member seats would need to submit notice of their intent to run as a nominee to the committee in advance of nominations. This would allow the committee staff adequate time to determine a candidate's eligibility in advance of issuing nomination ballots, and would allow for any questions or informational needs to be addressed in advance of voting for nominees.

Once qualified candidates are identified, ballots containing the names of those individuals and additional space for write-in candidates would be prepared. The ballots, together with voting instructions, would be mailed to all producers and handlers who are on record with the committee. The committee staff would tally the votes and submit its nomination report to USDA for selection.

The hearing record supports the same general approach for nominations of both producer and handler members. However, the language contained in the Notice of Hearing did not include provisions specific to successor handler

nominations. USDA is suggesting that proposed § 983.33(b) be modified accordingly.

The record shows that the committee should have authority (with USDA approval) to establish additional rules and regulations governing the nomination process, if deemed necessary. This authority would apply to both producer and handler member nominations.

Producer Members

Witnesses explained that individuals seeking candidacy for nomination to a producer seat would be required to designate the district in which they seek election and substantiate their qualification as a producer, or designated representative of a producer, in that district. However, testimony also clarified that the order would not require that the candidate be a resident of that district. Witnesses explained that it would not be reasonable to impose such a requirement since not all producers live in the same district in which they produce pistachios. Such a residency requirement would, therefore, preclude a number of pistachio producers from being able to serve on the committee.

Record evidence states that only producers would be qualified to serve as producer members and to participate in the nomination of producer members and their alternates. Producers can be corporations, partnerships, limited liability companies, trusts or other legal entities, as well as a sole proprietorship owned by an individual. The owners of the pistachio groves could designate an officer or employee to seek membership and to cast the votes on their behalf. As proposed, officers and employees would not include professional farm managers who perform farm management services for a number of different producers without being an employee or an officer of the producer. The intent is to limit those eligible to serve as producer members to persons who are involved, either as a producer with a proprietary interest in the pistachio industry or an employee working in the industry for a producer.

Each producer would be entitled to cast one vote, either in person or through an authorized officer or employee, for each producer member position to be filled in his or her district. Witnesses suggested that rules and regulations could be recommended by the committee and approved by the Department that would require such authorization to be in writing and to be addressed to the committee. A producer would only be able to cast his or her vote in the district in which that producer produces pistachios. If the producer were engaged in producing pistachios in more than one district, then the producer would need to select a district in which to participate as a nominee and/or as a voter. A producer would not be allowed to vote for candidates in more than one district.

Producers receiving the highest number of votes in each district would be designated nominees for their respective districts. Alternates for each nominee would be the candidates receiving the second highest number of votes in the same district. In the case of a tie, witnesses recommended that final nominees and their alternates be selected by a drawing.

Handler Members

Handler nominees would be selected for the production area as a whole, and final candidates would be determined based on those two individuals receiving (1) The most votes representing handlers by number, and (2) the most votes representing handlers by volume. Alternates would be designated as those individuals receiving the second highest vote in each respective category. Handler voting procedures are further described below.

Record evidence specifies that only handlers could participate in the nomination of the handler members and their alternates. Handlers would include the duly authorized officers or employees of handlers. Since many of the handlers are incorporated, a corporation or other business entity would be required to designate its representative. Individuals could also designate an employee to act on behalf of the proprietorship through a written designation signed by the owner.

As indicated above, handler representation would be divided into two categories, with one member nominated by a number vote and the other member nominated by a volume vote. The former would be nominated by receiving the highest number of votes placed by voting handlers, with each handler having one vote. That member's alternate would be the candidate receiving the second highest number of votes.

The provisions of the proposed order provide that if a person were both a producer and a handler of pistachios, that person would be able to participate in both the producer and handler nominations. While a single individual may not hold more than one seat on the committee, a producer who is also a handler could designate an officer or employee as a handler nominee, and another representative as a producer nominee. The affiliation provisions described above would apply.

Members of the committee, at the time of their selection and during their term of office, must be pistachio producers or handlers, or officers or employees of a producer or handler. If that relationship should terminate during their term as a committee member or alternate, that person would become disqualified to serve further, and the position would be deemed vacant.

Public Member

The provisions proposed under § 983.32(c) would govern nomination and selection of the public member and alternate member. According to the record, the public member, who would be neither a pistachio producer nor a handler, would have all the rights and responsibilities of any other member of the committee. The record evidence is that the producer and handler members of the committee should nominate the public member. Witnesses explained that industry committee members would be in the best position to identify individuals who are qualified and willing to serve. Once the committee identified possible public member and alternate public member candidates, the committee would make a recommendation to USDA for final approval and selection by the Department.

Alternate Members

The order should provide for the nomination and selection of an alternate member for each committee member. Alternates would be subject to the same eligibility requirements as committee members. They would act in the place and stead of the committee members they are alternates for when the committee members cannot fulfill their committee obligations. Alternates would provide continuity and stability to committee operations by ensuring full representation of the industry, including their particular district and group (producers or handlers).

Alternate members would be nominated in the same manner as committee members, except that the recommended alternate(s) would be the individual(s) receiving the next highest votes to the nominee(s) receiving the highest number of votes. If a person were selected as an alternate from the same district as a member and both are employed by or connected in a proprietary capacity with the same business entity, the alternate would serve as the alternate to that member.

When serving in the place and stead of their committee members, alternate members would be able to exercise all

of the rights, duties and powers of those members as though they were serving as full members of the committee. Alternate members would only be allowed to vote in the absence of those members for whom they are alternates, or when they succeed to those members' positions.

Record evidence also shows that an alternate member should succeed his or her member in the event of that member's death, removal, resignation or disqualification. The alternate would then serve until a successor was selected and qualified.

Selection by USDA

Record evidence states that once the nomination process for producer and handler members is completed, and the industry has voted on committee member and alternate candidates, nomination reports or committee minutes would be prepared by the committee staff and sent to the USDA. This should be done at least 60 days prior to the beginning of each two-year term of office (or by May 1). The Department, after determining that the conditions and qualifications of each nominee have been met, would then select the 10 producer and handler members of the committee and an alternate for each of those members based upon the nominations.

As previously mentioned, the newly appointed industry members of the committee would nominate the public member and alternate member. USDA would also be responsible for selecting the public member and alternate.

Nominees would be required to indicate in advance of their selection that they are willing to accept the position for which they were nominated. Agreeing in advance to serve as a committee member or alternate would avoid possible delays in the appointment of the committee.

In the event that nominations are not made within the time and manner specified in the order, the USDA could appoint members and alternates without regard to nominations. Those appointments would be made on the basis of representation provided in proposed §§ 983.32 and 983.33.

Term of Office

Record evidence suggests that the term of office should begin on July 1 and last for 2 years. The month of July represents a natural break in the California pistachio production cycle, with each new harvest beginning typically in September, or at the earliest in August. Moreover, witnesses indicated that this time frame would allow adequate time for committee members and staff to prepare an annual budget, develop a marketing policy for the upcoming production year, and make any recommendations to the Department for any needed regulatory changes prior to harvest activities.

In addition, witnesses at the hearing indicated that terms should be staggered so that approximately half of the committee members' positions would be filled each year. This provision would ensure that continuity in experience among committee members was maintained, yet provide for new members with new ideas and fresh perspectives to participate in the administration of the order. To initiate this process, witnesses recommended that the first committee members nominated would be divided into two groups by a drawing to determine whether they would be seated for initial terms of one year or two years. Four producer members, one handler member and their alternates would serve an initial term of about one year. Remaining industry members and the public member (and their alternates) would serve an initial term of about 2 years.

The regulatory text contained in the Notice of Hearing failed to specify that the term of office should apply to all committee members and their alternates. Paragraph (k) of proposed § 983.33 has been revised to correct this.

Term Limits

Record evidence supports term limits to spread the involvement of the pistachio producers and handlers, and increase industry participation in administering the marketing order. Term limits should apply to all committee members and alternates, including those representing the public. The maximum number of terms that an individual would be allowed to serve for would be four consecutive two-year terms of office, or a maximum of eight consecutive years on the committee. The tenure requirements would apply to both committee members and alternate members. Once a person has served as a member and/or alternate for 8 years, that person would not be eligible for renomination. He or she would be eligible to serve again after 12 consecutive months out of office.

Vacancies

Any vacancy on the committee would be filled by a majority vote of the committee members remaining for the remaining unexpired term of the vacant position. This authority appears in paragraph (j) of proposed § 983.33. The replacement must fulfill all of the qualifications set forth as required for any other nominee for the position, and that person's qualifications would have to be certified to USDA. The Department could then appoint the nominee to serve the balance of the term.

This procedure would eliminate the need to conduct a special nomination to fill a vacancy for the balance of a term, which would be less than two years in any case. It would also serve to address situations in which a member's position is vacant and the alternate declines the position or is not available to fill the vacancy, as provided in proposed § 983.33(g). The authority could also be used to fill a vacancy for an alternate member.

Proposed Quorum and Voting Provisions

The record evidence is that once the committee is appointed, a quorum of the committee would consist of seven committee members. This would include handlers, producers and the public member. Except as discussed below, any action of the committee would require the concurring vote of a majority of the committee members present. An alternate could serve as a member for purposes of constituting a quorum and voting if the member is absent.

Record evidence indicated, however, that certain issues are of sufficient significance to the industry that action should require a greater degree of consensus than a simple majority vote would demonstrate. Witnesses testified that there are four areas that should require at least seven concurring votes, prior to any recommendation being made to the USDA. The first involves any modifications of the minimum quality levels set forth in proposed § 983.39. The second entails any change in the aflatoxin levels prescribed in § 983.38 of the proposed order. Adjustments in the sampling and inspection requirements included in the order with respect to minimum quality (including aflatoxin) requirements is another area that should require seven concurring votes. And, finally, the record indicates that recommendations related to changes in committee representation (including qualifications and affiliation issues) should require a higher level of committee member agreement.

As such, this proposal provides that any recommended change or modification to the issues outlined above would require at least seven concurring votes. Any other actions by the committee could be determined by a simple majority of those voting.

The record shows that at committee meetings, members could cast their vote

by voice or in writing. Participation by telephone would be permitted as long as the equipment used would allow all meeting participants to hear and communicate with each other. Telephone or similar communication equipment could include conference call equipment and/or audio-visual equipment that would allow all members to participate in a meeting simultaneously.

If for some reason an action must be taken without a meeting, record evidence indicates that such action would require a unanimous vote of the committee, and the votes would have to be in writing. Witnesses testifying at the hearing stated that the types of committee actions contemplated without a meeting would be limited to issues of routine business or those of relatively minor importance, such as approval of meeting minutes. Such matters would not merit the time and expense of holding an assembled meeting. This proposed provision is common to several existing marketing orders and would enhance the committee's decision-making abilities on simple administrative matters.

Compensation

While testimony supported reimbursement of necessary expenses incurred by committee members attending meetings, witnesses testified that no compensation should be made to pistachio producers and handlers for their service on the committee. To the extent the committee requested the attendance of alternate members, those alternates would also be entitled to reimbursement of their expenses.

Record evidence did support compensation, in addition to the necessary expenses, of the public member. In order to get the level of experience and background required to serve as a qualified, effective public member, witnesses stated that it might be necessary to compensate that person for his or her time. Compensation would need to be set at a reasonable level, and should be consistent with that person's experience and background.

Committee Powers and Duties

The committee, under proposed § 983.35, should be given those specific powers that are set forth in section 608c(7)(C) of the Act. Such powers are necessary for an administrative agency, such as the proposed committee, to carry out its proper functions. According to record evidence, the committee would have four general powers under the proposed provisions of this order:

(1) To administer the provisions of the order;

(2) To adopt by-laws, rules, and regulations for the implementation of the order with the approval of the Department;

(3) To receive, investigate, and report to the Department complaints regarding violations of the order; and

(4) To recommend marketing order amendments to the Department.

These powers are necessary to carry out the committee's functions under both the proposed order and the Act. Witnesses indicated that these powers would enable the committee to make recommendations to the Department that reflect the conditions in the industry from their knowledge and experience.

The specific duties of the committee as set forth in § 983.36 of the proposed order are necessary for the discharge of its responsibilities. These duties are similar to those typically specified for administrative agencies under other marketing order programs. They pertain to specific activities authorized under the order, such as investigating and compiling information regarding California pistachio marketing conditions, and to the general administration of the program including hiring employees, appointing officers, and keeping records of all committee transactions. The proposed order delineates the committee's duties as follows:

(1) The committee should adopt bylaws and rules for the conduct of its meetings and for such other purposes as it deems necessary. The committee should also select such officers from among its membership, including a chairperson and vice-chairperson, as may be necessary, and define the duties of such officers.

(2) The committee should employ such persons as it deems necessary to effectively and efficiently operate the program. The committee could enter into contracts or agreements with such persons, determine their duties, and establish appropriate levels of compensation. Such contracts or agreements would pertain to the provision of services required by the order and for the payment of the cost of such services with funds collected under the order.

(3) The committee should select such subcommittees as may be necessary.

(4) The committee should submit to the USDA a budget for each fiscal period, prior to the beginning of such period. The budget submission should include a report explaining the budget items and the committee's recommendation as to the rate of assessments for the fiscal period.

(5) The committee should be required to keep minutes, books, and records that reflect all of the acts and transactions of the committee. Such records would be subject to examination by the Department.

(6) The committee should prepare periodic statements of the financial operations of the committee and make copies of each statement available to producers and handlers for examination at the office of the committee.

(7) The committee should be required to have its financial statements audited by a certified public accountant at least once each fiscal year and at such times as the USDA may request. Such audits should include an examination of the receipt of assessments and the disbursement of all funds. The committee should provide USDA with a copy of all audit reports and should make copies of such audits, after the removal of any confidential individual or handler information that may be contained in them, available for examination at the committee's office.

(8) The committee should act as an intermediary between USDA and any pistachio producer or handler with respect to the operations of the order.

(9) The committee should investigate and assemble data on the growing, handling, shipping and marketing conditions with respect to pistachios.

(10) The committee should be required to apprise the Department of all committee meetings in a timely manner.

(11) The committee should be required to submit to USDA such available information as the Department may request.

(12) The committee should have the duty to investigate compliance with the provisions of the order.

(13) The committee should provide, through communication to producers and handlers, information regarding the activities of the committee. The committee should also respond to industry inquiries about committee activities.

(14) The committee should oversee the collection of assessments levied under the order.

(15) Finally, the committee should have the authority to borrow such funds as may be necessary to fulfill its responsibilities and obligations. Any loan would be subject to USDA approval and could not exceed the expected expenses of one fiscal year.

Witnesses explained that the above-outlined duties are important to the efficient and functional operation of the committee.

Material Issue Number 5(c)—Expenses and Assessments

The committee should be required to prepare a budget showing estimates of income and expenditures necessary for the administration of the marketing order during each fiscal year. The budget, including an analysis of its component parts, should be submitted to USDA sufficiently in advance of each fiscal period to provide for USDA's review and approval. The budget should also include a recommendation to USDA of a rate of assessment designed to secure income required for such fiscal year.

The committee should be authorized under § 983.52 of the proposed order to incur such expenses as the Department finds are reasonable and likely to be incurred during each fiscal, or production, year. Such a provision is necessary to assure the maintenance and functioning of the committee, and to enable the committee to perform its duties in accordance with the provisions of the order.

The record states that funds to cover the committee's expenses would be obtained through the collection of assessments from handlers who process pistachios in the proposed production area. These assessments are intended to reflect each handler's proportional share of the committee's expenses. As such, assessments would be based on the total amount of pistachios processed by each handler relative to the total amount of pistachios processed by the industry as a whole during a given production year.

Witnesses explained that since pistachios are often transferred between handlers for further preparation or packaging for market, it would be appropriate to apply assessment calculations to the handler who first handles a particular lot of pistachios. By assessing the handler who initially receives a lot of pistachios, the industry intends to prevent having assessments paid more than once for the same pistachios. The previous discussion of the definition of ''assessed weight'' further clarifies this calculation.

Testimony in support of proposed § 983.52 covering committee expenses indicates that prior to the beginning of each production year, and as may be necessary thereafter, the committee should prepare an estimated budget of expenses necessary for its effective administration of the order. Based upon this estimate, the committee would calculate and recommend to the Department a rate of assessment that would provide adequate funds to cover the cost of projected expenditures. Preparing a budget for the committee prior to the beginning of each fiscal period is reasonable. A budget is necessary to provide the committee and the Department with a basis for determining the assessment necessary to cover the cost of operation.

The committee would present its annual budget to USDA for review and approval. Accompanying the budget would be a report showing the basis for its calculations, an explanation of each line item, and any proposed year-over-year increases or decreases. Assessments would be levied at the rates established by USDA. Establishment of such assessment rates would be accomplished through the informal rulemaking process. Such rates would be established on the basis of the committee's recommendations or other available information.

Witnesses stated that any assessment rate recommended to the Department should be limited to a maximum rate of one half of 1 percent of the industry's previous production year's average producer price. The average producer price would be calculated by the committee and would be based on the previous year's average grower receipt per pound of pistachios.

The record shows that recent producer prices for pistachios were around $1.10 per pound. If the average producer price calculated by the committee for the previous year was $1.10 per pound, the maximum assessment rate for the current year's crop would be $0.0055, or approximately one half a cent per pound. Applying this rate to 2001 production of about 160 million pounds would yield a maximum assessment income of $880,000. Witnesses testified that this should be sufficient to operate the proposed program.

The intent of the maximum limit on the assessment rate is to assure pistachio producers and handlers that program expenses would be kept within specified limits, and that no projects requiring extraordinary expenditures would be undertaken. The proposed limit appears reasonable for the administration of a program of this nature.

Witnesses reasoned that there could be times during a fiscal period when it would become necessary to revise the budget and/or increase the assessment. Such instances could include situations where actual harvest is lower than anticipated or the committee incurs unforeseen expenses. In this regard, witnesses stated that the assessment rate should not be increased without the committee first making a recommendation and securing approval of the Department to do so. Such recommendation would also need to be made prior the issuance of that production year's final handler assessment bill. Any assessment increase would be applicable to all pistachios received and processed by handlers within the proposed production area for that production year.

During the hearing, questions were raised regarding proposed order language contained in the Notice of Hearing. Language in the Notice provided that any change to the assessment rate would be required to be recommended and approved before October 1 of any production year and before the date established for payment of the assessment. Discussion at the hearing resulted in witnesses acknowledging that situations could arise where these deadlines would be too restrictive, and would prevent the committee from being able to address unforeseen shortfalls in assessment income.

Accordingly, witnesses recommended that the committee, as necessary, be permitted to adjust the rate of assessment (with USDA's approval) at any time before the final billing is made for the assessment. Section 983.53(b) should therefore be modified by removing the October 1 deadline and clarifying language that would allow the committee to recommend changes to the assessment rate before the issuance of the last handler assessment billing statement.

Record evidence in support of proposed § 983.55 indicates that if assessments are not paid within the time prescribed by the committee, the handler would be required to pay to the committee a late payment charge of 10 percent of the amount of the assessment determined to be past due and, in addition, interest on the unpaid balance at the rate of 1½ percent per month. Late payment charges and interest on unpaid balances are reasonable in encouraging timely payment of assessments and compensating the committee for expenses incurred in collecting unpaid assessments.

While supporters of this proposal indicated that any assessments imposed under the program would be quite modest, timely collection of those assessments would be important in order to efficiently and effectively administer the provisions of this proposed program. Moreover, they indicated that if one handler were to become delinquent in paying his or her assessments, this could serve as an incentive for others to also become delinquent. Witnesses felt that the proposed late payment and interest

charges would help to ensure stability in the flow of committee funds collected through assessments.

The record evidence is that the committee should have the authority to recommend other rates for late payment and interest charges, as may be appropriate. Section 983.55 is being modified to clarify this point. Any change in these rates would require approval of the Department through the informal rulemaking process.

The Department is recommending several additional modifications in proposed § 983.55. The language contained in the hearing notice provided that in addition to delinquent assessments, late charges and interest would be imposed on handlers who fail to file required reports under the order. Since (in the case of unfiled reports) there would be no monetary value upon which to impose these charges, this provision is found unworkable and is therefore deleted.

Witnesses also supported a provision that if a handler is delinquent in paying his or her assessments for more than 60 days, the committee could request that the USDA stop providing aflatoxin and grade and size inspections to the delinquent handler. Witnesses also suggested that the committee could require any handler who fails to pay an assessment or related charge to furnish and maintain a surety bond in a form and amount, and for a period of time, specified by the committee. These provisions are not typical in relation to delinquent assessments under a marketing order program. Thus, these provisions are being deleted from § 983.55 of the proposed order. The Department would work with the committee staff in determining an appropriate course of action relating to violations of the proposed order, including nonpayment of assessments.

Under the proposed order, the committee would be allowed to accept voluntary contributions. Contributions could only be used to pay for authorized committee expenses. The committee may accept contributions, for example, to fund the operations of the order during the first part of a production year, before sufficient income is available from assessments on the current year's pistachios.

A section on accounting is necessary to assure handlers and the industry that funds would only be used for the purposes intended, that there would be a proper disposition of excess funds, and that a detailed accounting would be made of such disposition. Under the order, the committee would only be authorized to incur such expenses as USDA finds are reasonable and likely to be incurred by it during each production year for its maintenance and functioning, and for such other purposes as the Department may determine to be appropriate.

Paragraph (a) of proposed § 983.56 provides for situations where, at the end of the fiscal period, the assessments collected may be in excess of expenses incurred. According to record evidence, the provisions under this section would allow the committee, with the approval of the Department, to establish an operating monetary reserve. This would allow the committee to carry over to subsequent production years any excess funds in a reserve, provided that funds already in the reserve do not exceed approximately two years' expenses. If reserve funds do exceed that amount, the assessment rate should be reduced to bring the reserves to a more reasonable level. These reserve funds could be used to defray expenses during any production year before assessment income is sufficient to cover such expenses; to cover deficits incurred during any fiscal period when assessment income is less than expenses; to defray expenses incurred during any period when any or all provisions of the order were suspended or inoperative; and, to cover necessary expenses of liquidation in the event of termination of the program.

If any excess funds were not retained in a reserve, each handler who paid assessments would be entitled to a proportionate refund of the excess assessments collected. If excess assessments remained at the end of a given production year, the committee could apply each handler's excess as a credit for handlers towards the next production year's operating costs, or the committee could refund such funds to the handlers.

Testimony states that all funds received by the committee pursuant to the provisions of the proposed order would be used solely for the purposes specified in the order. Moreover, § 983.56 would authorize the Department at any time to require the committee and its members to account for all receipts, disbursements, funds, property or records for which they are responsible. This authority is necessary to ensure that proper accounting procedures are followed at all times.

Whenever any person ceases to be a member of the committee, that individual should be required to account for all receipts and disbursements for which he or she was responsible. That person should also be required to deliver all property and funds in such person's possession to the committee. Finally, that person would execute such assignments and other instruments as might be necessary or appropriate to vest in the committee full title of all committee property and funds.

In the event the proposed order were to be terminated or become inoperative, the committee, with the approval of USDA, would appoint one or more trustees for holding records, funds or other property of the committee. Any funds not required to defray the necessary expenses of liquidation would be returned, to the extent practicable, pro rata to the handlers from whom such funds were collected. Distribution of those funds would be carried out in a way that the Department deems appropriate.

Material Issue Number 5(d)—Quality and Inspection Requirements

According to record evidence, provisions regarding maximum aflatoxin levels, minimum quality levels (including size requirements), and testing and certification procedures should be included in the proposed order. These provisions are captured under the proposed §§ 983.38 through 983.46.

Presently, certain pistachio quality controls are in place under the California Pistachio Marketing Agreement (agreement). The agreement is effective under the California Marketing Act (Chapter 1, Part 2, Division 21 of the Food and Agricultural Code of the State of California). The regulations in effect under the agreement prohibit the blending of naturally and artificially opened pistachios; ban the practice of bleaching pistachios; and require mandatory aflatoxin testing for shipments to specified export markets. These regulations are voluntary in that they apply only to handlers who choose to sign the agreement. The record evidence is that signatories to the agreement current account for 82 percent of the pistachios produced in California.

The proposed Federal order would establish mandatory testing and certification requirements for California pistachios distributed for domestic human consumption. The order would include requirements that set maximum tolerance levels for aflatoxin and defects, and a minimum allowable size. The requirements under the proposed order would not duplicate or contradict the regulations under the State agreement.

According to the record, in preparation for this proposal, the California pistachio industry initiated a study group on pistachio quality assurance issues in May 2000. The

purpose of this study group was to identify areas of quality regulation that would elicit consensus and support among industry producers and handlers. Record evidence also states that the proposed regulatory provisions are based on current industry practices and are substantiated by a wide body of scientific research and data.

Record testimony ties the industry's concern over the regulation of aflatoxin in pistachios to the protection of consumer interests by preventing the sale of contaminated nuts. Witnesses repeatedly cited evidence demonstrating consumers' reluctance to buying defective or damaged pistachios contaminated with mold. Consumer concerns about the presence or threat of aflatoxin in pistachios makes the regulation of aflatoxin bearing molds important.

Moreover, witnesses testified that if there were an outbreak of aflatoxin contamination in pistachios, widespread consumer reluctance to buy pistachios could result, even if the contamination was limited and quickly remedied. Witnesses feared that a single occurrence of aflatoxin contamination in pistachios could devastate the California pistachio industry and create effects that could take years and substantial financial resources to overcome.

Record evidence demonstrates the importance of regulating quality (including size) in tandem with aflatoxin, as research suggests a strong correlation between some sub-quality characteristics (for example, ''early-split'' pistachio nuts) and the propensity for aflatoxin contamination.

Evidence presented at the hearing suggests that aflatoxin contamination first occurs in the field and can continue to occur until pistachios are dried to a level where mold cannot grow. Industry research shows that most of the aflatoxin occurs in early split nuts or pistachios where the hull is damaged prior to harvest. A high percentage of small pistachios have a tendency to split early compared to larger pistachios. Accordingly, witnesses explained that there is a strong correlation between smaller, lighter pistachios with staining on the shell and the presence of aflatoxin.

Record evidence presented on the basis of research conducted by Mark A. Doster and Themis J. Michailides (''Characteristics of Pistachio Nuts with Aspergillus Molds,'' 1991) delineates a positive correlation between early split pistachios and aflatoxin. A witness citing this study quoted, ''Early splits (ES) are pistachio nuts that have both hull and shell split and frequently have moldy and/or insect-infested kernels. The hulls of ES nuts split over a several week period prior to harvest. Those ES that split earlier than two weeks before harvest had four times greater Aspergillus mold contamination compared with ES that split within two weeks of harvest. Both older ES and ES with moldy kernels had very different physical characteristics compared to normal nuts: fruits and kernels weighed less, hulls were more shriveled, and shells were smaller and stained * * *. In a typical orchard approximately 1 to 4% of the nuts are ES at harvest time. Molds in the genus Aspergillus are frequently found in ES nuts.''

According to other studies cited at the hearing, 90 percent of aflatoxin is contained in 4.6 percent of low-quality pistachios. Witnesses citing these studies further stated that removal of low-quality product, defined as smaller, lighter, stained-shell nuts typically found in ''early splits'', would reduce the average presence of aflatoxin in pistachios from 1.2 to 0.12 nano-grams/gram (ng/g) for all product sold for human consumption.

Furthermore, drawing from a study on the distribution of aflatoxin in processed and unprocessed pistachios, witnesses cited the study's conclusion that, ''all aflatoxin found here arises in the orchard; none is produced under normal processing conditions.''

Record evidence demonstrated that aflatoxin occurs rarely in a very small number of nuts, it originates in the field, and it is predominantly found in early split or damaged pistachios which have very different physical characteristics than higher quality pistachios.

Due to the exceptional physical characteristics of the infected nuts, witnesses explained that these nuts should be removed as part of the industry's handling procedures. As such, witnesses advocated the implementation of mandatory regulations that would not only set a maximum level of aflatoxin, but also, through quality and size specifications, encourage the removal of those nuts that both have the least consumer acceptance and are most likely to harbor aflatoxin.

Marketing Policy

Proposed § 983.37 would require that the committee prepare and submit to USDA prior to August 1st of each year an annual marketing policy. The marketing policy would serve as the basis for any committee recommendations for revisions in quality regulations for the upcoming crop year. Record evidence explained that in developing its marketing policy, the committee should consider production, harvesting, processing and storage conditions, as well as current and prospective prices.

Proposed Aflatoxin Provisions

According to testimony presented by Dr. Al Eaton, Director of the Center for Ecogenetics and Environmental Health, and the Department of Environmental Health, School of Public Health and Community Medicine, both of the University of Washington, aflatoxin is a known contaminant in pistachios. Dr. Eaton's testimony outlined the scientific arguments behind regulating aflatoxin as a known human carcinogen. Other witnesses argued that regulation of aflatoxin is an important factor contributing to the quality of pistachios. Witnesses testified that regulation of aflatoxin is crucial to positive acceptance of pistachios among consumers and growth of consumer demand.

As stated by Dr. Eaton, the U.S. and international scientific communities have reviewed the significance of aflatoxin in human food and animal feed extensively. Dr. Eaton referred to studies by Eaton and Groopman, 1994, as well as the Food and Agriculture Organization and World Health Organization's Joint Expert Committee on Food Additives (JECFA), 1998. Dr. Eaton stated that limiting aflatoxin in affected commodities is important in regard to these concerns.

Proposed § 983.38(a) would provide for a maximum aflatoxin level for pistachios shipped for domestic human consumption. The level supported by record evidence is 15 parts per billion (ppb). Under this provision, no pistachios with an aflatoxin level greater than 15 ppb could be shipped for domestic human consumption. Witnesses testifying at the hearing stated that the 15 ppb threshold is an appropriate level to ensure the quality of pistachios. Witnesses also explained that 15 ppb is the maximum level of aflatoxin allowed in peanuts, another commodity known to be affected by aflatoxin-bearing molds (7 CFR part 996).

The United States Food and Drug Administration (FDA) currently employs an aflatoxin tolerance level in pistachios of 20 ppb. Thus, this proposal would be more restrictive than what is currently accepted by the FDA. Witnesses explained that the 15 ppb was selected as the proposed maximum threshold to ensure that sampling procedures would result in aflatoxin tolerances below the current FDA level.

Proposed § 983.38(a) also provides that an aflatoxin inspection certificate

must cover all shipments for domestic human consumption. Further, any pistachios that fail to meet the aflatoxin requirement must be disposed of in certain ways. The inspection and substandard pistachio disposition procedures are discussed in detail later in this document.

At the hearing, witnesses recommended eliminating the decimal point and the zero from all references to ''15.0'' ppb. The maximum aflatoxin threshold should read ''15'' ppb. Witnesses explained that current testing techniques available to the industry are only accurate to one part per billion. As such, requiring testing beyond the one part per billion would not be compatible with current industry testing abilities. Similarly, references to ''5.0'' ppb and ''10.0'' ppb should be changed to ''5'' ppb and ''10'' ppb in all corresponding descriptions of aflatoxin test sampling procedures. These changes are reflected in the proposed order language contained in this Recommended Decision.

Witnesses testified that a considerable amount of concern and debate over the proposed aflatoxin and other quality requirements resulted in the details of those proposed requirements being included in the proposed order language. According to the record, industry discussions favored including specific regulatory language in the order over establishing committee authority to recommend such regulations. Witnesses explained that the former would allow industry participants to know, prior to voting on the proposed order in referendum, what specific requirements would be imposed on the industry. Thus, producers would be able to make a more informed decision as to whether they favor the program.

Witnesses testified that the committee should have the authority to make recommendations to the Department to change the specified maximum aflatoxin level of 15 ppb. Paragraph (b) of proposed § 983.38 therefore provides authority for changing the allowable level of aflatoxin in the event that industry conditions change or research shows that a change in the aflatoxin level would be appropriate. As previously discussed under Material Issue 5(b), such a recommendation would require the concurring votes of at least seven committee members.

Transfer Between Handlers

Paragraph (c) of § 983.38 would provide that transfers of pistachios between handlers within the production area are exempt from the aflatoxin requirement.

Record evidence indicates that pistachios are customarily traded among handlers. Trade among handlers predominantly occurs as a means for individual handlers to buy or sell pistachios to meet the specific needs of their respective customers. Witnesses also explained that some handlers are better equipped than others to handle pistachios that present processing problems. As such, pistachios requiring re-working to meet industry quality standards are often transferred from one handler to another for more efficient handling.

An example of an inter-handler transfer presented at the hearing described a handler who is unable to ship pistachios because they have too much dark stain on the shells, and are deemed to be unmarketable in that state. However, another handler is able to paint the shells with a red food grade colorant that covers the dark stain, making the pistachios acceptable to consumers. Transferring the pistachios from the first handler to the second handler could benefit both parties.

Proposed § 983.38(c) would facilitate transfers of pistachios between handlers, which would allow for the highest use of the pistachios. While pistachios could be transferred from one handler to another without first being tested and certified as meeting the aflatoxin requirement, those pistachios would have to meet that requirement prior to entering the market for domestic human consumption. If the pistachios had been tested and certified as meeting the aflatoxin requirement by the first handler, those pistachios would not have to be tested and certified a second time. This would be true only if the lot's identity had been preserved, as discussed in the discussion below relative to ''Traceability.''

Traceability

Proposed § 983.38(d) would require that each lot of pistachios inspected for aflatoxin be uniquely identified and traceable from the point of testing through shipment by the handler. This is necessary because the handling of pistachios consists of a number of different steps that occur over a period of time.

Witnesses stated that identification of individual lots would be necessary in order to distinguish one lot from another for aflatoxin certification purposes. Unique identification and traceability of lots would be necessary to ensure handler compliance with the provisions of the order. Further, in the event that sub-quality or aflatoxin contamination was found by a handler or his or her customers, traceability would allow for expeditious response on the part of that handler to remove such product from the production line or market.

Traceability would be accomplished through the maintenance of each lot's identity as that lot proceeds through a handling facility. A lot could be in a handler's storage bins when a sample is taken for aflatoxin testing and certification purposes. The pistachios could be run through a roasting line later that day, and packaged on a subsequent day. In this example, witnesses explained that the handler would assign a unique number to the lot when the sample is taken, and the pistachios in the lot would be identified by that number through the entire handling process. This issue is further discussed in relation to proposed § 983.44, ''Inspection, certification and identification.''

Sampling

Proposed § 983.38(d)(1) and (d)(2) outline sampling procedures for testing for aflatoxin and other quality requirements. The samples would be drawn by an inspector or under the supervision of an inspector.

Witnesses explained that each sample drawn would need to be sufficient to meet testing procedure requirements under proposed § § 983.38 (Aflatoxin levels) and 983.39 (Minimum quality levels). The record shows that having one sample drawn to serve both purposes would make the testing procedures more efficient and cost effective, as the process of drawing samples for each certification process would be condensed into one. Witnesses explained that this would help minimize inspection fees, as less sampling time would be needed. Sampling procedures for aflatoxin and minimum quality (including size) certification are described below, and under the discussion of proposed § 983.39.

Aflatoxin Sampling Procedures

As previously discussed, the record is that aflatoxin typically presents itself in high concentrations in very few nuts. Witnesses recommended a sampling system rooted in statistical calculations of aflatoxin per lot based on varying sample sizes calibrated to lot weight. The recommended sampling protocol would rely on established statistical sampling methodologies.

As there is not an internationally agreed upon procedure for aflatoxin sampling of pistachios, the proposed sampling regimen is based upon sequential sampling procedures used in the U.S. peanut industry; sampling

parameters identified by experts in the field; and sampling protocols currently used by the European Union.

Record evidence stated that each lot sample for inshell and kernel pistachio aflatoxin testing must be made up of a prescribed number of incremental samples. Incremental sampling would be accomplished with an automatic sampling device or with a sampling probe.

Witnesses explained that automatic samplers are devices that extract random samples from a stream of pistachios while the nuts are processed in the handler's plant. Sampling probes are tubes, with 5 to 10 ports, that are pushed down into bins of bulk pistachios. The probe extracts pistachios from the bin at different levels of the bin ensuring that a cross sample of the pistachios in the bin are taken for testing and facilitates the collection of the required incremental samples. Probing devices are widely used in the sampling of other food products with similar physical characteristics.

According to record evidence, the number of incremental samples and the total weight of the lot sample would be dependent on the size of the lot. As shown in the table below, a small lot of inshell pistachios weighing 220 pounds or less would require 10 incremental samples, resulting in a total lot sample weighing 3 kilograms. For a larger lot of inshell pistachios weighing 22,001 pounds to 150,000 pounds, a lot sample of 30 kilograms would consist of 100 incremental samples. As discussed later, the total lot sample would then be divided into three test samples. The fourth column of the table shows the weight of each of the test samples.

INSHELL PISTACHIO LOT SAMPLING INCREMENTS FOR AFLATOXIN CERTIFICATION

Lot weight (lbs.)	Number of incremental samples for the lot sample	Total weight of lot sample (kilograms)	Weight of test sample (kilograms)
220 or less	10	3.0	1.0
221–440	15	4.5	1.5
441–1100	20	6.0	2.0
1101–2200	30	9.0	3.0
2201–4400	40	12.0	4.0
4401–11,000	60	18.0	6.0
11,001–22,000	80	24.0	8.0
22,001–150,000	100	30.0	10.0

For aflatoxin testing of pistachio kernels, the proposed incremental sampling requirements would follow the same methodology. The number of incremental samples would depend on the size of the lot, and would equal the number required for inshell lots of pistachios. However, the lot samples for kernel testing would be half the weight of the lot samples for inshell pistachio testing. This is because, as the record shows, half of the weight of inshell pistachios is made up of the shell, and only the kernels are tested for aflatoxin.

According to the below table, a lot sample for a lot of 220 pounds or less of kernels would equal 1.5 kilograms and consist of 10 incremental samples. A lot sample for a lot of 22,001 pounds to 150,000 pounds of kernels would equal 15 kilograms and would consist of 100 incremental samples.

PISTACHIO KERNEL LOT SAMPLING INCREMENTS FOR AFLATOXIN CERTIFICATION

Lot weight (lbs.)	Number of incremental samples for the lot sample	Total weight of lot sample (kilograms)	Weight of test sample (kilograms)
220 or less	10	1.5	.5
220–440	15	2.3	.75
441–1100	20	3.0	1.0
1101–2200	30	4.5	1.5
2201–4400	40	6.0	2.0
4401–11,000	60	9.0	3.0
11,001–22,000	80	12.0	4.0
22,001–150,000	100	15.0	5.0

The above tables provide for lot sizes up to 150,000 pounds. The record shows that this reflects current industry practice. That is, handlers do not handle lots in excess of that amount. However, in the event that these practices change, proposed section 983.46 would allow the proposed sampling methodology to accommodate the change. Any change in sampling procedures would require a recommendation of the committee and approval of the Department. Proposed § 983.46 is discussed further under ''Modification or suspension of regulations.''

The record evidence is that the next step in the sampling process should be that the lot samples for inshell and kernel aflatoxin testing be divided into 3 equal test samples. The dividing of the lot sample would be conducted by, or under the supervision of, an inspector with the Federal or Federal-State Inspection Service (Inspection Service). Witnesses testified that any inspection process in use by the Inspection Service should be available to pistachio handlers under the proposed order. Inspection programs that could be used include the ''Partners In Quality'' program and the ''Customer Assisted Inspection Program.''

Aflatoxin Testing Procedures

As provided in § 983.38(d)(2), lot samples intended for aflatoxin testing and certification would be submitted to a laboratory that has been approved or accredited for aflatoxin analysis by the USDA. Witnesses explained that such a laboratory could be a third-party

laboratory or a laboratory run by an individual handler. In any case, witnesses stated that any laboratory conducting aflatoxin testing for certification under the provisions of the proposed order would be required to be approved or accredited by the USDA.

The test samples would be processed according to the provisions proposed under § 983.38(d)(3). The laboratory would record the receipt of each test sample. The test samples would then be prepared and chemically analyzed according to established testing procedures prescribed under the High Pressure Liquid Chromatograph (HPLC) or Vicam (Aflatest) aflatoxin testing methodologies, or any other method recommended by at least seven members of the committee and approved by USDA.

The language authorizing the use of additional testing methods represents a departure from the language contained in the Notice of Hearing. The revised language was proposed by proponents of the marketing order and would provide the committee with additional flexibility in identifying acceptable methods of testing. The authority to review and recommend alternative methods of aflatoxin testing for approval by the Department would allow for the accommodation of advances in aflatoxin technology.

Proposed § 983.38(d)(4) sets forth the process by which the test samples would be analyzed in order to determine whether a lot met the maximum aflatoxin threshold of 15 ppb.

As previously mentioned, each lot sample would be divided into three test samples. If the first sample tested, test sample 1, had an aflatoxin level at or below 5 ppb, the lot would be certified as negative to aflatoxin. No analysis of the other two test samples would be necessary. If test sample 1 were to test at or above 25 ppb, the lot would fail and the accredited laboratory would fill out a failed lot notification report as specified in § 938.40, described below.

If test sample 1 were to test above 5 ppb and below 25 ppb, the handler could either elect to continue the testing process or voluntarily re-work the lot. If the lot is re-worked, it would be subject to sampling and testing as if it were a new lot altogether.

If the handler elects not to re-work the lot and go forward with the testing, the accredited laboratory would analyze test sample 2, and the results of test samples 1 and 2 would be averaged. The lot would be certified as negative to aflatoxin if the laboratory determines that the averaged result for test samples 1 and 2 is at or below 10 ppb. If the averaged result of test samples 1 and 2 is at or above 20 ppb, the lot would fail and the laboratory would fill out a failed lot notification report. If the averaged aflatoxin level of test samples 1 and 2 is above 10 ppb and below 20 ppb, the handler could withdraw the lot from testing and re-work it. Thereafter, the handler could resubmit the lot for sampling and testing under proposed § 983.38(d).

If the handler elected to continue with the testing, the laboratory would analyze test sample 3, and the results of test samples 1, 2 and 3 would be averaged. A lot would be certified as negative to aflatoxin and the laboratory would issue an aflatoxin inspection certificate if the averaged result of test samples 1, 2 and 3 is at or below 15 ppb. If the averaged aflatoxin level of test samples 1, 2 and 3 is above 15 ppb, the lot would fail and the laboratory would fill out a failed lot form as required by proposed § 983.40, ''Failed lots/re-work procedures.''

If a lot failed to test below the maximum threshold for aflatoxin, the laboratory would send a copy of the Failed Lots/Re-Work Procedure form to the committee and to the failed lot's owner within 10 working days of failure.

If an aflatoxin inspection certificate were issued certifying that a lot is negative to aflatoxin at any stage of the sequential testing, meaning the lot's aflatoxin content is below the maximum threshold, the certification would identify the lot by weight, grade and date. The certification would expire after 12 months.

The recommendation at the hearing that a handler may withdraw his or her lot from testing at any stage in the testing and certification process represents a change to the proposed order language contained in the Notice of Hearing. Witnesses recommended this modification so that if a handler was not satisfied with an early aflatoxin content result, he or she could elect to rework the lot before the expense of completing the testing protocol.

Proposed § 983.38(d)(5) provides that accredited laboratories perform aflatoxin tests. Each lot shipped for domestic human consumption would be required to be tested and certified by a laboratory that it meets the aflatoxin requirement. The records of each test and of the final shipping disposition would be required to be kept by the handler. The records would be required to be maintained for 3 years and would be subject to audit by the Department or the committee at any time. The maintenance of the records and the audit provisions are to enable the committee to determine handler compliance with the aflatoxin level requirements, and are discussed further under Material Issue 5(e).

Pistachios that fail to meet the aflatoxin requirement would be required to be reworked or disposed of. Witnesses stated that a rework option is important as the cultivation of pistachios requires a substantial investment, and maximizing saleable usage of each harvest is crucial to the economic well being of both producers and handlers. Equally important are disposal requirements for pistachios failing to be certified as negative to aflatoxin. Disposal procedures would be important in assuring industry and consumers that failed product does not enter the stream of domestic commerce. Requirements for disposal of failed lots are discussed later under proposed § § 983.40, ''Failed lots/rework procedures'' and 983.45 ''Substandard pistachios.''

Proposed § 983.38(d)(6) provides that if test samples 2 or 3 are not used for testing and certification purposes, the handler could request the laboratory to return those samples to him or her. This would allow handlers to sell the pistachios that comprise test samples 2 and 3 for domestic human consumption if the lot is shown to comply with the aflatoxin regulation with the testing of sample 1. For example, with larger lots of 22,001 to 150,000 pounds, this would allow the handler to sell an additional 44 pounds of pistachios for human consumption.

Proposed Minimum Quality Levels

The record supports minimum quality requirements for pistachios being included in the proposed order. These requirements, set forth in proposed § 983.39, would establish maximum tolerances for certain internal and external defects, and a minimum size specification.

The record shows that elimination of shell defects, bad tasting, insect-infested and closed pistachios would not only increase consumer satisfaction but also reduce the incidence of aflatoxin. Moreover, witnesses stated that, based on industry experience, most consumers prefer large pistachios. Because many consumers do not find smaller pistachios desirable, these pistachios sell for lower prices. Quality and size specifications would help improve grower returns by ensuring that California pistachios sold in the domestic market are of the quality that consumers prefer. Enhancing consumer demand by assuring acceptable quality (including the absence of aflatoxin) is necessary for the industry to market

increasing supplies of California pistachios.

The record shows that the defects listed in proposed § 983.39 are generally accepted by the industry as those that reduce the marketability and consumer acceptance of pistachios. Handlers currently eliminate defective nuts in their normal operations to pack a product that meets their customers' expectations.

Four categories of defects are proposed. The first is external shell defects, which includes non-splits (shells that are not open), adhering hull material, dark stain, and other damage that materially detracts from the appearance of the shell. Next are internal defects, which include immature kernels, kernel spotting, insect damage, mold, rancidity, and decay. The third class of ''other defects'' includes shell pieces and blanks, foreign material, particles and dust, and loose kernels. The final category is in shell pistachios that are below the specified minimum size.

The proposed minimum quality requirements provide a maximum tolerance level for each type of defect. This is to recognize that in normal handling operations, it is impossible to eliminate every single defective nut from a lot. As an example, up to 5 percent (by weight) of the inshell pistachios in a lot may be below the minimum permissible size. The following table contains the proposed defects and tolerances.

MAXIMUM DEFECT AND MINIMUM SIZE LEVELS

Factor	Maximum permissible defects (percent by weight)	
	Inshell	Kernels
EXTERNAL (SHELL) DEFECTS		
a. Non-splits & not split on suture	10.0	.....
(1) Maximum non-splits allowed	4.0	.....
b. Adhering hull material	2.0	.....
c. Dark stain	3.0	.....
d. Damage by other means, other than a, b and c above, which materially detracts from the appearance or the edible or marketing quality of the individual shell or the lot	10.0	.....
INTERNAL (KERNEL) DEFECTS		
a. Damage: Immature kernel (Fills <75% – >50% of the shell), Kernel spotting (Affects ⅛ aggregate surface)	6.0	3.0
b. Serious damage—Minor insect or vertebrate injury/insect damage, insect evidence, mold, rancidity, decay	4.0	2.5
(1) Maximum insect damage allowed	2.0	0.5
Total external or internal defects allowed	9.0	.....
OTHER DEFECTS		
a. Shell pieces and blanks (Fills <50% of the shell)	2.0	.....
(1) Maximum blanks allowed	1.0	.....
b. Foreign material—No glass, metal or live insects permitted	0.25	0.1
3. Particles and dust	0.25	.....
4. Loose kernels	6.0	.....
	Minimum permissible defects (percent by weight)	
Maximum allowable inshell pistachios that will pass through a 30/64ths inch round hole screen	5.0	.....

Witnesses testified that about 90 percent of the pistachios produced in California are packed to higher quality standards than those being proposed in the order. Thus, imposition of these quality requirements should have a minimal impact on handlers, while ensuring that the pistachios available to U.S. consumers are of acceptable quality.

The terms used in the above table are defined in further detail under § 983.39(b) of the proposed order. These terms would clarify permissible maximum defects for inshell pistachios and pistachio kernels.

One of the terms defined in paragraph (b) of proposed § 983.39 is ''dark stain,'' an external defect. The definition of that term included in this Recommended Decision differs from that in the Notice of Hearing. In the Notice, dark stain was defined to mean an aggregate amount of discoloration affecting more than one-eighth of the shell surface or, on dyed nuts, when readily noticeable. Testimony at the hearing indicated that the last portion of that definition would have adversely impacted handlers who dye or color their nuts to remove cosmetic shell defects. Thus, this provision has been modified to exempt dyed or colored nuts from the dark stain requirements. This exemption is intended to allow handlers to improve the marketability of pistachios containing dark stain by covering that defect with a dye or color coat.

Witnesses stated that each shipment of California pistachios intended for domestic human consumption would require a minimum quality certificate. As previously discussed, this certificate would be issued by an inspector and would certify that the pistachios contained in that lot meet the established minimum quality requirements. Pistachios that fail to meet the minimum quality specifications would be disposed of in such manner as described in proposed § 983.40.

The record also states that under proposed § 983.39 (d), transfers between handlers within the production area would be exempt from minimum quality and size regulation. This exemption, as with a similar exemption for aflatoxin certificates, is designed to allow transfer of product between handlers. It would allow handlers to sell and trade pistachios of varying qualities among themselves, and would allow for efficiencies within the industry due to different handlers' abilities to prepare pistachios for market. All pistachios would have to be inspected and certified as meeting minimum quality

requirements before being shipped for domestic human consumption.

As with aflatoxin testing, provisions for minimum quality and size testing under the order would require that lot samples consisting of a minimum number of incremental samples be drawn. A minimum number of incremental samples would be required to protect the statistical validity of the testing process and to ensure that the test sample is representative of the quality of the entire lot of pistachios from which it was drawn.

As shown in the table below, the number of incremental samples per lot sample would be the same under the aflatoxin testing as under the minimum quality and size testing requirements. This would allow the handler to pull one set of samples for both tests, as previously explained. The sample would be drawn by, or under the supervision of, an inspector.

INSHELL AND KERNEL PISTACHIO LOT SAMPLING INCREMENTS FOR MINIMUM QUALITY CERTIFICATION

Lot weight (lbs.)	Number of incremental samples for the lot sample	Total weight of lot sample (grams)	Weight of inshell and kernel test sample (grams)
220 or less	10	500	500
221–440	15	500	500
441–1100	20	600	500
1101–2200	30	900	500
2201–4400	40	1200	500
4401–11,000	60	1800	500
11,001–22,000	80	2400	1000
22,001–150,000	100	3000	1000

According to witness testimony, a lot of inshell pistachios weighing 220 pounds or less would require a lot sample weighing a total of 500 grams. This lot sample would consist of 10 incremental samples collected throughout the lot. Alternatively, a lot weighing 22,001 pounds to 150,000 pounds would require a lot sample equal to 3,000 grams and would consist of 100 incremental samples.

A test sample would then be taken from the lot sample. For lots up to 11,000 pounds, the test sample would equal 500 grams. For any lot in excess of 11,000 pounds, the test sample would be 1,000 grams.

The test sample sizes for minimum quality requirements differ from those for aflatoxin testing. Under the aflatoxin testing system, the lot sample drawn would be divided into three equal test samples, with each sample being used progressively depending on the aflatoxin content of each test sample. Under the sampling and testing procedures for the proposed minimum quality requirements, the test sample would be used in its entirety. Inspectors would assess the quality of the test sample for external and internal defects.

Table 4 in proposed § 983.39(e)(1) has been revised from that included in the Notice of Hearing. An additional column entitled ''Weight of kernel test sample (grams)'' has been eliminated, and the column previously entitled ''Weight of inshell test sample (grams)'' has been re-titled to ''Weight of inshell and kernel test sample (grams).'' These changes are based on witness testimony that the test sample sizes for inshell and kernel testing should be the same.

Proposed Minimum Quality Testing Procedures

Witnesses stated that the test samples should be analyzed in accordance with USDA inspection procedures. This would ensure that the pistachios do not contain in excess of the maximum permissible defects and that they meet the minimum size level.

Under the USDA inspection procedures, the inspector would analyze the test sample for external, internal, and other defects. The nuts would be shelled for further analysis of internal kernel defects if the pistachios exhibited dark stain, adhering hull, or other external defects, or if, in the inspector's opinion, they had possible internal defects.

Witnesses explained the importance of this requirement as studies have shown that nuts with external defects have a higher probability of kernel defects. These studies, discussed earlier in this document, linked certain quality defects with the incidence of aflatoxin. Nuts with unblemished shells would be subject to internal kernel analysis at the discretion of the inspector. After testing, inspectors would certify that the lot had met the minimum quality levels.

The record states that handlers would be required to keep testing and certification records, along with records of final shipping disposition, for three years after the crop year in which the pistachios were shipped. These records would be subject to audit by the committee at any time. These requirements would be important in allowing the committee and the USDA to ensure that pistachio handlers comply with the proposed provisions of the order. As stated in the discussion of proposed aflatoxin testing procedures, each lot tested for minimum quality and size certification would also be required to be uniquely identified to ensure traceability.

Substandard Pistachios

Proposed § 983.40 addresses procedures recommended by the witnesses for reworking or disposing of substandard pistachios. Substandard pistachios are pistachios that fail to test below the maximum aflatoxin tolerance level or do not meet minimum quality (including size) requirements.

According to record testimony, handlers would have different options available for managing substandard pistachios. The first of these would allow a handler to rework a lot of pistachios until that lot met the aflatoxin and quality requirements proposed under the order. If, after being reworked, the pistachios met the aflatoxin and minimum quality levels, those pistachios could be shipped for domestic human consumption.

If a handler chose not to rework a lot of substandard pistachios, then the handler would be required to either dispose of those nuts or use them for non-human consumption. These pistachios could also be exported if they met the requirements of the receiving country.

Proposed § 983.45 would prevent substandard pistachios from entering the stream of domestic human consumption. Under the provisions of this section, reporting and disposition procedures for substandard pistachios would be implemented by USDA (upon recommendation of the committee) through informal rulemaking.

Failed Lot Reporting

According to record evidence, § 983.40(b) would establish reporting requirements for lots failing to meet aflatoxin or minimum quality requirements of the proposed order. Reports of failing lots would have to be filed with the committee within 10 working days of the test failure. Reports regarding lots exceeding the maximum aflatoxin tolerance level would be sent by the accredited laboratory directly to the committee. Reporting of lots exceeding the maximum aflatoxin requirements directly by the laboratory rather than the handler would expedite and increase the efficiency of the committee's ability to locally oversee industry compliance to the proposed aflatoxin provisions. Reports concerning lots failing to meet the minimum quality requirements would be filed by the handler with the committee, as minimum quality testing would be conducted at the handler's facility and not at a laboratory.

Establishing reporting procedures for lots failing to meet the requirements of the order would assist the committee in ensuring that only certified lots are used for domestic human consumption. This would help ensure that poor quality pistachios are either re-worked to requisite quality and aflatoxin levels, or properly disposed of. In this context, witnesses stated that failed lots reporting would be essential to supporting the committee's oversight and auditing responsibilities. Failed lot reporting would also present the committee with an important information-gathering tool, as it would allow the compilation of industry quality statistics.

Rework Procedures

Notification of a failed lot, either with regard to aflatoxin or quality, would alert the committee to the possible reworking of pistachios for reinspection, or to the disposal of those pistachios. Witnesses expressed the importance of establishing rework procedures in order to allow handlers the opportunity to separate acceptable quality pistachios from inferior ones. Witnesses explained that while reworking and reinspection would not be required under the order, rework would provide handlers with an opportunity to secure a better return for their pistachios. Rework and reinspection procedures should therefore benefit both handlers and producers.

Witnesses expanded on the importance of safeguarding against the negative effect of poor quality pistachios in the marketplace by explaining that lots failing to meet aflatoxin requirements would be subject to a different set of rework procedures than those failing quality requirements.

Rework procedures for inshell pistachios failing to meet aflatoxin requirements would require handlers to remove 100 percent of the failing lot from its bulk or retail packaging. These pistachios would be required to pass through the sorting stages of the handling process in order to remove from the lot those nuts having the characteristics most susceptible to harboring aflatoxin. Witnesses stated that after reworking the lot, the weight of the total accepted and rejected product would be reported to the committee. The acceptable portion of the reworked lot would again be sampled and tested for aflatoxin, as proposed under § 983.38, Aflatoxin levels, with one exception. In the case of a reworked lot, the lot sample size and the test sample size would be doubled from that specified in Table 1 of proposed § 983.38. In addition to being tested for aflatoxin content, the reworked lot would also be sampled and tested for minimum quality.

If, after having been reworked, the lot fails aflatoxin testing for a second time, the lot could be shelled and the kernels reworked, sampled and tested in the manner required for an original lot of pistachio kernels. If the handler decided not to pursue further reworking of the failed lot, those pistachios would be prohibited from entering the stream of commerce for domestic human consumption. That lot would be required to be disposed of, sold for domestic non-human consumption purposes, or exported in compliance with the receiving country's requirements.

Rework procedures proposed for pistachio kernels failing to test negative to aflatoxin would also require a re-processing of 100 percent of the volume of the failing lot. After reworking, witnesses stated that the total weight of the accepted product and the total weight of the rejected product would be reported to the committee for verification purposes. The reworked lot of kernels would be sampled and reinspected for aflatoxin as specified in the aflatoxin requirements of the order.

According to record evidence, handlers should also be able to rework lots that fail to meet the minimum quality requirements proposed in § 983.39 of the order. As in the case of pistachios failing aflatoxin requirements, handlers would need to remove from packaging and rework 100 percent of the product within that lot. Reworking would be completed by standard sorting techniques, including mechanical, electronic or manual procedures normally used in the handling of pistachios.

The reworked lot would be sampled and tested as required under proposed § 983.39, ''Minimum quality levels.'' There would be no limit to the number of times a lot could be reworked for minimum quality levels.

Testing of Minimal Quantities

The record supports simplified aflatoxin testing requirements for handlers who handle less than one million pounds of assessed weight of pistachios a year. Additionally, such handlers should qualify for an exemption from minimum quality inspection and certification requirements under certain circumstances. Including these provisions in the proposed order would reduce costs for the smallest handlers, while maintaining the industry objective of having all pistachios used for domestic human consumption meet certain quality (including aflatoxin) levels.

Section 983.41 of the proposed order, Testing of minimal quantities, would provide that aflatoxin testing for handlers of minimal quantities (less than a million pounds per year) could be accomplished in two ways. The first option would allow a handler to have an inspector sample and test all the handler's hulled and dried pistachios for aflatoxin certification prior to further processing. If the pistachios meet the proposed aflatoxin requirement, an aflatoxin certificate would be issued to cover the handler's total inventory. The handler would not then have to comply with the traceability procedures set forth in paragraph (d) of proposed § 983.38.

If the pistachios did not meet the aflatoxin requirements, the handler could subdivide his or her inventory into smaller lots and have each individual lot sampled and tested for aflatoxin. Any lots found to be above the maximum aflatoxin threshold could be reworked and would then be subject to the testing procedures specified in § 983.38.

Witnesses testifying at the hearing stated that small handlers should be allowed to test all of their hulled and dried pistachios before the pistachios are further processed for quality and size. The language of proposed § 983.41(a) has been so clarified.

Witnesses also testified that handlers of minimal quantities could apply to the committee for an exemption from inspection with respect to the minimum quality requirements set forth in

proposed § 983.39 of the order. If the exemption were granted, the handler would be required to pull and retain (for 90 days) samples from each lot shipped. The samples would be required to be made available for review by the committee.

Witnesses explained that if it was determined that an exempt handler were shipping substandard pistachios, the committee should be able to revoke the handler's exemption. The handler in question would then be subject to minimum quality and size inspections until further determination by the committee. The record indicates that implementing regulations should be effectuated to establish the specific procedures for such exemptions.

Commingling

Witnesses recommended under proposed § 983.42 that after a lot were issued an aflatoxin inspection certificate and minimum quality certificate, it could be commingled with other certified lots and maintain its aflatoxin and minimum quality certifications. However, handlers would be required to comply with paragraph (d) of proposed § 983.38 which provides that each certified lot be identified and traceable from testing through shipment. Thus, if pistachios were transferred between handlers prior to certification, those pistachios would be required to meet the certification provisions of this proposed order prior to being commingled with other certified lots. In the case of the exemption from minimum quality certification for handlers handling less than 1 million pounds, any pistachios transferred from an exempt handler to a non-exempt handler would be subject to minimum quality certification.

Reinspection

Witnesses supported authority for the committee to reject an inspection certificate and request reinspection of a lot whenever it has reason to believe that pistachios may have been damaged or deteriorated while in storage. That lot would be prevented from entering the marketplace for domestic human consumption until a new certification was obtained.

USDA would not allow invalidation of a certificate that has been issued by an inspector. However, there may be circumstances that warrant a requirement that a lot be subject to a second inspection. Thus, proposed § 983.43, Reinspection, is modified to provide that the Department, upon recommendation of the committee, may establish rules and regulations to establish conditions under which pistachios would be subject to reinspection.

Inspection, Certification and Identification

The record indicates that all pistachios shipped for domestic human consumption should be required to be inspected and certified as meeting the order's quality requirements (including those pertaining to aflatoxin levels). If deemed necessary, lots of pistachios could be required to be identified by appropriate seals, stamps, tags, or other identification affixed to the containers by the handler. All inspections would be at the expense of the handler.

Witnesses testified that not all handlers would have their pistachios tested or inspected at the same point in the handling process. The proposed order is intended to be flexible, as it was explained by witnesses that inspection could be appropriate for certain handlers at one stage in the process while being appropriate for other handlers at another stage. Witnesses stated that differences in inspection timing throughout different handlers' processing systems would not pose a compliance problem as long as lot identity was required and maintained.

Several handler witnesses testified that they have already implemented traceability systems in their plants. Currently, several different systems for tracking lots of pistachios exist in the industry. Record testimony indicates that some handlers identify lots by date and shift. These lots are then traced by written records maintained by the handler's staff. Other handlers mark the containers with a code using crayons or markers. Yet other handlers use bar codes.

The record indicates that current handling practices relating to the tracking of lots may be adequate for compliance purposes under the order. However, if deemed necessary, the USDA, upon recommendation of the committee, could issue rules to specify that handlers be required to affix some standardized type of identification to the containers in a lot.

The record shows that the responsibility for affixing such identification could be given to the handlers without requiring it be done under the direction or supervision of an inspector. This represents a departure from the regulatory text of proposed § 983.44 contained in the Notice of Hearing. Originally, affixing of identification would have been required under the supervision of an inspector. Witnesses explained that giving handlers the responsibility to maintain pistachio identity could result in more flexibility in handlers' operations and lower costs. Section 983.44 has been modified accordingly.

Substandard Pistachios

Record evidence indicates that the committee should have the authority to establish reporting and disposition requirements as it deems necessary to ensure that pistachios which do not meet the aflatoxin and minimum quality requirements prescribed by § 983.38 and § .39 are not shipped for domestic human consumption. This authority would appear in § 983.45 of the proposed order, and would require approval by the Department through the informal rulemaking process.

Witnesses opined that much of the information the committee and the Department would need to administer the order has been covered by reporting requirements set forth elsewhere in the proposed order. For example, reports would be required when pistachio lots fail testing for the aflatoxin tolerance or fail inspections for minimum quality and size specifications. However, in the course of administering the order, the committee may determine that further reports are necessary. This section gives the committee the authority to establish further reporting requirements, subject to the approval of the Department.

The committee should also be authorized to recommend other rules (aside from those relating to reporting requirements) needed to ensure appropriate disposition of substandard pistachios. For example, handlers could be required to dispose of substandard pistachios under the supervision of the committee staff or an inspector. Again, such rules would need to be approved by USDA.

In the Notice of Hearing, reference to § 983.38 was inadvertently omitted from § 983.45 of the proposed order. This oversight is corrected in this document.

Modification or Suspension of Regulations

According to record evidence, proposed § 983.46 should allow for modification, suspension, or termination of the requirements in § § 983.38 through 983.45 of the order. These sections of the proposed order relate to aflatoxin and minimum quality requirements.

The record shows that the quality and aflatoxin requirements specified in the proposed order are reasonable and appropriate at the current time. However, if the committee were to determine by reasons of changed industry conditions (such as development of new technology) that certain provisions of the order need to

be modified, suspended or terminated, the committee should have the authority to make those recommendations. All such recommendations would require seven concurring votes by the committee and would be subject to review and approval of USDA through the rulemaking process.

Additionally, the record shows that the committee should have the authority to recommend any rules necessary for the implementation of the provisions of §§ 983.38 through 983.45 of the proposed order. Again, any such recommendation would require USDA approval. It is recommended that a new paragraph (c) be added to proposed § 983.46 to add this authority to the order.

Material Issue Number 5(e)—Reporting and Recordkeeping

The record evidence is that the committee should have the authority, with the approval of the Department, to require handlers to submit such reports and information as the committee may need to perform its functions and fulfill its responsibilities under the order. The committee would need to collect information for such purposes as collecting assessments, compiling statistical data for use in market evaluation, and determining whether handlers are complying with order requirements. The types of information that could be collected to fill these reporting needs include but are not limited to production, sales and inventory data, and information pertaining to transfers of pistachios between handlers.

Additionally, under proposed § 983.49, each handler would be required to maintain records with respect to pistachios acquired, processed, further handled, sold, or otherwise disposed of, as would be necessary to verify the reports that the handler submits to the committee. All such records would be required to be maintained for at least 3 years after the end of the fiscal year in which the transaction occurred.

Witnesses also stated that the order should provide the authority for USDA and authorized employees of the committee to examine those records pertaining to matters within the purview of the order. This provision would enable verification of compliance with requirements of the proposed order.

All reports and records submitted to the committee by handlers would be required to remain confidential and be disclosed only as authorized by USDA in accordance with the Act. However, the committee would be authorized to release composite information from any or all reports. Such composite information could not disclose the identity of the persons furnishing the information or any person's individual operation.

The record shows that industry handlers already collect and maintain much of the information contemplated to be reported and retained under the proposed order provisions. Thus, compliance with the provisions of the order with regard to reporting and recordkeeping would entail minimal handler costs.

Material Issue Number 5(f)—Compliance

No handler should be permitted to handle pistachios except in conformity with the provisions of the order, as set forth in proposed § 983.58. If the program is to be effective, compliance with its requirements is essential.

Material Issue Number 5(g)—Continuance Referenda

In accordance with proposed § 983.67(d), the order should provide that the Department conduct periodic continuance referenda every 6 years. The initial continuance referendum should be conducted within 6 years of the effective date of the marketing order.

USDA has determined that continuance referenda are an effective means for ascertaining whether producers favor continuance of marketing order programs. As such, the proposed marketed order should include a provision for continuance referenda.

The Act provides that in the promulgation of a marketing order, at least two-thirds of the producers voting, by number or by volume represented in the referendum, must favor the issuance if the order. Continuance referenda should be based on the same standard of industry support. This requirement is considered adequate to measure producers' support to continue the marketing order.

The Department would consider termination of the order if less than two-thirds of the producers voting in the referendum and producers of less than two-thirds of the volume of pistachios represented in the referendum favor continuance. In evaluating the merits of continuance versus termination, USDA would not only consider the results of the referendum. The Department would also consider all other relevant information concerning the operation of the order and its relative benefits and disadvantages in order to determine whether continued operation of the order would tend to effectuate the declared policy of the Act.

The Department's ''Guidelines for Fruit, Vegetable and Specialty Crop Marketing Orders'' provide for periodic referenda to allow producers the opportunity to indicate their support for or rejection of a marketing order. It is the position of the Department that periodic referenda ensure that marketing order programs continue to be accountable to producers, obligate producers to evaluate their programs periodically, and involve them more closely in their operation. The record evidence supports these goals.

In any event, section 608(C)(16)(B) of the Act requires the Department to terminate the order whenever the Department finds that the majority of all producers favor termination, and that such majority produced more than 50 percent of the commodity for market.

Material Issue Number 5(h)—Exemption for Small Quantities

Proposed § 983.69, ''Exemption,'' states that any handler who handles 1,000 dried pounds of pistachios or less during any year may handle pistachios free of the regulatory and assessment provisions of the proposed order.

The record shows that the purpose of this provision is to provide an exemption from the proposed requirements of the order for small quantities of pistachios, such as those that are grown for home or personal use. This section may be changed, as recommended by the committee and approved by the Department. For example, the committee may recommend that the 1,000-pound threshold be revised.

Additionally, implementing rules and regulations may be deemed necessary to ensure that handlers claiming this minimum exemption are not selling pistachios in domestic human consumption outlets that are not in compliance with the minimum quality requirements of the order. Such rules and regulations could be implemented under the authority in proposed § 983.45 of the order.

Material Issue Number 5(i)—California Pistachio Commission

Proposed § 983.70, ''Relationship with the California Pistachio Commission,'' is supported by witness testimony that the committee have authority to deliberate, consult, cooperate and exchange information with the California Pistachio Commission (CPC). Any sharing of information between the two organizations would be kept confidential in accordance with the provisions of section 10(i) of the Act.

Testimony offered by the Chief Executive Officer of the CPC further clarifies the potential efficiencies to be gained through cooperation of the CPC and the committee. As stated by the witness, the industry is already familiar with the structure and protocols of the Commission. Joint management of the two programs could reduce added paperwork, costs and duplication of efforts.

In terms of proposed regulation, witnesses stated that the two programs would be complimentary, as the provisions of each program would not overlap. The proposed provisions of the Federal program pertain to mandatory testing and certification for aflatoxin, quality and size. The CPC does not administer such regulation but rather focuses on promotion and research activities. The CPC does oversee the California Pistachio Marketing Agreement, but this is a voluntary agreement among handlers, and the quality parameters under the agreement do not include those addressed in the proposed order.

Witnesses speaking in support of § 983.71 explained that, when the Agreement was formulated, it was the intention of the participants to pattern the administrative and organizational structure of the Agreement after the Commission for the purpose of minimizing administrative costs and avoiding the duplication of efforts as much as possible. According to record testimony, this goal has been obtained and has allowed the Agreement signatories the ability to maintain a very low administrative overhead with a minimum of added paperwork. Witnesses stated that, if the Federal program is approved, it is their intention to capture similar benefits.

Material Issue Number 5(j)—Common Terms

The provisions of proposed §§ 983.59 through 983.69 and §§ 983.90 through 983.92 are common to marketing agreements and orders now operating. All such provisions are necessary to effectuate the other provisions of the marketing order and marketing agreement and to effectuate the declared policy of the Act. The record evidence supports inclusion of each provision. These provisions, which are applicable to both the marketing agreement and the marketing order, are identified by section number and heading as follows: § 983.59 Rights of the Secretary; § 983.60 Personal Liability; § 983.61 Separability; § 983.62 Derogation; § 983.63 Duration of immunities; § 983.64 Agents; § 983.65 Effective time; § 983.66 Suspension or termination; § 983.67 Termination; § 983.68 Procedure upon termination; and § 983.69 Effect of termination or amendment. Those provisions applicable to the marketing agreement only are: § 983.90 Counterparts; § 983.91 Additional parties; and, § 983.92 Order with marketing agreement.

Material Issue Number 6—Implementation of Proposed Order

Based on a review of the hearing record, USDA recommends that if California pistachio producers were to vote in favor of promulgating the proposed marketing order, the provisions of this program be implemented in two phases. This recommendation addresses the need to establish administrative procedures, guidelines and forms, some of which would require USDA rulemaking and OMB approval, for the mandatory inspection and certification provisions of the proposed program to function effectively.

The first phase would allow for the nomination and seating of an initial administrative committee, and the recommendation and implementation of administrative rules, including reporting and recordkeeping requirements, under which the program would operate. These activities include, but are not limited to, nominations of producer and handler members and alternate members of the committee, the selection of that committee by the Department, and holding committee meetings to select a staff, draft operating procedures, recommend a budget and assessment rate for the first fiscal period under the proposed order, and make other recommendations necessary to implement order authorities. Some of the committee recommendations would require rulemaking by the Department and approval of new information collection requirements by the Office of Management and Budget (OMB).

The second phase would allow for the implementation of the regulatory provisions proposed under this program and necessary procedures to effectively administer them. This would include the mandatory testing and certification provisions for maximum aflatoxin and minimum quality levels of California pistachios, and failed lot rework provisions under §§ 983.38 through 983.46 of the proposed order. USDA recommends that these provisions become effective on August 1, 2004.

This recommendation reflects the fact that, if the order were to be approved through a producer referendum and implemented in its entirety, the immediate effectiveness of regulatory provisions without adequate administrative procedures to support them could obstruct the flow of California pistachios to the marketplace. USDA believes that while the intended effect of the proposed order is to ensure the delivery of high quality California pistachios to consumers, implementation of the regulatory provisions proposed herein without adequate implementation of industry administrative procedures could result in the unintended disruption of California pistachio shipments.

Small Business Consideration

Pursuant to the 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, the 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 so that small businesses will not be unduly or disproportionately burdened. Small agricultural producers have been defined by the Small Business Administration (SBA) (13 CFR 121.601) as those having annual receipts of less than $750,000. Small agricultural service firms, which include handlers that would be regulated under the proposed pistachio order, are defined as those with annual receipts of less than $5,000,000.

Interested persons were invited to present evidence at the hearing on the probable regulatory and informational impact of the proposed pistachio marketing order program on small businesses. The record evidence is that while the program would impose some costs on the regulated parties, those costs would be outweighed by the benefits expected to accrue to the U. S. pistachio industry.

The record indicates that there are approximately 647 pistachio producers, which includes the members of the one existing pistachio producer cooperative. There are about 19 handlers who process pistachios in the production area proposed to be regulated.

Statistics prepared by the California Pistachio Commission and submitted as evidence at the hearing 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 producers (7%) produce more than 250,000 and less than 500,000 pounds; and 59 producers (9%) grow more than 500,000 pounds.

Using an average grower price of $1.10 per pound, 9 percent of the

California pistachio producers receive more than $550,000 annually. Only a portion of these producers would meet SBA's definition of a small agricultural producer.

The record shows that 12 California pistachio handlers (63 percent of the total) handle less than 1,000,000 pounds per year; 4 handlers (21%) handle between 1,000,000 and 10,000,000 pounds; and 3 handlers (16%) handle more than 10,000,000 pounds annually. The largest handler processes over 50 percent of industry production.

Using an average handler price of $1.80 per pound, 63 percent of the pistachio handlers would receive annual receipts of less than $1.8 million, 2 percent would receive between $1.8 and $18.0 million, and 16 percent would receive more than $18.0 million. At least 12 of the pistachio handlers (or 63 percent of the total) could be considered small businesses under SBA's definition.

Record evidence concerning pistachio production and handling costs provide an understanding of the California pistachio industry and potential impacts of implementing the proposed order. Farming pistachios is a costly investment with a significant delay in benefits and an unreliable crop yield.

Although increasing yields have led to an increasing overall value of California pistachio production, producers must maintain a level of return per pound harvested that covers the cost of production in order for their pistachio operations to remain economically viable. Witnesses testified that maintaining a high level of quality product in the market would lead to increasing consumer demand and greater stability in producer returns.

Evidence suggests that poor quality pistachios impact the demand, and the potential growth of demand, for pistachios. Characteristics routinely deemed as ''poor quality'' by customers of the California pistachio industry include small size, and excessive internal and external blemishes. Market studies and customer comments presented by handler witnesses demonstrate that the presence of poor quality pistachios in the marketplace significantly impacts demand in a negative way.

Minimizing the level of aflatoxin in California pistachios is another significant quality factor, as aflatoxin is a known carcinogen. Consumer concerns over aflatoxin can affect their perception of pistachio quality, and therefore negatively impact demand. Moreover, any market disturbances related to aflatoxin in pistachios, regardless of the geographic origin of those pistachios, could have a detrimental effect on the California pistachio industry. A regulatory program limiting the amount of aflatoxin in pistachios could be useful in bolstering consumer confidence in the quality of California pistachios.

Pistachio acreage has been consistently increasing in California, from just over 20,000 bearing acres in 1979 to 78,000 bearing acres in 2001. The number of non-bearing acres (*i.e.* acres less than 7 years old, not yet in full production) has also shown consistent growth in recent years, rising from 13,400 acres in 1995 to 23,500 acres in 2001, a 75 percent increase. Yield per acre has also been steadily rising. Over the 1976–1980 period, average yield per bearing acre measured 1,110 pounds; by 1996–2000, this average had increased to 2,512 pounds.

Higher yields and increasing acreage has resulted in increasing production. According to information submitted by the CPC, production in 2000 totaled 242 million pounds, a 64-percent increase over 1995 production, which totaled 148 million pounds. Moreover, witnesses at the hearing indicated that maturing acreage, absent any additional new plantings, will likely result in a 60-percent increase in California pistachio production over the coming years.

Several witnesses at the hearing testified that, in light of increasing production, future stability of market returns is reliant on continually increasing consumer demand for pistachios. These witnesses stated that strong consumer demand, which is ultimately related to consumer perceptions of product quality, is essential to the continued economic well being of the California pistachio industry. Moreover, witnesses discussed the importance of implementing a marketing order program that would provide them with a regulatory structure to monitor and assure that minimum quality standards are not compromised as production of California pistachios increases.

The relationship between product quality, consumer demand and producer returns in the pistachio industry was demonstrated at the hearing. Pistachio production is not only costly in terms of initial investment and cultural costs, but it is highly unpredictable in terms of producer returns. Between the initial processes of cleaning, hulling, sorting and drying, a significant portion of the initial volume harvested is reduced. This volume is further reduced as the handling process reaches its final stages of sorting for quality and final preparation for market. Witnesses explained that ultimate pistachio sales are based on approximately 30 percent of the volume initially harvested from the field. Because of this, witnesses stated that the process of extracting the highest quality portion of the harvest, and ensuring consumer satisfaction with that product, is crucial to determining the value of the crop.

Pistachio production is similar to other nut crops in that yield and total production vary substantially from year to year because of the alternate bearing nature of pistachio trees resulting in cyclical high and low production years. Total value and value per acre are generally higher in higher yielding years. Conversely, grower return per pound is generally higher in low yielding years.

Producer returns and total crop value are also dependent on the percentage of harvest that is either ''open shell'' or ''closed shell.'' Each harvest yields a certain percentage of nuts that have not naturally opened prior to cultivation. These nuts are classified as ''closed shell,'' ''shelling stock'' or ''non-splits,'' and have a lower market value than those nuts that are naturally split, or ''open shell.'' The proportion of open-shells is a key factor in year-to-year changes in the total value of production.

Economic evidence presented at the hearing, based on data from the National Agricultural Statistics Service (NASS) and the CPC, indicates that trends for total crop value and value per bearing acre have been increasing over the past 20 years. In 1980, the pistachio crop in California was valued at $55.8 million. By 2000, total crop value had increased more than four-fold, reaching $245 million. These gains are attributed to increases in both total pistachio producing acreage and yield per acre. Average value per bearing acre increased from $1,642 per acre in 1980–1984 to $2,665 per acre in 1996–2000.

According to CPC historical price data, price per pound has gradually decreased over the past 20 years, ranging from a high of $2.05 per pound in 1980 to a low of $0.99 per pound in 2001. According to the record, the proposed order would assist in improving producer returns for pistachios. The proposed order would not only assist in fortifying consumer demand by ensuring consumer satisfaction with product quality, but mandatory quality and aflatoxin requirements are also likely to boost domestic prices by culling lower quality pistachios, which tend to have price-depressing effects, from the market.

A University of California Cooperative Extension study presented as part of record evidence estimates total cost of

production in 2001 at $2,643 per acre. According to industry data, the average grower return (value per bearing acre) for 1998–2001 was $2,619. This average revenue estimate is just below the Extension study's $2,643 estimate of typical cost. Record evidence indicates that over that 4-year period, the lowest value per bearing acre was $2,137 in 2001 and the highest was $3,207 in 2000.

Witnesses supplied an additional set of cost estimates, which ranged from a low-cost operation of $2,350 per acre to a high of $3,400 per acre. In their testimony, total costs of production were divided into three categories: the costs of orchard establishment, cultural costs and administrative costs. Establishment costs, or the overall cost to develop an acre of pistachios until revenues exceed growing expenses, were estimated at between $10,000 and $15,000, with an average tree maturation period of 7 years. In order to recover these investment costs, the hearing record states that producers generally target an 11% return on investment, estimated at between $1,100 and $1,650 per acre. Annual per acre cultural costs average between $1,100 and $1,600, once the trees are productive. Administrative costs include the cost of farm management and crop financing, and can vary between $150 and $200 per acre. The sum of cultural and administrative costs therefore range from $1,250 to $1,800.

Grower price per pound averaged approximately $1.10 between 1997 and 2001. Given that $1.10 average grower price and the cost estimates above, a producer would need to harvest an average of at least 2,000 pounds per acre to cover total production costs for the low-cost operation ($2,350 per acre). A producer would need to harvest at least 1,136 pounds per acre to cover the cultural and administrative costs of $1,250 per acre (not including a return on investment).

The CPC Annual Report for Crop Year 2001–2002 reveals that 6 out of 26 California counties with pistachio production yielded on average more than 2,000 pounds per acre between 1998 and 2001. These six counties, which together represented over 88 percent of total California pistachio production in 2000, are Colusa, Sutter, Madera, Fresno, Kings and Kern. Glenn, Butte, Placer, Yolo, Contra Costa, San Joaquin, Calaveras, Stanislaus, Merced, Tulare and Santa Barbara counties yield on average between 1,000 to 2,000 pounds per acre and represent roughly 12 percent of total state production. Shasta, Tehama, Yuba, Solano, Sacramento, San Luis Obispo, Los Angeles, San Bernardino and Riverside counties yield on average less than 1,000 pounds per acre and represent less than one percent of California pistachio production.

Given the assumptions made above, approximately 88 percent of the industry is covering total costs of production. Conversely, roughly 12 percent of the industry is currently covering cultural costs but not generating a return on their investment.

Simulation Model

Record evidence includes an economic analysis presented by Dr. Daniel Sumner, University of California-Davis on the potential impacts of the proposed marketing order provisions if the program were implemented. Dr. Sumner presented a cost-benefit analysis based on a simulation model, the purpose of which was to provide a framework for comparing costs of compliance to the benefits of improved quality through implementation of the standards.

Cost Estimates

Dr. Sumner's presentation focused on the regulatory features of the proposed marketing order: (1) Mandatory testing of pistachios for the presence of aflatoxin, with a maximum allowable tolerance of 15 ppb; and (2) mandatory minimum quality standards. The quality standards would specify minimum size and maximum allowable defects.

According to record testimony, the major costs associated with these features are the cost of aflatoxin testing and the cost of USDA presence in the handlers' plant to inspect and sample lots of pistachios. Expected benefits identified by the witnesses would be the increase in consumer confidence in pistachios as a result of aflatoxin regulation, and the combined increases in consumer demand for pistachios due to mandatory USDA regulation and stringent quality standards.

Dr. Sumner's analysis took into account many of the variables presented in testimony by other witnesses describing typical production and processing costs, and presented a weighted average cost computation for marketing order compliance. The average cost of compliance, as identified by several witnesses and reiterated in Dr. Sumner's analysis, is approximately one half cent per pound of domestic pistachio production, or $0.00525 per pound.

Record evidence suggests that the cost of having a USDA inspector in the plant, including mileage plus the standard fee per hour, is approximately $291 per day for the largest plants (which process about 80 percent of total production). Total production for the domestic market that would be processed by the largest plants (those that process over 10 million pounds annually) is estimated at 136 million pounds. If an average lot is 40,000 pounds (the most common lot size for testing cited by the largest handlers), then 3,400 lots would need to be tested to account for all 136 million pounds (166.67 million pounds times 80 per cent). If a USDA official were to test 5.5 lots per day, then 618 person-days would be needed to test all of the lots. Multiplying $291 per day times 618 person-days yields an annual cost of $180,000 for testing 136 million pounds. Dividing the $180,000 annual cost by 136 million pounds yields an estimated cost per pound of $0.0013 for having USDA personnel in the plant to sample and certify that the pistachios meet minimum quality standards. Testimony suggests that this cost estimate is on the high side, since many handlers would already have USDA personnel in their plants to perform other grading services besides certification of lots for minimum quality.

The cost of aflatoxin testing in the witnesses' simulation analysis is estimated at the current rate charged by a private laboratory ($75 per test). Given this rate information, the aflatoxin testing cost per pound would be $0.0019 ($75 divided by the average lot size of 40,000 pounds).

For the largest handlers, the combined cost of aflatoxin testing and paying for the USDA presence in the plants would be equal to the sum of the quality and aflatoxin cost figures outlined above ($0.0013 + $0.0019), or $0.0032 per pound. To account for imprecision of data and other incidental costs, Dr. Sumner's analysis employs a median cost per pound for marketing order compliance, which is slightly higher, or $0.005 per pound. The analysis further assumes that per unit costs are somewhat higher for smaller plants. Thus, median costs for two categories of smaller plants are estimated at $0.006 and $0.007.

Weighting these cost figures for the three different size categories of plants yields an overall median estimated cost per pound for compliance of $0.00525. In terms of economic theory, this cost increase is represented by a vertical shift in the supply curve of about one-half cent, as measured along the vertical axis in a supply-demand graph. The total direct cost of compliance is estimated at $875,000 in the median scenario ($0.00525 times 166.67 million pounds in the domestic market).

Benefit Estimates

The witness's economic analysis takes into account three separate demand benefits, which he considers distinct. The first, and largest, of the demand benefits is higher expected long run average demand due to the reduced chance of an aflatoxin event that would cause a major negative shock to demand. The mandatory aflatoxin testing under the marketing order would reduce the chance of a demand-decreasing market disturbance in the U.S.

Witnesses cited a 1996 pistachio aflatoxin case which occurred in Germany as an example of what could befall the U.S. pistachio industry if aflatoxin were not properly regulated. Widespread negative publicity about aflatoxin in foreign pistachios exported to Germany caused sales revenue to decline by 50 percent for a duration of three years or more. Witnesses estimate that a similar event in the United States could cost the industry over $300 million in gross revenue. Witnesses also pointed out that there were significant additional repercussions on pistachio sales worldwide as word of the German aflatoxin incident spread through the media of other nations, especially in Europe, affecting pistachio sales in those countries.

The witness's analysis assumes that an aflatoxin related market disturbance would cause a more moderate decrease, represented in the median simulation case as a 10 percent decline (18 cents) from the $1.80 per pound typical base price at the handler level.

By requiring aflatoxin testing for all pistachios destined for the domestic market, the marketing order would make the probability of an aflatoxin event less likely. As a starting point, witnesses argued that without mandatory aflatoxin testing through the proposed marketing order, there is a 5-percent annual probability of an aflatoxin related market disturbance. If such an incident were to occur, witnesses estimated that its impact would last for 3 years. Implementation of mandatory testing is then assumed to reduce the probability to 1 percent, a decline of 4 percentage points.

Mandatory testing under the marketing order therefore increases expected demand, or willingness to pay for pistachios, by $0.0216 per pound (4 per cent decline in probability times 18 cents times 3 years).

The witness's analysis includes two additional demand-side benefits. The witness asserts that USDA requirements convey a positive benefit in the market as reflected by the use of this claim in product promotion, labels, and displays. A median increase of $0.0025 in willingness to pay reflects a reasonably conservative estimate of the higher buyer confidence in pistachios due solely to USDA participation in the pistachio quality testing and certification process. The certification gives additional confidence in the quality of the product.

The third demand benefit is higher buyer perception of quality due to minimum standards. Witnesses assume a similarly small magnitude for this estimated increase in willingness to pay ($0.003 per pound).

Summing the median parameters for each of these three demand impacts, the increase in willingness to pay for pistachios supplied to the domestic market is a little under 3 cents per pound ($0.0271). In terms of economic theory, this figure represents an upward shift in the demand curve of nearly 3 cents, as measured along the vertical axis in a supply-demand graph. Most of the impact is from the first benefit, the reduced probability of aflatoxin being found in California pistachios.

Thus the median benefit in terms of increased per unit demand (willingness to pay) is estimated to be substantially larger than the estimated median per unit direct cost of marketing order compliance ($0.0271 versus $0.00525). Expected or average demand is higher, reflecting the lower probability of an aflatoxin event and the average quality and certification effects in the domestic market. Handlers would face higher costs to comply with the proposed requirements.

Simulation Results

These figures for increased cost and increased willingness to pay were combined with different demand and supply elasticities in the simulation model developed by Dr. Sumner to assess the net economic impact of marketing order implementation. The median elasticities used were unitary (-1.0 for demand and 1.0 for supply). The supply response that is modeled is a long run supply response (additional planting) due to the permanent change in market conditions resulting from the marketing order. These assumed elasticities are based on other prior econometric estimates for pistachios and other tree nuts. Witnesses cited a 1999 report by Lucinda Lewis of Competition Economics, Inc., ''Charting a Direction for the U.S. Pistachio Industry,'' which found a -1.14 demand elasticity for pistachios. According to the record testimony, the range of elasticities used in the simulation scenarios are consistent with published economic studies of supply and demand for pistachios and other tree nuts.

The simulation model solves a system of supply and demand equations for a new set of industry prices and quantities from marketing order implementation. As stated above, the total direct cost of compliance is $875,000. In the simulation, there is an upward shift in the market supply curve, representing increased costs to firms in the pistachio market. The magnitude of the price and quantity change from the shift in the supply curve is determined by the higher cost of production (compliance cost) and the elasticity of supply. The resulting computed (simulated) loss to the handler segment of the industry from higher expenses for marketing order compliance is $490,000.

This $490,000 differs from the previously stated $875,000 cost of compliance figure by the amount of an implied price increase and the small equalization effect on the smaller handlers that process 20 percent of the product.

The witness's analysis assumes that with minimum quality requirements the relative position of the smaller firms would improve to match those of other handlers. This is because prior to the new mandatory requirements, these firms are assumed to have fewer quality controls than most other firms, and thus end up selling nuts to the part of the market that buys lower quality nuts at lower prices. The equalization effect resulting from uniform minimum quality specifications is a small positive benefit that offsets some of the cost of compliance for the smaller firms.

On the demand side, the higher willingness to pay is $0.0216 per pound for the reduced probability of aflatoxin in California pistachios, and $0.0055 for the two additional demand-side benefits (higher buyer confidence from USDA certification and higher buyer perception of quality). The magnitude of the price and quantity change from the shift in the demand curve is determined by the higher willingness to pay and the elasticity of demand.

In the median simulation, the amount sold in the domestic market rises by 1.6 million pounds. The benefit to industry participants is the total value of this increase in domestic sales which is the 1.6 million pound increase in quantity sold multiplied by the higher expected price level resulting from the shifting of the supply and demand curves in the simulation of marketing order impacts.

Using the median supply and demand elasticities in the simulation model, and the median compliance cost and

willingness to pay figures, the computed benefit to the handler portion of the market from the reduced chance of an aflatoxin market disturbance is $1.545 million dollars. The value of the two additional demand-side benefits is $.392 million dollars. The total benefit to handlers is thus $1.938 million dollars.

When the loss due to compliance-related expenses ($490,000) is factored in, the resulting net benefit to pistachio handlers from the marketing order is $1.448 million dollars. This $1.448 million dollar estimate of net benefit to handlers is the key result from the witness's cost-benefit analysis.

In economic theory terminology, this part of the simulation is measuring the change in producer surplus. Viewed in terms of a supply-demand graph, producer surplus is the area under the cost and above the supply curve. The $1.448 million dollar estimate of net benefit is a measure of the difference between producer surplus at the initial equilibrium (*e.g.* $1.80 average price at the handler level, or $1.10 at the grower level) and the new higher price and quantity after the supply and demand curves have been shifted to represent the median changes in cost (supply) and willingness to pay (demand).

TABLE 1.—SIMULATION OF PISTACHIO MARKETING ORDER IMPACTS ON PRODUCERS/HANDLERS

[Annual Net Costs and Benefits with Median Parameter Values]

Benefit 1: Reduced chance of aflatoxin event	$1,545,000
Benefit 2: USDA certification	178,000
Benefit 3:	
Improved quality perception	214,000
Total benefit	1,938,000
Impact of cost of compliance	−490,000
Net total	1,448,000

It should be noted that although the witness asserts that Benefit 2 and Benefit 3 are conceptually distinct, one could argue that there is significant overlap between the value of USDA certification and improved quality perception on the part of pistachio buyers and consumers. However, the assumed benefits are small in both cases, and if either of the benefit figures is eliminated, net estimated benefits to handlers still exceed one million dollars.

Cost-benefit studies which use economic welfare analysis also typically include consumer impacts, and the witness's economic analysis includes a parallel set of computations for the buyer/consumer segment of the pistachio industry. The largest demand-side benefit, the reduced chance of an aflatoxin event, is estimated at $2.586 million. The combined value of the two additional demand-side benefits is $.655 million, yielding a total benefit estimate of $3.241 million. Subtracting the estimated impact on buyers/consumers of introducing added costs of marketing order compliance ($245,000) yields a buyer/consumer net benefit estimate of $2.996 million. A key aspect of this economic analysis is that consumer willingness to pay for pistachios rises as consumer confidence improves from the higher quality standards imposed by the order. With the demand and supply elasticities used in the analysis, the benefits to the domestic buyers/consumers in this simulation are larger than benefits to the handler side of the market.

In economic theory terminology, this part of the simulation is measuring the change in consumer surplus. Viewed in terms of a supply-demand graph, consumer surplus is the area above the price and below the demand curve. The $2.996 million dollar estimate of net benefit is a measure of the difference between consumer surplus at the initial equilibrium and the new price and quantity after the supply and demand curves have been shifted to represent the median changes in cost (supply) and willingness to pay (demand).

Summing the producer/handler and buyer/consumer net benefits ($2.996 + $1.448) yields a $4.444 million median estimated value of the marketing order to the economy.

Estimated Impacts on Small Producers

The proposed marketing order would not impose any direct compliance costs on producers. The direct impact is on the handlers who would be required to pay for testing and inspection. Producers would be affected to the extent that they may have to discard more low quality nuts than previously, if they produce quantities of nuts below the proposed size and quality standard. Witnesses stated there is no evidence that the proportion of low quality nuts is correlated with farm size.

Additionally, the record shows that handler costs of compliance are typically reflected in handler payments to producers. Witnesses stated that the anticipated benefit derived from increased consumer demand would offset the cost of compliance to producers.

Witnesses stated that most producers sell to large handlers (which handle 80 percent of production). Distinguishing among handlers by size does not indicate different economic impacts on individual farms, which are distributed broadly across handlers.

Witnesses also pointed out that there is substantial inter-handler competition in the pistachio industry, with at least 10 handlers out of 19 competing for producers' pistachios (with the remainder presumably processing for their own account). Given the distribution of producers across processing firms and the level of competition, the overall cost-benefit results may be taken as the impact on the full size range of producers.

Based on a farm price of $1.10 and a handler price of $1.80, producers receive about 60 percent of the revenue in the industry, and are likely (given certain supply elasticities) to receive more than 60 percent of the estimated handler net benefits. Producer total gain (out of the estimated $1.448 million in net benefits to the handler segment) is thus at least $870,000 per year ($1.448 million times 0.60). This is distributed across producers in proportion to output, with no differential impact on smaller or larger producers.

Based on the hearing record, AMS therefore concludes that pistachio producers would benefit from implementation of the proposed order. Further, there is no evidence of differing economic impacts between small and large producers.

Estimated Impact on Small Handlers

Most compliance costs are uniform across handlers, but some differences could be correlated with the size of a handler's operation. Two relevant points are the number of lots ready to be tested per day and the lot size to be tested. Larger firms, which are more likely to have larger lot sizes for testing and to have more lots ready per day (up to about 5), may experience some savings relative to firms with smaller lot sizes and fewer lots to be tested at one time.

The proposed marketing order includes provisions to reduce compliance costs for small handlers. Firms that handle less than 1,000,000 pounds per year would be subject to simplified afaltoxin testing procedures. Additionally, they would be exempt from testing for remaining minimum quality requirements. This should reduce the expenses for smaller handlers.

Some other handlers, which process substantially more, may face somewhat higher costs for at least part of their production. Those handlers are likely, however, to have more than $5 million in total revenue, and would thus not be classified as small business entities.

Table 2 shows that the compliance costs and net economic impacts for different sizes of handlers. A positive net economic impact would exist for all handler groups.

TABLE 2.—DISTRIBUTION OF ECONOMIC EFFECTS ACROSS HANDLERS OF DIFFERENT SIZES

[Pistachio Marketing Order Simulation Results With Median Parameter Values]

Handler group*	Direct compliance cost	Net economic impact
Higher Volume/Lower Compliance Costs	−$667,000	$1,178,000
Medium Volume/Compliance Costs	−150,000	208,000
Lower Volume/Higher Compliance Costs	58,000	61,000
Total	875,000	1,447,000

*80%, 15%, and 5%, respectively, of total quantity of pistachios marketed annually.

The above table shows that the net economic impact is in direct proportion to the volume of pistachios handled by each handler group. For example, the largest handler group, accounting for 80 percent of the pistachios marketed, would reap about 81 percent of the benefits of the program. AMS therefore concludes that the program would not have a disproportionate impact on small entities.

The cost and benefit estimates presented above focus on a single set of results using median parameter values. The witness's economic analysis involved simulating a number of scenarios, using alternative values for compliance costs, benefits, and elasticities of supply and demand. All scenarios, even the low benefit, high cost scenarios, indicated positive net economic impacts.

The witness's analysis concludes that the proposed marketing order would require minimal adjustments in current processing activities and would yield large estimated benefits. The simulation results indicate that costs of compliance are small relative to benefits for all firms, and that both small and large entities are likely to benefit significantly. Producers are likely to share net producer benefits in proportion to production. Large and small handlers both gain from the marketing order, also in proportion to the volumes handled. Some of the smallest handlers could have larger net benefits per unit because of the provision allowing special lower-cost testing arrangements.

The witness's net benefit analysis represents a reasonable, plausible set of estimates of the economic impact of mandatory aflatoxin testing and minimum quality standards through promulgation of a Federal marketing order. The median cost and benefit figures explained during the hearing are considered to adequately represent estimates of the economic impact of implementation of the proposed program and its regulatory provisions.

The proposed order would impose some reporting and recordkeeping requirements on handlers. However, handler testimony indicated that the expected burden that would be imposed with respect to these requirements would be negligible. Most of the information that would be reported to the committee is already compiled by handlers for other uses and is readily available. Reporting and recordkeeping requirements issued under the peanut aflatoxin certification program (7 CFR part 996) impose an average annual burden on each regulated handler and importer of about 8 hours. It is reasonable to expect that a similar burden may be imposed under this proposed marketing order on the estimated 19 handlers of pistachios in California.

The Act requires that, prior to the issuance of a marketing order, a referendum be conducted among the affected producers to determine if they favor issuance of the order. The ballot material that would be used in conducting the referendum would be submitted to and approved by OMB before it is used. It is estimated that it would take an average of 10 minutes for each of the approximately 647 pistachio producers in California to complete the ballot. Additionally, it has been estimated that it would take approximately 10 minutes for each handler to complete the marketing agreement.

Therefore, in compliance with OMB regulations (5 CFR part 1320) which implement the Paperwork Reduction Act of 1995 (Pub. L. 104–13), the information collection and recordkeeping requirements that may be imposed by this order would be submitted to OMB for approval. Those requirements would not become effective prior to OMB review. Any recordkeeping and reporting requirements imposed would be evaluated against the potential benefits to be derived and it is expected that any added burden resulting from increased reporting and recordkeeping would not be significant when compared to those anticipated benefits derived from administration of the order.

The record evidence also indicates that the benefits to small as well as large handlers are likely to be greater than would accrue under the alternatives to the order proposed herein, namely no marketing order, or an order without the proposed combination of quality, size and aflatoxin regulation.

In determining that the proposed order and its provisions would not have a disproportionate economic on a substantial number of small entities, all of the issues discussed above were

considered. Based on hearing record evidence and USDA's analysis of the economic information provided, the proposed order provisions have been carefully reviewed to ensure that every effort has been made to eliminate any unnecessary costs or requirements.

Although the proposed order may impose some additional costs and requirements on handlers, it is anticipated that the order will help to strengthen demand for California pistachios. Therefore, any additional costs would be offset by the benefits derived from expanded sales benefiting handlers and producers alike. Accordingly, it is determined that the proposed order would not have a disproportionate economic impact on a substantial number of small handlers or producers.

A 30-day comment period is provided to allow interested persons to respond to this proposed decision to effectuate a marketing order. Thirty days is deemed appropriate so that any marketing order resulting from this rulemaking process may be implemented as soon as possible at the beginning of the nearest marketing year. A 60-day comment period on the information collection burden is deemed appropriate as any paperwork burden imposed by this action will not become effective until the process is finalized. All written exceptions and comments timely received will be considered and a grower referendum will be conducted before these proposals are implemented.

Civil Justice Reform

The marketing agreement and order proposed herein have been reviewed under Executive Order 12988, Civil Justice Reform. They are not intended to have retroactive effect. If adopted, the proposed order would not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this proposal.

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 the Department 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 there from. A handler is afforded the opportunity for a hearing on the petition. After the hearing, the 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 the Department's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), AMS announces its intention to request an approval of a new information collection for the marketing order regulating pistachios grown in California.

Title: Pistachios Grown in California.

OMB Number: 0581–NEW.

Expiration Date of Approval: To be assigned by OMB.

Type of Request: Intent to establish a new information collection.

Abstract: The information collection requirements in this request are essential to carry out the intent of the Act, to provide the respondents the type of service they request, and to administer the California pistachio marketing order program.

The California pistachio marketing order would authorize standards for quality of pistachios produced and handled in California by establishing a maximum aflatoxin tolerance level, maximum limits for defects, a minimum size requirement, and mandatory inspection and certification. AMS is the agency that would provide oversight of the order, and any administrative rules and regulations issued under the program.

The Department must determine if sufficient producer support exists within the industry to initially establish the proposed marketing order. If the order were established, the USDA could also, given recommendation by the committee and adequate support by the industry, implement formal rulemaking to amend the order. Further, a continuance referendum would be conducted every 6 years to determine ongoing industry support for the order. In all of these instances, ballot information would be collected from producers and compiled in aggregate for purposes of determining producer support for the order (or any amendment to the order).

Upon implementation of the order or during amendatory proceedings, handlers would be asked to sign a marketing agreement to indicate their willingness to comply with the provisions of the new or amended order. AMS would also provide a certificate of resolution for each handler organization to sign, documenting the handler's support of the marketing agreement and order.

If the proposed order is established, handler and producer nomination forms, ballots, and confidential qualification and acceptance statements will be used to nominate and appoint the committee members.

California pistachio producers and handlers would be nominated by their peers to serve as representatives on the committee. Each producer and handler would have the opportunity to submit a nomination form with the names of individuals to be considered for nomination.

Individuals who are nominated and wish to stand for election would be required to complete a confidential qualification and acceptance statement before the election. If qualified, the nominees would be placed on a nomination ballot.

Producers and handlers would vote for the candidate(s) of their choice using the producer and handler nomination ballots. Names of candidates receiving the most votes would be submitted to AMS for appointment as committee members and alternate members. The producer and handler members of the committee would nominate a public member and alternate public member. Each would complete qualification and acceptance statement before being recommended to AMS for appointment.

The forms covered under this information collection request submission of minimum information necessary to ascertain producer support for implementing the proposed order and to appoint initial committee members. Additional reporting and recordkeeping requirements may subsequently be recommended by the committee for its use in administering the order. The burden imposed by any additional requirements would be submitted for approval by the OMB.

The information collected would be used only by authorized representatives of USDA, including AMS, Fruit and Vegetable Programs regional and headquarters' staff, and authorized employees of the committee, if established. Section 608(d)(2) of the Act provides that all information would be kept confidential.

Total Annual Estimated Burden

The total burden for the proposed information collection under the order is as follows:

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 15 minutes per response.

Estimated Number of Respondents: 668 (647 producers, 19 handlers and the public member and alternate nominee).

Estimated Number of Responses per Respondent: .77

Estimated Total Annual Burden on Respondents: 133 hours.

Estimated Annual Burden for Each Form

For each new form, the proposed request for approval of new information collections under the order are as follows:

FV–240 Producer's Referendum Ballot (promulgation and continuance). Producers would use this ballot to vote whether they favor establishment of the order and, once every 6 years, whether they want the order to continue in effect. For the purpose of this calculation, it is estimated that 450 pistachio producers (75 percent of the total) would vote in the promulgation referendum and in the continuance referenda.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 20 minutes per response.

Respondents: California pistachio producers.

Estimated Number of Respondents: 450.

Estimated Number of Responses per Respondent: Once every 6 years.

Estimated Total Annual Burden on Respondents: 25 hours.

FV–241 Cooperative Association of Producers Referendum Ballot (promulgation and continuance). This ballot would be used to register the cooperative's vote on promulgation or continuance of the marketing order. At the time of this promulgation proceeding, there is only 1 pistachio cooperative registered in the production area.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 20 minutes per response.

Respondents: California pistachio cooperative.

Estimated Number of Respondents: 1.

Estimated Number of Responses per Respondent: Once every 6 years.

Estimated Total Annual Burden on Respondents: 3 minutes.

FV–242 Marketing Agreement. Handlers would use this form to indicate their willingness to comply with the provisions of the order. The Marketing Agreement would be completed if the proposed order is implemented and in any future amendment of the order.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 5 minutes per response.

Respondents: California pistachio handlers.

Estimated Number of Respondents: 19.

Estimated Number of Responses per Respondent: Once every 6 years.

Estimated Total Annual Burden on Respondents: 16 minutes.

FV–242A Certificate of Resolution. This would document corporate handlers' support for the order and marketing agreement. The Marketing Agreement would be completed if the proposed order is implemented and in any future amendment of the order.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 5 minutes per response.

Respondents: Incorporated pistachio handlers.

Estimated Number of Respondents: 19.

Estimated Number of Responses per Respondent: Once every 6 years.

Estimated Total Annual Burden on Respondents: 16 minutes.

FV–243 Administrative Committee for Pistachios Confidential Producer/Handler and Public Member Qualification and Acceptance Statement. There are 11 members and 11 alternate members on the committee. Each year after the initial committee is seated, half of the 22 members would be replaced with new members. This form would be used by candidates for nomination to provide their qualifications to serve on the committee. For the purpose of this calculation, it is estimated that 30 individuals will agree to be candidates to serve on the committee.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 10 minutes per response.

Respondents: California pistachio producers, handlers and public member nominees.

Estimated Number of Respondents: 30.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 5 hours.

FV–244 Handler Members and Alternate Handler Members' Ballot. Each handler would use the ballot to vote on handler member nominees to serve on the committee.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 5 minutes per response.

Respondents: California pistachio handlers.

Estimated Number of Respondents: 19.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 1.5 hours.

FV–245 Producer Members and Alternate Producer Members Nomination Form. Pistachio producers would use this form to nominate themselves or other producers to serve on the committee. For the purpose of this calculation, it is estimated that 50 producers will offer nominations.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 20 minutes per response.

Respondents: California pistachio producers.

Estimated Number of Respondents: 50.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 17 hours.

FV–245A Handler Members and Alternate Handler Members' Nomination Form. Pistachio handlers would use this form to nominate themselves or other handlers to serve on the committee. For the purpose of this calculation, it is estimated that 10 handlers will offer nominations.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 20 minutes per response.

Respondents: California pistachio handlers.

Estimated Number of Respondents: 10.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 3.3 hours.

FV–246 Producer Member and Alternate Producer Member Ballot. Pistachio producers would use this ballot to vote on their choice of nominees to serve on the committee. For the purpose of this calculation, it is estimated that 325 producers (50 percent of all producers) will vote in nomination elections.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 15 minutes per response.

Respondents: California pistachio producers.

Estimated Number of Respondents: 325.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 81 hours.

If this marketing order program is approved by producers in referendum and established by USDA, the committee could recommend to the Department other forms (such as monthly handler reports of acquisitions

or dispositions of substandard pistachios) which would be needed to administer the order. All such forms would be subject to USDA and OMB review and approval.

Comments: Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information would have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments should reference OMB No. 0581–NEW and the California pistachio marketing order, and be sent to USDA in care of the Docket Clerk at the previously mentioned address. All comments received will be available for public inspection during regular business hours at the same address.

All responses to this notice will be summarized and included in the request for OMB approval of the above-described forms. All comments will become a matter of public record.

Rulings on Proposed Findings and Conclusions

Briefs, proposed findings and conclusions, and the evidence in the record were considered in making the findings and conclusions set forth in this recommended decision. To the extent that the suggested findings and conclusions filed by interested persons are inconsistent with the findings and conclusions of this recommended decision, the requests to make such findings or to reach such conclusions are denied.

General Findings

(1) The proposed marketing agreement and order and all of the terms and conditions thereof, would tend to effectuate the declared policy of the Act;

(2) The proposed marketing agreement and order regulate the handling of pistachios in California in the same manner as, and are applicable only to, persons in the respective classes of commercial and industrial activity specified in the marketing agreement and order upon which a hearing has been held;

(3) The proposed marketing agreement and order are limited in their application to the smallest regional production area which is practicable, consistent with carrying out the declared policy of the Act, and the issuance of several orders applicable to subdivision of the production area would not effectively carry out the declared policy of the Act;

(4) The proposed marketing agreement and order prescribe, insofar as practicable, such different terms applicable to different parts of the production area as are necessary to give due recognition to the differences in the production and marketing of pistachios grown in the production area; and

(5) All handling of pistachios grown in California as defined in the proposed marketing agreement and order, is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects such commerce.

Provisions of the proposed marketing agreement and order follow. Those sections identified with an asterisk (*) apply only to the proposed marketing agreement.

List of Subjects in 7 CFR Part 983

Marketing agreements, Pistachios, Reporting and recordkeeping requirements.

Title 7, chapter IX is proposed to be amended by adding part 983 to read as follows:

PART 983—PISTACHIOS GROWN IN CALIFORNIA

Subpart—Order Regulating Handling

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*Sections identified with an asterisk (*) apply only to the proposed marketing agreement.

Authority: 7 U.S.C. 601–674.

Subpart—Order Regulating Handling

Definitions

§ 983.1 Accredited laboratory.

An *accredited laboratory* is a laboratory that has been approved or accredited by the U.S. Department of Agriculture for testing aflatoxin.

§ 983.2 Act.

Act means Public Act No. 10, 73rd Congress (May 12, 1933), as amended and as re-enacted and amended by the Agricultural Marketing Order Act of 1937, as amended (48 Stat. 31, as amended; 7 U.S.C. 601 *et seq.*).

§ 983.3 Affiliation.

Affiliation. This term normally appears as ''affiliate of'', or ''affiliated with'', and means a person such as a producer or handler who is: a producer or handler that directly, or indirectly through one or more intermediaries, owns or controls, or is controlled by, or is under common control with the producer or handler specified; or a producer or handler that directly, or indirectly through one or more intermediaries, is connected in a proprietary capacity, or shares the ownership or control of the specified producer or handler with one or more other producers or handlers. As used in this part, the term *control* (including the terms *controlling, controlled by,* and *under the common control with*) means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a handler or a producer, whether through voting securities, membership in a cooperative, by contract or otherwise.

§ 983.4 Aflatoxin.

Aflatoxin is one of a group of mycotoxins produced by the molds *Aspergillus flavus* and *Aspergillus parasiticus.* Aflatoxins are naturally occurring compounds produced by molds, which can be spread in improperly processed and stored nuts, dried fruits and grains.

§ 983.5 Aflatoxin inspection certificate.

Aflatoxin inspection certificate is a certificate issued by an accredited laboratory or by a USDA laboratory.

§ 983.6 Assessed weight.

Assessed weight means pounds of pistachios, with the weight computed at 5 percent moisture, received for processing by a handler within each production year: *Provided,* That for loose kernels, the actual weight shall be multiplied by two to obtain an inshell weight; or based on such other elements as may be recommended by the committee and approved by the Secretary.

§ 983.7 Certified pistachios.

Certified pistachios are those for which aflatoxin inspection and minimum quality certificates have been issued.

§ 983.8 Committee.

Committee means the administrative committee for pistachios established pursuant to § 983.32.

§ 983.9 Confidential data or information.

Confidential data or information submitted to the committee consists of data or information constituting a trade secret or disclosure of the trade position, financial condition, or business operations of a particular entity or its customers.

§ 983.10 Department or USDA.

Department or USDA means the United States Department of Agriculture.

§ 983.11 Districts.

(a) *Districts* shall consist of the following:

(1) *District 1* consists of Tulare, Kern, San Bernardino, San Luis Obispo, Santa Barbara, Ventura, Los Angeles, Orange, Riverside, San Diego, and Imperial Counties of California.

(2) *District 2* consists of Kings, Fresno, Madera, and Merced Counties of California.

(3) *District 3* consists of all counties in California where pistachios are produced that are not included in Districts 1 and 2.

(b) With the approval of the Secretary, the boundaries of any district may be changed by the committee, to ensure proper representation. The boundaries need not coincide with county lines. In addition, the boundaries in the production area may be adjusted to conform to changes to the boundaries of the districts established for those of the California Pistachio Commission upon the recommendation of the committee and approval of the Secretary.

§ 983.12 Domestic shipments.

Domestic shipments means shipments to the fifty states of the United States or to territories of the United States and the District of Columbia.

§ 983.13 Edible pistachios.

Edible pistachios are those that do not exceed the level of defects under § 983.38 and § 983.39.

§ 983.14 Handle.

Handle means to engage in:

(a) Receiving pistachios;

(b) Hulling and drying pistachios;

(c) Further preparing pistachios by sorting, sizing, shelling, roasting, cleaning, salting, and/or packaging for marketing in or transporting to any and all markets in the current of interstate or foreign commerce; and/or

(d) Placing pistachios into the current of commerce from within the production area to points outside thereof: *Provided,* however, that transportation within the production area between handlers and from the orchard to the processing facility is not handling.

§ 983.15 Handler.

Handler means any person who handles pistachios.

§ 983.16 Inshell pistachios.

Inshell pistachios means pistachios that have a shell that has not been removed.

§ 983.17 Inspector.

Inspector means any inspector authorized by the USDA to inspect pistachios.

§ 983.18 Lot.

Lot means any quantity of pistachios that is submitted for testing purposes under this part.

§ 983.19 Minimum quality requirements.

Minimum quality requirements are permissible maximum defects and minimum size levels for inshell pistachios and kernels specified in § 983.39.

§ 983.20 Minimum quality certificate.

Minimum quality certificate is a certificate issued by the USDA or Federal/State Inspection Service.

§ 983.21 Part and subpart.

Part means the order regulating the handling of pistachios grown in the State of California, and all rules, regulations and supplementary orders issued there under. The aforesaid order regulating the handling of pistachios grown in California shall be a subpart of such part.

§ 983.22 Person.

Person means an individual, partnership, limited liability corporation, corporation, trust, association, or any other business unit.

§ 983.23 Pistachios.

Pistachios means the nuts of the pistachio tree of the genus *Pistacia vera* grown in the production area whether inshell or shelled.

§ 983.24 Processing.

Processing means hulling and drying pistachios in preparation for market.

§ 983.25 Producer.

Producer means any person engaged within the production area in a proprietary capacity in the production of pistachios for sale.

§ 983.26 Production area.

Production area means the State of California.

§ 983.27 Production year.

Production year is synonymous with ''fiscal period'' and means the period beginning on September 1 and ending on August 31 of each year or such other period as may be recommended by the committee and approved by the Secretary. Pistachios harvested and received in August of any year shall be applied to the subsequent production year for marketing order purposes.

§ 983.28 Proprietary capacity.

Proprietary capacity means the capacity or interest of a producer or handler that, either directly or through one or more intermediaries, is a property owner together with all the appurtenant rights of an owner including the right to vote the interest in that capacity as an individual, a shareholder, member of a cooperative, partner, trustee or in any other capacity with respect to any other business unit.

§ 983.29 Secretary.

Secretary means the Secretary of Agriculture of the United States or any officer or employee of the United States Department of Agriculture who is, or who may hereafter be, authorized to act in his/her stead.

§ 983.30 Shelled pistachios.

Shelled pistachios means pistachio kernels, or portions of kernels, after the pistachio shells have been removed.

§ 983.31 Substandard pistachios.

Substandard pistachios means pistachios, inshell or shelled, which do not comply with the maximum aflatoxin and/or minimum quality regulations of this part.

Administrative Committee

§ 983.32 Establishment and membership.

There is hereby established an administrative committee for pistachios to administer the terms and provisions of this part. This committee, consisting of eleven (11) member positions, each of whom shall have an alternate, shall be allocated as follows:

(a) *Handlers.* Two of the members shall represent handlers, as follows:

(1) One handler member nominated by one vote for each handler; and

(2) One handler member nominated by voting based on each handler casting one vote for each ton (or portion thereof) of the assessed weight of pistachios processed by such handler during the two production years preceding the production year in which the nominations are made.

(b) *Producers.* Eight members shall represent producers. Producers within the respective districts shall nominate four producers from District 1, three producers from District 2 and one producer from District 3. The Secretary, upon recommendation of the committee, may reapportion producer membership among the districts to ensure proper representation.

(c) *Public member.* One member shall be a public member who is neither a producer nor a handler and shall have all the powers, rights and privileges of any other member of the committee. The public member and alternate public member shall be nominated by the committee and selected by the Secretary.

§ 983.33 Initial members and nomination of successor members.

Nomination of committee members and alternates shall follow the procedure set forth in this section or as may be changed as recommended by the committee and approved by the Secretary.

(a) *Initial members.* Nominations for initial grower and handler members shall be conducted by the Secretary by either holding meetings of handlers and producers, or by mail.

(b) *Successor members.* Subsequent to the first nomination of committee members under this part, persons to be nominated to serve on the committee as producer or handler members shall be selected pursuant to nomination procedures that shall be established by the committee with the approval of the Secretary: *Provided,* That:

(1) Any qualified individuals who seek nomination as a producer member shall submit to the committee an intent to seek office in one designated district on such form and with such information as the committee shall designate; ballots, accompanied by the names of all such candidates, with spaces to indicate voters' choices and spaces for write-in candidates, together with voting instructions, shall be mailed to all producers who are on record with the committee within the respective districts; the person(s) receiving the highest number of votes shall be the member nominee(s) for that district, and the person(s) receiving the second highest number of votes shall be the alternate member nominee(s). In case of a tie vote, the nominee shall be selected by a drawing.

(2) Any qualified individuals who seek nomination as a handler member shall submit to the committee an intent to seek office with such information as the committee shall designate; ballots, accompanied by the names of all such candidates, with spaces to indicate voters' choices and spaces for write-in candidates, together with voting instructions, shall be mailed to all handlers who are on record with the committee. For the first handler member seat, the person receiving the highest number of votes shall be the handler member nominee for that seat, and the person receiving the second highest number of votes shall be the alternate member nominee. For the second handler member seat, the person receiving the highest number of votes representing handler volume shall be the handler member nominee for that seat, and the person receiving the second highest number of votes representing handler volume shall be the alternate member nominee. In case of a tie vote, the nominee shall be selected by a drawing.

(c) *Handlers.* Only handlers, including duly authorized officers or employees of handlers, may participate in the nomination of the two handler member nominees and their alternates. Nomination of the two handler members and their alternates shall be as follows:

(1) For one handler member nomination, each handler entity shall be entitled to one vote;

(2) For the second handler member nomination, each handler entity shall be entitled to cast one vote respectively for each ton of assessed weight of pistachios processed by that handler during the two production years preceding the production year in which the nominations are made. For the purposes of nominating handler members and alternates by volume, the assessed weight of pistachios shall be credited to the handler responsible under the order for the payment of assessments of those pistachios. The committee with the approval of the Secretary, may revise the handler representation on the committee if the committee ceases to be representative of the industry.

(d) *Producers.* Only producers, including duly authorized officers or employees of producers, may participate in the nomination of nominees for producer members and their alternates. Each producer shall be entitled to cast only one vote, whether directly or through an authorized officer or employee, for each position to be filled in the district in which the producer produces pistachios. If a producer is engaged in producing pistachios in more than one district, such producer shall select the district in which to participate in the nomination. If a person is both a producer and a handler of pistachios, such person may participate in both producer and

handler nominations, provided, however, that a single member may not hold concurrent seats as both a producer and handler.

(e) *Member's affiliation.* Not more than two members and not more than two alternate members shall be persons employed by or affiliated with producers or handlers that are affiliated with the same handler and/or producer. Additionally, only one member and one alternate in any one district representing producers and only one member and one alternate representing handlers shall be employed by, or affiliated with the same handler and/or producer. No handler, and all of its affiliated handlers, can be represented by more than one handler member.

(f) *Cooperative affiliation.* In the case of a producer cooperative, a producer shall not be deemed to be connected in a proprietary capacity with the cooperative notwithstanding any outstanding retains, contributions or financial indebtedness owed by the cooperative to a producer if the producer has not marketed pistachios through the cooperative during the current and one preceding production year. A cooperative that has as its members one or more other cooperatives that are handlers shall not be considered as a handler for the purpose of nominating or voting under this part.

(g) *Alternate members.* Each member of the committee shall have an alternate member to be nominated in the same manner as the member. Any alternate serving in the same district as a member where both are employed by, or connected in a proprietary capacity with the same corporation, firm, partnership, association, or business organization, shall serve as the alternate to that member. An alternate member, in the absence of the member for whom that alternate is selected shall serve in place of that member on the committee, and shall have and be able to exercise all the rights, privileges, and powers of the member when serving on the committee. In the event of death, removal, resignation, or the disqualification of a member, the alternate shall act as a member on the committee until a successor member is selected and has been qualified.

(h) *Selection by Secretary.* Nominations under paragraph (g) of this section received by the committee for all handler and producer members and alternate member positions shall be certified and sent to the Secretary at least 60 days prior to the beginning of each two-year term of office, together with all necessary data and other information deemed by the committee to be pertinent or requested by the Secretary. From those nominations, the Secretary shall select the ten producer and handler members of the committee and an alternate for each member.

(i) *Acceptance.* Each person to be selected by the Secretary as a member or as an alternate member of the committee shall, prior to such selection, qualify by advising the Secretary that if selected, such person agrees to serve in the position for which that nomination has been made.

(j) *Failure to nominate.* If nominations are not made within the time and manner specified in this part, the Secretary may, without regard to nominations, select the committee members and alternates qualified to serve on the basis of the representation provided for in § 983.32.

(k) *Term of office.* Selected members and alternate members of the committee shall serve for terms of two years: *Provided,* That four of the initially selected producer members and one handler member and their alternates shall, by a drawing, be seated for terms of one year so that approximately half of the memberships' terms expire each year. Each member and alternate member shall continue to serve until a successor is selected and has qualified. The term of office shall begin on July 1st of each year. Committee members and alternates may serve up to four consecutive, two-year terms of office. In no event shall any member or alternate serve more than eight consecutive years on the committee. For purposes of determining when a member or alternate has served four consecutive terms, the accrual of terms shall begin following any period of at least twelve consecutive months out of office.

(l) *Qualifications.* (1) Each producer member and alternate shall be, at the time of selection and during the term of office, a producer or an officer, or employee, of a producer in the district for which nominated.

(2) Each handler member and alternate shall be, at the time of selection and during the term of office, a handler or an officer or employee of a handler.

(3) Any member or alternate member who at the time of selection was employed by or affiliated with the person who is nominated, that member shall, upon termination of that relationship, become disqualified to serve further as a member and that position shall be deemed vacant.

(4) No person nominated to serve as a public member or alternate public member shall have a financial interest in any pistachio growing or handling operation.

(m) *Vacancy.* Any vacancy on the committee occurring by the failure of any person selected to the committee to qualify as a member or alternate member due to a change in status making the member ineligible to serve, or due to death, removal, or resignation, shall be filled, by a majority vote of the committee for the unexpired portion of the term. However, that person shall fulfill all the qualifications set forth in this part as required for the member whose office that person is to fill. The qualifications of any person to fill a vacancy on the committee shall be certified in writing to the Secretary. The Secretary shall notify the committee if the Secretary determines that any such person is not qualified.

(n) The committee, with the approval of the Secretary, may issue rules and regulations implementing §§ 983.32, 983.33 and 983.34.

§ 983.34 Procedure.

(a) *Quorum.* A quorum of the committee shall be any seven voting committee members. The vote of a majority of members present at a meeting at which there is a quorum shall constitute the act of the committee: *Provided,* That actions of the committee with respect to the following issues shall require at least seven concurring votes of the voting members regarding any recommendation to the Secretary for adoption or change in:

(1) Minimum quality levels;

(2) Aflatoxin levels;

(3) Inspection programs;

(4) The establishment of the committee.

(b) *Voting.* Members of the committee may participate in a meeting by attendance in person or through the use of a conference telephone or similar communication equipment, as long as all members participating in such a meeting can communicate with one another. An action required or permitted to be taken by the committee may be taken without a meeting, if all members of the committee shall consent in writing to that action.

(c) *Compensation.* The members of the committee and their alternates shall serve without compensation, but members and alternates acting as members shall be allowed their necessary expenses: *Provided,* That the committee may request the attendance of one or more alternates not acting as members at any meeting of the committee, and such alternates may be allowed their necessary expenses; and, *Provided further,* That the public member and the alternate for the public member may be paid reasonable

compensation in addition to necessary expenses.

§ 983.35 Powers.

The committee shall have the following powers:

(a) To administer the provisions of this part in accordance with its terms;

(b) To make and adopt bylaws, rules and regulations to effectuate the terms and provisions of this part with the approval of the Secretary;

(c) To receive, investigate, and report to the Secretary complaints of violations of this part; and

(d) To recommend to the Secretary amendments to this part.

§ 983.36 Duties.

The committee shall have, among others, the following duties:

(a) To adopt bylaws and rules for the conduct of its meetings and the selection of such officers from among its membership, including a chairperson and vice-chairperson, as may be necessary, and define the duties of such officers; and adopt such other bylaws, regulations and rules as may be necessary to accomplish the purposes of the Act and the efficient administration of this part;

(b) To employ or contract with such persons or agents as the committee deems necessary and to determine the duties and compensation of such persons or agents;

(c) To select such subcommittees as may be necessary;

(d) To submit to the Secretary a budget for each fiscal period, prior to the beginning of such period, including a report explaining the items appearing therein and a recommendation as to the rate of assessments for such period;

(e) To keep minutes, books, and records which will reflect all of the acts and transactions of the committee and which shall be subject to examination by the Secretary;

(f) To prepare periodic statements of the financial operations of the committee and to make copies of each statement available to producers and handlers for examination at the office of the committee;

(g) To cause its financial statements to be audited by a certified public accountant at least once each fiscal year and at such times as the Secretary may request. Such audit shall include an examination of the receipt of assessments and the disbursement of all funds. The committee shall provide the Secretary with a copy of all audits and shall make copies of such audits, after the removal of any confidential individual or handler information that may be contained in them, available for examination at the offices of the committee;

(h) To act as intermediary between the Secretary and any producer or handler with respect to the operations of this part;

(i) To investigate and assemble data on the growing, handling, shipping and marketing conditions with respect to pistachios;

(j) To apprise the Secretary of all committee meetings in a timely manner;

(k) To submit to the Secretary such available information as the Secretary may request;

(l) To investigate compliance with the provisions of this part;

(m) To provide, through communication to producers and handlers, information regarding the activities of the committee and to respond to industry inquiries about committee activities;

(n) To oversee the collection of assessments levied under this part;

(o) To borrow such funds, subject to the approval of the Secretary and not to exceed the expected expenses of one fiscal year, as are necessary for administering its responsibilities and obligations under this part.

Marketing Policy

§ 983.37 Marketing policy.

Prior to August 1st each year, the committee shall prepare and submit to the Secretary a report setting forth its recommended marketing policy covering quality regulations for the pending crop. In the event it becomes advisable to modify such policy, because of changed crop conditions, the committee shall formulate a new policy and shall submit a report thereon to the Secretary. In developing the marketing policy, the committee shall give consideration to the production, harvesting, processing and storage conditions of that crop. The committee may also give consideration to current prices being received and the probable general level of prices to be received for pistachios by producers and handlers. Notice of the committee's marketing policy, and of any modifications thereof, shall be given promptly by reasonable publicity, to producers and handlers.

Regulations

§ 983.38 Aflatoxin levels.

(a) *Maximum level.* No handler shall ship for domestic human consumption, pistachios that exceed an aflatoxin level of more than 15 ppb. All shipments must also be covered by an aflatoxin inspection certificate. Pistachios that fail to meet the aflatoxin requirements shall be disposed in such manner as described in Failed lots/rework procedure of this part.

(b) *Change in level.* The committee may recommend to the Secretary changes in the aflatoxin level specified in this section. If the Secretary finds on the basis of such recommendation or other information that such an adjustment of the aflatoxin level would tend to effectuate the declared policy of the Act, such change shall be made accordingly.

(c) *Transfers between handlers.* Transfers between handlers within the production area are exempt from the aflatoxin regulation of this section.

(d) *Aflatoxin testing procedures.* To obtain an aflatoxin inspection certificate, each lot to be certified shall be uniquely identified, be traceable from testing through shipment by the handler and be subjected to the following:

(1) *Samples for testing.* Prior to testing, a sample shall be drawn from each lot and divided between those pistachios for aflatoxin testing and those for minimum quality testing (''lot samples'') in sufficient weight to comply with Table 1, Table 2 and Table 4 of this part.

(2) *Test samples for aflatoxin.* Prior to submission of samples to an accredited laboratory for aflatoxin analysis, three samples shall be created equally from the pistachios designated for aflatoxin testing in compliance with the requirements of Tables 1 and 2 of this paragraph (d)(2) (''test samples''). The test samples shall be prepared by, or under the supervision of, an inspector, or as approved under an alternative USDA-recognized inspection program. The test samples shall be designated by an inspector as Test Sample #1, Test Sample #2, and Test Sample #3. Each sample shall be placed in a suitable container, with the lot number clearly identified, and then submitted to an accredited laboratory. The gross weight of the inshell lot sample for aflatoxin testing and the number of samplings required are shown in Table 1 of this paragraph (d)(2). The gross weight of the kernel lot sample for aflatoxin testing and the number of incremental samples required is shown in Table 2 of this paragraph (d)(2).

TABLE 1.—INSHELL PISTACHIO LOT SAMPLING INCREMENTS FOR AFLATOXIN CERTIFICATION

Lot weight (lbs.)	Number of incremental samples for the lot sample	Total weight of lot sample (kilograms)	Weight of test sample (kilograms)
220 or less	10	3.0	1.0
221–440	15	4.5	1.5
441–1100	20	6.0	2.0
1101–2200	30	9.0	3.0
2201–4400	40	12.0	4.0
4401–11,000	60	18.0	6.0
11,001–22,000	80	24.0	8.0
22,001–150,000	100	30.0	10.0

TABLE 2.—SHELLED PISTACHIO KERNEL LOT SAMPLING INCREMENTS FOR AFLATOXIN CERTIFICATION

Lot weight (lbs.)	Number of incremental samples for the lot sample	Total weight of lot sample (kilograms)	Weight of test sample (kilograms)
220 or less	10	1.5	.5
221–440	15	2.3	.75
441–1100	20	3.0	1.0
1101–2200	30	4.5	1.5
2201–4400	40	6.0	2.0
4401–11,000	60	9.0	3.0
11,001–22,000	80	12.0	4.0
22,001–150,000	100	15.0	5.0

(3) *Testing of pistachios.* Test samples shall be received and logged by an accredited laboratory and each test sample shall be prepared and analyzed using High Pressure Liquid Chromatograph (HPLC) and Vicam Method (Aflatest) or other methods as recommended by not less than seven members of the committee and approved by the Secretary. The aflatoxin level shall be calculated on a kernel weight basis.

(4) *Certification of lots ''negative'' as to aflatoxin.* Lots will be certified as ''negative'' on the aflatoxin inspection certificate if Test Sample #1 has an aflatoxin level at or below 5 ppb. If the aflatoxin level of Test Sample #1 is above 25 ppb, the lot fails and the accredited laboratory shall fill out a failed lot notification report as specified in § 983.40. If the aflatoxin level of Test Sample #1 is above 5 ppb and below 25 ppb, the accredited laboratory may at the handler's discretion analyze Test Sample #2 and the test results of Test Samples #1 and #2 will be averaged. Alternatively, the handler may elect to withdraw the lot from testing, rework the lot, and re-submit it for testing after re-working. If the handler directs the laboratory to proceed with the analysis of Test Sample #2, a lot will be certified as negative to aflatoxin and the laboratory shall issue an aflatoxin inspection certificate if the averaged results of Test Samples #1 and Test Sample #2 is at or below 10 ppb. If the averaged aflatoxin level of the Test Samples #1 and #2 is at or above 20 ppb, the lot fails and the accredited laboratory shall fill out a failed lot notification report as specified in § 983.40. If the averaged aflatoxin level of Test Samples #1 and #2 is above 10 ppb and below 20 ppb, the accredited laboratory may, at the handler's discretion, analyze Test Sample #3 and the results of Test Samples #1, #2 and #3 will be averaged. Alternatively, the handler may elect to withdraw the lot from testing, re-work the lot, and re-submit it for testing after a re-working. If the handler directs the laboratory to proceed with the analysis of Test Sample #3, a lot will be certified as negative to aflatoxin and the laboratory shall issue an aflatoxin inspection certificate if the averaged results of Test Samples #1, #2 and #3 is at or below 15 ppb. If the averaged aflatoxin results of Test Samples #1, #2 and #3 is above 15 ppb, the lot fails and the accredited laboratory shall fill out a failed lot notification report as specified in § 983.40. The accreditation laboratory shall send a copy of the failed lot notification report to the committee and to the failed lot's owner within 10 working days of any failure described in this section. If the lot is certified as negative as described in this section, the aflatoxin inspection certificate shall certify the lot using a certification form identifying each lot by weight, grade and date. The certification expires for the lot or remainder of the lot after 12 months.

(5) *Certification of aflatoxin levels.* Each accredited laboratory shall complete aflatoxin testing and reporting and shall certify that every lot of California pistachios shipped domestically does not exceed the aflatoxin levels as required in § 983.38(d)(4). Each handler shall keep a record of each test, along with a record of final shipping disposition. These records must be maintained for three years beyond the crop year of their applicability, and are subject to audit by the Secretary or the committee at any time.

(6) *Test samples that are not used for analysis.* If a handler does not elect to use Test Samples #2 or #3 for certification purposes the handler may request the laboratory to return them to the handler.

§ 983.39 Minimum quality levels.

(a) *Maximum defect and minimum size.* No handler shall ship for domestic human consumption, pistachios that exceed permissible maximum defect and minimum size levels shown in the following Table 3.

TABLE 3.—MAXIMUM DEFECT AND MINIMUM SIZE LEVELS

Factor	Maximum permissible defects (percent by weight)	
	Inshell	Kernels
External (Shell) Defects		
1. Non-splits & not split on suture	10.0	
(i) Maximum non-splits allowed	4.0	
2. Adhering hull material	2.0	
3. Dark stain	3.0	
4. Damage by other means, other than paragraphs 1, 2 and 3, which materially detracts from the appearance or the edible or marketing quality of the individual shell or the lot	10.0	
Internal (Kernel) Deffects		
1. Damage	6.0	3.0
Immature kernel (Fills <75%–<50% of the shell)		
Kernel spotting (Affects ⅛ aggregate surface)		
2. Serious damage	4.0	2.5
Minor insect or vertebrate injury/insect damage, insect evidence, mold, rancidity, decay		
(i) Maximum insect damage allowed	2.0	0.5
Total external or internal defects allowed	9.0	
Other Defects		
1. Shell pieces and blanks (Fills <50% of the shell)	2.0	
(i) Maximum blanks allowed	1.0	
2. Foreign material	0.25	0.1
No glass, metal or live insects permitted		
3. Particles and dust	0.25	
4. Loose kernels	6.0	
	Minimum permissible defects (percent by weight)	
Maximum allowable inshell pistachios that will pass through a 30/64ths inch round hole screen	5.0	

(b) *Definitions applicable to permissible maximum defect and minimum size levels:* The following definitions shall apply to inshell pistachio and pistachio kernel maximum defect and minimum size:

(1) *Loose kernels* means edible kernels or kernel portions that are out of the shell and which cannot be considered particles and dust.

(2) *External (shell) defects* means any abnormal condition 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 or dark stains.

(3) *Damage by external (shell) defects* shall also include any specific defect described in paragraphs (b)(3)(i) through (iv) 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 edibility or the marketing quality of the individual shell or the lot.

(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 of hull covers more than one-eighth (⅛) of the total shell surface, or when readily noticeable on dyed shells.

(iv) *Dark stain* on raw or roasted nuts means an aggregate amount of dark brown, dark gray or black discoloration that affects more than one-eighth of the total shell surface. Pistachios that are dyed or color-coated to improve their marketing quality are not subject to the maximum permissible defects for dark stain. Speckled discoloration on the stem end, bottom quarter of the nut is not considered damage.

(4) *Internal (kernel) defects* means any damage affecting the kernel. Such damage includes, but is not limited to evidence of insects, immature kernels, rancid kernels, mold or decay.

(i) *Damage by internal (kernel) defects* shall also include any specific defect described in paragraphs (b)(4)(i)(A) and (B) 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 edibility or the marketing quality of the individual kernel or of the lot.

(A) *Immature kernels* in inshell are excessively thin kernels, or when a kernel fills less than three-fourths, but not less than one-half of the shell cavity. ''Immature kernels'' in shelled pistachios 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.

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

(ii) *Serious damage* by internal (kernel) defects means any specific defect described in paragraphs (b)(4)(ii)(A) through (E) of this section, or an equally objectionable variation of any one of these defects, which seriously detracts from the appearance or the edibility or the marketing quality of the individual kernel or of the lot.

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

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

(C) *Mold* that is readily visible on the shell or kernel.

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

(E) *Decay* means 1/16th or more of the kernel surface is decomposed.

(5) *Other defects* means defects that cannot be considered internal defects or external defects. Such defects include, but are not limited to shell pieces, blanks, foreign materials or particles and dust. The following shall be considered other defects:

(i) *Shell pieces* means open inshell without a kernel, half shells or pieces of shell which are loose in the sample.

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

(iii) *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.

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

(v) *Undersized* means inshell pistachios that fall through a 30/64-inch round hole screen.

(c) *Minimum quality certificate.* Each shipment for domestic human consumption must be covered by a USDA certificate certifying a minimum quality or higher. Pistachios that fail to meet the minimum quality specifications shall be disposed of in such manner as described in § 983.40.

(d) *Transfers between handlers.* Transfers between handlers within the production area are exempt from the minimum quality regulation of this section.

(e) *Minimum quality testing procedures.* To obtain a minimum quality certificate, each lot to be certified shall be uniquely identified, shall be traceable from testing through shipment by the handler and shall be subjected to the following procedure:

(1) *Sampling of pistachios for maximum defects and minimum size.* The gross weight of the inshell and kernel sample, and number of samplings required to meet the minimum quality regulation, is shown in Table 4 of this paragraph (e)(1). These samples shall be drawn from the lot that is to be certified pursuant to § 983.38(d)(1) under the supervision of an inspector or as approved under an alternative USDA recognized inspection program.

TABLE 4.—INSHELL AND KERNEL PISTACHIO LOT SAMPLING INCREMENTS FOR MINIMUM QUALITY CERTIFICATION

Lot weight (lbs.)	Number of incremental samples for the lot sample	Total weight of lot sample (grams)	Weight of inshell and kernel test sample (grams)
220 or less	10	500	500
221–440	15	500	500
441–1100	20	600	500
1101–2200	30	900	500
2201–4400	40	1200	500
4401–11,000	60	1800	500
11,001–22,000	80	2400	1000
22,001–150,000	100	3000	1000

(2) *Testing of pistachios for maximum defect and minimum size.* The sample shall be analyzed according to USDA protocol, current or as subsequently revised, to insure that the lot does not exceed maximum defects and meets at least the minimum size levels as specified in Table 3 of paragraph (a) of this section. For inshell pistachios, those nuts with dark stain, adhering hull, and those exhibiting apparent serious defects shall be shelled for internal kernel analysis. The USDA protocol currently appears in USDA inspection instruction manual ''Pistachios in the Shell, Shipping Point and Market Inspection Instructions,'' June 1994: revised September 1994, HU–125–9(b). Copies may be obtained from the Fresh Products Branch, Agricultural Marketing Service, USDA. Contact information may be found at *http://www.ams.usda.gov/fv/fvstand.htm.*

(f) *Certification of minimum quality.* Each inspector shall complete minimum quality testing and reporting and shall certify that every lot of California pistachios or portion thereof shipped domestically meets minimum quality levels. A record of each test, along with a record of final shipping disposition, shall be kept by each handler. These records must be maintained for three years following the production year in which the pistachios were shipped, and are subject to audit by the committee at any time.

§ 983.40 Failed lots/rework procedure.

(a) *Substandard pistachios.* Each lot of substandard pistachios may be reworked to meet minimum quality requirements.

(b) *Failed lot reporting.* If a lot fails to meet the aflatoxin and/or the minimum quality requirements of this part, a failed lot notification report shall be completed and sent to the committee within 10 working days of the test failure. This form must be completed and submitted to the committee each time a lot fails either aflatoxin or the minimum quality testing. The accredited laboratories shall send the failed lot notification reports for aflatoxin tests to the committee, and the handler, under the supervision of an inspector, shall send the failed lot notification reports for the lots that do not meet the minimum quality requirements to the committee.

(c) *Inshell rework procedure for aflatoxin.* If inshell rework is selected as a remedy to meet the aflatoxin requirements of this part, then 100% of the product within that lot shall be removed from the bulk and/or retail packaging containers and reworked to remove the portion of the lot that caused the failure. Reworking shall consist of mechanical, electronic or manual procedures normally used in the handling of pistachios. After the rework procedure has been completed the total weight of the accepted product and the total weight of the rejected product shall be reported to the committee. The reworked lot shall be sampled and tested for aflatoxin as specified in § 983.38 except that the lot sample size and the test sample size shall be doubled. The reworked lot shall also be sampled and tested for the minimum quality requirements. If, after the lot has been reworked and tested, it fails the aflatoxin test for a second time, the lot may be shelled and the kernels reworked, sampled and tested in the manner specified for an original lot of kernels, or the failed lot may be used for non-human consumption or otherwise disposed of.

(d) *Kernel rework procedure for aflatoxin.* If pistachio kernel rework is selected as a remedy to meet the aflatoxin requirements of § 983.38, then 100% of the product within that lot shall be removed from the bulk and/or retail packaging containers and

reworked to remove the portion of the lot that caused the failure. Reworking shall consist of mechanical, electronic or manual procedures normally used in the handling of pistachios. After the rework procedure has been completed the total weight of the accepted product and the total weight of the rejected product shall be reported to the committee. The reworked lot shall be sampled and tested for aflatoxin as specified in § 983.38.

(e) *Minimum quality rework procedure for inshell pistachios and kernels.* If rework is selected as a remedy to meet the minimum quality requirements of § 983.39, then 100% of the product within that lot shall be removed from the bulk and/or retail packaging containers and processed to remove the portion of the lot that caused the failure. Reworking shall consist of mechanical, electronic or manual procedures normally used in the handling of pistachios. The reworked lot shall be sampled and tested for the minimum quality requirements as specified in the minimum quality regulations of § 983.39.

§ 983.41 Testing of minimal quantities.

(a) *Aflatoxin.* Handlers who handle less than 1 million pounds of assessed weight per year, have the option of utilizing both of the following methods for testing for aflatoxin:

(1) The handler may have an inspector sample and test his or her entire inventory of hulled and dried pistachios for the aflatoxin certification before further processing.

(2) The handler may segregate receipts into various lots at the handler's discretion and have an inspector sample and test each specific lot. Any lots that have less than 15 ppb aflatoxin can be certified by an inspector to be negative as to aflatoxin. Any lots that are found to be above 15 ppb may be tested after reworking in the same manner as specified in § 983.38.

(b) *Minimum quality.* Handlers who handle less than 1 million pounds of assessed weight can apply to the committee for an exemption from minimum quality testing. If the committee grants an exemption, then the handler must pull and retain samples of the lots and make samples available for review by the committee. The handler shall maintain the samples for 90 days.

§ 983.42 Commingling.

After a lot is issued an aflatoxin inspection certificate and minimum quality certificate, it may be commingled with other certified lots.

§ 983.43 Reinspection.

The Secretary, upon recommendation of the committee, may establish rules and regulations to establish conditions under which pistachios would be subject to reinspection.

§ 983.44 Inspection, certification and identification.

Upon recommendation of the committee and approval of the Secretary, all pistachios that are required to be inspected and certified in accordance with this part, shall be identified by appropriate seals, stamps, tags, or other identification to be affixed to the containers by the handler. All inspections shall be at the expense of the handler.

§ 983.45 Substandard pistachios.

The committee shall, with the approval of the Secretary, establish such reporting and disposition procedures as it deems necessary to ensure that pistachios which do not meet the outgoing maximum aflatoxin tolerance and minimum quality requirements prescribed by §§ 983.38 and 983.39 shall not be shipped for domestic human consumption.

§ 983.46 Modification or suspension of regulations.

(a) In the event that the committee, at any time, finds that, by reason of changed conditions, the order provisions contained in § 983.38 through § 983.45 should be modified or suspended, it shall by vote of at least seven concurring members, so recommend to the Secretary.

(b) Whenever the Secretary finds from the recommendations and information submitted by the committee or from other available information, that the aflatoxin or minimum quality provisions in § 983.38 and § 983.39 should be modified, suspended, or terminated with respect to any or all shipments of pistachios in order to effectuate the declared policy of the Act, the Secretary shall modify or suspend such provisions. If the Secretary finds that a regulation obstructs or does not tend to effectuate the declared policy of the Act, the Secretary shall suspend or terminate such regulation.

(c) The committee, with the approval of the Secretary, may issue rules and regulations implementing §§ 983.38 through 983.45.

Reports, Books and Records

§ 983.47 Reports.

Upon the request of the committee, with the approval of the Secretary, each handler shall furnish such reports and information on such forms as are needed to enable the Secretary and the committee to perform their functions and enforce the regulations under this part. The committee shall provide a uniform report format for the handlers.

§ 983.48 Confidential information.

All reports and records furnished or submitted by handlers to the committee which include confidential data or information constituting a trade secret or disclosing the trade position, financial condition, or business operations of the particular handler or their customers shall be received by, and at all times kept in the custody and under the control of, one or more employees of the committee, who shall disclose such data and information to no person except the Secretary. However, such data or information may be disclosed only with the approval of the Secretary, to the committee when reasonably necessary to enable the committee to carry out its functions under this part.

§ 983.49 Records.

Records of pistachios received, held and shipped by him, as will substantiate any required reports and will show performance under this part will be maintained by each handler for at least three years beyond the crop year of their applicability.

§ 983.50 Random verification audits.

(a) All handlers' pistachio inventory shall be subject to random verification audits by the committee to ensure compliance with the terms of the order, and regulations adopted pursuant thereto.

(b) Committee staff or agents of the committee, based on information from the industry or knowledge of possible violations, may make buys of handler product in retail locations. If it is determined that violations of the order have occurred as a result of the buys, the matter will be referred to the Secretary for appropriate action.

§ 983.51 Verification of reports.

For the purpose of checking and verifying reports filed by handlers or the operation of handlers under the provisions of this part, the Secretary and the committee, through their duly authorized agents, shall have access to any premises where pistachios and records relating thereto may be held by any handler and at any time during reasonable business hours, shall be permitted to inspect any pistachios so held by such handler and any and all records of such handler with respect to the acquisition, holding, or disposition of all pistachios which may be held or

which may have been shipped by him/her.

Expenses and Assessments

§ 983.52 Expenses.

The committee is authorized to incur such expenses as the Secretary finds are reasonable and likely to be incurred by it during each production year for the maintenance and functioning of the committee and for such other purposes as the Secretary may, pursuant to the provisions of this part, determine to be appropriate.

§ 983.53 Assessments.

(a) Each handler who receives pistachios for processing in each production year shall pay the committee on demand, an assessment based on the pro rata share of the expenses authorized by the Secretary for that year attributable to the assessed weight of pistachios received by that handler in that year.

(b) The committee, prior to the beginning of each production year, shall recommend and the Secretary shall set the assessment for the following production year, which shall not exceed one-half of one percent of the average price received by producers in the preceding production year. The committee, with the approval of the Secretary, may revise the assessment if it determines, based on information including crop size and value, that the action is necessary, and if the revision does not exceed the assessment limitation specified in this section and is made prior to the final billing of the assessment.

§ 983.54 Contributions.

The committee may accept voluntary contributions but these shall only be used to pay for committee expenses.

§ 983.55 Delinquent assessments.

Any handler who fails to pay any assessment within the time required by the committee, shall pay to the committee a late payment charge of 10 percent of the amount of the assessment determined to be past due and, in addition, interest on the unpaid balance at the rate of one and one-half percent per month. The late payment and interest charges may be modified by the Secretary upon recommendation of the committee.

§ 983.56 Accounting.

(a) If, at the end of a production year, the assessments collected are in excess of expenses incurred, such excess shall be accounted for in accordance with one of the following:

(1) If such excess is not retained in a reserve, as provided in paragraph (a)(2) of this section, it shall be refunded proportionately to the persons from whom it was collected in accordance with § 983.53: *Provided,* That any sum paid by a person in excess of his/her pro rata share of the expenses during any production year may be applied by the committee at the end of such production year as credit for such person, toward the committee's fiscal operations of the following production year;

(2) The committee, with the approval of the Secretary, may carry over such excess into subsequent production years as a reserve: *Provided,* That funds already in the reserve do not exceed approximately two production years' budgeted expenses. In the event that funds exceed two production years' budgeted expenses, future assessments will be reduced to bring the reserves to an amount that is less than or equal to two production years' budgeted expenses. Such reserve funds may be used:

(i) To defray expenses, during any production year, prior to the time assessment income is sufficient to cover such expenses;

(ii) To cover deficits incurred during any production year when assessment income is less than expenses;

(iii) To defray expenses incurred during any period when any or all provisions of this part are suspended; and

(iv) To cover necessary expenses of liquidation in the event of termination of this part. Upon such termination, any funds not required to defray the necessary expenses of liquidation shall be disposed of in such manner as the Secretary may determine to be appropriate: *Provided,* That to the extent practical, such funds shall be returned pro rata to the persons from whom such funds were collected.

(b) All funds received by the committee pursuant to the provisions of this part shall be used solely for the purpose specified in this part and shall be accounted for in the manner provided in this part. The Secretary may at any time require the committee and its members to account for all receipts and disbursements.

(c) Upon the removal or expiration of the term of office of any member of the committee, such member shall account for all receipts and disbursements for which that member was personally responsible, deliver all committee property and funds in the possession of such member to the committee, and execute such assignments and other instruments as may be necessary or appropriate to vest in the committee full title to all of the committee property, funds, and claims vested in such member pursuant to this part.

§ 983.57 Implementation and amendments.

The Secretary, upon the recommendation of a majority of the committee, may issue rules and regulations implementing or modifying § 983.47 through § 983.56, inclusive.

Miscellaneous Provisions

§ 983.58 Compliance.

Except as provided in this part, no handler shall handle pistachios, the handling of which has been prohibited or otherwise limited by the Secretary in accordance with provisions of this part; and no handler shall handle pistachios except in conformity to the provision of this part.

§ 983.59 Rights of the Secretary.

The members of the committee (including successors or alternates) and any agent or employee appointed or employed by the committee, shall be subject to removal or suspension at the discretion of the Secretary, at any time. Each and every decision, determination, or other act of the committee shall be subject to the continuing right of the Secretary to disapprove of the same at any time, and upon such disapproval, shall be deemed null and void.

§ 983.60 Personal liability.

No member or alternate member of the committee, nor any employee, representative, or agent of the committee shall be held personally responsible to any handler, either individually, or jointly with others, in any way whatsoever, to any person, for errors in judgment, mistakes, or other acts, either of commission or omission, as such member, alternate member, employee, representative, or agent, except for acts of dishonesty, willful misconduct, or gross negligence.

§ 983.61 Separability.

If any provision of this part is declared invalid, or the applicability thereof to any person, circumstance, or thing is held invalid, the validity of the remainder, or the applicability thereof to any other person, circumstance, or thing, shall not be affected thereby.

§ 983.62 Derogation.

Nothing contained in this part is, or shall be construed to be, in derogation or in modification of the rights of the Secretary or of the United States to exercise any powers granted by the Act or otherwise, or, in accordance with such powers, to act in the premises whenever such action is deemed advisable.

§ 983.63 Duration of immunities.

The benefits, privileges, and immunities conferred upon any person by virtue of this part shall cease upon its termination, except with respect to acts done under and during the existence thereof.

§ 983.64 Agents.

The Secretary may, by a designation in writing, name any person, including any officer or employee of the United States Government, or name any service, division or branch in the United States Department of Agriculture, to act as agent or representative of the Secretary in connection with any of the provisions of this part.

§ 983.65 Effective time.

The provisions of this part, as well as any amendments, shall become effective at such time as the Secretary may declare, and shall continue in force until terminated or suspended in one of the ways specified in § 983.66 or § 983.67.

§ 983.66 Suspension or termination.

The Secretary shall terminate or suspend the operation of any or all of the provisions of this part, whenever he/she finds that such provisions do not tend to effectuate the declared policy of the Act.

§ 983.67 Termination.

(a) The Secretary may at any time terminate the provisions of this part.

(b) The Secretary shall terminate or suspend the operations of any or all of the provisions of this part whenever it is found that such provisions do not tend to effectuate the declared policy of the Act.

(c) The Secretary shall terminate the provisions of this part at the end of any fiscal period whenever it is found that such termination is favored by a majority of producers who, during a representative period, have been engaged in the production of pistachios: *Provided,* That such majority has, during such representative period, produced for market more than fifty percent of the volume of such pistachios produced for market, but such termination shall be announced at least 90 days before the end of the current fiscal period.

(d) Within six years of the effective date of this part the Secretary shall conduct a referendum to ascertain whether continuance of this part is favored by producers. Subsequent referenda to ascertain continuance shall be conducted every six years thereafter. The Secretary may terminate the provisions of this part at the end of any fiscal period in which the Secretary has found that continuance of this part is not favored by a two thirds (⅔) majority of voting producers, or a two thirds (⅔) majority of volume represented thereby, who, during a representative period determined by the Secretary, have been engaged in the production for market of pistachios in the production area. Such termination shall be announced on or before the end of the production year.

(e) The provisions of this part shall, in any event, terminate whenever the provisions of the Act authorizing them cease.

§ 983.68 Procedure upon termination.

Upon the termination of this part, the members of the committee then functioning shall continue as joint trustees, for the purpose of liquidating the affairs of the committee. Action by such trustees shall require the concurrence of a majority of said trustees. Such trustees shall continue in such capacity until discharged by the Secretary, and shall account for all receipts and disbursements and deliver all property on hand, together with all books and records of the committee and the joint trustees, to such persons as the Secretary may direct; and shall upon the request of the Secretary, execute such assignments or other instruments necessary or appropriate to vest in such person full title and right to all the funds, properties, and claims vested in the committee or the joint trustees, pursuant to this part. Any person to whom funds, property, or claims have been transferred or delivered by the committee or the joint trustees, pursuant to this section, shall be subject to the same obligations imposed upon the members of said committee and upon said joint trustees.

§ 983.69 Effect of termination or amendment.

Unless otherwise expressly provided by the Secretary, the termination of this part or of any regulation issued pursuant thereto, or the issuance of any amendment to either thereof, shall not:

(a) Affect or waive any right, duty, obligation, or liability which shall have arisen or which may thereafter arise, in connection with any provisions of this part or any regulation issued there under,

(b) Release or extinguish any violation of this part or any regulation issued there under, or

(c) Affect or impair any rights or remedies of the Secretary, or of any other persons, with respect to such violation.

§ 983.70 Exemption.

Any handler may handle pistachios within the production area free of the requirements in §§ 983.38 through 983.45 and 983.53 if such pistachios are handled in quantities not exceeding 1,000 dried pounds during any marketing year. This subpart may be changed as recommended by the committee and approved by the Secretary.

§ 983.71 Relationship with the California Pistachio Commission.

In conducting committee activities and other objectives under this part, the committee may deliberate, consult, cooperate and exchange information with the California Pistachio Commission. Any sharing of information gathered under this subpart shall be kept confidential in accordance with provisions under section 10(i) of the Act.

***§ 983.90 Counterparts.**

Handlers may sign an agreement with the Secretary indicating their support for this marketing order. This agreement may be executed in multiple counterparts by each handler. If more than fifty percent of the handlers, weighted by the volume of pistachios handled during a representative period, enter into such an agreement, then a marketing agreement shall exist for the pistachio marketing order. This marketing agreement shall not alter the terms of this part. Upon the termination of this part, the marketing agreement has no further force or effect.

***§ 983.91 Additional parties.**

After this part becomes effective, any handler may become a party to the marketing agreement if a counterpart is executed by the handler and delivered to the Secretary.

***§ 983.92 Order with marketing agreement.**

Each signatory handler hereby requests the Secretary to issue, pursuant to the Act, an order for regulating the handling of pistachios in the same manner as is provided for in this agreement.

Dated: July 23, 2003.

A. J. Yates,

Administrator, Agricultural Marketing Service.

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