

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 § 983.40, 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