

DEPARTMENT OF AGRICULTURE**Agricultural Marketing Service****7 CFR Part 983****[Docket No. AO-F&V-983-2; FV02-983-01]****Pistachios Grown in California; Secretary's Decision and Referendum Order on Proposed Marketing Agreement and Order No. 983****AGENCY:** Agricultural Marketing Service, USDA.**ACTION:** Proposed rule and referendum order.

SUMMARY: This decision proposes the issuance of a marketing agreement and order (order) for pistachios grown in California, and provides growers with the opportunity to vote in a referendum to determine if they favor promulgation of the order. 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 program would enhance grower returns through the delivery of higher-quality pistachios to consumers.

DATES: The referendum will be conducted from January 12 to February 9, 2004. The representative period for the purpose of the referendum is September 1, 2002, through August 31, 2003.

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); Recommended Decision and Opportunity to File Written Exceptions issued on July 23, 2003, and published in the August 4, 2003, issue of the **Federal Register** (68 FR 45990).

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

Preliminary Statement

The proposed marketing agreement and order regulating the handling of pistachios grown in California is 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. The hearing was held 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). Notice of this hearing was published in the **Federal Register** on June 26, 2002.

The proposal was submitted for consideration to the Department by the Proponents Committee (proponents), a group representing the majority of producers and handlers of pistachios in California. The proponents are independent of the California Pistachio Commission and the Western Pistachio Association.

Provisions of this proposal would 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 marketplace. 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.

Upon the basis of evidence introduced at the hearing and the record thereof, the Administrator of AMS on July 23, 2003, filed with the Hearing

Clerk, U.S. Department of Agriculture, a Recommended Decision and Opportunity to File Written Exceptions thereto by September 3, 2003. That document also announced AMS's intent to request approval of new information collection requirements to implement the program. Written comments on the proposed information collection requirements were due by October 3, 2003.

One exception (and as corrected) was filed during the period provided on behalf of the proponents. The exception expressed general support of the proposed marketing order and requested that several changes be made to the proposed order provisions, including that one proposed definition be revised, one definition be deleted, and several editorial and clarifying changes be made. The specifics of the exception are discussed in the Findings and Conclusions; Discussion of Exceptions section of this document.

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 final 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. Marketing orders are unique in that they are normally brought through group action of essentially small entities for their own benefit. Thus, both the RFA and the Act are compatible with respect to small entities.

Small agricultural producers have been defined by the Small Business Administration (SBA) (13 CFR 121.201) 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