



DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 983

[Doc. No. AMS-SC-20-0069; SC20-983-2 PR]

**Pistachios Grown in California, Arizona, and New Mexico;
Increased Assessment Rate**

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This proposed rule would implement a recommendation from the Administrative Committee for Pistachios (Committee) to increase the assessment rate established for the 2020-21 and subsequent production years. The proposed assessment rate would remain in effect indefinitely unless modified, suspended, or terminated.

DATES: Comments must be received by [INSERT DATE 45 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Interested persons are invited to submit written comments concerning this proposed rule. Comments must be sent to the Docket Clerk, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250-0237; Fax: (202) 720-8938; or Internet: <https://www.regulations.gov>. Comments should reference the

document number and the date and page number of this issue of the *Federal Register* and will be available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at:

<https://www.regulations.gov>. All comments submitted in response to this rule will be included in the record and will be made available to the public. Please be advised that the identity of the individuals or entities submitting the comments will be made public on the Internet at the address provided above.

FOR FURTHER INFORMATION CONTACT: Peter Sommers, Marketing Specialist, or Terry Vawter, Regional Director, California Marketing Field Office, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA; Telephone: (559)538-1670 or Email: PeterR.Sommers@usda.gov or Terry.Vawter@usda.gov.

Small businesses may request information on complying with this regulation by contacting Richard Lower, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491, Fax: (202)720-8938, or Email: Richard.Lower@usda.gov.

SUPPLEMENTARY INFORMATION: This action, pursuant to 5 U.S.C. 553, proposes to amend regulations issued to carry out a marketing order as defined in 7 CFR 900.2(j). This proposed rule is issued under Marketing Agreement and Order No. 983, as amended (7 CFR part 983), regulating the handling of pistachios grown in California, Arizona, and New Mexico. Part 983 (referred to as the "Order") is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act." The Committee locally administers the Order and is comprised of producers and handlers of pistachios operating within the production area, and a public member.

The Department of Agriculture (USDA) is issuing this proposed rule in conformance with Executive Orders 13563 and 13175. This proposed rule falls within a category of regulatory actions that the Office of Management and Budget (OMB) exempted from Executive Order 12866 review. Additionally, because this proposed rule does not meet the definition of a significant regulatory action, it does not trigger the requirements contained in Executive Order 13771. See OMB's Memorandum titled "Interim Guidance Implementing Section 2 of the Executive Order of January

30, 2017, titled 'Reducing Regulation and Controlling Regulatory Costs'" (February 2, 2017).

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the Order now in effect, pistachio handlers are subject to assessments. Funds to administer the Order are derived from such assessments. It is intended that the assessment rate would be applicable to all assessable pistachios for the 2020-21 production year and continue until amended, suspended, or terminated.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on

the petition, provided an action is filed no later than 20 days after the date of the entry of the ruling.

This proposed rule would increase the assessment rate from \$0.00010 per pound of assessed weight pistachios, the rate that was established for the 2017-18 and subsequent production years, to \$0.00015 per pound of assessed weight pistachios for the 2020-21 and subsequent production years.

The Order authorizes the Committee, with the approval of USDA, to formulate an annual budget of expenses and collect assessments from handlers to administer the program. The members are familiar with the Committee's needs and with the costs of goods and services in their local area and are in a position to formulate an appropriate budget and assessment rate. The assessment rate is formulated and discussed in a public meeting. Thus, all directly affected persons have an opportunity to participate and provide input.

For the 2017-18 and subsequent production years, the Committee recommended, and USDA approved, an assessment rate of \$0.00010 per pound of assessed weight pistachios. That assessment rate continues in effect from production year to production year unless modified, suspended, or terminated by USDA upon recommendation and information

submitted by the Committee or other information available to USDA.

The Committee met on July 14, 2020, and unanimously recommended expenditures of \$679,800 and an assessment rate of \$0.00015 per pound of assessed weight pistachios handled for the 2020-21 and subsequent production years. In comparison, last year's budgeted expenditures were \$677,100. The proposed assessment rate of \$0.00015 is \$0.00005 higher than the rate currently in effect. The Committee recommended increasing the assessment rate to provide adequate income, along with California Pistachio Research Board (CPRB) management income and reserve funds, to cover all of the Committee's budgeted expenses for the 2020-21 production year. Funds in the reserve are expected to be approximately \$197,585 at the end of the 2020-21 production year, which is within the Order's requirement of carry-over no more than approximately two production years' budgeted expenses.

The major expenditures recommended by the Committee for the 2020-21 production year include \$74,800 for various administrative expenses, \$10,000 for compliance expenses, \$346,500 for salaries and related employee expenses, \$125,000 for research, and \$80,000 for a contingency fund.

Budgeted expenses for these items for the 2019-20 production year were \$48,900 for various administrative expenses, \$10,000 for compliance expenses, \$336,500 for salaries and related employee expenses, \$125,000 for research, and \$80,000 for a contingency fund.

The Committee derived the recommended assessment rate by considering anticipated expenses, an estimated crop of 950 million pounds of assessed weight pistachios, and the amount of funds available in the authorized reserve. Income derived from handler assessments, calculated at \$142,500 (950,000,000 pounds assessed weight pistachios multiplied by \$0.00015 assessment rate), along with CPRB management income (\$175,200), and funds from the Committee's authorized reserve (\$559,685), would be adequate to cover budgeted expenses of \$679,800. Funds in the reserve are estimated to be \$197,585 at the end of the 2020-21 production year (\$142,500 plus \$175,200 plus \$559,685 minus \$679,800 equals \$197,585).

The assessment rate proposed in this rule would continue in effect indefinitely unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other available information.

Although this assessment rate would be in effect for an indefinite period, the Committee will continue to meet prior to or during each production year to recommend a budget of expenses and consider recommendations for modification of the assessment rate. The dates and times of Committee meetings are available from the Committee or USDA. Committee meetings are open to the public and interested persons may express their views at these meetings. USDA would evaluate Committee recommendations and other available information to determine whether modification of the assessment rate is needed. Further rulemaking would be undertaken as necessary. The Committee's 2020-21 production year budget, and those for subsequent production years, would be reviewed and, as appropriate, approved by USDA.

Initial Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612), the Agricultural Marketing Service (AMS) has considered the economic impact of this proposed rule on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions in order

that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 21 handlers subject to the regulation under the Order, and approximately 1,501 producers of pistachios in the production area. Small agricultural producers are defined by the Small Business Administration (SBA) as those having annual receipts of less than \$1,000,000, and small agricultural service firms have been defined as those whose annual receipts are less than \$30,000,000 (13 CFR 121.201).

According to the National Agricultural Statistics Service (NASS), the national average producer price for pistachios for the 2018 production year was \$2.65 per pound. Committee data indicates 2018-19 pistachio total production was 746,858,150 pounds. The total 2018 value of the pistachio crop was \$1,979,174,098 (746,858,150 pounds times \$2.65 per pound equals \$1,979,174,098). Dividing the crop value by the estimated number of producers (1,501) yields an estimated average receipt per producer of

\$1,318,570 which is above the SBA threshold for small producers.

According to USDA Market News data, the reported terminal price for 2018 for pistachios ranged between \$155.00 to \$165.00 per 25-pound carton. The average of this range is \$160.00 ($\$155.00 + \165.00 divided by 2 equals \$160.00). Dividing the average value by the 25-pound carton yields an estimated average price per pound of \$6.40 ($\160.00 average value for 25-pound carton divided by 25). Multiplying the 2018-19 pistachio total production of 746,858,150 pounds by the estimated average price per pound of \$6.40 equals \$4,779,892,160.

Dividing this figure by 21 regulated handlers yields estimated average annual handler receipts of \$227,613,912, which is above the SBA threshold for small agricultural service firms. Therefore, using the above data, and assuming a normal distribution, the majority of producers and handlers of pistachios may be classified as large entities.

The proposed assessment rate of \$0.00015 that the committee approved complies with section 983.71(b) of the Order which states that any proposed assessment rate must not exceed one-half of one percent of the average price

received by producers in the preceding production year. The average price received by producers in the preceding production year was \$2.65 per pound of pistachios. Thus, \$2.65 times 0.5 percent equals \$0.01325, which is greater than the assessment rate increase of \$0.00015.

This proposal would increase the assessment rate collected from handlers for the 2020-21 and subsequent production years from \$0.00010 to \$0.00015 per pound assessed weight pistachios. The Committee unanimously recommended 2020-21 expenditures of \$679,800 and an assessment rate of \$0.00015 per pound assessed weight pistachios. The proposed assessment rate of \$0.00015 per pound assessed weight pistachios is \$0.00005 higher than the current rate. The volume of assessable pistachios for the 2020-21 production year is estimated to be 950 million pounds. Thus, the \$0.00015 per pound assessed weight pistachios should provide \$142,500 in assessment income (950,000,000 multiplied by \$0.00015). Income derived from handler assessments, along with CPRB management income and funds from the Committee's authorized reserve, would be adequate to cover budgeted expenses for the 2020-21 production year.

The major expenditures recommended by the Committee for the 2020-21 production year include \$74,800 for various administrative expenses, \$10,000 for compliance expenses, \$346,500 for salaries and related employee expenses, \$125,000 for research, and \$80,000 for a contingency fund. Budgeted expenses for these items in the 2019-20 production year were \$48,900, \$10,000, \$336,500, \$125,000, and \$80,000 respectively.

In recent years, the Committee has utilized reserve funds to partially fund its budgeted expenditures. The Committee recommended increasing the assessment rate to provide adequate income to cover the Committee's budgeted expenses for the 2020-21 production year while maintaining its financial reserve. This action would maintain the Committee's reserve balance at a level that the Committee believes is appropriate and meets the requirements of the Order.

Prior to arriving at this budget and assessment rate recommendation, the Committee discussed various alternatives, including maintaining the current assessment rate of \$0.00010 per pound assessed weight pistachios, and increasing the assessment rate by a different amount. However, the Committee determined that the recommended

assessment rate would fully fund budgeted expenses and avoid drawing down reserves at an unsustainable rate.

This proposed rule would increase the assessment obligation imposed on handlers. Assessments are applied uniformly on all handlers, and some of the costs may be passed on to producers. However, these costs would be offset by the benefits derived by the operation of the Order.

The Committee's meeting was widely publicized throughout the pistachio industry. All interested persons were invited to attend the meeting and encouraged to participate in Committee deliberations on all issues. Like all Committee meetings, the July 14, 2020, meeting was a public meeting, and all entities, both large and small, were able to express views on this issue. Interested persons are invited to submit comments on this proposed rule, including the regulatory and information collection impacts of this action on small businesses.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Order's information collection requirements have been previously approved by the OMB and assigned OMB No. 0581-0215, Pistachios Grown in California, Arizona, and New Mexico. No changes in those requirements

would be necessary as a result of this proposed rule. Should any changes become necessary, they would be submitted to OMB for approval.

This proposed rule would not impose any additional reporting or recordkeeping requirements on either small or large pistachio handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

AMS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this proposed rule.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: <https://www.ams.usda.gov/rules-regulations/moa/small-businesses>. Any questions about the compliance guide should be sent to Richard Lower at the

previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

A 45-day comment period is provided to allow interested persons to respond to this proposed rule. All written comments timely received will be considered before a final determination is made on this matter.

List of Subjects in 7 CFR Part 983

Marketing agreements, Pistachios, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Agricultural Marketing Service proposes to amend 7 CFR part 983 as follows:

PART 983 - PISTACHIOS GROWN IN CALIFORNIA, ARIZONA, AND NEW MEXICO.

1. The authority citation for 7 CFR part 983 continues to read as follows:

Authority: 7 U.S.C. 601-674.

2. Section 983.253 is revised to read as follows:

§ 983.253 Assessment rate.

On and after September 1, 2020, an assessment rate of \$0.00015 per pound is established for California, Arizona, and New Mexico pistachios.

Bruce Summers,

Administrator.

Agricultural Marketing Service.

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