

# Rules and Regulations

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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 91

[Document Number AMS-ST-09-0016]

RIN 0581-AC98

#### Changes in Hourly Fee Rates for Science and Technology Laboratory Services—Fiscal Years 2010–2012

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

**ACTION:** Final rule.

**SUMMARY:** The Agricultural Marketing Service (AMS) is changing the annual standard, appeal, overtime, and holiday hourly fee rates for fiscal years 2010–2012 for Science and Technology (S&T) Laboratory Services in order to recover anticipated laboratory program costs. The Agency is raising these rates to reflect, among other factors, national and locality pay increases for Federal employees and inflation, operating costs, instrumentation and training, equipment maintenance costs, and program and agency administrative overhead costs. The regulations are updated to identify existing S&T facility addresses. This action also includes changes to provide greater clarity of reported test analyses and laboratory determinations.

**DATES:** Effective April 7, 2010.

**FOR FURTHER INFORMATION CONTACT:** James V. Falk, Staff Scientist, or Dr. Robert L. Epstein, Deputy Administrator, Science and Technology Programs, Agricultural Marketing Service, United States Department of Agriculture, Mail Stop 0270, 1400 Independence Avenue, SW., Washington, DC 20250–0270, telephone number (202) 720–5231; fax (202) 720–6496, or Internet: <http://www.regulations.gov> or e-mail:

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#### SUPPLEMENTARY INFORMATION:

##### Background

Science and Technology (S&T) Programs has been performing voluntary laboratory services under the Agricultural Marketing Act of 1946 (AMA), as amended (7 U.S.C. 1621–1627), for the AMS commodity programs (Fruit and Vegetable, Cotton and Tobacco, Livestock and Seed, Poultry, and Dairy) and applicable stakeholders in these industries since its inception on August 17, 1988. Before that time, voluntary laboratory testing was provided for on a separate user fee basis under the various AMS commodity programs. The current standard hourly rate of \$67.00, the appeal or overtime hourly rate of \$78.00 and the holiday hourly rate of \$89.00 have been in effect since the March 30, 2007 final rule (72 FR 15011) was published. The standard fee rate for laboratory services will be \$78.00 per hour for the remainder of fiscal year 2010, and will increase to \$81.00 per hour in fiscal year 2011, and \$83.00 per hour in fiscal year 2012. The appeal and overtime hourly fee rate for laboratory services outside the normal business hours will also be adjusted to \$93 for the remainder of FY 2010, to \$96 in FY 2011, and to \$99 in FY 2012. The holiday hourly fee rate for laboratory services during designated federal holidays will be increased to \$108 for the rest of FY 2010, to \$111 in FY 2011, and to \$115 in FY 2012. An increase in the premium hourly rates over the three fiscal years for laboratory services performed on appeal samples, overtime basis, and holidays is also needed since Science and Technology laboratory personnel may be required to work extended hours of service at the time and a half pay or the double hourly pay on legal holidays to accommodate clients. This is due to stakeholder demand for immediate test results. Generally, the processing of all laboratory samples is continuous over a 24/7 timeframe due to the recent introduction of automated devices on several sample process equipment and analytical instruments. The AMA authorizes the Secretary of Agriculture to provide Federal analytical testing services that facilitate domestic marketing and international trade. In

addition, consumers may be able to determine the quality and wholesomeness characteristics of a commodity or product through laboratory testing. This allows agricultural products to be assigned official AMS grade designations or to meet specifications. The AMA also requires that reasonable fees be collected from the users of the voluntary services to cover as nearly as possible the costs of maintaining the laboratory programs.

The Agency will recover the actual cost of services for multiple fiscal years (FY 2010 through FY 2012) with the new hourly fee rates covered by this rule. This rule will amend its regulations to identify the updated and existing S&T Programs' facility addresses. It clarifies that results of analyses and laboratory determinations provided by AMS laboratory services apply only to the submitted samples and do not represent the quality; condition or disposition of the lot from which each sample was taken.

Federal salaries with national and locality pay adjustments and choices in benefits are made available on an annual basis by the Office of Personnel Management (OPM). Operational costs include expenses for rents, communications, utilities, medical examinations, safety equipment, sample preparation equipment, training, trash and hazardous waste disposal, travel and transportation costs. There have been certain large capital improvement expenditures in the laboratories in recent years due to unfunded legal mandates. These expenditures include costs for the counter-terrorism Food Emergency Response Network (FERN) and the capital improvements for the Environmental Management Systems (EMS) in accordance with the applicable mandates for Federal laboratories of Executive Order 13423 of January 24, 2007, Strengthening Federal Environmental, Energy, and Transportation Management (72 FR 3919). These capital improvement costs are included in the normal operations of the Science and Technology field service laboratories. In addition, operational costs include expenses for office and laboratory supplies, chemicals, reagents, hazardous waste removal, and a Laboratory Information Management System (LIMS). Infrastructure costs are mainly

laboratory instruments and capital equipment with service and maintenance contracts and replacement spare parts. Infrastructure expenses include consumable supply costs associated directly with the proper operation of analytical instruments and laboratory equipment. Stakeholders demand that AMS provide cost effective and timely product testing requiring modern and sometimes automated instrumentation. These instruments are expensive and undergo equipment capitalization for determining costs. Equipment capitalization is the determined cost per year to replace the equipment after its useful service life has been established. Agency overhead is the pro-rated share, attributable to a particular service, of the agency's management and support costs. Overhead expenditures are allocated across the Agency for each direct hour of laboratory service.

With this rulemaking, there will be essentially three standard hourly fee rate increases established for the basic laboratory services—\$67 to \$78 per hour or 16.4 percent for the rest of fiscal year 2010, \$78 to \$81 per hour or 3.8 percent in fiscal year 2011 and \$81 to \$83 per hour or 2.5 percent in fiscal year 2012. The rate increases for overtime and appeals will be \$78 to \$93 per hour or 19.2 percent, \$93 to \$96 per hour or 3.2 percent, and \$96 to \$99 per hour or 3.1 percent in fiscal years 2010, 2011, and 2012, respectively. The rate increases for legal holiday service will be \$89 to \$108 per hour or 21.3 percent, \$108 to \$111 per hour or 2.8 percent, and \$111 to \$115 per hour or 3.6 percent in fiscal years 2010, 2011, and 2012, respectively. This is a voluntary program and the costs to each user will increase proportionally to their use of laboratory services each fiscal year. The increased fees will cover inflation and national and locality pay raises but will not support any new budgetary initiative. The revised hourly fee rates will apply to voluntary laboratory services that are provided for five types of analytical testing: microbiological, physical, residue chemistry, proximate analysis for composition, and biomolecular (DNA-based) testing. A user fee system, using set hourly rates

for three fiscal years, will be established by this rulemaking to ensure that AMS properly recovers its full costs for providing voluntary laboratory services in a timely manner, and that all stakeholders have advance notice of their estimated laboratory fees so that they can make reasonable cost assumptions when formulating their annual budgets.

The largest cost of operations for the AMS laboratory programs is payroll and employee benefits. This obligation is projected to amount to \$3,848,000 or 57.6 percent of the total laboratory costs for FY 2010. Recent cross-training of the employees in the laboratories has resulted in the reduction of staff from 67 individuals in FY 2007 to 50 current individuals in FY 2009 as ongoing efforts to limit program costs are implemented. AMS calculated its projected increases in salaries and inflation in fiscal years 2010 through 2012. The estimate for increases in salaries for fiscal year 2009 as the base year and the succeeding years are from the Office of Management and Budget's (OMB) "Federal Pay Raise Assumptions" table. The fiscal year pay adjustments are increased by 3 percent in the following tables of calculated proposed new hourly fee rates for laboratory program services for FY 2010 through FY 2012. The OMB Federal pay rise assumptions (including geographical pay differentials) state that in the development of civilian government personnel costs a yearly percentage (3%) increase shall be used. This information comes from the table, "Federal Pay Raise Assumptions", of the Office of Management and Budget's Fiscal Year 2007 Budget and beyond which is available at <http://www.whitehouse.gov/omb/memoranda/fy2007/m07-02.pdf>.

Inflation for FY 2010 and subsequent years is estimated to be 3.5 percent. In Tables 2 through 10 below a yearly 3.5 percent inflation rate is used in the calculations for hourly fee rate determinations for laboratory program services because the 2007 annual average for the base Consumer Price Index for all Urban Consumers (CPI-U): U.S. city average for service costs is listed as 246.848 in Table 3A. of the referenced website and there is a most

recent annual average increase of 3.5% to 255.498 for the CPI-U provided for the change in service costs. This estimate for inflation percent (3.5%) can be obtained from Table 3A, "Consumer Price Index for all Urban Consumers (CPI-U): U.S. city average, detailed expenditure categories", which is available at <http://www.bls.gov/cpi/cpid08av.pdf>.

The Agency will initiate, when necessary, another rulemaking to adjust any fee established, if estimated increases for pay and inflation do not adequately cover the Agency's costs of providing the services. The cost of providing laboratory services includes both direct and not explicit overhead costs. Direct costs include the cost of salaries, employee benefits, operation costs, equipment service and replacements, security, training needs, and infrastructure cost. The Agency is able to estimate the employee benefits attributable to overtime work and has included these in the fee rate calculations.

The current and new fees for standard, appeal, overtime and legal holiday voluntary laboratory services are listed by type of service in Table 1 below. The first increases ranging from 16.4 to 21.3 percent, from the current rates to the fiscal year 2010 rates, are larger than the subsequent 2011 and 2012 fiscal year increases (2.5 to 3.8 percent range) because these are the first amended hourly rate increases since last set on March 30, 2007. Therefore, it includes the actual increases in salaries and inflation that have occurred since that date. It also reflects changes in personnel numbers and the promotions and within-grade pay step increases for General Schedule (GS) salaries granted worthy employees, and new employee position pay costs.

With this action, the AMS will amend its regulations to provide for three annual differing fee increases in one action. Table 1 shows the summary of the current rates and the revised hourly fee rates for fiscal years 2010 through 2012 for the four different types of services (regular laboratory, appeal, overtime, and legal holiday work) that Science and Technology Programs employees perform.

TABLE 1—CURRENT AND NEW HOURLY FEE RATES (PER HOUR) BY TYPE OF SERVICE

Service	Current rate	FY 2010 rate <sup>1</sup>	FY 2011 rate <sup>2</sup>	FY 2012 rate <sup>3</sup>
Laboratory .....	\$67.00	\$78.00	\$81.00	\$83.00
Appeal .....	78.00	93.00	96.00	99.00
Overtime .....	78.00	93.00	96.00	99.00
Legal Holiday .....	89.00	108.00	111.00	115.00

<sup>1 2 3</sup> Hourly values for FY 2010–FY 2012 are rounded off to nearest whole dollar.

With this action, the AMS will amend its regulations to provide for three annual fee increases in one action. In AMS's analysis of projected costs set forth in Tables 2 through 10 below, AMS has identified the basis for the

increases in the cost of voluntary hourly fee rates for laboratory services for fiscal year 2010 through fiscal year 2012. These fee increases are essential for the continued sound financial management of the Agency's budget. In order to

enhance the transparency of the hourly fee rates in the aforementioned Tables 2 through 10 for fiscal year 2010, fiscal year 2011 and fiscal year 2012, a description is provided of each fee charge category.

TABLE 2—CALCULATIONS FOR THE STANDARD HOURLY RATE FOR LABORATORY PROGRAM SERVICES FOR THE REMAINDER OF FY 2010

Laboratory services	Apportioned fee rate
Base Time:	
Actual FY 2009 Salaries <sup>1</sup> @ \$3,029,744 .....	\$29.13
FY 2010 Pay Adjustment <sup>2</sup> = [Actual FY 2009 Salaries (\$29.13)] × 0.03(3%) .....	0.87
Benefits <sup>3</sup> .....	6.99
Operational Costs <sup>4</sup> .....	22.38
Infrastructure Cost <sup>5</sup> .....	13.08
Agency Overhead <sup>6</sup> .....	4.81
FY 2010 Inflation <sup>7</sup> (3.5%) = [Costs excluding infrastructure and payroll = \$34.18] × 0.035 .....	1.20
Total Rate Per Hour—Base Time .....	78.46

<sup>1</sup> Actual cost of FY 2009 salaries (\$3,029,744) ÷ (2,080 program hours times 50 program employees) = \$29.13 unit cost.

<sup>2</sup> Actual cost of FY 2010 pay adjustment (\$90,892) ÷ (2,080 program hours times 50 program employees) = \$0.87 unit cost.

<sup>3</sup> Actual cost of benefits (\$727,364) ÷ (2,080 program hours times 50 program employees) = \$6.99 unit cost.

<sup>4</sup> Actual cost of operational costs (\$2,328,000) ÷ (2,080 program hours times 50 program employees) = \$22.38 unit cost.

<sup>5</sup> Actual cost of infrastructure (\$1,360,000) ÷ (2,080 program hours times 50 program employees) = \$13.08 unit cost.

<sup>6</sup> Actual cost of Agency overhead (\$500,000) ÷ (2,080 program hours times 50 program employees) = \$4.81 unit cost.

<sup>7</sup> Cost of FY 2010 Inflation (\$125,000) ÷ (2,080 program hours times 50 program employees) = \$1.20 unit cost.

In order to project the hourly fee rates for the laboratory program services for fiscal years 2010 through 2012, the last fiscal year 2009 is used as a base. The total base time hourly fee rate calculation (Table 2) for fiscal year 2010 begins with the actual salaries for fiscal year 2009 (\$3,029,744) and adds the fiscal year 2010 projected pay adjustments (3 percent) and the fiscal year 2010 cost of employee benefits (\$727,364). Table 2 contains footnotes 1–7 that provide the common mathematical formula used to calculate the apportioned rate for each fee charge category for fiscal year 2010. The

formula uses the actual cost or projected cost in dollars for the applicable fiscal year for each individual fee charge category divided by the available program hours (2,080 hours) and further divided by the number of laboratory service program employees (50 people). The formula derives the apportioned fee rate for each fee charge category (salaries with pay adjustment, benefits, operational costs, infrastructure cost, agency overhead and inflation factor at 3.5 percent rate). The same formula that is used in Table 2 and that is indicated in its footnotes is also applied in the other tables to derive each category unit

rate with the different actual costs or variable projected costs to be inserted in the formula equation for the applicable fiscal year. See Table 3 through Table 10 below for additional new hourly fee rate calculations for laboratory program services for the remainder of fiscal year 2010 and fiscal years 2011 through 2012 to be rounded off to whole number dollar amounts.

Table 3 through Table 4 shows the calculations of the total standard hourly fee rates to be rounded off to \$81 and \$83 for fiscal years 2011 through 2012, respectively.

TABLE 3—CALCULATIONS FOR THE STANDARD HOURLY RATE FOR LABORATORY PROGRAM SERVICES FOR FY 2011

Laboratory services	Apportioned fee rate
Base Time:	
Projected FY 2010 Salaries = Actual FY 2009 (\$29.13) + FY 2010 Pay Adjustment (\$0.87) .....	\$30.00
FY 2011 Pay Adjustment = [FY 2010 Salaries (\$30.00)] × 0.03(3%) .....	0.90
Benefits .....	6.99
Operational Costs .....	22.38
Infrastructure Cost .....	13.08
Agency Overhead .....	4.81
FY 2010 Inflation (3.5%) = [Costs excluding infrastructure and payroll = \$34.18] × 0.035 .....	1.20
FY 2011 Inflation (3.5%) = [Costs excluding infrastructure and payroll = \$34.18] × 0.035 .....	1.20
Total Rate Per Hour—Base Time .....	80.56

TABLE 4—CALCULATIONS FOR THE STANDARD HOURLY RATE FOR LABORATORY PROGRAM SERVICES FOR FY 2012

Laboratory services	Apportioned fee rate
Base Time:	
Projected FY 2011 Salaries = FY 2010 (\$30.00) + FY 2011 Pay Adjustment (\$0.90) .....	\$30.90

TABLE 4—CALCULATIONS FOR THE STANDARD HOURLY RATE FOR LABORATORY PROGRAM SERVICES FOR FY 2012—  
Continued

Laboratory services	Apportioned fee rate
FY 2012 Pay Adjustment = [FY 2011 Salaries (\$30.90)] × 0.03(3%) .....	0.93
Benefits .....	6.99
Operational Costs .....	22.38
Infrastructure Cost .....	13.08
Agency Overhead .....	4.81
FY 2010 Inflation (3.5%) = [Costs excluding infrastructure and payroll = \$34.18] × 0.035 .....	1.20
FY 2011 Inflation (3.5%) = [Costs excluding infrastructure and payroll = \$34.18] × 0.035 .....	1.20
FY 2012 Inflation (3.5%) = [Costs excluding infrastructure and payroll = \$34.18] × 0.035 .....	1.20
<b>Total Rate Per Hour—Base Time .....</b>	<b>82.69</b>

Table 5 through Table 7 shows the calculations of the total appeal and total overtime hourly fee rates to be rounded off to whole dollar amounts for the remainder of fiscal year 2010 and fiscal years 2011 through 2012. These tables incorporate the differentials in costs associated with the necessity of

laboratory personnel to work extended hours of service at the time and a half pay carrying out either overtime or appeal sample testing. Federal employee rates of premium pay are described in part 551 of Title 5 of the Code of Federal Regulations (CFR) for the Office of Personnel Management (OPM). Section

551.512(a) specifies that Federal employees are entitled to receive overtime premium pay, when overtime work is performed, at one and one-half times the employee's hourly rate of basic pay.

TABLE 5—CALCULATIONS FOR THE APPEAL AND OVERTIME HOURLY RATES FOR LABORATORY PROGRAM SERVICES FOR THE REMAINDER OF FY 2010

Laboratory services	Apportioned fee rate
Appeal and Overtime Rates: Projected Salaries @ 1.5 (time and a half)	
FY 2009 Salaries @ 1.5 = [Actual 2009 Salaries (\$29.13)] × 1.5 .....	\$43.70
FY 2010 Pay Adjustment = FY 2009 Salaries @ 1.5 (\$43.70) × 0.03 (3%) .....	1.31
Benefits .....	6.99
Operational Costs .....	22.38
Infrastructure Cost .....	13.08
Agency Overhead .....	4.81
FY 2010 Inflation (3.5%) = [Costs excluding infrastructure and payroll = \$34.18] × 0.035 .....	1.20
<b>Total Rate Per Hour—Appeal and Overtime .....</b>	<b>93.47</b>

TABLE 6—CALCULATIONS FOR THE APPEAL AND OVERTIME HOURLY RATES FOR LABORATORY PROGRAM SERVICES FOR FY 2011

Laboratory services	Apportioned fee rate
Appeal and Overtime Rates: Projected Salaries @ 1.5 (time and a half)	
FY 2010 Salaries @ 1.5 = [Actual FY 2009 Salaries (\$29.13) + FY 2010 Pay Adjustment (\$0.87)] × 1.5 .....	\$45.00
FY 2011 Pay Adjustment = FY 2010 Salaries @ 1.5 (\$45.00) × 0.03 (3%) .....	1.35
Benefits .....	6.99
Operational Costs .....	22.38
Infrastructure Cost .....	13.08
Agency Overhead .....	4.81
FY 2010 Inflation (3.5%) .....	1.20
FY 2011 Inflation (3.5%) = [Costs excluding infrastructure and payroll = \$34.18] × 0.035 .....	1.20
<b>Total Rate Per Hour—Appeal and Overtime .....</b>	<b>96.01</b>

TABLE 7—CALCULATIONS FOR THE APPEAL AND OVERTIME HOURLY RATES FOR LABORATORY PROGRAM SERVICES FOR FY 2012

Laboratory services	Apportioned fee rate
Appeal and Overtime Rates: Projected Salaries @ 1.5 (time and a half)	
FY 2011 Salaries @ 1.5 = [Projected FY 2010 Salaries (\$30.00) + FY 2011 Pay Adjustment (\$0.90)] × 1.5 .....	\$46.35
FY 2012 Pay Adjustment = FY 2011 Salaries @ 1.5 (\$46.35) × 0.03 (3%) .....	1.39
Benefits .....	6.99

TABLE 7—CALCULATIONS FOR THE APPEAL AND OVERTIME HOURLY RATES FOR LABORATORY PROGRAM SERVICES FOR FY 2012—Continued

Laboratory services	Apportioned fee rate
Operational Costs .....	22.38
Infrastructure Cost .....	13.08
Agency Overhead .....	4.81
FY 2010 Inflation (3.5%) .....	1.20
FY 2011 Inflation (3.5%) .....	1.20
FY 2012 Inflation (3.5%) = [Costs excluding infrastructure and payroll = \$34.18] × 0.035 .....	1.20
<b>Total Rate Per Hour—Appeal and Overtime .....</b>	<b>98.60</b>

Table 8 through Table 10 shows the calculations of the total legal holiday hourly fee rates to be rounded off to whole dollar amounts for the remainder of fiscal year 2010 and fiscal years 2011 through 2012. These tables incorporate

the differentials in costs associated with the necessity of laboratory personnel to work extended hours of service at the double hourly pay rate doing sample testing on a Federal holiday or a designated day for the Federal holiday.

Accordingly, 5 CFR, part 532, section 532.507(a) specifies that Federal employees are entitled to receive holiday premium pay, which is not overtime work, at double the employee's hourly rate of basic pay.

TABLE 8—CALCULATIONS FOR THE FEDERAL HOLIDAY HOURLY RATE FOR LABORATORY PROGRAM SERVICES FOR THE REMAINDER OF FY 2010

Laboratory services	Apportioned fee rate
Holiday Rate: Projected Salaries @ 2.0 (double time)	
FY 2009 Salaries @ 2.0 = [Actual 2009 Salaries (\$29.13)] × 2.0 .....	\$58.26
FY 2010 Pay Adjustment = FY 2009 Salaries @ 2.0 (\$58.26) × 0.03 (3%) .....	1.75
Benefits .....	6.99
Operational Costs .....	22.38
Infrastructure Cost .....	13.08
Agency Overhead .....	4.81
FY 2010 Inflation (3.5%) = [Costs excluding infrastructure and payroll = \$34.18] × 0.035 .....	1.20
<b>Total Rate Per Hour—Holidays .....</b>	<b>108.47</b>

TABLE 9—CALCULATIONS FOR THE FEDERAL HOLIDAY HOURLY RATE FOR LABORATORY PROGRAM SERVICES FOR FY 2011

Laboratory services	Apportioned fee rate
Holiday Rate: Projected Salaries @ 2.0 (double time)	
FY 2010 Salaries @ 2.0 = [Actual FY 2009 Salaries (\$29.13) + FY 2010 Pay Adjustment (\$0.87)] × 2.0 .....	\$60.00
FY 2011 Pay Adjustment = FY 2010 Salaries @ 2.0 (\$60.00) × 0.03 (3%) .....	1.80
Benefits .....	6.99
Operational Costs .....	22.38
Infrastructure Cost .....	13.08
Agency Overhead .....	4.81
FY 2010 Inflation (3.5%) .....	1.20
FY 2011 Inflation (3.5%) = [Costs excluding infrastructure and payroll = \$34.18] × 0.035 .....	1.20
<b>Total Rate Per Hour—Holidays .....</b>	<b>111.46</b>

TABLE 10—CALCULATIONS FOR THE FEDERAL HOLIDAY HOURLY RATE FOR LABORATORY PROGRAM SERVICES FOR FY 2012

Laboratory services	Apportioned fee rate
Holiday Rate: Projected Salaries @ 2.0 (double time)	
FY 2011 Salaries @ 2.0 = [Projected FY 2010 Salaries (\$30.00) + FY 2011 Pay Adjustment (\$0.90)] × 2.0 .....	\$61.80
FY 2012 Pay Adjustment = FY 2011 Salaries @ 2.0 (\$61.80) × 0.03 (3%) .....	1.85
Benefits .....	6.99
Operational Costs .....	22.38
Infrastructure Cost .....	13.08
Agency Overhead .....	4.81
FY 2010 Inflation (3.5%) .....	1.20

TABLE 10—CALCULATIONS FOR THE FEDERAL HOLIDAY HOURLY RATE FOR LABORATORY PROGRAM SERVICES FOR FY 2012—Continued

Laboratory services	Apportioned fee rate
FY 2011 Inflation (3.5%) .....	1.20
FY 2012 Inflation (3.5%) = [Costs excluding infrastructure and payroll = \$34.18] × 0.035 .....	1.20
Total Rate Per Hour—Holidays .....	114.51

### Proposed Rule and Comments

AMS published a proposed rule on October 26, 2009 (74 FR 54920), stating that it was proposing changing fees for laboratory services for fiscal years 2010 through 2012. AMS provided for a 30 day comment period, ending November 25, 2009. The proposed rule included the required economic analysis for determining the fee schedule and regulatory flexibility analysis. AMS received no comments.

### Executive Order 12866

This rule has been determined to be not significant for purposes of Executive Order 12866; and, therefore, has not been reviewed by the Office of Management and Budget (OMB).

### Civil Justice Reform (Executive Order 12988)

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. It is not intended to have retroactive effect. There are no administrative procedures which must be exhausted prior to any judicial challenge to this rule or the application of its provisions.

### Regulatory Flexibility Act

Pursuant to the requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612) AMS has considered the economic impact of this action on small entities and has determined that its implementation will not have a significant economic impact on a substantial number of small businesses. The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions so that small businesses will not be disproportionately burdened. There are 499 current stakeholders who voluntarily use the AMS laboratory services annually. Such users of services include food processors, handlers, growers, government agencies, and exporters. The majority of these firms, organizations, and individuals are small businesses under the criteria established by the Small Business Administration (13 CFR 121.201). The increases in annual hourly fee rates as stated will not significantly affect these small

businesses as defined in the RFA because this is a voluntary program and the costs to each user will increase proportionally to their use of laboratory services each fiscal year. Any decision by the current stakeholders to discontinue the use of the AMS laboratory services because of the increased fees will not hinder the food processors or industry members from marketing their products, since stakeholders may contract for services with other government agencies or private laboratories. The AMS laboratory testing programs are voluntary, user fee services, conducted under the authority of the AMA.

The AMA authorizes the Secretary of Agriculture to provide Federal analytical testing services that facilitate marketing and trade with the financial necessity that reasonable fees be collected from the users of the services to cover as nearly as possible the costs of maintaining the programs. AMS regularly reviews its user-fee-supported laboratory service programs to determine if the voluntary fees are adequate and reasonable to cover expenses. The most recent review determined that the existing hourly fee rates, which have been in place since March 30, 2007, will not generate sufficient revenue to recover annual operating costs of laboratory programs and will not maintain adequate end-of-year operating reserve balances in FY 2010, FY 2011, and FY 2012. This decline in revenues is due to lower numbers of samples and a reduction in the number of clients by 312 that is attributable mainly to a shift in usage patterns on the part of applicants for testing services and change to government programs. For example, several federal commodity purchasing programs are now relying heavily on vendor certification rather than government laboratory testing; a larger percentage of aflatoxin analyses and microbiological testing are performed by approved or designated private laboratories; and food and fiber product testing is decreasing due to changing importer country requirements. For analytical purposes, projected collections are based on calculations

using an effective date of October 1, 2009 for the new fiscal year 2010 user fees. Without the fee increase in this rule, FY 2010 revenues are projected at \$6,421,000; obligations are projected at \$6,676,000, for a fiscal year loss of \$256,000 and a depleted trust fund to an 8.0 month end-of-year reserve balance of \$4,449,000. In fiscal years 2011 and 2012 additional operating losses for the laboratories are projected. If there are no hourly rate changes as reflected in this rule, the FY 2011 and FY 2012 end-of-year reserve balances will decline from \$4,449,000 to \$3,984,000 (6.9 months operating reserve), and \$3,568,000 (6.0 months operating reserve), respectively. However, a minimum operating reserve of 11.1 months or an end-of-year trust fund balance amount of \$6,173,000 is needed for FY 2010 based on the current shut down analysis and prior experiences, including the permanent closing of the S&T Midwestern Laboratory in Chicago, Illinois on June 30, 2000. The AMS estimates that the raised hourly fee rates in this rule will yield \$1,228,000 overall in additional laboratory testing program revenues during FY 2010. This will increase the end-of-year available capital assets in the trust fund from \$4,704,000 or 8.8 months of permitted operations in FY 2009 to \$5,677,000 or 10.2 months of permitted operations in FY 2010. By forgoing the purchase of new models of analytical equipment and instruments employing up to date technology to replace aging ones in the laboratories, a \$500,000 savings in the costs of operations could take place in FY 2010. This will enable AMS to replenish program reserves to an 11 month level, \$6,177,000, for FY 2010 that is called for by Agency policy and prudent financial management. With increased revenue from the hourly rate changes in this rule, program reserves will be maintained at this level in subsequent fiscal years 2011 and 2012.

With this action, the Agency expects to collect \$7,649,000 in FY 2010, \$7,986,000 in FY 2011, and \$8,211,000 in FY 2012 attributable to the increased fee changes, to cover the full cost of routine laboratory services, appeal requests, overtime, and legal holiday

services for Science and Technology customers and other program stakeholders. This action will allow AMS to continue to offer laboratory testing services under the Agricultural Marketing Act of 1946 as amended, to facilitate marketing and allow products to obtain grade designations or meet marketing standards. As such, the program provides a viable option for a wide variety of stakeholders by delivering scientific and analytical support services to the diversified agricultural and food processing community and provides a valuable resource for those businesses and industries that wish to use a USDA shield. By establishing a three year fee increase over FYs 2010, 2011, and 2012 the Agency will help ensure that the fee increases are effective at the beginning of each fiscal year from FY 2011 to FY 2012. This increase over three fiscal years will permit customers and other program stakeholders an opportunity to plan for annual changes in costs of laboratory service and to incorporate them into their budgetary plans.

Finally, this rule will update and identify Science and Technology Programs' existing facility addresses. It will also clarify that test results of analyses and laboratory determinations provided by AMS laboratory program only apply to the submitted samples and do not represent the quality, condition or disposition of the lot from which each sample was taken.

#### Paperwork Reduction Act

This rule contains no new information collection or recordkeeping requirements that are subject to the Office of Management and Budget (OMB) approval under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). AMS is committed to implementation of the Government Paperwork Elimination Act which provides for the use of information resources to improve the efficiency and effectiveness of governmental operations, including providing the public with the option of submitting information or transacting business electronically to the extent practicable. USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

#### Unfunded Mandate Analysis

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of UMRA, the Department generally must prepare a

written statement, including a cost benefit analysis, for proposed and final rules with “Federal mandates” that may result in expenditures to State, local, or tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. When such a statement is needed for a rule, section 205 of UMRA generally requires that the Department identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective or least burdensome alternative that achieves the objectives of the rule.

This rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) that impose costs on State, local, or tribal governments or to the private sector of \$100 million or more in any one year. Thus, this rule is not subject to the requirements of sections 202 and 205 of UMRA.

#### Comments and Effective Date

A thirty day comment period was provided for interested persons to comment on the proposed rule published in the **Federal Register** (74 FR 54920) regarding changes in user fees for voluntary laboratory testing services. No comments were received by the end of the comment period on November 25, 2009. The existing hourly fee rates have been in place since March 30, 2007. AMS regularly reviews its user-fee-supported programs to determine if the current fees are adequate to cover expenses. The agency is unable to recover the full cost of its present laboratory testing services. With this regulation, AMS is establishing three annual hourly fee rate increases for standard, overtime and appeals, and holiday services for fiscal years 2010–2012. Accordingly, for these reasons, pursuant to 5 U.S.C. 553, and because of initiation of the Federal fiscal year 2010 already, it is found and determined that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register**. Therefore, this final rule is effective one day after the date of publication in the **Federal Register**.

#### List of Subjects in 7 CFR Part 91

Administrative practice and procedure, Agricultural commodities, Laboratories, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, the Agricultural Marketing Service under the authority of 7 U.S.C. 1622, 1624 amends part 91 of Title 7, chapter I, subchapter E, of the Code of Federal Regulations as follows:

#### PART 91—SERVICES AND GENERAL INFORMATION

■ 1. The authority citation for part 91 continues to read as follows:

**Authority:** 7 U.S.C. 1622, 1624.

■ 2. Section 91.5 is revised to read as follows:

##### § 91.5 Where services are offered.

(a) Services are offered to applicants at the Science and Technology laboratories and facilities as listed below.

(1) *Science and Technology Programs National Science Laboratory.* A variety of proximate for composition, chemical, physical, microbiological and biomolecular (DNA-based) tests and laboratory analyses performed on fruits and vegetables, poultry, dairy and dairy products, juices, fish, vegetative seed and oilseed, honey, meat and meat products, fiber products and processed foods are performed at the Science and Technology Programs (S&T) laboratory located at: USDA, AMS, Science and Technology Programs, National Science Laboratory (NSL), 801 Summit Crossing Place, Suite B, Gastonia, North Carolina 28054–2193.

(2) *Science and Technology (S&T) Programs Science Specialty Laboratories.* The Science specialty laboratories performing aflatoxin and other testing on peanuts, peanut products, dried fruits, grains, edible seeds, tree nuts, shelled corn products, oilseed products, olive oil, vegetable oils, juices, citrus products, and other commodities are located as follows:

(i) USDA, AMS, Science & Technology, Citrus Laboratory, 98 Third Street, SW., Winter Haven, Florida 33880–2905.

(ii) USDA, AMS, Science & Technology, Science Specialty Laboratory, 6567 Chancey Mill Road, Blakely, Georgia 39823–2785.

(3) *Program laboratories.* Laboratory services are available in all areas covered by cooperative agreements providing for this laboratory work and entered on behalf of the Department with cooperating Federal or State laboratory agencies pursuant to authority contained in Act(s) of Congress. Also, services may be provided in other areas not covered by a cooperative agreement if the Administrator determines that it is possible to provide such laboratory services.

(4) *Other alternative laboratories.* Laboratory analyses may be conducted at alternative Science and Technology Programs laboratories and can be reached from any commodity market in which a laboratory facility is located to

the extent laboratory personnel are available.

(5) *The Plant Variety Protection (PVP) Office.* The PVP office and plant examination facility of the Science and Technology programs issues certificates of protection to developers of novel varieties of plants which reproduce sexually. The PVP office is located as follows: USDA, AMS, Science & Technology Programs, Plant Variety Protection Office, National Agricultural Library Building, Room 401, 10301 Baltimore Boulevard, Beltsville, MD 20705–2351.

(6) *Science and Technology Programs headquarters offices.* The examination, licensure, quality assurance reviews, laboratory approval/certification and consultation services are provided by headquarters staff located in Washington, DC. The main headquarters office is located as follows: USDA, AMS, Science and Technology Programs, Office of the Deputy Administrator, Room 1092 South Agriculture Bldg., Mail Stop 0270, 1400 Independence Ave., SW., Washington, DC 20250–0270.

(7) *Statistics Branch Office.* The Statistics Branch office of Science and Technology Programs (S&T) provides statistical services to the Agency and other agencies within the USDA. In addition, the Statistics Branch office generates sample plans and performs consulting services for research studies in joint efforts with or in a leading role with other program areas of AMS or of the USDA. The Statistics Branch office is located as follows: USDA, AMS, S&T Statistics Branch, Room 0603 South Agriculture Bldg., Mail Stop 0223, 1400 Independence Ave., SW., Washington, DC 20250–0223.

(8) *Technical Services Branch Office.* The Technical Services Branch office of Science and Technology (S&T) provides technical support services to all Agency programs and other agencies within the USDA. In addition, the Technical Services Branch office provides certification and approval services of private and State government laboratories as well as oversees quality assurance programs; import and export certification of laboratory tested commodities. The Technical Services Branch mailing address is as follows: USDA, AMS, S&T Technical Services Branch, South Agriculture Bldg., Mail Stop 0272, 1400 Independence Ave., SW., Washington, DC 20250–0272. The Technical Services Branch office is located as follows: USDA, AMS, Science and Technology Technical Services Branch, Room 0604 South Agriculture Bldg., 1400 Independence Ave., SW., Washington, DC 20250.

(9) *Monitoring Programs Office.* Services afforded by the Pesticide Data Program (PDP) and Microbiological Data Program (MDP) are provided by USDA, AMS, Science and Technology Monitoring Programs Office, 8609 Sudley Road, Suite 206, Manassas, VA 20110–8411.

(10) *Pesticide Records Branch Office.* Services afforded by the Federal Pesticide Record Keeping Program for restricted-use pesticides by private certified applicators are provided by USDA, AMS, Science and Technology, Pesticide Records Branch, 8609 Sudley Road, Suite 203, Manassas, VA 20110–8411.

(b) The addresses of the various laboratories and offices appear in the pertinent parts of this subchapter. A prospective applicant may obtain a current listing of addresses and telephone numbers of Science and Technology Programs laboratories, offices, and facilities by addressing an inquiry to the Administrative Officer, Science and Technology Programs, Agricultural Marketing Service, United States Department of Agriculture (USDA), 1400 Independence Ave., SW., Room 0725 South Agriculture Building, Mail Stop 0271, Washington, DC 20250–0271.

■ 3. Sections 91.24 and 91.25 are revised to read as follows:

#### **§ 91.24 Reports of test results.**

(a) Results of analyses are provided, in writing, by facsimile, by e-mail or other electronic means to the applicant.

(b) Results of test analyses and laboratory determinations provided by AMS laboratory services only apply to the submitted samples and do not represent the quality, condition or disposition of the lot from which each sample was taken.

(c) Applicants may call the appropriate Science and Technology laboratory for interim or final results prior to issuance of the formal report. The advance results may be telegraphed, e-mailed, telephoned, or sent by facsimile to the applicant. Any additional expense for advance information shall be borne by the requesting party.

(d) A letter report in lieu of an official certificate of analysis may be issued by a laboratory representative when such action appears to be more suitable than a certificate: Provided, that, issuance of such report is approved by the Deputy Administrator.

#### **§ 91.25 Certificate requirements.**

Certificates of analysis and other memoranda concerning laboratory

service and the reporting of results should have the following requirements:

(a) Certificates of analysis shall be on standard printed forms approved by the Deputy Administrator;

(b) Shall be printed in English;

(c) Shall have results typewritten, computer generated, or handwritten in ink and shall be clearly legible;

(d) Shall show the results of laboratory tests in a uniform, accurate, and concise manner with abbreviations identified on the form;

(e) Shall show the information required by §§ 91.26 through 91.29; and

(f) Show only such other information and statements of fact as are provided in the instructions authorized by the Deputy Administrator.

■ 4. Sections 91.37 through 91.39 are revised to read as follows:

#### **§ 91.37 Standard hourly fee rate for laboratory testing, analysis, and other services.**

(a) The standard hourly fee rate in this section for the individual laboratory analyses cover the costs of Science and Technology laboratory services, including issuance of certificates and personnel and overhead costs other than the commodity inspection fees referred to in 7 CFR 52.42 through 52.46, 52.48 through 52.51, 55.510 through 55.530, 55.560 through 55.570, 58.38 through 58.43, 58.45 through 58.46, 70.71 through 70.72, and 70.75 through 70.78. The hourly fee rates in this part 91 apply to all commodity and processed commodity products. The new fiscal year for Science and Technology Programs commences on October 1 of each calendar year. The rate for laboratory services is \$78.00 per hour in fiscal year 2010, \$81.00 per hour in fiscal year 2011, and \$83.00 per hour in fiscal year 2012.

(b) Printed updated schedules of the laboratory testing fees for processed fruits and vegetables (7 CFR part 93), poultry and egg products (7 CFR part 94), and meat and meat products (7 CFR part 98) will be available for distribution to Science and Technology's constituents and stakeholders by the individual Laboratory Directors of Science and Technology laboratories listed in § 91.5. These single test laboratory fee schedules are based upon the applicable hourly fee rate stated in paragraph (a) of this section.

(c) Except as otherwise provided in this section, charges will be made at the applicable hourly rate stated in paragraph (a) of this section for the time required to perform the service. A charge will be made for service pursuant to each request or certificate issued.



(d) When a laboratory test service is provided for AMS by a commercial or State government laboratory, the applicant will be assessed a fee which covers the costs to the Science and Technology program for the service provided.

(e) When Science and Technology staff provides applied and developmental research and training activities for microbiological, physical, chemical, and biomolecular analyses on agricultural commodities the applicant will be charged a fee on a reimbursable cost to AMS basis.

**§ 91.38 Additional fees for appeal of analysis.**

(a) The applicant for appeal sample testing will be charged a fee at the hourly rate for laboratory service that appears in this paragraph. The new fiscal year for Science and Technology Programs commences on October 1 of each calendar year. The appeal rate for laboratory service is \$93.00 per hour in fiscal year 2010, \$96.00 per hour in fiscal year 2011, and \$99.00 per hour in fiscal year 2012.

(b) The appeal fee will not be waived for any reason if analytical testing was completed in addition to the original analysis.

**§ 91.39 Premium hourly fee rates for overtime and legal holiday service.**

(a) When analytical testing in a Science and Technology facility requires the services of laboratory personnel beyond their regularly assigned tour of duty on any day or on a day outside the established schedule, such services are considered as overtime work. When analytical testing in a Science and Technology facility requires the services of laboratory personnel on a Federal holiday or a day designated in lieu of such a holiday, such services are considered holiday work. Laboratory analyses initiated at the request of the applicant to be rendered on Federal holidays, and on an overtime basis will be charged fees at hourly rates for laboratory service that appear in this paragraph. The new fiscal year for Science and Technology Programs commences on October 1 of each calendar year. The laboratory analysis rate for overtime service is \$93.00 per hour in fiscal year 2010, \$96.00 per hour in fiscal year 2011, and \$99.00 per hour in fiscal year 2012. The laboratory analysis rate for Federal holiday or designated holiday service is \$108.00 per hour in fiscal year 2010, \$111.00 per hour in fiscal year 2011, and \$115.00 per hour in fiscal year 2012.

(b) Information on legal holidays or what constitutes overtime service at a particular Science and Technology Laboratory is available from the Laboratory Director or facility manager.

Dated: April 1, 2010.

**Rayne Pegg,**

*Administrator, Agricultural Marketing Service.*

[FR Doc. 2010-7739 Filed 4-5-10; 8:45 am]

**BILLING CODE P**

**DEPARTMENT OF AGRICULTURE**

**Animal and Plant Health Inspection Service**

**7 CFR Part 319**

[Docket No. APHIS-2008-0052]

**RIN 0579-AD07**

**Citrus Seed Imports; Citrus Greening and Citrus Variegated Chlorosis**

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Interim rule and request for comments.

**SUMMARY:** We are amending the regulations governing the importation of nursery stock to prohibit the importation of propagative seed of several Rutaceae (citrus family) genera from certain countries where citrus greening or citrus variegated chlorosis (CVC) is present. We are also requiring propagative seed of these genera imported from all other countries to be accompanied by a phytosanitary certificate with an additional declaration that neither citrus greening nor CVC are known to occur in the country where the seed was produced. Scientific evidence indicates that seed of certain genera of the family Rutaceae may be a pathway for the introduction of those diseases. This action is necessary in order to prevent the introduction or dissemination of citrus greening and CVC into or within the United States.

**DATES:** This interim rule is effective April 6, 2010. We will consider all comments that we receive on or before June 7, 2010.

**ADDRESSES:** You may submit comments by either of the following methods:

• Federal eRulemaking Portal: Go to (<http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2008-0052>) to submit or view comments and to view supporting and related materials available electronically.

• Postal Mail/Commercial Delivery: Please send a copy of your comment to

Docket No. APHIS-2008-0052, Regulatory Analysis and Development, PPD, APHIS, Station 3A-03.8, 4700 River Road Unit 118, Riverdale, MD 20737-1238. Please state that your comment refers to Docket No. APHIS-2008-0052.

**Reading Room:** You may read any comments that we receive on this docket in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690-2817 before coming.

**Other Information:** Additional information about APHIS and its programs is available on the Internet at (<http://www.aphis.usda.gov>).

**FOR FURTHER INFORMATION CONTACT:** Dr. Arnold Tschanz, Senior Plant Pathologist, Plant Health Programs, PPQ, APHIS, 4700 River Road Unit 133, Riverdale, MD 20737-1231; (301) 734-0627.

**SUPPLEMENTARY INFORMATION:**

**Background**

The regulations in 7 CFR part 319, "Foreign Quarantine Notices," prohibit or restrict the importation of certain plants and plant products to prevent the introduction or dissemination of plant pests and noxious weeds into the United States. The regulations in "Subpart-Citrus Canker and Other Citrus Diseases" (§ 319.19) prohibit the importation into the United States of plants and plant parts, except fruit and seeds, of all genera, species, and varieties of the subfamilies Aurantioideae, Rutoideae, and Toddaliodeae of the botanical family Rutaceae (citrus) in order to prevent the introduction of citrus canker (*Xanthomonas citri* subsp. *citri*) into areas of the United States.

The regulations contained in "Subpart-Nursery Stock, Plants, Roots, Bulbs, Seeds, and Other Plant Products," §§ 319.37 through 319.37-14 (referred to below as the regulations), restrict, among other things, the importation of seeds for propagation. In this interim rule, we are amending the regulations to prohibit the importation of propagative seed of several Rutaceae genera from certain countries where citrus greening or citrus variegated chlorosis (CVC) is present. We are also requiring propagative seed of these genera imported from all other countries to be accompanied by a phytosanitary certificate with an additional