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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 930

[Docket No. FV97–930–1 FIR]

Tart Cherries Grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin; Assessment Rate and Establishment of Late Payment and Interest Charges on Delinquent Assessments

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: The Department of Agriculture (Department) is adopting, as a final rule, with modifications, the provisions of an interim final rule that established an assessment rate for the 1997–98 and subsequent fiscal periods to cover expenses incurred by the Cherry Industry Administrative Board (Board) under Marketing Order No. 930. That rule also established an interest rate and late payment charge on delinquent assessments owed by handlers under the tart cherry marketing order. The Board is responsible for local administration of the marketing order. Authorization to assess tart cherry handlers will enable the Board to incur expenses that are reasonable and necessary to administer the program. The interest rate and late payment charges will contribute to the efficient operation of the program by ensuring adequate funds are available to cover budgeted expenses incurred under the marketing order. The 1997–98 fiscal period covers the period July 1, through June 30. The assessment rate will remain in effect indefinitely unless modified, suspended, or terminated.

EFFECTIVE DATE: April 23, 1998.

FOR FURTHER INFORMATION CONTACT: Patricia A. Petrella, Marketing Specialist, or Kenneth G. Johnson, Regional Manager, DC Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, P.O. Box 96456, room 2525–S, Washington, DC 20090–6456; telephone:(202) 720–2491, Fax: (202) 205–6632. Small businesses may request information on compliance with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, P.O. Box 96456, room 2525–S, Washington, DC 20090–6456; telephone: (202) 720–2491, Fax: (202) 205–6632.

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Agreement and Order No. 930 (7 CFR part 930), regulating the handling of tart cherries grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin, hereinafter referred to as the ''order.'' The marketing agreement and order are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.''

The Department of Agriculture (Department) is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order now in effect, tart cherry handlers are subject to assessments. Funds to administer the order are derived from such assessments. It is intended that the assessment rate as issued herein will be applicable to all assessable tart cherries beginning July 1, 1997, and continuing until amended, suspended, or terminated. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

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 Secretary 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 the Secretary 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 Secretary's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

The tart cherry marketing order in section 930.31 provides that one of the duties of the Board is 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 rates of assessments for such period. The recommendations concerning the proposed assessment rate are discussed in a public meeting. Thus, all directly affected persons have an opportunity to participate and provide input.

At its meeting on January 8 and 9, 1997, the Board unanimously recommended expenditures of $650,000, and an assessment rate of $0.0025 per pound of tart cherries handled during the 1997–1998 crop year and subsequent crop years. The recommended expenditure figure covers expenses for the 1997–98 fiscal period, as well as expenses incurred in connection with the start-up of the program beginning on January 1, 1997, when the first public meeting of the newly formed Board took place. The tart cherry marketing order became effective on September 25, 1996. The Department has approved the Board's 1997–98 budget of expenses.

The Board assessed handlers after the effective date of the interim final rule concerning assessments, and all assessments were due to the Board office by November 30, 1997, for this season only. Future assessment payments will be due to the Board office by October 1 of each crop year. Major expenditures recommended by the Board for the 1997–98 fiscal period, ending June 30, 1998, and expenditures for the prior six months, are $25,000 for interest, $175,000 for Board meeting expenses, $150,000 for salaries, $100,000 for administration, and $200,000 for compliance. For the six month period from January 1, 1997, through June 30, 1997, the expenses were $59,000.

The order provides that when an assessment rate based on the number of

pounds of cherries handled is established it should provide for differences in relative market values for various cherry products. The discussion of this provision in the order promulgation record indicates that proponents testified that cherries utilized in high value products such as frozen, canned, or dried cherries should be assessed one rate while cherries used to make low value products such as juice concentrate or puree should be assessed at one half that rate.

This rule continues an assessment rate for the 1997–98 and subsequent fiscal periods at $0.0025 per pound of tart cherries used in the production of tart cherry products other than juice, juice concentrate and puree, and $0.00125 per pound for cherries used for juice, juice concentrate and puree. The Department inadvertently stated in the preamble of the interim final rule and in the regulatory text itself that the assessment rate for cherries used for juice, juice concentrate and puree shall be $0.0125. Such rate should be one half of $0.0025 which is $0.00125. Such error has been corrected in this rule.

Data from the National Agricultural Statistics Service (NASS) states that for 1996, tart cherry utilization for juice, wine or brined uses was 8.0 million pounds for all districts covered under the marketing order. The total processed amount of tart cherries for the 1996 crop year was 256.1 million pounds. Juice, wine, or brined represents about 3 percent of the total processed crop. Data for this season (1997–98) is not available at this time. However, based on the data from the previous season, it seems that juice, juice concentrate and puree represent a very small percentage of the crop. Therefore, a reduced assessment rate for cherries used in such products should have an insignificant effect on the monies collected for assessments this season.

The assessment rate recommended by the Board was derived by dividing anticipated expenses by expected shipments of tart cherries. Tart cherry shipments for the 1997–98 crop year were estimated at 260 million pounds and were projected to provide $650,000 in assessment income which, along with interest income, should have been adequate to cover budgeted expenses. At this time, actual production figures are available. Crop production for the 1997–98 season is now projected at 278,989,653 pounds. Assessment income, based on this crop, will be adequate to cover this year's expenses. Funds in any reserve will be kept within the current approximately one year's operational expenses permitted by the order (§ 930.42(a)).

Section 930.41 also provides that if a handler does not pay an assessment within the time prescribed by the Board, the assessment may be made subject to an interest or late payment charge, or both.

This final rule continues an interest rate of 1 percent per month and a late payment charge equal to 10 percent of the unpaid balance of the assessment amount due. The interest rate will be applied to any assessment not paid by the October 1 due date. For the 1997–98 crop year only, the assessment due date was November 30. Any interest charge for late assessment payments accrued 30 days after the November 30 due date and any late fee accrued 90 days after that date. The late payment fees on an unpaid assessment balance by a handler will be assessed 90 days after the October 1 due date for future seasons.

Section 930.41(a) of the marketing order provides for the payment by handlers of a pro-rata share of the cost of administering the program under the order. The payment is in the form of a uniform assessment rate applied to each handler's cherry acquisitions. In addition, section 930.41(f) provides that assessments will be calculated on the basis of pounds handled provided that the formula adopted by the Board and approved by the Secretary for determining the rate of assessment will compensate for differences in the number of pounds of cherries utilized for various cherry products and the relative market values of such cherry products.

Assessments are the main source of funds to pay Board expenses. The failure of handlers to pay assessment obligations promptly results in added expense and operational problems for the Board. Authority was placed in the order to levy interest and late payment charges on delinquent assessments. The interest rate and late payment charges in this final rule are similar to those established under other marketing orders. In collecting delinquent assessments, the Board would incur the added expense of sending out additional invoices and contacting each delinquent handler by phone, in person, or by fax. Nonpayment or late payment of assessments hampers the operation of the Board.

Any amount paid by the handler will be credited upon receipt in the Board office. Interest and late payment charges will provide incentive for handlers to remit assessments in a timely manner, with the intent of creating a fair and equitable process among all industry handlers. They will not impose any costs on handlers who pay their assessments on time, and will contribute to the efficient administration of the program.

In its deliberations, the Board discussed lower rates when recommending the interest rate and late payment charge but decided that prompt payment of assessments by handlers was crucial to the operation of the program. Therefore, the Board recommended an interest rate and late payment charge deemed to be sufficient to serve as an incentive to handlers to be prompt with their payment of assessments.

A proposed rule concerning this action was published in the **Federal Register** on July 3, 1997 (62 FR 36020). An interim final rule was issued by the Department on October 17, 1997, and published in the **Federal Register** on Thursday, October 23, 1997 (62 FR 55146). The rule addressed the comments concerning the proposed rule and was made available through the Internet by the Office of the Federal Register. A 60-day comment period, which ended on December 22, 1997, was provided to allow interested persons to respond to a modification of the proposed rule. The modification provided a different rate of assessment for cherries used for juice, juice concentrate, or puree.

One comment was received during the comment period in response to the interim final rule. That comment is discussed later in this rule.

The Regulatory Flexibility Act and Effects on Small Businesses

The Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities and has prepared this final regulatory flexibility analysis. The Regulatory Flexibility Act (RFA) would allow AMS to certify that regulations do not have a significant economic impact on a substantial number of small entities. However, as a matter of general policy, AMS' Fruit and Vegetable Programs (Programs) no longer opt for such certification, but rather perform regulatory flexibility analyses for any rulemaking that would generate the interest of a significant number of small entities. Performing such analyses shifts the Programs' efforts from determining whether regulatory flexibility analyses are required to the consideration of regulatory options and economic impacts.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that the 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. Thus, both statutes have small entity orientation and compatibility.

There are approximately 1,220 producers of tart cherries in the production area and approximately 40 handlers subject to regulation under the marketing order. Small agricultural producers have been defined by the Small Business Administration (13 CFR 121.601) as those having annual receipts less than $500,000, and small agricultural service firms are defined as those whose annual receipts are less than $5,000,000. The majority of tart cherry producers and handlers may be classified as small entities.

This rule continues an assessment rate for the 1997–98 and subsequent fiscal periods to cover expenses of the Board at $0.0025 per pound of tart cherries used in the production of tart cherry products other than juice, juice concentrate and puree, and $0.00125 per pound for cherries used in the production of juice, juice concentrate and puree.

The Board unanimously recommended expenditures of $650,000 for expenses incurred during the 1997–98 fiscal period as well as for those incurred during the start-up period beginning January 1, 1997. From January 1, 1997, through June 30, 1997, the expenses for this six month period was $59,000. The expenses for the 1997–98 fiscal period are projected at $591,000. Tart cherry shipments for the year were estimated at 260 million pounds, which would have provided $650,000 in assessment income (260,000,000 pounds at $0.0025 per pound) and would have been adequate to cover this year's expenses. At this time, actual production figures are available. Crop production for the 1997–98 season is 278,989,653 pounds, which, even with the reduced assessment rate for cherries used in juice, juice concentrate, and puree, will provide adequate assessment income to cover this year's expenses. Funds in any reserve will be kept within the current approximately one year's operational expenses permitted by the order (§ 930.42(a)).

The Board discussed alternatives when recommending the interest rate and late payment charge. The Board discussed lower rates, but decided that prompt payment of assessments by handlers is crucial to the operation of the program. Therefore, the Board recommended an interest rate and late payment charge deemed to be sufficient to serve as an incentive to handlers to be prompt with their payment of assessments.

Major expenditures recommended for the 18-month period ending in June 30, 1998, include $25,000 for interest, $175,000 for Board meeting expenses, $150,000 for salaries, $100,000 for administration, and $200,000 for program compliance. The $200,000 for compliance was deemed necessary in the event volume control regulations are implemented during the 1997–98 season. The Board discussed setting an assessment rate that would allow for sufficient operation of a volume control program for the upcoming season. With regards to alternatives, this rate may be adjusted by the Secretary, if necessary. Accordingly, the Department believes that since the assessments are necessary to make funds available to cover the initial costs of implementing the new order, including operation of a volume control program for this season, the assessment rate will be as recommended by the Board, and modified by the Department.

This action will not impose any additional reporting or recordkeeping on either small or large tart cherry 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. The forms for the operation of the order have been previously approved by the Office of Management and Budget (OMB) and have been assigned OMB No. 0581–0177.

The interest and late payment charges were also discussed at a public meeting. The Board believes the interest charge is reasonable. The late payment charge is high enough to discourage late payments and encourage the timely payment of assessments by handlers.

This final rule continues to provide an incentive for handlers to remit assessments in a timely manner, with the intent of creating a fair and equitable process among all industry handlers. It will not impose any costs on handlers who pay their assessments on time, and will contribute to the efficient administration of the program.

Handlers who do not pay their assessments on time would be able to reap the benefits of Board programs at the expense of others. In addition, they would be able to utilize funds for their own use that will otherwise be paid to the Board to finance Board programs. In effect, this would provide handlers with an interest free loan.

Continuation of the interest and late payment charges will provide an incentive for handlers to pay assessments on time, which will improve compliance with the order. It should help minimize actions taken against handlers who fail to pay assessments on time through administrative remedies or the Federal courts. This final rule will remove any economic advantage gained by those handlers who do not pay on time, thus helping to ensure a program that is equitable to all. This is also consistent with standard business practices.

While this final rule will impose some costs on handlers, the costs are in the form of uniform assessments on all handlers. Some of the additional costs may be passed on to producers. However, these costs will be offset by the benefits derived by the operation of the marketing order.

This final rule will not impose any additional reporting or recordkeeping requirements on either small or large tart cherry 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. The Department has not identified any relevant Federal rules that duplicate, overlap, or conflict with this final rule. In addition, the Board's meeting was widely publicized throughout the tart cherry industry and all interested persons were invited to attend the meeting and participate in Board deliberations on all issues. Like all Board meetings, the January 8 and 9, 1997, meeting was a public meeting and all entities, both large and small, were able to express views on these issues. Finally, interested persons were invited to submit information on the regulatory and informational impacts of this final rule on small businesses, and none were received on this issue.

The Board discussed alternatives when recommending the interest rate and late payment charge. The Board discussed lower rates, but decided that prompt payment of assessments by handlers is crucial to the operation of the program. Therefore, the Board recommended an interest rate and late payment charge deemed to be sufficient to serve as an incentive to handlers to be prompt with their payment of assessments. The assessment rate, interest rate and late payment charge established in this final rule will continue in effect indefinitely unless modified, suspended, or terminated by the Secretary upon recommendation and information submitted by the Board or other available information.

Although the assessment rate, interest rate and late payment charge will be effective for an indefinite period, the Board will continue to meet prior to or

during each fiscal period to recommend a budget of expenses and consider recommendations for modification of the assessment and interest rates and late payment charge. The dates and times of Board meetings are available from the Board or the Department. Board meetings are open to the public and interested persons may express their views at these meetings. The Department will evaluate Board recommendations and other available information to determine whether modification of the assessment or interest rates or late payment charge is needed. Further rulemaking would be undertaken as necessary. The Board's 1997–98 budget has already been approved by the Department to allow the Board to expend funds that they have borrowed. Budgets for subsequent fiscal periods will be reviewed and, as appropriate, approved by the Department.

One comment concerning the interim final rule was received. The commenter urged the Department to not assess cherries used in juice, juice concentrate, or puree at a different rate. The commenter stated that the Board considered the differences in the number of pounds of cherries utilized for various cherry products and the relative market value of such cherry products in its recommendation. The Board unanimously recommended that because raw product values for the past years have been relatively equal for most product uses the assessments should be based on a single assessment rate for all raw products delivered. The commenter also stated that the Board considered the appropriate factors when it needed to consider the recommended assessment rate, and recommended that a dual assessment rate should not be imposed.

The commenter further stated that the proponent's original proposal for a tart cherry marketing order contained provisions for storage assessments. According to the commenter, the discussion in the record of the administrative proceeding to formulate the order concerning dual assessments relates to high and low value fruit as a consequence of these different costs of storage. The Department, during the promulgation process, concluded that a collection of a storage assessment would not be equitable to the industry as a whole and therefore such assessment was not included in the order since nonregulated districts would not incur storage expenses. Therefore, the commenter stated that the discussion on high and low value fruit is no longer relevant and it is improper and inconsistent for the Department to rely on such testimony to require a dual assessment rate.

The Department issued the rule to reflect the intent of § 930.41 of the order which states that assessments will be calculated on the basis of pounds of cherries handled. The order further states that the formula adopted by the Board and approved by the Secretary for determining the rate of assessment will compensate for differences in the number of pounds of cherries utilized for various cherry products and the relative market values of such cherry products. The proponents of the order testified during promulgation of the order that there should be different assessment rates by providing exhibits of how such assessment rates would work based on the relative market value of products. Therefore, this part of the comment is denied.

The commenter also stated that no grace period was recommended under the interest and late payment charge provision. The Department included a 30-day grace period which would allow assessments due on October 1 to be paid as late as October 31 without incurring interest and late payment charges. The commenter stated that handlers' financial officers would clearly take advantage of this 30-day grace period and not pay assessments until October 31. However, the Board's period of heaviest expense is the summer months when harvest is underway and compliance activities are at their peak. If reserves are not available, the Board would have to borrow money to operate. It is therefore important that assessments be paid on the October 1 date as recommended by the Board.

Based on this comment, the Department is modifying the date when the interest rate begins to accrue by excluding the 30-day grace period. Therefore, starting with the 1998-99 crop year, assessments will be due on October 1 and interest will begin to accrue after October 1 on any unpaid assessment balance.

After consideration of all relevant material presented, including the information and recommendation submitted by the Board and other available information, it is hereby found that this rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

List of Subjects in 7 CFR Part 930

Marketing agreements, Reporting and recordkeeping requirements, Tart cherries.

Accordingly, the interim final rule amending 7 CFR part 930 which was published at 62 FR 55146 on October 23, 1997, is adopted as a final rule with the following changes:

PART 930—TART CHERRIES GROWN IN THE STATES OF MICHIGAN, NEW YORK, PENNSYLVANIA, OREGON, UTAH, WASHINGTON, AND WISCONSIN

1. The authority citation for 7 CFR Part 930 continues to read as follows:

Authority: 7 U.S.C. 601–674.

2. Section 930.141 is amended by revising paragraph (a) and by removing and reserving paragaph (b) to read as follows:

§ 930.141 Delinquent assessments.

(a) Pursuant to § 930.41, the Board shall impose an interest charge on any handler whose assessment payment has not been received by October 1 of each crop year. The interest rate shall be a rate of one percent per month and shall be applied to the unpaid assessment balance not paid by the October 1 due date. In addition to the interest charge, the Board shall impose a late payment charge on any handler whose assessment payment has not been received within 90 days from the due date of October 1. The late payment charge shall be 10 percent of the unpaid balance.

3. Section 930.200 is revised to read as follows:

§ 930.200 Handler assessment rate.

On and after the effective date of this rule, the assessment rate imposed on handlers shall be $0.0025 per pound of cherries handled for tart cherries grown in the production area and utilized in the production of tart cherry products other than juice, juice concentrate, or puree. The assessment rate for tart cherries utilized in the production of juice, juice concentrate, and puree products shall be $0.00125 per pound. The assessment due date shall be October 1 of each crop year.

Dated: March 18, 1998.

Robert C. Kenney,

Deputy Administrator, Fruit and Vegetable Programs.

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