

# Rules and Regulations

Federal Register

Vol. 66, No. 132

Tuesday, July 10, 2001

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 930

[Docket No. FV01-930-3 IFR]

#### Tart Cherries Grown in the States of Michigan, et al.; Modifications to the Rules and Regulations Under the Tart Cherry Marketing Order

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

**ACTION:** Interim final rule with request for comments.

**SUMMARY:** This interim final rule increases the Cherry Industry Administrative Board (Board) membership, and establishes procedures under the rules and regulations of the Federal tart cherry marketing order (order) for handlers who want to post surety bonds to temporarily defer maintaining an inventory reserve for tart cherries. The Board recommended these actions to improve order administration, provide handlers more marketing flexibility, and change Board representation as required. The order regulates the handling of tart cherries grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin and is administered locally by the Board.

**DATES:** Effective July 11, 2001; comments received by September 10, 2001 will be considered prior to issuance of a final rule.

**ADDRESSES:** Interested persons are invited to submit written comments concerning this rule. Comments must be sent to the Docket Clerk, Fruit and Vegetable Programs, AMS, USDA, room 2525-S, P.O. Box 96456, Washington, DC 20090-6456, Fax (202) 720-8938 or E-mail: [moabdocket.clerk@usda.gov](mailto:moabdocket.clerk@usda.gov). All comments should reference the docket number and the date and page number of this issue of the **Federal Register** and

will be made available for public inspection in the Office of the Docket Clerk during regular business hours.

**FOR FURTHER INFORMATION CONTACT:** Patricia A. Petrella or Kenneth G. Johnson, Marketing Order Administration Branch, F&V, AMS, USDA, Suite 2A04, Unit 155, 4700 River Road, Riverdale, Maryland 20737, telephone: (301) 734-5243, Fax: (301) 734-5275; or George Kelhart, Technical Advisor, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, Room 2525-S, P.O. Box 96456, Washington, DC 20090-6456; telephone: (202) 720-2491, Fax: (202) 720-8938. Small businesses may request information on compliance with this regulation, or obtain a guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders 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) 720-8938, or E-mail: [Jay.Guerber@usda.gov](mailto:Jay.Guerber@usda.gov).

**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." This 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 Department of Agriculture (Department or USDA) is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect. 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. A 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.

This rule increases the Board's membership, and establishes procedures under the order's rules and regulations for handlers to post surety bonds to temporarily defer maintaining an inventory reserve for tart cherries.

The Board recommended that its membership be increased by one member for District 8, the State of Washington. Currently, § 930.20(e) provides that if Districts 5, 6, 8, or 9 become subject to volume regulation under § 930.52(a), the Board shall be reestablished by the Secretary to provide such District(s) with at least one grower and one handler seat on the Board. At the September 8, 2000, meeting it was determined that the State of Washington's annual average production of cherries over the prior three years has exceeded the 15 million pound threshold required for districts to become regulated. As such, if volume regulation is implemented for the 2001-2002 crop year, handlers handling tart cherries grown in Washington will be subject to volume regulation. Therefore, the Board should be increased from 18 to 19 members which would allow two members instead of one to represent District 8—Washington. The new member and alternate would be nominated and selected in the same manner as other Board members and alternates. With the change for District 8, Washington, District representation on the Board will be as follows:

District	Grower members	Handler members
1 .....	2	2
2 .....	1	2
3 .....	1	1
4 .....	1	1
5 .....	1	or 1
6 .....	1	or 1
7 .....	1	1
8 .....	1	1

District	Grower members	Handler members
9 .....	1	or 1

The Board also recommended that procedures be established for handlers to post surety bonds to temporarily defer maintaining inventory reserves. Section 930.63 provides in part that handlers may, in order to comply with the requirements of §§ 930.50 and 930.51 and regulations issued thereunder, secure bonds on restricted percentage cherries to temporarily defer the date that inventory reserve cherries must be held to any date requested by a handler as long as it is not later than 60 days prior to the end of the crop year. Pursuant to the Board's recommendation, handlers would be required to post surety bonds at two times the market value of the quantity of cherries for which the holding obligation is being deferred. For example, if the inventory reserve product to be marketed is tart cherry juice concentrate and the market value for the concentrate is \$20,000, the handler has to post a surety bond of \$40,000 in order to temporarily defer his/her inventory reserve obligation.

The deferment would be conditioned on the execution and delivery by the handler to the Board of a written undertaking within 30 days after the Secretary announces the final restricted percentage under § 930.51. The written undertaking (required to be secured by a bond or bonds with a surety or sureties acceptable to the Board) must guarantee that on or prior to the acceptable deferred date that handler will have fully satisfied the restricted percentage amount required by § 930.51. If a handler fails to satisfy that obligation with cherries in reserve by the date requested by the handler, the bond will be forfeited to the Board. The Board will then buy cherries to fulfill the handler's obligation. Handlers not posting surety bonds to temporarily defer maintaining an inventory reserve shall keep inventory reserves in compliance with applicable order regulations.

**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 initial 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 or regulatory impacts.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules 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 40 handlers of tart cherries who are subject to regulation under the order and approximately 900 producers of tart cherries in the regulated area. Small agricultural service firms, which include handlers, have been defined by the Small Business Administration (13 CFR 121.201) as those having annual receipts of less than \$5,000,000, and small agricultural producers are defined as those having annual receipts of less than \$500,000. The majority of handlers and producers are small entities.

Board and subcommittee meetings are widely publicized in advance and are held in a location central to the production area. The meetings are open to all industry members (including small business entities) and other interested persons who are encouraged to participate in the deliberations and voice their opinions on topics under discussion. Thus, Board recommendations can be considered to represent the interests of small business entities in the industry.

The principal demand for tart cherries is in the form of processed products. Tart cherries are dried, frozen, canned, juiced, and pureed. During the period 1995/96 through 1999/00, approximately 91 percent of the U.S. tart cherry crop, or 280.5 million pounds, was processed annually. Of the 280.5 million pounds of tart cherries processed, 62 percent was frozen, 29 percent was canned, and 9 percent was utilized for juice.

Based on National Agricultural Statistics Service data, acreage in the United States devoted to tart cherry production has been trending downward. In the ten-year period, 1987/88 through 1997/98, tart cherry area

decreased from 50,050 acres, to less than 40,000 acres. In 1999/00, approximately 90 percent of domestic tart cherry acreage is located in four States: Michigan, New York, Utah and Wisconsin.

Michigan leads the nation in tart cherry acreage with 70 percent of the total. Michigan produces about 75 percent of the U.S. tart cherry crop each year. In 1999/00, tart cherry acreage in Michigan decreased to 28,100 from 28,400.

The impact of this rule would be beneficial to growers and handlers. The recommendation to add another member and alternate is consistent with the order requirements and will provide greater participation on the Board by the industry. Adding procedures for handlers to temporarily defer their inventory reserve holding obligations through written undertakings secured by surety bonds is also consistent with order provisions and will provide handlers with flexibility in their day-to-day processing, packing, and marketing operations.

One alternative to these actions would be to continue the status quo. However, the order requires a change in Board membership, following established nomination procedures, upon a district meeting the volume regulation threshold and becoming regulated. The order also provides handlers the authority to post surety bonds. Recommending procedures for handlers to implement this authority is another tool the Board hopes to use to facilitate the orderly marketing of tart cherries.

As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sectors. In addition, the Department has not identified any relevant Federal rules which duplicate, overlap, or conflict with this rule.

In compliance with Office of Management and Budget (OMB) regulations (5 CFR part 1320) which implement the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the information collection and recordkeeping requirements imposed by this action have been previously approved by OMB and assigned OMB Number 0581-0177. Handlers taking advantage of the bonding option would execute an application which would take about an hour to complete. The total burden hours approved, 4,649 hours, will be adequate to cover this added burden.

The Board's meetings were widely publicized throughout the tart cherry industry and all interested persons were

invited to attend them and participate in Board deliberations. Like all Board meetings, the September 2000 meeting was a public meeting and all entities, both large and small, were able to express their views on these issues. The Board itself is composed of 18 members, of which 17 members are growers and handlers and one represents the public. Also, the Board has a number of appointed committees to review certain issues and make recommendations.

Finally, interested persons are invited to submit information on the regulatory and informational impacts of these actions on small businesses.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at the following website: <http://www.ams.usda.gov/fv/moab.html>. Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT SECTION**.

This rule invites comments on increasing the Board membership and adding rules and regulations to implement the use of surety bonds to temporarily defer maintaining an inventory reserve for tart cherries. All comments received will be considered in finalizing this interim final rule.

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

Pursuant to 5 U.S.C. 553, it is also found and determined upon good cause that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice prior to putting this rule into effect and that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because: (1) The increase in Board membership is required by the order and needs to be implemented on a timely basis; (2) the Board needs this rule to be in place this season so handlers can take advantage of the bonding option; (3) the Board recommended these changes at a public meeting and interested parties had an opportunity to provide input; and (4) this rule provides a 60-day comment period and any comments received will be considered prior to finalization of this rule.

#### List of Subjects in 7 CFR Part 930

Marketing agreements, Reporting and recordkeeping requirements, Tart cherries.

For the reasons set forth in the preamble, 7 CFR part 930 is amended as follows:

#### **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. A new § 930.120 is added to read as follows:

#### **§ 930.120 Board membership.**

Pursuant to § 930.20(e), membership of the Cherry Industry Administrative Board is increased from 18 to 19 members and alternates. There will be one grower and one handler member from District 8.

3. A new § 930.163 is added to read as follows:

#### **§ 930.163 Deferment of restricted obligation.**

A handler may obtain a surety bond on restricted percentage cherries to be posted to temporarily defer the date that inventory reserves must be held. The surety bond must be posted at two times the market value of the quantity of cherries for which the holding obligation is being deferred. The Board can temporarily defer the date inventory reserve cherries must be held to any date requested by the handler. However, this date shall not be later than 60 days prior to the end of the crop year. The deferment shall be conditioned on the execution and delivery by the handler to the Board of a written undertaking within 30 days after the Secretary announces the final restricted percentage under § 930.51. The written undertaking (required to be secured by a bond or bonds with a surety or sureties acceptable to the Board) must guarantee that on or prior to the deferment date requested by the handler the handler will have fully satisfied the restricted percentage obligation. On or prior to the deferment date requested by the handler, the handler will have to fully satisfy the restricted percentage obligation. In the event, a handler has posted the surety bond, reached the deferment date deadline and does not have cherries in the inventory reserve to cover his/her inventory reserve obligation, the bond will be forfeited to the Board. The Board will then buy cherries to fulfill that handler's obligation.

Dated: July 3, 2001.

**Kenneth C. Clayton,**

*Acting Administrator, Agricultural Marketing Service.*

[FR Doc. 01–17126 Filed 7–9–01; 8:45 am]

BILLING CODE 3410–02–P

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 930

[Docket Nos. AO–370–A6; FV98–930–2]

#### **Tart Cherries Grown in the States of Michigan, et al.; Order Amending Marketing Agreement and Order No. 930**

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

**ACTION:** Final rule.

**SUMMARY:** This final rule amends the marketing agreement and order (order) for tart cherries grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin. The amendments were submitted by the Cherry Industry Administrative Board (Board), the agency responsible for local administration of the order. One change clarifies the current limitation on the number of Board members that may be from, or affiliated with, a single "sales constituency" by amending the definition of that term. Another change simplifies the method used to establish volume regulations for tart cherries. These changes were favored by tart cherry growers in a mail referendum and will improve the operation and functioning of the tart cherry marketing order program.

**EFFECTIVE DATE:** August 9, 2001.

#### **FOR FURTHER INFORMATION CONTACT:**

Kenneth G. Johnson, Regional Manager, DC Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 4700 River Road, Unit 155, Suit 2A04, Riverdale Maryland 20737; telephone (301) 734–5243, or Fax: (301) 734–5275; or Anne M. Dec, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, room 2525–S, Washington, DC 20250–0200; telephone: (202) 720–2491; or Fax: (202) 720–8938.

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;