

# Proposed Rules

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 927

[Docket No. FV00-927-3]

### Winter Pears Grown in Oregon and Washington; Secretary's Decision and Referendum Order on Proposed Amendment of Marketing Agreement and Order No. 927

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

**ACTION:** Proposed rule and referendum order.

**SUMMARY:** This decision proposes amendments to the marketing agreement and order for winter pears grown in Oregon and Washington (order), and provides growers with the opportunity to vote in a referendum to determine if they favor the changes. The amendments are based on those proposed by the Winter Pear Control Committee (Committee), which is responsible for local administration of the order. The amendments include: authorizing the Committee to recommend maturity regulations; authorizing the Committee to recommend container or marking requirements; and changing provisions related to alternate Committee members serving for absent members at Committee meetings. The proposed amendments are intended to improve the operation and functioning of the winter pear marketing order program.

**DATES:** The referendum will be conducted from July 17 to August 2, 2002. The representative period for the purpose of the referendum is July 1, 2001, through June 30, 2002.

#### FOR FURTHER INFORMATION CONTACT:

Anne M. Dec, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, Stop 0237, room 2522-S, Washington, DC 20250-0237; 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, 1400 Independence Avenue, Stop 0237, room 2525-S, Washington, D.C. 20250-0237; telephone (202) 720-2491; Fax (202) 720-8938, or E-mail: [Jay.Guerber@usda.gov](mailto:Jay.Guerber@usda.gov).

**SUPPLEMENTARY INFORMATION:** Prior documents in this proceeding: Notice of Hearing issued on November 2, 2000, and published in the November 8, 2000, issue of the **Federal Register** (65 FR 66935); Recommended Decision and Opportunity to File Written Exceptions issued on March 27, 2002, and published in the April 3, 2002, issue of the **Federal Register** (67 FR 15747).

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

#### Preliminary Statement

The proposed amendments were formulated based on the record of a public hearing held in Portland, Oregon, on November 29, 2000. Notice of this hearing was published in the **Federal Register** on November 8, 2000. The hearing was held to consider the proposed amendment of Marketing Agreement and Order No. 927, regulating the handling of winter pears grown in Oregon and Washington, hereinafter referred to collectively as the "order." The hearing was held pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*), hereinafter referred to as the "Act," and the applicable rules of practice and procedure governing the formulation of marketing agreements and orders (7 CFR Part 900). The notice of hearing contained several proposals submitted by the Committee, and one proposed by the Agricultural Marketing Service (AMS).

The Committee's proposed amendments included: authorizing the Committee to recommend maturity regulations; authorizing the Committee to recommend container and marking requirements; and changing provisions related to alternate Committee members serving for absent members at Committee meetings.

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Monday, June 10, 2002

The Fruit and Vegetable Programs of AMS proposed to allow such changes as may be necessary to the order, if any of the proposed changes are adopted, so that all of the order's provisions conform with the effectuated amendments.

Upon the basis of evidence introduced at the hearing and the record thereof, the Administrator of AMS on March 27, 2002, filed with the Hearing Clerk, U.S. Department of Agriculture, a Recommended Decision and Opportunity to File Written Exceptions thereto by May 3, 2002. No exceptions were filed.

#### Small Business Considerations

Pursuant to the requirements set forth in the Regulatory Flexibility Act (RFA), AMS has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions so that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act and amendments thereto are unique in that they are normally brought about through group action of essentially small entities acting on their own behalf. Thus, both the RFA and the Act are compatible with respect to small entities.

According to the Small Business Administration (13 CFR 121.201), small handlers are those having annual receipts of less than \$5,000,000 and small agricultural producers are defined as those with annual receipts of less than \$750,000. Based on testimony presented at the hearing, a majority of the winter pear producers are considered small under the SBA definition. Of the 1,800 winter pear growers, 80 to 85 percent are estimated to have sales equal to or less than \$750,000. There are 90 handlers operating in the production area. The majority of these handlers fit the SBA definition of a small handler. Thus, this action will apply primarily to small entities.

This decision proposes making the following amendments to the winter pear marketing order: (1) To amend § 927.51(a)(1) of the order to specifically authorize the establishment of maturity regulations; (2) To amend § 927.51 of the order to authorize the establishment of container requirements which would

encompass capacity, weight, dimensions, and packing of the container, or containers, which may be used in packaging or handling of pears; and (3) To amend § 927.28 of the order to authorize additional alternates to serve for a Committee member in the event that both that member and that member's alternates are unable to attend a Committee meeting.

These actions are designed to enhance the quality of winter pears at consumer outlets through the regulation of maturity regulations, to create more orderly marketing conditions for winter pears through the implementation of container uniformity, to improve grower returns through these combined actions, and to ensure grower and handler representation at all Committee meetings.

Members of the Winter Pear Control Committee attending the hearing testified that the proposal to grant authority to establish maturity regulations has been widely discussed within the grower community, an estimated 80 to 85 percent of which qualify as small producers. Moreover, among the witnesses testifying, it was often stated that implementing maturity requirements would equally benefit small and large producers by standardizing industry requirements and enhancing overall product quality in the market.

Small handlers from both Oregon and Washington were present and participated in the hearing, and indicated their support for this proposal. When asked if such regulations would increase handler costs, one small handler responded that while some additional inspection costs would be incurred, those costs are expected to be offset with the increase in consumption. Ultimately, witnesses testifying at the hearing indicated that net returns to both handlers and producers would increase.

Testimony also indicated that the proposal to grant authority to fix the size, capacity, weight, dimensions, markings, or pack of the container, or containers, used in the packaging or handling of winter pears has been widely discussed within the winter pear industry. The proposed changes also include definitions of "pack" and "container" that are added based upon testimony at the hearing. Among the witnesses testifying, it was widely stated that implementing this authority would equally benefit both small and large handlers and growers. By standardizing container and packing requirements, handling costs would decrease through reduced inventories and more efficient packing procedures.

Uniformity in the market would also facilitate standardized transactions by ensuring more equitable cost per unit comparisons and producer returns on product.

Small handlers testifying at the hearing indicated their support for this proposal. When asked if such regulations would increase handler costs, one small handler explained that the costs of new containers are likely to be offset by gains in packing efficiency and a more transparent cost per unit comparisons in handler to retailer transactions. Small producers testifying to this issue realized that increased costs in packing material would more than likely be passed from the handler to the grower, but the net gain from container standardization will ultimately benefit the industry as a whole, including the small producer. It was stated that by removing confusion related to container size in the marketplace, growers should get a fairer return on their product.

In the case of districts having only two Committee members, a temporary alternate will be selected by the absent Committee member from the collective pool of alternates from all districts and will represent the same group (grower or handler). The amendment proposed in this decision represents a modification to the Committee's proposal in order to better effectuate its terms. This method of selecting a temporary alternate would ensure representation of all growers and handlers (both large and small) at Committee meetings while having little or no increase in Committee administrative costs. Moreover, testimony demonstrated that the authority to temporarily assign alternates would improve representation of the small producers and handlers.

The collection of information under the marketing order would not be affected by these amendments to the marketing order. Current information collection requirements for Part 927 are approved by OMB under OMB number 0581-0089.

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.

USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this proposed rule. All of these amendments are designed to enhance the administration and functioning of the marketing order to the benefit of the industry.

Committee meetings held to discuss these proposals, as well as the hearing, were widely publicized throughout the

Oregon and Washington winter pear production area. All interested persons were invited to attend the meetings and the hearing, and participate in Committee deliberations on all issues. All Committee meetings and the hearing were public forums, and all entities, both large and small, were able to express views on these issues.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at the following Web site: <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.

#### Civil Justice Reform

The amendments proposed herein have been reviewed under Executive Order 12988, Civil Justice Reform. They are not intended to have retroactive effect. If adopted, the proposed amendments will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with the amendments.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after date of the entry of the ruling.

#### Findings and Conclusions

The findings and conclusions, rulings, and general findings and determinations included in the Recommended Decision set forth in the April 3, 2002, issue of the **Federal Register** are hereby approved and adopted.

#### Marketing Agreement and Order

Annexed hereto and made a part hereof is the document entitled "Order Amending the Order Regulating the Handling of Winter Pears Grown in Oregon and Washington." This document has been decided upon as the detailed and appropriate means of

effectuating the foregoing findings and conclusions.

*It is hereby ordered*, That this entire decision be published in the **Federal Register**.

#### Referendum Order

It is hereby directed that a referendum be conducted in accordance with the procedure for the conduct of referenda (7 CFR part 900.400 *et seq.*) to determine whether the annexed order amending the order regulating the handling of winter pears grown in Oregon and Washington is approved or favored by growers, as defined under the terms of the order, who during the representative period were engaged in the production of winter pears in the production area.

The representative period for the conduct of such referendum is hereby determined to be July 1, 2001, through June 30, 2002.

The agent of the Secretary to conduct such referendum is hereby designated to be Gary Olson, Northwest Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1220 S.W. Third Avenue, room 369, Portland, Oregon 97204; telephone (503) 326-2724.

#### List of Subjects in 7 CFR Part 927

Marketing agreements, Pears, Reporting and recordkeeping requirements.

Dated: June 4, 2002.

**A.J. Yates,**  
Administrator, Agricultural Marketing Service.

#### Order Amending the Order Regulating the Handling of Winter Pears Grown in Oregon and Washington<sup>1</sup>

##### *Findings and Determinations*

The findings and determinations hereinafter set forth are supplementary and in addition to the findings and determinations which were previously made in connection with the issuance of the marketing agreement and order; and all said previous findings and determinations are hereby ratified and affirmed, except insofar as such findings and determinations may be in conflict with the findings and determinations set forth herein.

##### *(a) Findings and Determinations Upon the Basis of the Hearing Record.*

Pursuant to the provisions of the Agricultural Marketing Agreement Act

of 1937, as amended (7 U.S.C. 601 *et seq.*), and the applicable rules of practice and procedure effective thereunder (7 CFR part 900), a public hearing was held upon the proposed amendments to the Marketing Agreement and Order No. 927 (7 CFR part 927), regulating the handling of winter pears grown in Oregon and Washington. Upon the basis of the evidence introduced at such hearing and the record thereof, it is found that:

(1) The marketing agreement and order, as amended, and as hereby proposed to be further amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(2) The marketing agreement and order, as amended, and as hereby proposed to be further amended, regulate the handling of winter pears grown in the production area in the same manner as, and are applicable only to, persons in the respective classes of commercial and industrial activity specified in the marketing agreement and order upon which hearings have been held;

(3) The marketing agreement and order, as amended, and as hereby proposed to be further amended, are limited in their application to the smallest regional production area which is practicable, consistent with carrying out the declared policy of the Act, and the issuance of several orders applicable to subdivisions of the production area would not effectively carry out the declared policy of the Act;

(4) The marketing agreement and order, as amended, and as hereby proposed to be further amended, prescribe, insofar as practicable, such different terms applicable to different parts of the production area as are necessary to give due recognition to the differences in the production and marketing of winter pears cherries grown in the production area; and

(5) All handling of winter pears grown in the production area as defined in the marketing agreement and order, is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects such commerce.

##### **Order Relative to Handling**

*It is therefore ordered*, That on and after the effective date hereof, all handling of winter pears grown in Oregon and Washington shall be in conformity to, and in compliance with, the terms and conditions of the said order as hereby proposed to be amended as follows:

The provisions of the proposed marketing agreement and order amending the order contained in the

Recommended Decision issued by the Administrator on March 27, 2002, and published in the **Federal Register** on April 3, 2002, will be and are the terms and provisions of this order amending the order and are set forth in full herein.

#### **PART 927—WINTER PEARS GROWN IN OREGON AND WASHINGTON**

1. The authority citation for 7 CFR part 927 continues to read as follows:

**Authority:** 7 U.S.C. 601–674.

2. Revise § 927.5 to read as follows:

##### **§ 927.5 Size**

*Size* means the number of pears which can be packed in a standard pear box when packed in accordance with the packing requirements of the U.S. Standards for Pears (part 51 of this title), or as such regulations hereafter may be modified or as *Asize*" may be more specifically defined in a regulation issued under this part.

3. Add a new § 927.14 to read as follows:

##### **§ 927.14 Pack.**

*Pack* means the specific arrangement, size, weight, count, or grade of a quantity of pears in a particular type and size of container, or any combination thereof.

4. Add a new § 927.15 to read as follows:

##### **§ 927.15 Container.**

*Container* means a box, bag, crate, lug, basket, carton, package, or any other type of receptacle used in the packaging or handling of pears.

5. Revise § 927.28 to read as follows:

##### **§ 927.28 Alternates for members of the Control Committee.**

The first alternate for a member shall act in the place and stead of the member for whom he or she is an alternate during such member's absence. In the event of the death, removal, resignation, or disqualification of a member, his or her first alternate shall act as a member until a successor for the member is selected and has qualified. The second alternate for a member shall serve in the place and stead of the member for whom he or she is an alternate whenever both the member and his or her first alternate are unable to serve. In the event that both a member of the Control Committee and that member's alternates are unable to attend a Control Committee meeting, the member may designate any other alternate member from the same group (handler or grower) to serve in that member's place and stead.

<sup>1</sup> This order shall not become effective unless and until the requirements of § 900.14 of the rules of practice and procedure governing proceedings to formulate marketing agreements and marketing orders have been met.

6. Amend § 927.51 by revising paragraph (a) to read as follows:

**§ 927.51 Issuance of regulations and modification, suspension, or termination thereof.**

(a) Whenever the Secretary finds, from the recommendations and information submitted by the Control Committee, or from other available information, that regulation, in the manner specified in the section, of the shipment of pears would tend to effectuate the declared policy of the act, he or she shall so limit the shipment of pears during a specified period or periods. Such regulation:

(1) May limit the total quantity of any grade, size, quality, maturity, or combination thereof, of any variety of pears grown in any district and may prescribe different requirements applicable to shipments in different export markets; or

(2) May prescribe minimum standards of quality for any variety of pears and limit the shipment thereof to those meeting such minimum standards; or

(3) Fix the size, capacity, weight, dimensions, markings, or pack of the container, or containers, which may be used in packaging or handling of pears.

\* \* \* \* \*

[FR Doc. 02-14404 Filed 6-7-02; 8:45 am]

**BILLING CODE 3410-02-P**

**DEPARTMENT OF AGRICULTURE**

**Agricultural Marketing Service**

**7 CFR Part 930**

**[Docket No. FV02-930-3 PR]**

**Tart Cherries Grown in the States of Michigan, et al.; Increased Assessment Rates**

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

**ACTION:** Proposed rule.

**SUMMARY:** This rule would increase the assessment rate for cherries that are utilized in the production of tart cherry products other than juice, juice concentrate, or puree from \$0.00175 to \$0.0021 per pound. It also would increase the assessment rate for cherries utilized for juice, juice concentrate, or puree from \$0.000875 to \$0.00105 per pound. Both assessment rates were recommended by the Cherry Industry Administrative Board (Board) under Marketing Order No. 930 for the 2002-2003 and subsequent fiscal periods. The Board is responsible for local administration of the marketing order which regulates the handling of tart

cherries grown in the production area. Authorization to assess tart cherry handlers enables the Board to incur expenses that are reasonable and necessary to administer the program. The fiscal period will begin July 1, 2002, and end June 30, 2003. The assessment rates would remain in effect indefinitely unless modified, suspended, or terminated.

**DATES:** Comments must be received by July 10, 2002.

**ADDRESSES:** Interested persons are invited to submit written comments concerning this action. Comments must be sent to the Docket Clerk, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW STOP 0237, Washington, DC 20250-0237; Fax: (202) 720-8938, or e-mail:

*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 or can be viewed at: <http://www.ams/usda.gov/fv/moab.html>.

**FOR FURTHER INFORMATION CONTACT:**

Patricia A. Petrella or Kenneth G. Johnson, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, Suite 2A04, Unit 155, 4700 River Road, Riverdale, MD 20737, telephone: (301) 734-5243, or Fax: (301) 734-5275; or George Kelhart, Technical Advisor, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW STOP 0237, Washington, DC 20250-0237; telephone: (202) 720-2491, or Fax: (202) 720-8938.

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW STOP 0237, Washington, DC 20250-0237; telephone: (202) 720-2491, Fax: (202) 720-8938, or e-mail: *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." 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 (USDA) 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 rates as issued herein would be applicable to all assessable tart cherries beginning July 1, 2002, and continue 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 USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This rule would increase the assessment rate established for the Board for the 2002-2003 and subsequent fiscal periods for cherries that are utilized in the production of tart cherry products other than juice, juice concentrate, or puree from \$0.00175 to \$0.0021 per pound of cherries. The assessment rate for cherries utilized for juice, juice concentrate, or puree would be increased from \$0.000875 to \$0.00105 per pound.

The tart cherry marketing order provides authority for the Board, with the approval of USDA, to formulate an annual budget of expenses and collect assessments from handlers to administer the program. The members of the Board are producers and handlers of tart cherries. They are familiar with the Board's needs and with the costs for goods and services in their local area and are thus in a position to formulate an appropriate budget and assessment rates. The assessment rates are formulated and discussed in a public meeting. Thus, all directly affected