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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 930

[Docket No. FV03-930-3 FR]

#### Tart Cherries Grown in the States of Michigan, et al.; Increased Assessment Rate

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

**ACTION:** Final rule.

**SUMMARY:** This final rule increases the assessment rate for tart cherries that are utilized in the production of tart cherry products from \$0.0019 to \$0.0021 per pound. The assessment rate was recommended by the Cherry Industry Administrative Board (Board) under Marketing Order No. 930 for the 2003-2004 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 began July 1 and ends June 30. The assessment rate will remain in effect indefinitely unless modified, suspended, or terminated.

**EFFECTIVE DATE:** This final rule becomes effective October 6, 2003.

**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](mailto:Jay.Guerber@usda.gov).

**SUPPLEMENTARY INFORMATION:** This final 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 final 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, 2003, 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 final rule increases the assessment rate established for the Board for the 2003-2004 and subsequent fiscal periods for cherries that are utilized in the production of tart cherry products from \$0.0019 to \$0.0021 per pound of cherries.

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 rate. The assessment rate is formulated and discussed in a public meeting. Thus, all directly affected persons have an opportunity to participate and provide input.

For the 2002-2003 fiscal period, the Board recommended, and the Department approved, an assessment rate that would continue in effect from fiscal period to fiscal period unless modified, suspended, or terminated by the USDA upon recommendation and information submitted by the Board or other information available to USDA.

Section 930.42(a) of the order authorizes a reserve sufficient to cover one year's operating expenses. The increased rate is expected to generate enough income to meet the Board's operating expenses in 2003-2004.

The Board met on January 23, 2003, and unanimously recommended 2003-2004 expenditures of \$532,000. The industry completed a formal rulemaking proceeding which amended the assessment rate section by authorizing one assessment rate rather than two assessment rates for different tart cherry products [67 FR 51697]. The provisions requiring the establishment of different assessment rates for different products were removed. In their place, the Board is required to consider the volume of cherries used in making various products and the relative market value of those products in deciding whether the assessment rate should be a single, uniform rate applicable to all cherries or

whether varying rates should be recommended for cherries manufactured into different products.

In addition, the amended order provides that the assessment rate not apply to cherries diverted in orchard by growers, and those diverted by handlers through destruction at their plants. The Board recommended the amendment to allow them to establish one assessment rate for all tart cherry products handled. In making its recommendation, the Board stated that while a two-tiered assessment rate scheme may be appropriate in some years, it may not be in others due to the fact that the absolute and relative market values of various tart cherry products fluctuate from year to year.

The amended order specifically provides that under section 930.41(f)(1) and (2) the established assessment rate may be uniform, or may vary depending on the product the cherries are used to manufacture. The Board must consider the differences in the number of pounds of cherries utilized for various cherry products and the relative market values of such cherry products.

On June 25, 2003 (68 FR 37726), a final rule was published in the **Federal Register** that established a single assessment rate for the 2002–2003 fiscal period for all tart cherries handled regardless of the product the cherries are used to manufacture. The Board determined that the markets for juice, juice concentrate, and puree were gaining in importance and that cherries used in such products should be assessed the same as those sold for use in assorted bakery items, as canned pie fill and as dried cherries.

The Board considered the above items and decided that one assessment rate should be recommended for all cherry products during 2003–2004. According to the Board, processors have developed a strong market for juice and concentrate products over the past few years. There is considerable belief that juice will be one of the growth outlets for tart cherries. This derives from the industry's promotional efforts being undertaken for juice and concentrate products, the segmentation of the market into retail and industrial components, and the nutritional/nutraceutical profile of the product. As a result, there has been an increase in consumer recognition, acceptance, purchases, and the value of tart cherry juice and concentrate. According to the Board, prices received for tart cherry juice concentrate are now \$25.00 per gallon or more. This is derived by using the fairly common conversion ratio of 100 pounds to the gallon for mid-west production, which has a raw product

value of \$0.25 per pound. Using a 50 gallon conversion for the product, as has been seen on the west coast, this represents a per pound value of \$0.50. The difference in the west and mid-west conversion factors is that tart cherries produced in the western United States generally have a higher sugar content and larger fruit size, thus fewer raw product is needed. The average grower price received ranges between \$0.17 to \$0.20 per pound.

According to the Board, puree products are as valuable and comparable to juice and juice concentrate products. The Board reported that the spot price for single strength puree for 2001 was about 60 cents per pound. The raw product equivalent (RPE) volume of pureed fruit was 539,504 pounds which is about 0.15 percent of all processed fruit. The Board also reported for 2001 that the price for five plus one product was 67 cents per pound. Five plus one is a product of cherries and sugar which is manufactured by many processors (25 pounds of cherries and 5 pounds of sugar to make a 30 pound commercial container). It is the main product that handlers produce. Five plus one cherries are primarily sold and remanufactured into assorted bakery items, canned pie fill, and dried cherries. Since juice, juice concentrate, and puree are not considered to be low value products at this time, the Board considers one assessment to be appropriate. It is important to understand that product is moved around between production areas and may be converted into puree or concentrate at a later date. The market drives the processing of these various products each season.

In comparing the costs of juice, juice concentrate, and puree, the Board has determined that current prices are similar for these products when compared to the 5 plus 1 product. The information received from the Board indicates that puree products are becoming a viable market and should be assessed at a higher assessment rate.

As a result of last season's short crop, much of the tart cherry products released from inventory were in the form of tart cherry juice and/or juice concentrate. There is not much, if any, of this product that is available on the market today. The Board contends that given these factors, it is hard to suggest that juice/concentrate, or puree, are of lesser value than are the more traditional products such as pie-fill or individually quick frozen tart cherries. Thus, the Board determined that one assessment rate is appropriate for the 2003–04 fiscal period.

Budgeted expenditures for the 2003–04 fiscal period were unanimously recommended at \$532,000. The major expenditures recommended by the Board for the 2003–2004 fiscal period include \$81,000 for meetings, \$149,000 for compliance, \$191,000 for personnel, \$106,000 for office expenses, and \$5,000 for industry educational efforts. Budgeted expenses for those items in 2002–2003 were \$85,000 for meetings, \$170,000 for compliance, \$185,000 for personnel, \$80,000 for office expenses, and \$2,500 for industry educational efforts, respectively. In comparison, last year's budgeted expenditures were \$522,500. Last season, the tart cherry industry experienced a significant frost mainly in Michigan which severely impacted the crop. Only 60 million pounds of cherries were produced in comparison to a normal crop of about 260 million pounds. The Board staff has responded to this decrease in funds by cutting its expenditures. The Board reduced its staff and Committee travel for meetings and used reserve funds to continue administrative operations in 2002–2003.

The recommended assessment rate of \$0.0021 is higher than the current rate of \$0.0019 per pound. The Board recommended an increased assessment rate to generate larger revenue to meet its expenses and keep its reserves at an acceptable level. In deriving the recommended assessment rate in January, the Board estimated assessable tart cherry production for the fiscal period at 260 million pounds. However, actual production was 222 million pounds. Therefore, total assessment income for 2003–2004 based on actual production of 222 million pounds is \$466,200. This amount plus adequate funds in the reserve and interest income will be adequate to cover budgeted expenses. Funds in the reserve (approximately \$66,000) will be kept within the approximately six months' operating expenses as recommended by the Board consistent with section 930.42(a).

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

Although the assessment rate is 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 rate. The dates and times of Board meetings are available from the Board or the USDA. Board meetings are

open to the public and interested persons may express their views at these meetings. USDA will evaluate Board recommendations and other available information to determine whether modifications of the assessment rate is needed. Further rulemaking will be undertaken as necessary. The Board's 2003–2004 budget and those for subsequent fiscal periods would be reviewed and, as appropriate, approved by the USDA.

### 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) allows 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's Fruit and Vegetable Programs (Programs) no longer opts for such certification, but rather performs 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 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 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 have been defined by the Small Business Administration (13 CFR 121.201) as those having annual receipts less than \$5,000,000, and small agricultural producers are those whose annual receipts are less than \$750,000. A majority of the tart cherry handlers and producers may be classified as small entities.

The Board unanimously recommended 2003–2004 expenditures of \$532,000 and an assessment rate increase from \$0.0019 to \$0.0021 per pound. This rule increases the

assessment rate established for the Board and collected from handlers for the 2003–2004 and subsequent fiscal periods for cherries that are utilized in the production of tart cherry products. The quantity of assessable tart cherries produced during the 2003–2004 crop year is 222 million pounds. Assessment income, based on this crop, along with interest income and reserves, would be adequate to cover budgeted expenses.

The major expenditures recommended by the Board for the 2003–2004 fiscal period include \$81,000 for meetings, \$149,000 for compliance, \$191,000 for personnel, \$106,000 for office expenses, and \$5,000 for industry educational efforts. Budgeted expenses for those items in 2002–2003 were \$85,000 for meetings, \$170,000 for compliance, \$185,000 for personnel, \$80,000 for office expenses, and \$2,500 for industry educational efforts, respectively.

The Board discussed the alternative of continuing the existing assessment rate, but concluded that would cause the amount in the operating reserve to be reduced to an unacceptable level.

The principal demand for tart cherries is in the form of processed products. Tart cherries are dried, frozen, canned, juiced, and pureed. Data from the National Agricultural Statistics Service (NASS) states that during the period 1995/96 through 2002/03, approximately 92 percent of the U.S. tart cherry crop, or 285.7 million pounds, was processed annually. Of the 285.7 million pounds of tart cherries processed, 58 percent was frozen, 30 percent was canned, and 12 percent was utilized for juice.

Based on NASS data, acreage in the United States devoted to tart cherry production has been trending downward. Since 1987/88 tart cherry bearing acres have decreased from 50,050 acres, to 36,900 acres in the 2002/03 crop year. In 2002/03, 93 percent of domestic tart cherry acreage was located in four States: Michigan, New York, Utah, and Wisconsin. Michigan leads the nation in tart cherry acreage with 74 percent of the total. Michigan produces about 75 percent of the U.S. tart cherry crop each year. Tart cherry acreage in Michigan decreased from 28,500 acres in 2000–2001, to 27,400 acres in 2002–2003.

In deriving the recommended assessment rate, the Board estimated assessable tart cherry production for the fiscal period at 260 million pounds. However, actual 2003–2004 production is approximately 222 million pounds. Cherries used for handler destruction and grower diversion outlets are exempt from assessment obligations. Funds in

the reserve (approximately \$66,000) will be kept within the approximately six months' operational expenses as recommended by the Board which would be consistent with the order (§ 930.42(a)).

While this action will impose additional costs on handlers, the costs are in the form of assessments which are applied uniformly. Some of the costs may also be passed on to producers. However, these costs are offset by the benefits derived from the operation of the marketing order. 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 23, 2003, meeting was a public meeting and all entities, both large and small, were able to express views on this issue. Finally, interested persons were invited to submit information on the regulatory and informational impacts of this action on small businesses.

This action will impose no 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.

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

A proposed rule concerning this action was published in the **Federal Register** on July 25, 2003 (68 FR 43978). Copies of the rule were mailed and sent via facsimile to all Board members and cherry handlers. Finally, the rule was made available through the Internet by the Office of the Federal Register and USDA. A 30-day comment period ending August 25, 2003, was provided to allow interested persons to respond to the proposal.

One comment was received from Mr. Perry Hedin, Executive Director of the Board. He commented that the Board is in support of the proposed rule but he wanted to make one clarification. The terms of the order allow the Board to maintain one year's operational expenses as a reserve. The Board policy, however, intends to maintain cash reserves equal to one half of one year's operational budget. The Board's increase in the assessment rate this year was intended to replenish the cash reserves depleted when the crop was extremely short in 2002. The commenter stated that the Board should be able to rebuild some of the intended cash reserves under the current assessment,

but it is as yet unknown if reserves will be fully replenished this season.

Accordingly, no changes will be made to the rule based on the comment received.

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

After consideration of all relevant matters 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.

It is further found that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** (5 U.S.C. 553) because the 2003–2004 fiscal period began on July 1, 2003, and ends on June 30, 2004, and the marketing order requires that the rate of assessment for each fiscal period apply to all assessable tart cherries handled during such fiscal period. Further, handlers are aware of this action which was unanimously recommended by the Board at a public meeting. Also, a 30-day comment period was provided in the proposed 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. Section 930.200 is revised to read as follows:

#### **§ 930.200 Handler assessment rate.**

On and after July 1, 2003, the assessment rate imposed on handlers shall be \$0.0021 per pound of cherries handled for tart cherries grown in the production area and utilized in the production of tart cherry products.

Dated: September 29, 2003.

**A.J. Yates,**

*Administrator, Agricultural Marketing Service.*

[FR Doc. 03–25110 Filed 10–2–03; 8:45 am]

**BILLING CODE 3410–02–P**

## **DEPARTMENT OF AGRICULTURE**

### **Agricultural Marketing Service**

#### **7 CFR Part 956**

[Docket No. FV03–956–1 FR]

#### **Sweet Onions Grown in the Walla Walla Valley of Southeast Washington and Northeast Oregon; Fiscal Period Change**

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

**ACTION:** Final rule.

**SUMMARY:** This rule changes the fiscal period under the Walla Walla sweet onion marketing order from June 1 through May 31 to January 1 through December 31. This rule was recommended by the Walla Walla Sweet Onion Marketing Committee (Committee), the agency responsible for local administration of the marketing order regulating the handling of sweet onions grown in the Walla Walla Valley of Southeast Washington and Northeast Oregon. The June 1 through May 31 fiscal period has been in place since the marketing order's inception in 1995. Due to the advance planning needed for market promotion, including paid advertising, it has been the practice of the Committee to develop its budget of expenditures prior to the start of each fiscal period, but delay the actual expenditure of funds until after June 1. This made it more difficult for the Committee to coordinate the timing of marketing promotion activities with the short harvest and marketing season for Walla Walla sweet onions. This fiscal period change is expected to help the Committee better coordinate its marketing promotion activities with the marketing season—mid-June into September.

**EFFECTIVE DATE:** This final rule becomes effective January 1, 2004.

**FOR FURTHER INFORMATION CONTACT:** Barry M. Broadbent, Northwest Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1220 SW Third Avenue, Suite 385, Portland, Oregon 97204–2807; Telephone: (503) 326–2724, Fax: (503) 326–7440, or E-mail: [Barry.Broadbent@usda.gov](mailto:Barry.Broadbent@usda.gov); 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, Fax: (202) 720–8938.

Small business 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](mailto:Jay.Guerber@usda.gov).

**SUPPLEMENTARY INFORMATION:** This final rule is issued under Marketing Agreement and Order No. 956, both as amended (7 CFR part 956), regulating the handling of Walla Walla sweet onions grown in Southeast Washington and Northeast Oregon, hereinafter referred to as the “order.” The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the “Act.”

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

This final 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 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 the date of the entry of the ruling.

This final rule changes the fiscal period from June 1 through May 31 to January 1 through December 31. This rule also makes conforming changes to the order's administrative rules and regulations. This change was