

# Rules and Regulations

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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 930

[Docket No. FV03-930-5-IFR]

#### Tart Cherries Grown in the States of Michigan, et al.; Revision of Current Procedures for Handlers To Receive Exempt Use/Diversion Credit for New Product and New Market Development Activities

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

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

**SUMMARY:** This rule provides more specific criteria to help handlers take better advantage of exempt use/diversion credit activities in meeting volume regulation requirements, and to help the Cherry Industry Administrative Board (Board) better assess the validity of handler requests for such diversion credit. It also clarifies the current definitions of "new product development" and "new market development" activities eligible for diversion credit, includes "market expansion" activities in the definition of "new market development," and specifies what a handler has to do to become "involved" in an authorized activity to obtain diversion credit. This rule also specifies an industry-wide limit for market expansion activities totaling 10 million pounds per crop year. These changes were recommended by the Board, which locally administers the Federal marketing order for tart cherries grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin. Finally, a conforming change to the rules and regulations is made to recognize that cherry juice and juice concentrate products marketed domestically now are eligible for

diversion credit. Prior to a formal rulemaking amendment completed in 2002, only exports of such products earned diversion credits.

**DATES:** Effective date: June 23, 2004. Comments must be received by August 23, 2004.

**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](mailto:moabdocket.clerk@usda.gov) or Internet: <http://www.regulations.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](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." 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. 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 revises the current procedures for handlers to receive exempt use/diversion credit in meeting their volume regulation obligations as follows: (1) It provides more specific criteria to help handlers take better advantage of exempt use/diversion credit activities and to help the Board better assess the validity of handler requests for diversion credit; (2) It clarifies the current definitions of "new product development" and "new market development" activities eligible for diversion credit, and adds "market expansion" to the definition of "new market development"; (3) It also specifies an industry-wide limit for market expansion activities totaling 10 million pounds per crop year. This limitation reflects the Board's concern that these activities should be developed gradually. The limitation would be allocated on a pro rata basis among the handlers who requested diversion credit for market expansion activities and were approved by the Board; and (4) Handlers requesting

diversion credit under these provisions would have to provide evidence to the Board that they have been actively involved in the development of the new product, new market, or market expansion activity, or have financially supported the development efforts. This is to assure that the handlers initiating such efforts are the ones who earn the resulting diversion credits.

Handler diversion is authorized under § 930.59 of the order and, when volume regulation is in effect, handlers may fulfill restricted percentage requirements by diverting cherries or cherry products rather than placing tart cherries in an inventory reserve.

Volume regulation is intended to help the tart cherry industry stabilize supplies and prices in years of excess production. The volume regulation provisions of the order provide for a combination of processor owned inventory reserves and grower or handler diversion of excess tart cherries. Reserve cherries may be released for sale into commercial outlets when the current crop is not expected to fill demand. Under certain circumstances, such cherries may also be used for charity, experimental purposes, nonhuman use, and other approved purposes.

Section 930.59(b) of the order provides for the designation of allowable forms of handler diversion. These include: uses exempt under § 930.62; contribution to a Board approved food bank or other approved charitable organization; acquisition of grower diversion certificates that have been issued in accordance with § 930.58; or other uses, including diversion by destruction of the cherries at the handler's facilities. Section 930.62 provides that the Board, with the approval of the Secretary, may exempt from the provisions of §§ 930.41 (Assessments), 930.44 (Quality control), 930.51 (Issuance of volume regulations), 930.53 (Modification, suspension, or termination of regulations), and 930.55 through 930.57 (Reserve regulations) cherries which are diverted in accordance with § 930.59, which are used for new product and new market development, which are used for experimental purposes, or which are used for any other purpose designated by the Board, including cherries processed into products for markets for which less than 5 percent of the preceding 5-year average production of cherries were utilized.

When applying to the Board to receive exemptions for cherries or cherry products used for exempt purposes, the handler must detail the nature of the product or market, how it differs from

the current, existing products and/or markets, and the estimated short and long term sales volume for the exemption. In addition, in order to obtain diversion credit for cherries used for exempt purposes, the application must also contain an agreement that the proposed exempt use diversion is to be carried out under the supervision of the Board, and that the cost of any such supervision that is needed is paid by the applicant. The fees for such USDA or Board supervision as previously stated, will be the current hourly rate of \$41.00, which is subject to change, under USDA's inspection fee schedule (7 CFR 54.42).

The information which is provided allows the Board to assess the request for exemption and render a determination concerning its approval or disapproval. Any information received by the Board which is of a confidential and/or proprietary nature is protected from disclosure pursuant to § 930.73 of the order.

Each handler that is granted an exemption must submit to the Board an annual progress report, due May 1 of each year. The progress report shall include the results of the exemption activity (comparison of intended activity with actual activity) for the year in its entirety, the volume of exempted fruit, an analysis of the success of the exemption program, and such other information the Board may request.

For the purposes of regulation concerning exempt uses and diversion credit, assisting handlers in obtaining exempt use/diversion credit under § 930.162, and assisting the Board in properly administering these provisions, the terms "new product development", "new market development", "development of export markets", and "experimental purposes" are defined.

Currently, "new product development" is defined as the production or processing of new tart cherry products or foods or other products in which tart cherries or tart cherry products are incorporated which are not presently being produced on a commercial basis. New product development can also include the production or processing of a tart cherry product using a technique not presently being utilized commercially in the tart cherry industry. For example, a handler may ask for an exemption for a product such as ground meat in combination with raw tart cherries to form a leaner meat product. When a new product is commercially viable, which is defined as the time when total industry utilization for the product exceeds 2 percent of the 5-year average production of tart cherries, the product is no longer

eligible for a new product development exemption and diversion credit.

"New market development" means the development of markets for cherry products which are not commercially established markets and which are not competitive with commercial outlets presently utilized by the tart cherry industry (including the development of new export markets). For example, a handler may seek to establish sales of cherry preserves to India or China, currently undeveloped markets. New markets become commercially established when the total industry utilization in the market exceeds 2 percent of the 5-year average production of tart cherries. When the new markets become commercially viable they are no longer eligible as an exempt use outlet or diversion credit.

"Development of export markets" is defined as the sale of cherries or cherry products, including the development of sales for new or different tart cherry products or the expansion of sales for existing tart cherry products, to countries other than Canada and Mexico. An example of development of sales for new or different tart cherry products could be a handler seeking to establish sales of dried cherries in Germany, which is primarily a hot pack market (canned tart cherries). No quantity limitations are specified for development of export markets. The Board did not want to put any constraints on handlers seeking to establish export markets. Moreover, the optimum supply formula which is used by the Board to calculate the desirable volume of tart cherries that should be available for sale does not apply to product that can be diverted or used in exempt outlets. Thus, the Board felt that handlers in meeting their restricted percentage obligations during volume regulation seasons, should be free to move exempted/diverted cherries to export markets without constraints.

"Experimental purposes" is defined as the use of cherries or cherry products in preliminary and/or developmental activities intended to result in new products, new applications and/or new markets for tart cherry products, such as a handler working with cereal companies to develop a cereal using dried cherries. Any exemption for experimental work must be limited in scope, duration, and volume based on information supplied by the applicant at the time a request for exemption is made. In no case, shall an individual exemption for experimental purposes last longer than 5 years or exceed 100,000 pounds raw product equivalent of tart cherries.

To improve the administration of the exempt use/diversion credit procedures, the Board believes that the current definitions of what constitutes new product development and new market development should be clarified, and that a new definition for market expansion should be included in the definition of "new market development" in § 930.162(b). It also recommended that an industry-wide limit for market expansion activities be established totaling 10 million pounds per crop year to be allocated pro rata among the approved handler applicants. Under the recommended procedures, handlers applying for exempt use/diversion credit would have to provide the Board evidence that they have been actively involved in the development of the new product, new market, or market expansion activities, or have financially supported the development efforts. A definition of the term "involvement" has been added to the provisions specifying these conditions in § 930.162(c)(5).

The Board believes that these changes will provide handlers better guidance in making marketing decisions and in earning exempt use/diversion credits, and help the Board in assessing handler applications and in determining when handlers have satisfactorily accomplished diversion and rightfully earned credits against their restricted percentage obligations during a crop year with volume regulation percentages. No changes were recommended in the definitions of the terms "development of export markets" or "experimental purposes".

These issues were discussed at the Board's January 2003 meeting, they were then reconsidered at an April 2003 meeting, and a final recommendation was reached at the Board's June 26, 2003, meeting.

There have been differences of opinion between industry members and the Board concerning the existing provisions. The Board developed the recommended changes to provide handlers with clearer and more detailed guidelines to help them better understand the procedures when applying for such credits, and to provide the Board members on the New Product/New Market (NPNM) subcommittee with more specific guidance on granting and denying applications for such diversion credits.

The Board believes that it is important to expand the demand for tart cherries to better keep supplies in line with market needs. To accomplish this, the Board thinks that the development of new markets and products and that the expansion of current markets for tart

cherries and tart cherry products should be encouraged to the fullest extent possible. The changes to the exempt use/diversion credit procedures made by this rule are expected to help the tart cherry industry further the Board's objectives and help producers and handlers accordingly.

This rule specifies a revised definition for "new product development," "new market development," adds the concept of "market expansion" to the definition of "new market development," and adds a new condition of participation in obtaining exempt use/diversion credit for new product development, new market development, and market expansion referred to as "involvement".

As previously stated, "new product development" is currently defined as the production or processing of new tart cherry products or foods or other products in which tart cherries or tart cherry products are incorporated which are not presently being produced on a commercial basis. New product development can also include the production or processing of a tart cherry product using a technique not presently being utilized commercially in the tart cherry industry. Once total industry utilization for the product exceeds 2 percent of the 5-year average production of tart cherries, the product will no longer be eligible for a new product development exemption.

This action adds to the current definition of "new product development" the following clarification: (1) New product development can also include an end product of the processing of raw tart cherries created by handlers at pack time either for resale or for re-manufacturing which has not previously been manufactured by handlers in the industry (for example, dried tart cherries (dehydrated) were marketed as a new product after first undergoing processing as a five plus one product (25 pounds of cherries topped with 5 pounds of sugar)); or (2) a processed, value-added, item that includes tart cherry products as an ingredient which has never been marketed to consumers either by a handler within the industry or by a food manufacturer. For example, during the 2002-03 crop year, a new cookie with a tart cherry filling was sold in retail markets for the first time.

As previously mentioned, language within § 930.162(b)(1) provides a volume limit of 2 percent of the five year average of production of tart cherries. Once this total industry utilization for a new product exceeds this amount, the product is no longer considered under development and is not eligible for a new product

development exemption and diversion credit. This limitation remains the same. However, an additional limitation recommended by the Board for new product and new market development is added to limit the duration of any diversion credit to three years from the first date of shipment of the new product. The Board believes that limiting the eligibility of the exemption for 3 years from the first date of shipment of the new product provides a handler time to adequately develop the market for the product. After 3 years, regardless whether markets have been developed for the new product or not, the product will no longer qualify for an exemption and diversion credit.

Adding such references and volume limitations to the current definition of "new product development" will clarify what new product activities can qualify for exempt use/diversion credit and how long such credit can be obtained by the handler once the Board approves the handler's application and sales and shipments of the product are made.

Under the order, "new market development" is defined as the development of markets for tart cherry products which are not commercially established markets and which are not competitive with commercial outlets presently utilized by the tart cherry industry (including the development of new export markets). For instance, a handler who developed a new market for tart cherries that is also an export market would get credit for either the new market development or development of the export market but could not get credit for both. A new market becomes commercially established, when total industry utilization in the market exceeds 2 percent of the five year average production of tart cherries, and is not eligible for exempt use/diversion credit.

This action also clarifies the current definition of "new market development" by adding to that definition a proviso that "new market development" should be a geographic area into which tart cherries or products derived from them have not previously been sold. Included within the revised "new market development" definition are "market expansion activities", which are defined as activities that incrementally expand the sale of either tart cherries or the products in which tart cherries are an ingredient. Such activities include, but are not limited to: (1) Expansions of the geographic areas in which products are marketed; (2) product line extensions; (3) significant improvements to or revisions of existing products; (4) packaging innovations; (5) segmentation of markets along

geographic, demographic, or other definable characteristics; and (6) product repositionings.

Examples of these activities follow: (1) Expansions of the geographic areas in which products are marketed would include shipping tart cherries to the Ukraine and then on to Uzbekistan; (2) product line extensions would include taking tart cherry pie and making it an apple-cherry-berry pie fill; (3) significant improvements to or revisions of existing products would include using non-sugar sweeteners or reduced sugar content to processed tart cherry products; (4) packaging innovations would include using square containers instead of round 2.5 pound poly bags; (5) an example of segmentation of markets along geographic, demographic, or other definable characteristics would include tart cherry juice concentrate marketed specifically to consumers who suffer with arthritis or gout; and (6) product repositionings would mean that retailers would move pie-fill out of the dessert category to be used as a topping. These examples are intended to provide guidance of potential marketing opportunities and not to limit the marketing creativity of the handlers in the tart cherry industry.

To earn new market development or new product development exempt use/diversion credits for cherries or cherry products a handler must demonstrate involvement in the activity for which credits are sought. To demonstrate involvement, for the purpose of earning market development or new product development diversion credits, the requesting handler must either (1) be or have been involved in development of the product or the market for which the credits are sought or (2) have had financial involvement in these processes. This involvement must be demonstrated and established to the satisfaction of the NPNM subcommittee by the handler requesting the diversion credits.

This action also makes a conforming change to § 930.162(a) to be consistent with a formal rulemaking order amendment completed in 2002. Language within § 930.162(a) states, in summary, that tart cherry juice and juice concentrate products are not eligible for exempt use/diversion credit in domestic markets but such products for export can receive exempt use/diversion credit. This language is no longer correct because juice and juice concentrate shipped into domestic markets can now receive exempt use/diversion credit as provided by the 2002 order amendment.

### **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) 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' 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.

Pursuant to a unanimous recommendation of the Board, this rule specifies a revised definition for "new product development," "new market development," adds the concept of "market expansion" to the definition of "new market development," adds a new condition of handler participation in obtaining exempt use/diversion credit for new product development, new market development, and market expansion referred to as "involvement", and specifies an industry-wide limit on market expansion activities for exempt use/diversion credit.

The rule provides more specific criteria to help handlers take better

advantage of exempt use/diversion credit activities and to help the Board better assess the validity of handler requests for diversion credit. It clarifies the current definitions of "new product development" and "new market development" activities eligible for diversion credit, and adds "market expansion" to the definition of "new market development". It also specifies an industry-wide limit for market expansion activities totaling 10 million pounds per crop year. This limitation reflects the Board's concern that these activities should be developed gradually. The limitation would be allocated on a pro rata basis among the handlers who requested diversion credit for market expansion activities and were approved by the Board. Handlers requesting exempt use/diversion credit under these provisions would have to provide evidence to the Board that they have been actively involved in the development of the new product, new market, or market expansion activity, or have financially supported the development efforts. This is to assure that the handlers initiating such efforts are the ones earning the diversion credits.

With regard to alternatives, the Board discussed leaving the exempt use/diversion credit procedures unchanged. However, the Board determined that this course of action would not be satisfactory and recommended adding specific guidelines for consideration when reviewing handler applications for exempt use/diversion credit activities.

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 1998/99 through 2002/03, approximately 91 percent of the U.S. tart cherry crop, or 240.6 million pounds, was processed annually. Of the 240.6 million pounds of tart cherries processed, 55 percent was frozen, 30 percent was canned, and 15 percent was utilized for juice and other products.

Based on National Agricultural Statistics Service data, acreage in the United States devoted to tart cherry production has been trending downward. Bearing acreage has declined from a high of 50,050 acres in 1987/88 to 36,900 acres in 2002/03. This represents a 26 percent decrease in total bearing acres. Michigan leads the nation in tart cherry acreage with 70 percent of the total and produces about 75 percent of the U.S. tart cherry crop each year.

The 2003/04 crop is moderate in size at 222.1 million pounds. The largest crop occurred in 1995 with production in the regulated districts reaching a

record 395.6 million pounds. The price per pound received by tart cherry growers ranged from a low of 7.3 cents in 1987 to a high of 46.4 cents in 1991.

This action will not impose additional costs on handlers, regardless of size, because the changes are intended to clarify and improve the Board's current procedures on approving exempt use/diversion credit requests. The recommended changes are intended to assure that all exempt use/diversion credit requests are handled in a more consistent and equitable manner.

The Board's meetings were 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, April 24, and June 26, 2003, meetings were public meetings and all entities, both large and small, were able to express views on this issue. Finally, interested persons are 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.

This rule invites comments on the revision of the current procedures for tart cherry handlers to receive exempt use/diversion credit for new product development, new market development, and market expansion activities under the Federal marketing order for tart cherries.

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 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 60 days after publication in the **Federal Register** because: (1) This rule revises current rules and regulations to provide clearer procedures for handlers and the Board to follow in making exempt use/diversion credit decisions; (2) volume regulations are in place for the 2003-04 season and this rule should be effective as soon as possible; (3) the Board recommended this change 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. Section 930.162 is amended by:

- A. Revising paragraph (a);
- B. Revising paragraphs (b)(1) and (b)(2); and
- C. Adding a new paragraph (c)(5) to read as follows:

#### **§ 930.162 Exemptions.**

(a) *General.* Tart cherries which are used for the purpose of new product development, for new market development and market expansion, for the development of export markets, for experimental purposes, for export to countries other than Canada, and Mexico, or which are donated to charitable organizations may be granted an exemption by the Board and will be exempt from §§ 930.41, 930.44, 930.51, 930.53, and §§ 930.55 through 930.57, subject to the following terms and conditions. Any information received of a confidential and/or proprietary nature included in this application will be protected from disclosure pursuant to § 930.73 of the order.

(b) \* \* \*

(1) *New product development.* This term includes the development of new tart cherry products or of foods or other products in which tart cherries or tart cherry products are incorporated which

are not presently being produced on a commercial basis. New product development can also include the production or processing of a tart cherry product using a technique not presently being utilized commercially in the tart cherry industry; an end product of the processing of raw tart cherries done by the industry at pack time either for resale or for re-manufacturing which has not been manufactured previously by the industry; or a processed, value-added item that includes tart cherry products as an ingredient which has never been marketed to consumers either by a handler within the industry or by a food manufacturer. Once total industry utilization for a new product exceeds 2 percent of the five year average production of tart cherries, the product shall no longer be considered under development and not eligible for a new product development exemption. In addition, the maximum duration of any credit activity is three years from the first date of shipment.

(2) *New market development and market expansion.* This term includes the development of markets for tart cherry products which are not commercially established markets and which are not competitive with commercial outlets presently utilized by the tart cherry industry (including the development of new export markets): *Provided*, That these markets are a geographic area into which tart cherries or products derived from them have not previously been sold. The term "market expansion", includes activities that incrementally expand the sale of either tart cherries or the products in which tart cherries are an ingredient, such as, but not be limited to: Expansions of the geographic areas into which tart cherries or tart cherry products are marketed; product line extensions; significant improvements to or revisions of existing products; packaging innovations; segmentation of markets along geographic, demographic, or other definable characteristics; and product repositionings. There is an annual, industry-wide maximum diversion credit volume of ten million RPE pounds (Raw Product Equivalent pounds) of cherry products for all expansion activities which will be allocated pro rata among participating handlers.

\* \* \* \* \*

(c) \* \* \*

(5) To be eligible for new product, new market development and market expansion diversion exemptions, a handler must demonstrate involvement in the activity for which the exemptions are sought. The requesting handler must

either be or have been involved in development of the product, the market, or market expansion activities for which the exemptions are sought or have had financial involvement in the activities. This involvement must be demonstrated and established to the satisfaction of the Board by the handler requesting the exemptions.

Dated: June 16, 2004.

**A.J. Yates,**

*Administrator, Agricultural Marketing Service.*

[FR Doc. 04-14062 Filed 6-21-04; 8:45 am]

**BILLING CODE 3410-02-P**

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 1033

[Docket No. AO-361-A35; DA-01-04]

#### Milk in the Mideast Marketing Area: Order Amending the Order

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

**ACTION:** Final rule.

**SUMMARY:** This document adopts as a final rule, with changes, an interim final rule concerning pooling provisions of the Mideast Federal milk order. More than the required number of producers in the Mideast marketing area have approved the issuance of the final order amendments. Conforming changes are made to clarify references to order provision paragraphs.

**EFFECTIVE DATE:** July 1, 2004.

**FOR FURTHER INFORMATION CONTACT:**

Gino Tosi, Marketing Specialist, USDA/AMS/Dairy Programs, Order Formulation and Enforcement Branch, Stop 0231—Room 2971, 1400 Independence Avenue, SW., Washington, DC 20250-0231, (202) 690-1366, e-mail: [gino.tosi@usda.gov](mailto:gino.tosi@usda.gov).

**SUPPLEMENTARY INFORMATION:** This document adopts as a final rule, with changes, an interim final rule, concerning pooling provisions of the Mideast Federal milk order. Specifically, this final rule continues to amend the *Pool plant* provisions which: Eliminate automatic pool plant status for the 6-month period of March through August, eliminate milk shipments to a distributing plant regulated by another Federal milk order as pool-qualifying shipments under the Mideast order, eliminate the “split plant” feature, eliminate including diversions made by a pool supply plant located outside the marketing area to a second pool plant, and establish a “net

shipments” provision for pool supply plants not operated by a cooperative. For the *Producer milk* provisions, this final rule continues amendments which: Seasonally adjust and increase the number of days that the milk of a producer needs to be delivered to a pool plant and establish year-round diversion limits, adjusted seasonally, for producer milk for handlers pooled under the Mideast order.

This administrative rule 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.

This final rule have been reviewed under the 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 the rule.

The Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), 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 request modification or exemption from such order by filing with the Department of Agriculture (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 the law. A handler is afforded the opportunity for a hearing on the petition. After a hearing, the Department 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 its principal place of business, has jurisdiction in equity to review the Department's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

#### Regulatory Flexibility Act and Paperwork Reduction Act

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Agricultural Marketing Service has considered the economic impact of this action on small entities and has certified that this rule will not have a significant economic impact on a substantial number of small entities. For the purpose of the Regulatory Flexibility Act, a dairy farm is considered a “small business” if it has an annual gross revenue of less than \$750,000, and a dairy products manufacturer is a “small business” if it has fewer than 500 employees.

For the purposes of determining which dairy farms are “small businesses,” the \$750,000 per year criterion was used to establish a production guideline of 500,000 pounds per month. Although this guideline does not factor in additional monies that may be received by dairy producers, it should be an inclusive standard for most “small” dairy farmers. For purposes of determining a handler's size, if the plant is part of a larger company operating multiple plants that collectively exceed the 500-employee limit, the plant will be considered a large business even if the local plant has fewer than 500 employees.

On the producer side, 10,756 of the 11,133 dairy farmers, or 97 percent, whose milk was pooled under the Mideast order at the time of the hearing (October 2001) would meet the definition of small businesses. On the processing side, 27 of the 58 milk plants associated with the Mideast order during October 2001 would qualify as small businesses, constituting 47 percent of the total. Based on these criteria, the vast majority of the producers and handlers would be considered as small businesses.

The adoption of the proposed pooling standards serve to revise established criteria that determine those producers, producer milk, and plants that have a reasonable association with, and are consistently serving the fluid needs of, the Mideast milk marketing area and are not associated with other marketwide pools concerning the same milk. Criteria for pooling are established on the basis of performance levels that are considered adequate to meet the Class I fluid needs and, by doing so, determine those that are eligible to share in the revenue that arises from the classified pricing of milk. Criteria for pooling are established without regard to the size of any dairy industry organization or entity. The criteria established are applied in an identical fashion to both large and small businesses and do not have any different economic impact on small entities as opposed to large entities. Therefore, the amendments will not have a significant economic impact on a substantial number of small entities.

A review of reporting requirements was completed under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). It was determined that these amendments would have no impact on reporting, recordkeeping, or other compliance requirements because they would remain identical to the current requirements. No new forms are proposed and no additional reporting requirements would be necessary.