

# Proposed Rules

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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 923

[Docket No. FV04-923-1 PR]

#### Sweet Cherries Grown in Designated Counties in Washington; Establishment of Minimum Size and Maturity Requirements for Lightly Colored Sweet Cherry Varieties

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

**ACTION:** Proposed rule.

**SUMMARY:** This rule invites comments on the establishment of a minimum size requirement of 11-row size ( $6\frac{1}{64}$ -inch diameter) and a minimum maturity requirement of 17 percent soluble solids for all lightly colored sweet cherry varieties shipped to fresh markets under the Washington sweet cherry marketing order. This rule was recommended by the Washington Cherry Marketing Committee (Committee), the agency responsible for local administration of the marketing order. Currently, only the Rainier variety of lightly colored sweet cherries must meet these requirements. This rule is intended to enhance the quality and image of all lightly colored sweet cherry varieties shipped to the fresh market, thereby increasing sales and improving returns to producers.

**DATES:** Comments must be received by January 3, 2005.

**ADDRESSES:** Interested persons are invited to submit written comments concerning this rule. Comments must be sent to the Docket Clerk, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250-0237; Fax: (202) 720-8938; E-mail: [moab.docketclerk@usda.gov](mailto:moab.docketclerk@usda.gov); or Internet: <http://www.regulations.gov>. Comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be 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:**

Teresa L. Hutchinson, Marketing Specialist, Northwest Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1220 SW., Third Avenue, suite 385, Portland, OR 97204; telephone: (503) 326-2724, Fax: (503) 326-7440; or George J. 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 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 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. 923 (7 CFR part 923) regulating the handling of sweet cherries grown in designated counties in Washington, 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 proposal has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect. This proposal 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 proposal invites comments on the establishment of a minimum size requirement of 11-row size ( $6\frac{1}{64}$ -inch diameter) and a minimum maturity requirement of 17 percent soluble solids for all lightly colored sweet cherry varieties shipped to fresh markets. Currently, Rainier variety cherries are the only lightly colored sweet cherries under these requirements. This rule would establish the same requirements for all other varieties of lightly colored sweet cherries as are established for Rainier variety cherries.

Section 923.52 of the order authorizes the establishment of grade, size, quality, maturity, pack and container regulations for any variety or varieties of cherries grown in the production area. Section 923.53 further authorizes the modification, suspension, or termination of regulations issued under § 923.52. Section 923.55 provides that whenever cherries are regulated pursuant to § 923.52 or § 923.53, such cherries must be inspected by the Federal-State Inspection Service, and certified as meeting the applicable requirements of such regulations.

On May 18, 2004, the Committee recommended, by a nine to four vote, the establishment of a minimum size requirement of 11-row size ( $6\frac{1}{64}$ -inch diameter) and a minimum maturity requirement of 17 percent soluble solids for all lightly colored sweet cherry varieties shipped to fresh markets under the order. The Committee recommended the requirement become effective on April 1, 2005, which is the beginning of the 2005-2006 marketing season.

Supporters of the proposal believe that such a regulation would be in the best interests of producers and consumers. Growing lightly colored sweet cherries for the fresh market is more labor intensive and costly than producing dark colored varieties. Trees that produce lightly colored sweet cherries need to be pruned more heavily

than the trees that produce dark colored sweet cherries to ensure acceptable size fruit. The lightly colored sweet varieties are fragile and susceptible to damage during handling with most lightly colored sweet cherries being sorted and packed by hand. Producers need to offer a quality product in order to recoup the higher production costs. The sale of small, immature or poor quality cherries results in buyer dissatisfaction, which reduces repeat purchases and damages the market for all lightly colored sweet cherries.

Supporters of the proposal believe that the requirements currently in place for Rainier variety cherries (59 FR 31917, June 21, 1994) have benefited producers. Concern was also expressed that the non-regulation of new varieties of lightly colored sweet cherries would have an adverse effect in the future on the marketing of Rainier variety cherries if the newer varieties are not regulated in the same manner. It is difficult to distinguish between the different varieties of lightly colored cherries and this can result in confusion in the marketplace.

Those opposed to the recommendation believe that the tonnage of the newer lightly colored sweet cherry varieties is not enough to impact the Rainier market at this time. They believe that the regulation of all lightly colored sweet cherries would reduce the volume of such cherries on the market and reduce overall returns on the crop. Some believe that the additional cost of inspection would increase costs with little added return to the producer.

The Committee estimates that there were less than 500 tons of lightly colored sweet cherry varieties other than the Rainier variety marketed during the 2004 marketing season. By comparison, there were 8,080 tons (Committee records) of Rainier cherries marketed from the production area in 2004.

This rule proposes adding a new provision to § 923.322 to establish a minimum size requirement of  $6\frac{1}{64}$ -inch in diameter for all lightly colored sweet cherries which corresponds to the 11-row size. To provide for variances in packing, a tolerance of 10 percent would be provided for undersized lightly colored sweet cherries. Further, the regulation would provide that not more than 5 percent of lightly colored sweet cherries in any lot could be less than  $5\frac{7}{64}$ -inch in diameter, which is  $11\frac{1}{2}$ -row size, one size lower than the 11-row size. These tolerances are identical to those in effect for Rainier cherries and comparable to those in effect for dark colored sweet cherry varieties.

Section 923.322 would also be revised to include that any lot of lightly colored sweet cherries would have to contain a minimum of 17 percent soluble solids. The percentage of soluble solids would be determined by using a refractometer to measure the sugar level in a composite sample of cherries. This maturity test would be taken prior to packing, at the time of packing, or at time of shipment, provided that individual lots shall not be combined with other lots to meet soluble solids requirements. The rule would be effective April 1, 2005, the beginning of the next marketing season.

This rule would also change the section heading of § 923.322 from "Washington Cherry Regulation 22" to "Washington Cherry Handling Regulation" to more accurately describe the requirements contained therein.

#### Initial Regulatory Flexibility Analysis

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

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 1,800 producers of sweet cherries grown in designated counties in Washington. In addition, there are approximately 69 handlers subject to regulation under the order. Small agricultural producers are defined by the Small Business Administration (13 CFR 121.201) as those having annual receipts of less than \$750,000, and small agricultural service firms are defined as those whose annual receipts are less than \$5,000,000.

Based on a three-year (2001–2003) average fresh cherry production of 79,763 tons (Committee records), a three-year average producer price of \$1,390 per ton as reported by the National Agricultural Statistics Service, USDA, and 1,800 Washington cherry producers, the average annual producer revenue is approximately \$61,595. In addition, based on Committee records and an average 2003 f.o.b. price of \$28.00 per 20-pound container as reported by the AMS Market News, approximately 75 percent of the

Washington sweet cherry handlers ship under \$5,000,000 worth of cherries. Based on this information, the majority of Washington sweet cherry producers and handlers may be classified as small entities.

This proposal would establish a minimum size requirement of 11-row size ( $6\frac{1}{64}$ -inch diameter) and a minimum maturity requirement of 17 percent soluble solids for all lightly colored sweet cherry varieties that can be shipped to fresh markets. Currently, Rainier variety cherries are the only lightly colored sweet cherries currently under these requirements.

Rainier and other lightly colored sweet cherry varieties are typically marketed from mid-June through July. AMS Market News data shows that prices are the highest for the earliest offerings of these cherries, and that such prices decline as the season progresses. In 2003, for example, the opening f.o.b. price on June 23 ranged from \$45.00 to \$45.50 per carton. This declined to \$35.00 to \$36.50 a week later, and f.o.b. prices were \$38.00 to \$40.50 per carton at season's end for similar quality and sizes. This price trend serves as an incentive for producers to harvest early, which has resulted in immature and poor quality lightly colored sweet cherries being marketed.

The Committee reports that cherry size and quality are important to buyers. Consistency and dependability are equally important. Shipments of immature, low quality, under-sized lightly colored sweet cherries in recent seasons have disappointed buyers and consumers. This reduces repeat purchases and results in declines in prices and overall sales volumes.

Cherry size is related to maturity and other quality factors. That is, larger sized cherries tend to be sweeter and of higher overall quality. This is supported by prices received for different sizes of Bing (dark colored) cherries. AMS Market News data show that f.o.b. prices for 12 row sized Bing cherries ( $5\frac{5}{64}$ -inch diameter) averaged about \$18.00 per carton in mid-June 2003. At the same time,  $10\frac{1}{2}$  row sized (1 inch diameter) Bing cherries were selling for \$24.50 to \$26.50 per carton. This price relationship held steady throughout the season. Further, the Committee has conducted research showing that larger sizes correlate with higher maturity levels, and that larger sizes are preferred by cherry consumers. While research results and prices by size specifically for Rainier or other lightly colored sweet cherry varieties are currently unavailable, industry consensus is that the same relationships are true for

Rainier and other lightly colored sweet cherries, and Bings.

The Committee discussed alternatives to this rule, including not establishing a minimum size and maturity requirement. The general consensus of the industry is that mandatory size and quality requirements are needed to ensure product quality and to encourage repeat purchases. Previous voluntary standards for lightly colored sweet cherries such as Rainier variety cherries have not been successful.

This proposed rule would establish a minimum size requirement of 11-row size (61/64-inch diameter) and a minimum maturity requirement of 17 percent soluble solids for lightly colored sweet cherry varieties shipped to fresh markets. Accordingly, this proposed rule would not impose any additional reporting or recordkeeping requirements on either small or large sweet cherry handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplications by industry and public sector agencies.

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

In addition, the Committee's meeting was widely publicized throughout the Washington sweet cherry industry and all interested persons were invited to attend and participate in the Committee's deliberations on all issues. Like all Committee meetings, the May 18, 2004, meeting was a public meeting 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.

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

**List of Subjects in 7 CFR Part 923**

Cherries, Marketing agreements, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 923 is proposed to be amended as follows:

**PART 923—SWEET CHERRIES GROWN IN DESIGNATED COUNTIES IN WASHINGTON**

1. The authority citation for 7 CFR part 923 continues to read as follows:

**Authority:** 7 U.S.C. 601–674.

2. In § 923.322, paragraphs (b) introductory text, (b)(1), and (c) are revised to read as follows:

**§ 923.322 Washington Cherry Regulation 22.**

\* \* \* \* \*

(b) *Size.* No handler shall handle, except as otherwise provided in this section, any lot of cherries unless such cherries meet the following minimum size requirements:

(1) For the Rainier variety and similar varieties commonly referred to as "lightly colored sweet cherries," at least 90 percent, by count, of the cherries in any lot shall measure not less than 61/64 inch in diameter and not more than 5 percent, by count, may be less than 57/64 inch in diameter.

\* \* \* \* \*

(c) *Maturity.* No handler shall handle, except as otherwise provided in this section, any lot of Rainier cherries or other varieties of "lightly colored sweet cherries" unless such cherries meet a minimum of 17 percent soluble solids as determined from a composite sample by refractometer prior to packing, at time of packing, or at time of shipment:

*Provided,* That individual lots shall not be combined with other lots to meet soluble solids requirements.

\* \* \* \* \*

Dated: October 27, 2004.

**A.J. Yates,**

*Administrator, Agricultural Marketing Service.*

[FR Doc. 04–24443 Filed 11–2–04; 8:45 am]

**BILLING CODE 3410–02–P**

**DEPARTMENT OF TRANSPORTATION**

**Federal Aviation Administration**

**14 CFR Part 39**

[Docket No. FAA–2004–19494; Directorate Identifier 2004–NM–135–AD]

**RIN 2120–AA64**

**Airworthiness Directives; Airbus Model A318, A319, A320, and A321 Series Airplanes Equipped With Air Cruisers/ Aerazur Forward and Aft Passenger Door Emergency Escape Slides**

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** The FAA proposes to adopt a new airworthiness directive (AD) for certain Airbus Model A318, A319, A320, and A321 series airplanes equipped with certain forward and aft passenger door emergency escape slides. This proposed AD would require modifying the forward and aft door slides. This proposed AD is prompted by manufacturer testing that has shown contact between the inflation hose and fabric roll, within a short period of time after inflation of the emergency escape slides, can rupture the inflation hose at its end fittings. We are proposing this AD to prevent interference between the inflation hose and slide fabric and rupture of the inflation hose, which could result in incomplete inflation of the emergency escape slides and consequent unavailability of those slides during an emergency evacuation.

**DATES:** We must receive comments on this proposed AD by December 3, 2004.

**ADDRESSES:** Use one of the following addresses to submit comments on this proposed AD.

• *DOT Docket web site:* Go to <http://dms.dot.gov> and follow the instructions for sending your comments electronically.

• *Government-wide rulemaking web site:* Go to <http://www.regulations.gov> and follow the instructions for sending your comments electronically.

• *Mail:* Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW, Nassif Building, room PL–401, Washington, DC 20590.

• *By fax:* (202) 493–2251.

• *Hand Delivery:* Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France.

You can examine the contents of this AD docket on the Internet at <http://dms.dot.gov>, or at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW., room PL–401, on the plaza level of the Nassif Building, Washington, DC.

**FOR FURTHER INFORMATION CONTACT:**

*Technical information:* Dan Rodina, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2125; fax (425) 227–1149.

*Plain language information:* Marcia Walters, [marcia.walters@faa.gov](mailto:marcia.walters@faa.gov).