

# Proposed Rules

Federal Register

Vol. 75, No. 102

Thursday, May 27, 2010

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

### Animal and Plant Health Inspection Service

#### 7 CFR Part 319

[Docket No. APHIS-2008-0016]

RIN 0579-AD15

#### Importation of Mexican Hass Avocados; Additional Shipping Options

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Proposed rule.

**SUMMARY:** We are proposing to amend our regulations for the importation of Hass avocados originating in Michoacan, Mexico, into the United States by adding the option to ship avocados to the United States in bulk shipping bins when safeguarding is maintained from the packinghouse to the port of first arrival in the United States and by making it clear that the avocados may be shipped by land, sea, or air. We are also proposing to allow avocados from multiple packinghouses that participate in the avocado export program to be combined into one consignment. We are proposing these actions in response to requests from the Government of Mexico and inquiries from a U.S. maritime port. These actions will allow additional options for shipping Hass avocados from Mexico to the United States and allow Mexican exporters to ship full container or truck loads from multiple packinghouses while continuing to provide an appropriate level of protection against the introduction of plant pests.

**DATES:** We will consider all comments that we receive on or before July 26, 2010.

**ADDRESSES:** You may submit comments by either of the following methods:

• Federal eRulemaking Portal: Go to (<http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2008-0016>) to

submit or view comments and to view supporting and related materials available electronically.

• Postal Mail/Commercial Delivery: Please send one copy of your comment to Docket No. APHIS-2008-0016, Regulatory Analysis and Development, PPD, APHIS, Station 3A-03.8, 4700 River Road Unit 118, Riverdale, MD 20737-1238. Please state that your comment refers to Docket No. APHIS-2008-0016.

*Reading Room:* You may read any comments that we receive on this docket in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690-2817 before coming.

*Other Information:* Additional information about APHIS and its programs is available on the Internet at (<http://www.aphis.usda.gov>).

**FOR FURTHER INFORMATION CONTACT:** Mr. David B. Lamb, Import Specialist, Regulatory Coordination and Compliance, PPQ, APHIS, 4700 River Road Unit 133, Riverdale, MD 20737-1236; (301) 734-0627.

#### SUPPLEMENTARY INFORMATION:

##### Background

The regulations in “Subpart—Fruits and Vegetables” (7 CFR 319.56-1 through 319.56-50) prohibit or restrict the importation of fruits and vegetables into the United States from certain parts of the world to prevent the introduction and dissemination of plant pests, including fruit flies, that are new to or not widely distributed within the United States.

Under the regulations in § 319.56-30 (referred to below as the regulations), fresh Hass avocado fruit grown in approved orchards in approved municipalities in Michoacan, Mexico, may be imported into specified areas of the United States after meeting the requirements of a systems approach. The systems approach, which is described in the regulations, includes surveys for pathway pests in municipalities and orchards; municipality, orchard, and packinghouse certification; protection of harvested fruit from infestation;

shipment in sealed, refrigerated trucks or containers; and the cutting and inspection of fruit in orchards, in packinghouses, and at ports of entry. The overlap of the phytosanitary measures helps ensure the effectiveness of the systems approach.

This systems approach has been successful mitigating the pest risk of Hass avocados. Between 1997 and 2006, more than 28 million Hass avocados from Mexico were cut open and examined for pests. These included fruit from wild trees, backyards, and packinghouses and fruit selected at the border for inspection. During this time, only twice were pests associated with Mexican avocados detected. In both cases, a small avocado seed weevil, *Conotrachelus perseae*, was found on backyard trees in avocados that were not of the Hass variety. Both municipalities where these avocados originated were suspended from the program until eradication actions were completed.

Due largely to the success of the systems approach in mitigating the pest risk associated with Hass avocados, the Mexican Hass avocado import program has expanded from avocados being authorized for entry only during the months of November through February and only in 19 northeastern States and the District of Columbia to its current state, with avocados being allowed entry year-round to all 50 States.

Given the long-term success and stability of the Mexican avocado import program, the national plant protection organization (NPPO) of Mexico has asked us to consider adjustments to the program to two aspects of the program in order to provide greater flexibility to packers and shippers. These requested adjustments, which are explained in detail below, would allow avocados to be shipped in bulk bins and in ship holds rather than only overland in boxes, and would enable shippers to place consignments from more than one packinghouse in a truck or shipping container.

As a result of these requests, the Animal and Plant Health Inspection Service (APHIS) has reviewed the pest risks associated with the importation of Hass avocados originating in Michoacan, Mexico, in bulk shipping bins to maritime ports in the United States, and have prepared a risk management document summarizing

the findings of that review.<sup>1</sup> In that document, we conclude that as long as proper screening or safeguarding of exposed bulk loads and consignments from multiple packinghouses is maintained and the remaining additional safeguards in the regulations are employed, there would be no additional pest risk involved.

We therefore propose to amend the regulations governing the importation of Hass avocados originating in Michoacan, Mexico, into the United States to include an option for the avocados to be exported to the United States in bulk bins, and to allow consignments to be assembled from multiple packinghouses under certain conditions. The fruit would continue to have to meet all the requirements already set forth in the regulations. We would also amend the regulations to make it clear that the avocados may be shipped by land, sea, or air.

#### *Bulk Consignments*

The regulations in § 319.56-30(c)(3)(vii) require that the avocados be packed in clean, new boxes or clean plastic reusable crates. The boxes or crates must be clearly marked with the identity of the grower, packinghouse, and exporter. We established these requirements at the inception of the avocado import program because shipping in small, individually marked boxes allows greater capability for traceback in the event of a pest detection. This method of shipping is not efficient, however, and most fruits and vegetables are shipped in bulk shipping bins. The NPPO of Mexico has asked us to allow Hass avocados originating in Michoacan to be imported in bulk consignments packed in large boxes or cardboard bins.

We would amend the regulations to add the option of packing the avocados in bulk shipping bins. The bins would have to be marked in the same way currently required for the boxes or crates.

The regulations also require that boxes of avocados must be placed in a refrigerated truck or refrigerated container and remain in that truck or container while in transit through Mexico to the port of first arrival in the United States. This provision protects against the avocados becoming infested with fruit flies while in transit.

However, because the bulk shipping containers are open-topped, we propose to amend the regulations to specify that the boxes, bins, or crates would have to be safeguarded from insects by covering with a lid, insect-proof mesh, or by some other barrier that prevents insects from entering the boxes or bins. Those safeguards would have to be intact at the time the consignment arrives in the United States. This will provide an additional layer of protection against insects of concern.

The regulations also contain an outdated provision requiring that between January 31, 2005, and January 31, 2007, the boxes or crates to be marked with a statement that the avocados are not for distribution in California, Florida, Hawaii, Puerto Rico, or U.S. Territories. We would remove that sentence.

#### *Multiple Packinghouses*

The regulations in § 319.56-30(c)(3)(viii) require that the boxes of avocados must be placed in a refrigerated truck or refrigerated shipping container and remain in that truck or container while in transit through Mexico to the port of first arrival in the United States. Before leaving the packinghouse, the truck or container must be secured by the Mexican NPPO with a seal that will be broken when the truck or container is opened. Once sealed, the truck or container must remain sealed until it reaches the port of first arrival in the United States.

Because of this requirement that the truck or container be sealed at the packinghouse and not opened until the truck or container arrives in the United States, shippers are precluded from stopping at a second eligible packinghouse to “top off” trucks or containers that are only partially full at the time they leave the first packinghouse. The NPPO of Mexico has asked us to allow avocados from multiple packinghouses that participate in the avocado export program to be combined into one consignment.

In response to this request, we propose to amend paragraph (c)(3)(viii) of § 319.56-30 to specify that the refrigerated truck or refrigerated container must be secured by the Mexican NPPO with a seal that will be broken by the Mexican NPPO if the truck or container is opened to have more avocados added from another participating packinghouse. The refrigerated truck or refrigerated container would then have to be resealed by the Mexican NPPO at each packinghouse that contributes to the shipment and then remain unopened

until it reaches the port of first arrival in the United States or to the port of export for bulk shipments.

#### *Methods of Shipping*

The regulations do not specify any particular means of conveyance that must be used for transporting avocados from Mexico to the United States. When the regulations were originally established, they did refer to shipments moved by truck, rail, or air, but those references were in the context of provisions that specified where shipments could enter the United States and the transit corridors within the United States through which they could travel. Those provisions were necessary when the distribution of the avocados was limited to 19 northeastern States and the District of Columbia and have since been removed from the regulations. Officials at the maritime port of San Diego have expressed an interest in receiving consignments of Hass avocados from Mexico through that port. We have reviewed the regulations in light of those inquiries and have determined that, in order to make it clear that shipments may be moved by land, sea, or air, we should add references to the port of export in Mexico in paragraph (c)(3)(viii) of § 319.56-30 of the regulations. That paragraph currently begins “The boxes must be placed in a refrigerated truck or refrigerated container and remain in that truck or container while in transit through Mexico to the port of first arrival in the United States.” We would amend that sentence to refer to “the port of export for consignments shipped by air or sea or the port of first arrival in the United States for consignments shipped by land.” We would make a similar change at the end of the paragraph in the sentence that currently refers to trucks and containers remaining unopened until they reach the port of first arrival in the United States.

#### *Miscellaneous Changes*

We are also proposing to remove paragraphs (f) and (g) of § 319.56-30 and to redesignate paragraphs (h) and (i) of that section as paragraphs (f) and (g). Paragraph (f), which specifies that avocados may enter the United States only through ports of entry located in a State where distribution of the fruit is authorized, is out of date. Paragraphs (g) and (h), which provide for inspection of avocados at the port of arrival, are duplicative.

<sup>1</sup> The risk management document, titled “Importation of Fresh Commercial Avocado (*Persea americana* Mill var. Hass) Fruit in Bulk Shipments from Mexico into the United States,” can be viewed on the Regulations.gov Web site (see ADDRESSES above for instructions for accessing Regulations.gov) or in our reading room. A copy may also be obtained from the person listed under FOR FURTHER INFORMATION CONTACT.

**Executive Order 12866 and Regulatory Flexibility Act**

This proposed rule has been determined to be not significant for the purposes of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget.

This analysis examines impacts for U.S. small entities of a proposed rule that would allow fresh Hass avocado originating in Michoacan, Mexico, to be imported into the United States by palletized bulk consignments in ship holds and in consignments from multiple packinghouses when phytosanitary safeguarding is maintained from the packinghouse to

the first maritime ports of entry in the United States.

California produces nearly all Hass avocado grown in the United States.<sup>2</sup> As shown in table 1, California's fresh Hass avocado production has fluctuated in recent years, and was significantly higher in 2006, at about 257,000 metric tons (MT) valued at \$1.6 billion. During this same period, both U.S.

consumption and imports have trended upward, totaling about 443,000 MT and about 193,000 MT, respectively, in 2006. U.S. per capita consumption of fresh avocado has shown strong growth, from 2.2 pounds in 2002 to nearly 3.3 pounds in 2006.

The United States is a large net importer of Hass avocado. Over the 5-year period 2002-2006, annual imports averaged about 172,000 MT, and exports averaged less than 3,000 MT. During this time, imports provided 44 percent of U.S. consumption. Almost all fresh Hass avocado imports come from Mexico and Chile. As described below, the data for the first 11 months of 2007 show an exceptionally large increase in U.S. imports; they totaled nearly 313,000 MT, an 85 percent increase over 2006 total imports, with over 95 percent shipped from Mexico (64.6 percent) and Chile (30.7 percent).

TABLE 1.—U.S. AVOCADO PRODUCTION, CONSUMPTION, PRICE, EXPORTS AND IMPORTS, 2002-2006, METRIC TONS

Year	Production	Consumption	Price	Exports	Imports
2002	169,523	286,686	\$2,062	1,849	119,012
2003	142,271	282,224	\$2,494	1,199	141,152
2004	182,604	326,308	\$2,016	1,600	145,304
2005	126,622	389,498	\$2,072	1,331	264,207
2006	256,858	442,960	\$1,283	6,576	192,678
5-year average (2002-2006)	175,576	345,535	\$1,985	2,511	172,470

Note: Consumption is calculated by subtracting exports from production and adding imports.

Sources: Production and price data are from California Avocado Growers, Pounds and Dollars by Variety (<http://www.avocado.org/growers/poundsdollars.php>); export and import data are from the U.S. Census Bureau, as reported by Global Trade Information Services, Inc., Country Edition, August 2007.

Currently, avocado that meets the requirements of a systems approach described in § 319.56-30, may be imported overland from Michoacan, Mexico, into all 50 States by truck. This proposal would amend the regulations for the importation of Hass avocado from Mexico into the United States by including the option to import avocado by palletized bulk consignments in ship holds and to combine consignments from multiple packinghouses when phytosanitary safeguarding is maintained from the packinghouse to the first maritime port of entry in the United States.

Mexico is the largest producer of Hass avocado in the world (about 34 percent of world production). Recent data show Mexico's production increasing from about 897,000 MT in 2002 to about 1,072,000 MT in 2006, for an average of about 964,500 MT. Mexico is also the world's largest consumer of avocado (about 32 percent), with per capita consumption averaging 15.6 pounds. Mexico's exports increased from about

94,000 MT in 2002 to about 208,000 MT in 2006, for an average of 152,000 MT. Exports to the United States over the same period ranged between about 39,000 MT and about 119,000 MT, and averaged about 80,000 MT.

Not all Hass avocado produced in Mexico is eligible to be exported to the United States. To be eligible, the avocado has to be produced in municipalities that are certified as pest-free by APHIS. Currently, APHIS has certified 40,266 hectares in 5,293 avocado orchards for export to the United States. Based on an average yield of 10.36 MT per hectare, this bearing area would yield a total of 417,160 MT. This total is far above Mexico's largest recorded exports of 229,095 MT in 2005.

Mexico's access to the U.S. Hass avocado market has expanded step-by-step over the past 11 years, based on successive pest risk assessments: From 19 northeastern States, November through February; to 32 Eastern and Midwestern States, mid-October to mid-April; to 47 States year-round (all except

California, Florida and Hawaii). In 2007, Mexico's Hass avocado exporters had year-round access to all 50 States for the first time. Mexico's increased access has been matched by expanding consumer demand. Per-capita avocado consumption increased from 1.22 pounds (total consumption of 325 million pounds) in 1996, the year before the first major entry of Mexican avocado, to 3.26 pounds (total consumption of 976 million pounds) in 2006. The strong demand for Hass avocado is reflected in the fact that, other than for 2006, there has been no noticeable decline in price during this time.<sup>3</sup>

As mentioned, total U.S. imports increased by about 85 percent during the first 11 months of 2007, compared to the 2006 total. This sharp increase can be attributed to the beginning in February 2007 of year-round market access to all 50 States for fresh Hass avocado from Mexico, a freeze in Chile, and a decline in domestic production because of wildfires in southern

<sup>2</sup> California Avocado Growers, Pounds and Dollars by Variety. (<http://www.avocado.org/growers/poundsdollars.php>).

<sup>3</sup> California Avocado Growers, Pounds and Dollars by Variety (<http://www.avocado.org/growers/poundsdollars.php>).

California. It is unknown whether Mexican exports will continue at this level when production in Chile and California is restored to pre-freeze and pre-wildfire levels, although Mexico's exporters have the capacity to do so.<sup>4</sup>

Because Mexico's Hass avocado exporters have year-around access to all 50 States and there is no volume restriction, any impact of the proposed rule on U.S. entities will be determined by market forces of supply and demand and the extent to which the maritime consignments are in addition to rather than in place of consignments by truck. We welcome public comment that may help us to better understand possible effects of the rule for U.S. Hass avocado producers.

#### *Effects on Small Entities*

The Small Business Administration (SBA) has established guidelines for determining which firms are to be considered small under the Regulatory Flexibility Act. This rule could affect U.S. producers of fresh avocado (North American Industry Classification System [NAICS] 111339) and some importers of fresh avocado. Avocado growers are classified as small if their annual receipts are not more than \$750,000.

According to the 2002 Census of Agriculture (most recent data on farm sizes), there were 4,445 farms producing avocado in the United States. Overall, 4,332 farms (97.5 percent) had a total of 35,694 acres in avocado (about 60 percent of the total planted area) and are considered small, with an average of about 8.2 acres and an average annual income of about \$48,610 in 2002. The remaining 2.5 percent of producers planted a total of 23,568 acres (40 percent) in avocado. They had an average of 209 acres and average annual income of about \$1,230,470. As noted, Hass avocado exports from Michoacan, Mexico, are currently allowed to enter all 50 States throughout the year. Since there is no limit to the volume that may be shipped, market forces of supply and demand and the extent to which the maritime consignments are in addition to rather than in place of consignments by truck will determine the size of any market effects of the rule. APHIS welcomes public comment on the proposed rule's possible impacts.

#### *Reporting, Recordkeeping and Other Compliance Requirements*

The proposed rule has no new mandatory reporting, recordkeeping, or

other compliance requirements. U.S. entities that may be affected by the rule voluntarily engage in trade transactions. Any reporting or other requirements would be those normally associated with the regular transactions involved in doing business.

#### *Duplication, Overlap, and Conflict with Existing Rules and Regulations*

APHIS has not identified any duplication, overlap, or conflict of the proposed rule with other Federal rules.

#### *Alternatives*

No significant alternatives were identified that would meet the objectives of the proposed rule.

#### **Executive Order 12988**

This proposed rule would allow Hass avocados to be imported into the United States from Mexico in bulk consignments and in consignments from multiple packinghouses when phytosanitary safeguarding is maintained from the packinghouse to the first port of entry in the United States. If this proposed rule is adopted, State and local laws and regulations regarding Hass avocados imported under this rule would be preempted while the fruit is in foreign commerce. Fresh avocados are generally imported for immediate distribution and sale to the consuming public and would remain in foreign commerce until sold to the ultimate consumer. The question of when foreign commerce ceases in other cases must be addressed on a case-by-case basis. If this proposed rule is adopted, no retroactive effect will be given to this rule, and this rule will not require administrative proceedings before parties may file suit in court challenging this rule.

#### **Paperwork Reduction Act**

This proposed rule contains no new information collection or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

#### **List of Subjects in 7 CFR Part 319**

Coffee, Cotton, Fruits, Imports, Logs, Nursery stock, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Rice, Vegetables.

Accordingly, we propose to amend 7 CFR part 319 as follows:

#### **PART 319—FOREIGN QUARANTINE NOTICES**

1. The authority citation for part 319 continues to read as follows:

**Authority:** 7 U.S.C. 450, 7701-7772, and 7781-7786; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.3.

2. Section 319-56.30 is amended as follows:

a. In paragraph (c)(3)(v), by removing the words "shipping boxes" and adding the words "containers in which they will be shipped" in their place.

b. In paragraph (c)(3)(vi), by removing the words "in boxes" and adding the words "for shipping" in their place.

c. By revising paragraphs (c)(3)(vii) and (c)(3)(viii) to read as set forth below.

d. By removing paragraphs (f) and (g) and redesignating paragraphs (h) and (i) as paragraphs (f) and (g), respectively.

e. In newly redesignated paragraph (g), by adding the words ", crates, or bulk shipping bins" after the words "original shipping boxes" and by removing the words "new boxes" and adding the words "new packaging" in their place.

#### **§ 319.56-30 Hass avocados from Michoacan, Mexico.**

\* \* \* \* \*

(c) \* \* \*

(3) \* \* \*

(vii) The avocados must be packed in clean, new boxes or bulk shipping bins, or in clean plastic reusable crates. The boxes, bins, or crates must be clearly marked with the identity of the grower, packinghouse, and exporter, and with the statement "Not for importation or distribution in Puerto Rico or U.S. Territories." The boxes, bins, or crates must be covered with a lid, insect-proof mesh, or other material to protect the avocados from fruit-fly infestation prior to leaving the packinghouse. Those safeguards must be intact at the time the consignment arrives in the United States.

(viii) The packed avocados must be placed in a refrigerated truck or refrigerated container and remain in that truck or container while in transit through Mexico to the port of export for consignments shipped by air or sea or the port of first arrival in the United States for consignments shipped by land. Prior to leaving the packinghouse, the truck or container must be secured by the Mexican NPPO with a seal that will be broken when the truck or container is opened. The seal may be broken and a new seal applied by the Mexican NPPO if the truck or container stops at another approved packinghouse for additional avocados meeting the requirements of this section to be placed in the truck or container. The seal on the refrigerated truck or refrigerated container must be intact at the time the truck or container reaches the port of

<sup>4</sup> United States Department of Agriculture/ Foreign Agricultural Service, Mexico Avocado Annual 2007, Global Agricultural Information Network Report Number MX7084.

export in Mexico or the port of first arrival in the United States.

\* \* \* \* \*

Done in Washington, DC, this 20<sup>th</sup> day of May 2010.

**Kevin Shea**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 2010-12823 Filed 5-26-10; 8:45 am]

**BILLING CODE 3410-34-S**

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 930

[Doc. No. AMS-FV-10-0029; FV10-930-2 PR]

#### **Tart Cherries Grown in the States of Michigan, et al.; Increased Assessment Rate for the 2010-2011 Crop Year for Tart Cherries**

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

**ACTION:** Proposed rule.

**SUMMARY:** This rule would increase the assessment rate established for the Cherry Industry Administrative Board (Board) for the 2010-2011 fiscal period from \$0.0066 to \$0.0075 per pound of assessable tart cherries. The Board locally administers the marketing order which regulates the handling of tart cherries grown in Michigan, New York, Oregon, Pennsylvania, Utah, Washington, and Wisconsin. Assessments upon tart cherry handlers are used by the Board to fund reasonable and necessary expenses of the program. The 2010-2011 fiscal period year begins October 1, 2010. The assessment rate would remain in effect indefinitely unless modified, suspended, or terminated.

**DATES:** Comments must be received by July 26, 2010.

**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, or Internet: <http://www.regulations.gov>. All comments should reference the document 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.regulations.gov>. All comments submitted in response to this

rule will be included in the record and will be made available to the public. Please be advised that the identity of the individuals or entities submitting the comments will be made public on the Internet at the address provided above.

**FOR FURTHER INFORMATION CONTACT:**

Kenneth G. Johnson, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, Unit 155, 4700 River Road, Riverdale, MD 20737; telephone: (301) 734-5243, Fax: (301) 734-5275; E-mail:

[Kenneth.Johnson@ams.usda.gov](mailto:Kenneth.Johnson@ams.usda.gov).

Small businesses may request information on complying with this regulation by contacting Antoinette Carter, 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: [Antoinette.Carter@ams.usda.gov](mailto:Antoinette.Carter@ams.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 produced in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin, 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 rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order provisions 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 proposed herein would be applicable to all assessable tart cherries beginning October 1, 2010, and continue until amended, suspended, or terminated.

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 exempt 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 in equity 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 2010-2011 and subsequent fiscal periods from \$0.0066 to \$0.0075 per pound of assessable tart cherries. The 2010-2011 fiscal period begins on October 1, 2010, and ends on September 30, 2011.

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.

Authority to fix the rate of assessment to be paid by each handler and for the Board to collect such assessments appears in § 930.41 of the order. That section also provides that each part of an assessment rate intended to cover administrative costs and research and promotional costs be identified. Section 930.48 of the order provides that the Board, with the approval of the USDA, may establish or provide for the establishment of production research, market research and development, and/or promotional activities designed to assist, improve, or promote the marketing, distribution, consumption, or efficient production of cherries. The expense of such projects is paid from funds collected pursuant to § 930.41 (Assessments), or from such other funds as approved by the USDA.

For the 2006-2007 fiscal year, the Board recommended, and USDA approved, an assessment rate of \$0.0066 per pound of tart cherries handled that would continue in effect from fiscal period to fiscal period unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Board or other information available to USDA.

The Board met on January 26, 2010, and recommended 2010-2011 expenditures of \$1,665,000 and an assessment rate of \$0.0075 per pound of tart cherries. The Board's recommendation was unanimous. In comparison, last year's budgeted