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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 923

[Doc. No. AMS-FV-09-0033; FV09-923-1 FR]

#### Sweet Cherries Grown in Designated Counties in Washington; Change in the Handling Regulation

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

**ACTION:** Final rule.

**SUMMARY:** This rule revises the handling regulation for cherries under the Washington cherry marketing order. The marketing order regulates the handling of sweet cherries grown in designated counties in Washington and is administered locally by the Washington Cherry Marketing Committee (Committee). This rule adds quality and pack requirements for Rainier cherries and other lightly-colored sweet cherry varieties that are designated as "premium" when handled. This change is expected to reduce market confusion regarding the marketing of such cherries; improve producer returns by providing pack differentiation; and benefit producers, handlers, and consumers.

**DATES:** *Effective Date:* June 5, 2010.

**FOR FURTHER INFORMATION CONTACT:** Robert Curry or Gary Olson, Northwest Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1220 SW Third Avenue, Suite 385, Portland, Oregon 97204; Telephone: (503) 326-2724, Fax: (503) 326-7440, or E-mail: [Robert.Curry@ams.usda.gov](mailto:Robert.Curry@ams.usda.gov) or [GaryD.Olson@ams.usda.gov](mailto:GaryD.Olson@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: [AntoinetteCarter@ams.usda.gov](mailto:AntoinetteCarter@ams.usda.gov).

**SUPPLEMENTARY INFORMATION:** This rule is issued under Marketing Agreement and Order No. 923, both as amended (7 CFR part 923), regulating the handling of 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 rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect.

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

This final rule changes the handling regulation for cherries under the order. Specifically, this rule adds minimum requirements for Rainier cherries and other lightly-colored sweet cherry varieties that are designated as "premium" when marketed. Under this regulation, when labeled "premium, a Rainier cherry or other lightly-colored sweet cherry variety container must be packed so that at least 90 percent, by count, of the cherries in any lot shall measure not less than  $\frac{6}{64}$  inch ( $1\frac{1}{2}$  row) in diameter and not more than 5 percent, by count, may be less than  $\frac{6}{64}$  inch (11-row) in diameter. In addition,

90 percent, by count, of the cherries in any lot must exhibit a pink-to-red surface blush. For any given sample, not more than 20 percent of the cherries shall be absent a pink-to-red surface blush.

This change is intended to reduce market confusion and improve producer returns by providing pack differentiation, and is expected to benefit producers, handlers, and consumers.

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.

Section 923.322 of the order's rules and regulations currently provide grade, size, maturity, and pack regulations for Washington grown sweet cherries. Rainier cherries and other lightly-colored sweet cherry varieties have variety-specific minimum size and maturity requirements as well as the same pack requirements as all Washington sweet cherries, but do not share the minimum grade requirements with dark colored cherries.

As just stated, Rainier cherries and other lightly-colored sweet cherry varieties have certain current mandatory grading requirements, including a minimum maturity requirement of 17 percent soluble solids and a minimum size requirement of  $\frac{6}{64}$  inch diameter (11-row) as provided in section 923.322(c). However, lightly-colored varieties are not currently required to meet a minimum grade or pack standard. As a consequence, the cherry industry markets several different qualities or packs of lightly colored sweet cherries without the benefit of any clear differentiation between competing products. This lack of differentiation in the marketing of lightly-colored sweet cherries has led to market confusion and downward pricing pressure in recent years.

The worldwide retail trade is currently demanding a consistently

large lightly-colored sweet cherry that arrives with a pink to red blush on its external surface. Likewise, the retail trade is willing to pay a premium price for large lightly-colored sweet cherries that consistently exhibit this surface blush. Conversely, the market for lightly-colored sweet cherries without a blush—cherries pure yellow in color—is decreasing and this sub-group of cherries is generally sold at a lower market price. Prior to this change in the handling regulations, there was no clear articulation of a “premium” designation within the lightly-colored cherry category, and buyers have used the price of the packs containing all-yellow cherries to put downward pricing pressure on cherries that have been produced with the preferred pink-to-red blush.

With this change, industry handlers will be able to differentiate packs of lightly colored cherries and the price point that comes with producing a superior sweet cherry. It is also expected that the change will add further incentive to produce superior quality sweet cherries and strengthen the producer’s position in the marketplace.

This rule requires any regulated handler packing cherries with the “premium” designation to adhere to the new requirements as provided in new section 923.322(e). All cherries not so designated continue to be allowed to be marketed without regard to the new requirements. Nevertheless, all sweet cherries must continue to meet the other minimum requirements of the order and the order’s regulations.

Further changes are made to § 923.322 to reflect the addition of the new requirements. The existing paragraph (e) is redesignated as paragraph (d), and the introductory sentence of paragraph (g) is revised to reference the new paragraph (e).

#### Final Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions 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.

There are approximately 44 handlers of Washington sweet cherries subject to regulation under the marketing order and approximately 1,500 cherry producers in the regulated area. Small agricultural service firms are defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of less than \$7,000,000, and small agricultural producers are defined as those having annual receipts of less than \$750,000.

Based on the 2005–2007 three-year average fresh cherry utilization of 121,666 tons and average fresh cherry producer price of \$2,400 per ton as reported by the National Agricultural Statistics Service, USDA, and 1,500 Washington cherry producers, the recent three-year average annual producer revenue was approximately \$194,666. In addition, the Committee reports that none of the 44 handlers have annual receipts of over \$7,000,000. Based on this information, the majority of Washington sweet cherry producers and handlers may be classified as small entities.

Utilizing authority contained in sections 923.52, 923.53, and 923.55, the Committee recommended that a definition for premium packed lightly-colored sweet cherries be added to section 923.322(h) in the order’s handling regulation to identify the minimum size and color requirements that a premium packed cherry must meet. In addition, to help stabilize the negative pricing pressure that some unmarked grades have on the market, the Committee recommended adding a new paragraph 923.322(e)(3) to this subpart establishing a requirement that all cherries packed in containers marked “premium” must adhere to the definition.

USDA subsequently determined that, rather than adding a new definition, it would be more appropriate to add minimum requirements for cherries that are designated as “premium” to section 923.322 of the handling regulation.

The Committee reports that cherry size and quality are important to buyers. Consistency and dependability are equally important. In recent seasons, there has not been marketing consistency in the quality and size of lightly-colored cherries. This has resulted in a price depressing pressure on all cherries, regardless of the quality, color, and size of the fruit packed.

Cherry size is related to maturity and other quality factors. That is, larger sized cherries tend to be sweeter and of higher overall quality, and thus generally provide higher prices for the

producer. Although AMS Market News Service data is not reported for Rainier cherries smaller than 10½ row (1-inch diameter), this correlation is supported by prices received for Bing cherries of various sizes. For example, the Market News Service reported f.o.b. prices for 12-row sized Bing cherries (5¼ inch diameter) of \$24.00 per carton in late June 2007. Concurrently, 10½ row size Bing cherries were selling for \$35.00 to \$36.00 per carton (10½ row Rainier cherries were being quoted by Market News at \$35.00 to \$40.00 per carton in late June 2007). This price relationship generally holds steady throughout each season. Furthermore, market research by the Washington cherry industry shows that larger sizes correlate with higher maturity levels, and that larger sizes are preferred by consumers.

Although research showing a correlation between the flavor of lightly-colored sweet cherry varieties and the degree of reddish blush is lacking, actual market experience has shown the industry that a definite price correlation exists according to remarks made at the May 14, 2009 Committee meeting. This is largely due to consumer preference for lightly colored cherries that exhibit a reddish blush.

The Committee believes that this change will not negatively impact either small or large handlers or producers. Comments made at the May 14, 2009 meeting indicate that a majority of the Washington sweet cherry industry is already packing to such standards or better. Comments also indicate that it is possible to control the amount of blush on lightly-colored sweet cherries, since the added color is related to the amount of direct sunlight available to the fruit. Pruning and other common cultural practices can greatly affect the amount of blush on the cherries by controlling how much direct sunlight makes it through the foliage to the fruit. Finally, since this change is only required should a handler choose to pack and mark lightly-colored cherries to the “premium” standard, any additional costs can be eliminated by the handler.

Among the alternative actions discussed by the Committee at the May 14, 2009 meeting was a potential requirement that there be a minimum percentage of reddish color on all lightly colored sweet cherries, as well as a mandatory increase in the minimum size (currently 11-row size or 6¼ minimum diameter). There were other various options briefly discussed under this alternative related to sizing and the actual degree of blush. Comments from many of those attending the meeting, however, indicated that a mandatory change in size and pack requirements

would not be well received by the industry at this time, and that the less restrictive recommendation subsequently made should adequately solve the current marketing problem.

This rule does 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 duplication by industry and public sector agencies. In addition, USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this rule.

AMS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to government information and services, and for other purposes.

In addition, the Committee meeting was widely publicized throughout the Washington cherry industry and all interested persons were invited to attend the meeting and participate in the deliberations. Like all Committee meetings, the May 14, 2009 meeting was a public meeting and all entities, both large and small, were able to express their views on this issue.

A proposed rule concerning this action was published in the **Federal Register** on March, 8, 2010 (75 FR 10442). Copies of the rule were made available to all Committee members and sweet cherry handlers. The proposed rule was also made available through the Internet by USDA and the Office of the Federal Register. A 60-day comment period ending May 7, 2010, was provided to allow interested persons to respond to the proposal. No comments were received.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateN&page=MarketingOrdersSmallBusinessGuide>. Any questions about the compliance guide should be sent to Antoinette Carter at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant matter presented, including the information and recommendation submitted by the Committee and other available information, it is hereby found that this rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

It is further found that good cause exists for not postponing the effective

date of this rule until 30 days after publication in the **Federal Register** (5 U.S.C. 553) because the 2010 cherry harvest may start as early as the last week in May and handlers will want to take advantage of the potential economic benefits of this rule. Further, handlers are aware of this rule, which was recommended at a public meeting. Finally, a 60-day comment period was provided for in the proposed rule.

#### 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 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, redesignate paragraph (e) as paragraph (d), add a new paragraph (e), and revise the introductory sentence of paragraph (g) to read as follows:

#### § 923.322 Washington cherry handling regulation.

\* \* \* \* \*

(e) *Light sweet cherries marked as premium.* No handler shall handle, except as otherwise provided in this section, any package or container of Rainier cherries or other varieties of lightly colored sweet cherries marked as premium except in accordance with the following:

(1) *Quality.* 90 percent, by count, of such cherries in any lot must exhibit a pink-to-red surface blush and, for any given sample, not more than 20 percent of the cherries shall be absent a pink-to-red surface blush.

(2) *Pack.* At least 90 percent, by count, of the cherries in any lot shall measure not less than  $\frac{64}{64}$  inch ( $1\frac{1}{2}$  row) in diameter and not more than 5 percent, by count, may be less than  $\frac{61}{64}$  inch (11-row) in diameter.

\* \* \* \* \*

(g) *Exceptions.* Any individual shipment of cherries which meets each of the following requirements may be handled without regard to the provisions of paragraphs (a), (b), (c), (d), and (e) of this section, and of §§ 923.41 and 923.55.

\* \* \* \* \*

Dated: May 28, 2010.

**Rayne Pegg,**

*Administrator, Agricultural Marketing Service.*

[FR Doc. 2010–13408 Filed 6–3–10; 8:45 am]

**BILLING CODE 3410–02–P**

## FEDERAL RESERVE SYSTEM

### 12 CFR Part 205

[Regulation E; Docket No. R–1343]

#### Electronic Fund Transfers

**AGENCY:** Board of Governors of the Federal Reserve System.

**ACTION:** Final rule.

**SUMMARY:** On November 17, 2009, the Board published a final rule amending Regulation E, which implements the Electronic Fund Transfer Act, and the official staff commentary to the regulation (Regulation E final rule). The Regulation E final rule limited the ability of financial institutions to assess overdraft fees for paying automated teller machine (ATM) and one-time debit card transactions that overdraw a consumer's account, unless the consumer affirmatively consents, or opts in, to the institution's payment of overdrafts for those transactions. The Board is amending Regulation E and the official staff commentary to clarify certain aspects of the Regulation E final rule.

**DATES:** This rule is effective July 6, 2010.

#### FOR FURTHER INFORMATION CONTACT:

Dana E. Miller or Vivian W. Wong, Senior Attorneys, or Ky Tran-Trong, Counsel, Division of Consumer and Community Affairs, at (202) 452–3667 or (202) 452–2412, Board of Governors of the Federal Reserve System, 20th and C Streets, NW., Washington, DC 20551. For users of Telecommunications Device for the Deaf (TDD) only, contact (202) 263–4869.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

In November 2009, the Board adopted a final rule under Regulation E, which implements the Electronic Fund Transfer Act (EFTA), limiting a financial institution's ability to assess fees for paying ATM and one-time debit card transactions pursuant to the institution's overdraft service without the consumer's affirmative consent. The rule was published in the **Federal Register** in November 2009 and has a mandatory compliance date of July 1, 2010. See 74 FR 59033 (November 17, 2009) (Regulation E final rule).