

housing receiving direct USDA assistance funds from engaging in religious exercise within such housing.

§ 16.4 Effect on State and local funds.

If a State or local government voluntarily contributes its own funds to supplement activities carried out under programs governed by this part, the State or local government has the option to separate out the direct USDA assistance funds or commingle them. If the funds are commingled, the provisions of this part shall apply to all of the commingled funds in the same manner, and to the same extent, as the provisions apply to the direct USDA assistance.

§ 16.5 Compliance.

USDA agencies will monitor compliance with this part in the course of regular oversight of USDA programs.

Ann M. Veneman,

Secretary of Agriculture.

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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 930

[Docket No. FV03-930-6 IFR]

Tart Cherries Grown in the States of Michigan, et al.; Additional Option for Handler Diversion

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim final rule with request for comments.

SUMMARY: This rule adds another method of handler diversion to the regulations under the Federal tart cherry marketing order (order). Handlers handling cherries harvested in a regulated district may fulfill any restricted percentage requirement when volume regulation is in effect by diverting cherries or cherry products rather than placing them in an inventory reserve. Under this additional method, handlers will be allowed to obtain diversion credit for diverting tart cherries, after processing, that may not be acceptable for the finished products manufactured by the handler. Currently, such diversion must take place prior to processing. This action was unanimously recommended by the Cherry Industry Administrative Board (Board), the body which locally administers the marketing order. The marketing order regulates the handling of tart cherries grown in the States of

Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin.

DATES: Effective July 12, 2004; comments received by September 7, 2004, will be considered prior to issuance of a final rule.

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, e-mail: 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, or obtain a guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders 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) 720-5698, or e-mail: 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 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. 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 the Secretary 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, the Secretary 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 the Secretary's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

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 into authorized outlets. 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 free percentage portion of the regulated crop is not expected to fill demand.

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 as provided for in § 930.59(c).

Section 930.159 of the rules and regulations under the order allows handlers to divert cherries by destruction of the cherries at the handler's facility. Currently, at-plant diversion of cherries takes place at the handler's facility prior to placing

cherries into the processing line. However, experience has shown that this limitation places a burden on handlers regulated under this order.

To remove this burden, the Board unanimously recommended that handlers be allowed to divert and receive diversion credit for tart cherries after processing that may not be acceptable for the finished products they manufacture. With the capability to divert such cherries after processing, but before the finished product is completed, handlers would have an incentive to remove the lower quality processed cherries from the lot, meet their restricted obligation requirements, and improve the quality of their products. Improvement in the quality of tart cherries and tart cherry products would benefit producers, handlers, and consumers.

This action is intended to provide handlers more flexibility in meeting their restricted obligation requirements. The ability to perform at-plant diversion after placing the cherries into the processing line, but before a finished product is completed, will benefit all handlers. This action is expected to especially benefit handlers who only process one product. In many instances, these handlers are small.

This rule would allow a handler who processes only five plus one cherries (25 pounds of tart cherries with 5 pounds of sugar added) to fulfill his/her restricted percentage obligation (in a volume regulated year) by diverting at-plant, lower quality wholesome fruit from his/her five plus one processing line. Currently, the diversion must take place prior to processing and handlers that process one product may be forced to divert their good quality tart cherries with the lower quality wholesome cherries, or divert cherries by some other approved method. Handlers processing more than one product also would be able to take advantage of the additional method of at-plant diversion.

Diversion may also be accomplished by handlers donating cherries to charitable organizations, utilizing cherries in exempt outlets, or redeeming grower diversion certificates obtained from growers who have diverted cherries by non-harvest, and who have been issued diversion certificates by the Board in accordance with rules and regulations governing the issuance of grower diversion certificates (§ 930.158).

The Board reported that during the 2001–2002 crop year that the inventory reserve contained 44.3 percent frozen products, 11.3 percent waterpack, 15.2 percent piefill, 28 percent juice and juice concentrate, and 1.2 percent other products. These percentages show that

frozen products, and juice and juice concentrate make up most of the reserve quantities.

Pursuant to § 930.159(b), handlers electing to divert cherries or cherry products must first notify the Board and submit a plan for approval. Such notification and plan must include an agreement that diversion will take place under the supervision of the USDA Processed Products Inspection Service or Board employee inspectors, and that the costs of such supervision are to be paid by the handler. USDA inspectors supervise the diversion of cherries or finished products at the current hourly rate under USDA's inspection fee schedule (7 CFR 54.42). Board employees supervise diversion at the same payment rate.

Once diversion is satisfactorily accomplished, handlers receive diversion certificates stating the weight of cherries diverted. Such diversion certificates can be used to satisfy handlers' restricted percentage obligations. Cherries and finished cherry products which have been diverted are not be subject to assessments.

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) would allow 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 opt for such certification, but rather perform 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 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 tart cherry marketing order and approximately 900 producers of tart cherries in the regulated area. Small agricultural service firms, which includes handlers, have been defined by the Small Business Administration (13 CFR 121.201) as those having annual receipts of less than \$5,000,000, and small agricultural producers are defined as those having annual receipts of less than \$750,000. A majority of the producers and handlers are considered small entities under SBA's standards.

Board and subcommittee meetings are widely publicized in advance and are held in a location central to the production area. The meetings are open to all industry members (including small business entities) and other interested persons who are encouraged to participate in the deliberations and voice their opinions on topics under discussion. Thus, Board recommendations can be considered to represent the interests of small business entities in the industry.

The Board reported that during the 2001–2002 crop year that the inventory reserve contained 44.3 percent frozen products, 11.3 percent waterpack, 15.2 percent piefill, 28 percent juice and juice concentrate, and 1.2 percent other products. These percentages show that frozen products, and juice and juice concentrate make up most of the reserve quantities.

The Board unanimously recommended this additional method for diversion credit to allow handlers to divert product after processing that may not be acceptable for the finished products manufactured by the handler. As discussed earlier, this action provides handlers more flexibility in meeting their restricted obligation requirements and is expected to be particularly helpful to handlers who produce only one product. In many instances, the one product handlers in the tart cherry industry are small.

Handlers that process juice concentrate and other products can more easily meet their restricted obligation requirements by juicing and processing lower quality wholesome product and placing it in the inventory reserve. Handlers that only have the ability to process products requiring higher quality fruit, like five plus one cherries have to put this fruit into the inventory reserves, or take advantage of other diversion options available under the order.

To sell more of their higher quality products, some handlers purchase cherries or diversion credit certificates from other handlers to meet their restricted obligation requirements. The

added flexibility provided by this action will help all handlers, and is expected to especially benefit the one-product handlers who will be able to sell more of their higher quality cherries in finished product form.

Producers also are expected to benefit from the implementation of this action. Currently, producers can use in-orchard tank diversion, in which cherries harvested into tanks are measured, calculated then diverted in the orchard. This method of diversion, however, removes both good and lesser quality fruit. Under the Board's recommendation, producers could deliver all of their fruit to handlers and the good quality fruit would be sorted and the poor quality fruit diverted or dumped. Producers would be paid for the good quality fruit. According to the Board, growers are paid on a quality point basis relative to the quality of the fruit delivered. This action would provide producers with more consistent income proportionate to the quality of the fruit delivered to handlers and with discretion to reduce orchard diversion. As such, producers can be more selective in complying with the grower diversion process.

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

With regard to alternatives, the Board felt that the recommendation was the only solution to providing handlers additional flexibility in meeting their restricted obligation requirements.

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

In compliance with Office of Management and Budget (OMB) regulations (5 CFR part 1320) which implement the Paperwork Reduction Act of 1995 (Pub. L. 104-13), the information collection and recordkeeping requirements have been previously approved by OMB and assigned OMB Number 0581-0177.

There are some reporting, recordkeeping, and other compliance requirements under the marketing order. The reporting and recordkeeping burdens are necessary for compliance purposes and for developing statistical data for maintenance of the program.

The forms require information which is readily available from handler records and which can be provided without data processing equipment or trained statistical staff. As with other, similar marketing order programs, reports and forms are periodically studied to reduce or eliminate duplicate information collection burdens by industry and public sector agencies. This rule does not change those requirements.

This rule invites comments on adding another method of handler diversion to the regulations under the Federal tart cherry marketing order. Any comments received will be considered prior to finalization of this rule.

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 30 days after publication in the **Federal Register** because: (1) The tart cherry crop year begins July 1 and this action needs to be implemented so handlers can take advantage of this opportunity for the upcoming season; (2) the Board unanimously recommended this action at a public meeting and interested parties had an opportunity to provide input; and (3) 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 to read 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 930.159 is amended by revising paragraph (c) to read as follows:

§ 930.159 Handler diversion.

* * * * *

(c) *At-plant diversion.* Diversion by disposal at-plant may take place prior to placing the cherries into the processing line, or after processing, but before a finished product is manufactured. Such diversion will take place under the supervision of USDA Inspection Service or Board employee inspectors. USDA inspectors or Board employees or Board agents will supervise diversion of cherry products at-plant at the current hourly rate under USDA's inspection fee schedule (7 CFR 52.42).

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Dated: July 1, 2004.

A.J. Yates,

Administrator, Agricultural Marketing Service.

[FR Doc. 04-15584 Filed 7-8-04; 8:45 am]

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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 989

[Docket No. FV04-989-3 IFR]

Raisins Produced From Grapes Grown in California; Change to Reporting Requirements Regarding Other Seedless Raisins

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim final rule.

SUMMARY: This rule invites comments on changing the reporting requirements regarding Other Seedless (OS) raisins under the Federal marketing order for California raisins (order). The order regulates the handling of raisins produced from grapes grown in California and is administered locally by the Raisin Administrative Committee (RAC). The order provides authority for volume and quality regulations and reporting requirements by varietal type of raisin. The OS varietal type includes raisins produced from Flame Seedless (Flames) and other red grapes. This rule requires handlers to report to the RAC information on acquisitions, shipments, inventories, and inter-handler transfers of the different types of OS raisins, including Flames. The RAC will evaluate this data to determine whether segregating Flames into a separate varietal type is warranted.

DATES: Effective July 12, 2004; comments received by September 7, 2004, will be considered prior to issuance of a final rule.

ADDRESSES: Interested persons are invited to submit written comments concerning this rule. Comments must be