

# 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 Nos. AO-F&V-923-3; FV03-923-01]

#### **Sweet Cherries Grown in Designated Counties in Washington; Recommended Decision and Opportunity To File Written Exceptions to Proposed Amendments to Marketing Agreement and Order No. 923**

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

**ACTION:** Proposed rule and opportunity to file exceptions.

**SUMMARY:** This recommended decision invites written exceptions on proposed amendments to the marketing agreement and order (order) for sweet cherries grown in Washington. Four amendments were proposed by the Washington Cherry Marketing Committee (Committee), which is responsible for local administration of the order: adding authority for promotion, including paid advertising, and production research projects; adding authority for supplemental rates of assessment for individual varieties of cherries; adding authority for the Committee to accept voluntary contributions for research and promotion; and, adding a public member to the Committee. Two additional amendments are proposed by the Agricultural Marketing Service: establishing tenure limitations for Committee members; and, requiring that continuance referenda be conducted every 6 years.

**DATES:** Written exceptions must be filed by November 4, 2004.

**ADDRESSES:** Written exceptions should be filed with the Hearing Clerk, U.S. Department of Agriculture, room 1081-S, Washington, DC 20250-9200, Facsimile number (202) 720-9776 or <http://www.regulations.gov>. All comments should reference the docket number and the date and page number

of this issue of the **Federal Register**. Comments will be made available for public inspection in the Office of the Hearing Clerk during regular business hours, or can be viewed at: <http://www.ams.usda.gov/fv/moab.html>.

#### **FOR FURTHER INFORMATION CONTACT:**

Melissa Schmaedick, Marketing Order Administration Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, USDA, Post Office Box 1035, Moab, UT 84532, telephone: (435) 259-7988, fax: (435) 259-4945.

Small businesses may request information on this proceeding by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue SW., Stop 0237, Washington, DC 20250-0237; telephone: (202) 720-2491, fax: (202) 720-8938.

**SUPPLEMENTARY INFORMATION:** Prior documents in this proceeding include a Notice of Hearing issued on October 6, 2003, and published in the October 10, 2003, issue of the **Federal Register** (68 FR 58636).

This action is governed by the provisions of sections 556 and 557 of title 5 of the United States Code and is therefore excluded from the requirements of Executive Order 12866.

#### **Preliminary Statement**

Notice is hereby given of the filing with the Hearing Clerk of this recommended decision with respect to the proposed amendment of Marketing Agreement and Order No. 923 regulating the handling of sweet cherries grown in designated counties in Washington, and the opportunity to file written exceptions thereto. Copies of this decision can be obtained from Melissa Schmaedick, whose address is listed above.

This recommended decision is issued pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*), hereinafter referred to as the "Act," and the applicable rules of practice and procedure governing the formulation of marketing agreements and orders (7 CFR part 900).

The proposed amendments are based on the record of a public hearing held November 18, 2003, in Yakima, Washington. Notice of this hearing was published in the **Federal Register** on October 10, 2003. The notice of hearing

contained proposals submitted by the Committee and by AMS.

The Committee's proposed amendments include: (1) Adding the authority for promotion, including paid advertising, and production research projects; (2) adding the authority for supplemental rates of assessment for individual varieties of cherries; (3) adding the authority for the Committee to accept voluntary contributions for marketing research and promotion, including paid advertising, and production research projects; and (4) adding a public member and alternate public member to the Committee.

The Fruit and Vegetable Programs of AMS proposed two additional amendments: to establish tenure limitations for Committee members and require that continuance referenda be conducted on a periodic basis to ascertain grower support for the order. In addition, AMS proposed to allow such changes as may be necessary to the order, if any of the proposed changes are adopted, so that all of the order's provisions conform to the effectuated amendments.

Six industry witnesses testified at the hearing. These witnesses represented sweet cherry growers and handlers in the production area, and they all supported the Committee's recommended changes.

Witnesses addressed the need for adding the authority for promotion, including paid advertising, and production research projects. This authority would enable the Committee to develop more efficient growing, harvesting, marketing and distribution techniques for sweet cherries produced in the production area. Promotional activities, including paid advertising, could lead to greater market exposure and consumer demand for sweet cherries, thereby supporting increased grower returns.

Witnesses stated their approval of the Committee's recommendation to add the authority for supplemental rates of assessment for individual varieties of cherries. Funds generated from supplemental rates of assessment would be used for research or promotion projects specific to an individual variety of sweet cherry.

Witnesses also supported the proposal to add authority for the Committee to accept voluntary contributions for marketing research and promotion,

including paid advertising, and production research projects. Witnesses stated that the industry would benefit from this authority as contributions could provide the industry with additional research and marketing opportunities.

Lastly, the Committee recommended adding a public member and alternate public member to the Committee. Witnesses stated that a public member would benefit Committee deliberations by bringing a non-industry, consumer perspective to the table.

An AMS witness testified in support of tenure limitations as a way to broaden industry participation in the program. That witness also supported continuance referenda as a means of determining grower sentiment on the order's operations.

At the conclusion of the hearing, the Administrative Law Judge stated that the final date for interested persons to file proposed findings and conclusions or written arguments and briefs based on the evidence received at the hearing would be 30 days after USDA's receipt of the hearing record transcript. No briefs were filed.

#### Material Issues

The material issues presented on the record of hearing are as follows:

- (1) Whether to add authority for promotion, including paid advertising, and production research projects;
- (2) Whether to add authority for supplemental rates of assessment for individual varieties of cherries;
- (3) Whether to add authority for the Committee to accept voluntary contributions for marketing research and promotion, including paid advertising, and production research projects;
- (4) Whether to add a public member and alternate public member seat to the Committee;
- (5) Whether to impose term limitations on Committee members; and
- (6) Whether to add a requirement that continuance referenda be held every 6 years.

#### Findings and Conclusions

The following findings and conclusions on the material issues are based on evidence presented at the hearing and the record thereof.

##### Material Issue Number 1—Authority for Production Research and Promotion, Including Paid Advertising

Section 923.45 of the order should be amended to add authority for production research and promotion, including paid advertising. That order provision currently authorizes only

marketing research and development activities.

This authority would enable the Committee to develop more efficient growing, harvesting, marketing and distribution techniques for sweet cherries produced in the production area. Promotional activities, including paid advertising, could lead to greater market exposure and consumer demand for Washington sweet cherries, thereby supporting increased returns for growers.

This authority would enable the Committee to fund production research and promotion efforts. Such activities could be conducted by the Committee itself or be contracted out to other parties. The industry believes that it is important to include promotion and production research under the Federal marketing order as these activities are vital to the long-term health of the industry.

The record evidence shows that sweet cherry acreage in Washington has increased from 21,000 acres in 1997 to an estimated 30,000 acres in 2004. In that same time period, overall tonnage of Washington sweet cherries increased from 62,000 tons to 120,000 tons. Witnesses testified that acreage and production will continue to increase, making promotion and research all that more important. As production increases, there is an increasing need to identify means of increasing quality and more accurately determining the volume of cherries that will be available to consumers in a given year.

For many years, production research and promotion has been carried out by the Washington State Fruit Commission (Commission) and other entities within the industry. Demonstrated success of these research and promotion programs has led to industry support for adding this authority to the order.

Testimony indicated that current industry production research and promotion activities range from the development of more accurate weather detection systems and timely distribution strategies, to in-store promotion activities and paid advertising.

According to the record, production research in forecasting crop yield and harvest timing through Global Positioning Systems (GPS), satellite imagery, and real-time reporting technology has been particularly successful. Sweet cherries are a highly perishable crop. Accurate prediction of crop size and harvest timing is vital to the effective marketing and distribution of high quality cherries to the retail sectors. Because of the new advances in production technology, the industry was

able to effectively anticipate the timing and record-breaking volume of the 2003 sweet cherry crop. In 2003, 8.5 million boxes were harvested, marketed and sold over a four week period (June 15 to July 15). Before that year, the industry's record volume for those four weeks was 5.5 million boxes.

Another example of research conducted by the industry involves taste testing of newly developed sweet cherry varieties. According to the record, new varieties developed in Prosser, Washington, were taken to the United Kingdom for consumer taste tests in 2000. This project was a cooperative effort by the Commission, Washington State University and the Washington State Research Commission. This project helped the industry determine consumer receptivity of new varieties introduced into the market.

A representative of the Commission testifying at the hearing stated that, since 1997, both volume and prices of Washington sweet cherries have shown annual increases. Increased market demand can be tied to the Commission's success in working with the retail sector. From 1997 to 2003, the number of retailers running 4-week promotion ads increased from 30 to 79. At the same time, the number of retail chains decreased from 250 to 160. The witness stated that these numbers indicate that the relative proportion of retail exposure for sweet cherries since 1997 has increased considerably.

Consumers have responded to marketing efforts by doubling their purchase volume during targeted retail promotion periods. According to the witness, since 1997, sweet cherries have become a focus item for retail, as they have grown to make up at least 3.5 percent of the total produce category sales. Sweet cherry sales also continue to drive just over 10 percent sales lifts in the U.S. domestic retail market in the months of June and July.

The witness estimates that the dollar impact on the local economy, or the residual benefit of the Commission's marketing efforts and increased sweet cherry demand within the State of Washington, has increased 29.74 percent over the past 5 years. With nearly 70 percent of total sweet cherry production sold domestically, the industry's marketing efforts have enabled the Washington sweet cherry industry to remain profitable in light of increasing production, rather than fall into a non-sustaining oversupply situation with low producer returns.

One witness who produces other crops in addition to sweet cherries indicated that the recent loss of the Washington State Apple Commission

has had a negative impact on his returns for apples. More specifically, the witness indicated that the lack of promotional activities for Washington apples resulted in that industry's inability to respond effectively to last year's increased production. With increased volume in the market and few tools to assist in marketing and distributing that product, grower returns fell below subsistence levels. The witness stated that the Washington sweet cherry industry's ability to continue to meet the industry's challenges of increasing production through research and promotion has resulted in that industry's continued success. While to date that work has been done under the auspices of the Commission, the industry wants to further its ability to conduct these activities by adding research and promotion authority to the order.

When asked whether a voluntary promotion program would work for the Washington sweet cherry industry, witnesses responded that the authority to conduct research and promotion activities under the order would ensure that those activities continue in a consistent manner, and that they would not be subject to economic cycles within the industry. One witness explained that a cooperative approach to funding these activities would operate as an "umbrella" mechanism for the entire industry by providing research and promotion solutions to all industry participants. Witnesses also indicated that this authority would be equally beneficial to small and large grower and handler entities. Grower input into the development of any research or promotion programs would also ensure that these activities, and the use of assessment funds to support them, would remain responsive to industry needs.

Adding this authority to the order would provide the Committee with the flexibility to use research and promotional activities, including paid advertising, to assist and improve production techniques, and promote the marketing, distribution and consumption of Washington sweet cherries. The use of assessments and available funding sources for research and promotion, including paid advertising, would be an important component to increasing demand and consumption of Washington sweet cherries.

The record supports adding authority for production research and promotion to § 923.45 of the order. There was no opposition testimony on this issue.

#### **Material Issue Number 2— Supplemental Rates of Assessment**

Section 923.41, Assessments, of the order should be amended to allow additional rates of assessment for individual varieties of cherries. Currently, the order provides for a single rate of assessment for all cherries, regardless of variety, to be established. The base assessment rate is recommended by the Committee for approval by the Department. If authority to establish supplemental rates of assessment by variety was added to the order, those rates would also be recommended by the Committee for approval by USDA. Assessments are used to fund the administrative functions of the Committee, as well as any research and promotion activities. According to the record, supplemental rates of assessment would be used for expenses specific to an individual variety of sweet cherry.

Witnesses stated that there are a number of reasons for which specific varieties may warrant supplemental assessment rates, including differences in production and marketing needs. Supplemental assessments could be used to fund research that is particular to the needs of a specific variety, or could be used to fund promotional projects to market lesser known or off-season varieties. Supplemental rates could also be applied when a particular variety of cherries produces a larger than anticipated crop in a given year. In those cases, extra funds generated through a supplemental rate could be used to support additional marketing efforts needed to stimulate demand and move that crop within the market.

Witnesses stated that any supplemental assessments collected by variety of cherry should only be used to fund projects associated with that variety. While all growers within the production area benefit from general sweet cherry production research and marketing efforts, growers of specific varieties should fund any projects aimed at benefiting that particular variety. For example, if a new variety of sweet cherry is developed, special marketing may be needed to introduce that variety to consumers in the market. While there is a risk associated with the production of that new variety, both the costs and the benefits of producing a unique and potentially higher price product should be attributed to the growers of that product.

It is not anticipated that this authority would unduly burden small growers or handlers. While a supplemental assessment would represent an additional cost, witnesses stated that the

benefits derived from that assessment would outweigh its cost. Adding this authority in conjunction with the proposal to add authority to conduct production research and promotion activities, including paid advertising, would allow the Committee to streamline and more specifically focus its research and promotion activities to the needs of the industry.

Record evidence supports amending the marketing order to authorize supplemental rates of assessment for specific varieties of sweet cherries. This proposal would allow the Committee to collect assessment funds to be used for research and promotion activities that are specific to a single variety of sweet cherry in addition to projects that are beneficial to the Washington sweet cherry industry as a whole. There was no opposition expressed with respect to this proposal.

#### **Material Issue Number 3—Voluntary Contributions**

A new § 923.43, Contributions, should be added to the order to allow the Washington Cherry Marketing Committee to accept voluntary contributions for the purpose of funding marketing research and promotion (including paid advertising), and production research projects. Such contributions should be free from any encumbrances by the donor so that the Committee would retain complete control of their use.

Currently, the marketing order program does not contain authority for the Committee to accept contributions. All marketing order activities are funded through handler assessments. Witnesses stated that the industry would benefit from this authority as contributions from groups and businesses could provide the industry with additional research and marketing opportunities.

The record shows that contributions could come from equipment and machinery dealers, fertilizer, chemical or seed dealers, container manufacturers and dealers, and companies that currently have their own marketing activities. One witness stated that this authority would have healthy, long-range effects on the industry. Ultimately, this would benefit all growers, handlers and consumers of Washington sweet cherries.

Witnesses testified that voluntary contributions should only be accepted with the understanding that the Committee would retain full discretion over how those funds would be used. Witnesses stated that project selection and spending decisions would rest with the Committee. While a donor could

indicate a specific project that he or she supports, the Committee would decide how those funds should be spent.

Record evidence supports revising the marketing order to incorporate the authority to accept voluntary contributions. There was no opposition given to this proposal.

#### **Material Issue Number 4—Public Member**

The marketing order should be revised to add a public member and alternate public member to the Washington Cherry Marketing Committee. This amendment would necessitate revising language in § 923.20, Establishment and membership, and 923.22, Nomination.

If this change were implemented, Committee membership would increase from 16 to 17 members. The public member could not have any financial interest in the Washington sweet cherry industry. The public member would have the same rights and responsibilities as other Committee members, including reimbursement for expenses as approved by the Committee.

Witnesses stated that the addition of a public member to the Committee would be beneficial in that it would bring a non-industry perspective to Committee deliberations and decision-making. The public member and alternate should be persons who can present constructive criticism when needed, and who can work together with other Committee members to build a bridge for better understanding between consumers and agriculture.

The evidence of record is that a non-industry perspective could be especially useful in deliberations over production research and promotion activities. Research and promotion activities are aimed not only at improving production and harvest techniques, but also product quality. High quality is important to the industry's ability to boost consumer demand and maintain adequate grower returns. Moreover, promotion activities are intended to attract or increase consumer interest in the product. Often promotion activities include an educational element about the benefits of the product, or ideas for using the product in cooking or food presentation. A public member could help the Committee to decide which types of production research or promotion activities would be most beneficial in the eyes of the consumer.

Persons serving as public representatives should not be, at the time of selection, nomination or during the term of office, engaged in the commercial production, buying, grading, processing of any agricultural

product, nor should they be an officer, director, member, or employee of any firm engaged in the production or processing of any agricultural product. Should the public member or alternate public member become involved in such activities at any time during their term of office, they would become ineligible to continue to serve and a replacement would be nominated for the Department's appointment.

Testimony indicates that the initial public member and alternate public member should be nominated at the first Committee meeting following the selection of industry members for a new term of office, which starts on April 1. Normally, the Committee holds its marketing policy and organization meeting during May of each year, so such meeting could be used to nominate the public member and the alternate.

Witnesses recognized that some delay would occur in the nomination and seating of the initial public member and alternate public member, as recommendation of those candidates would occur after the grower and handler members the Committee were appointed. Witnesses stated that it would be better to have the public member positions vacant for a short period of time until the new Committee members are seated by the Department, rather than create a second later term of office just applicable to the public member and alternate member. This situation would only occur once since all subsequent public members and their alternates would serve until their respective successors are appointed, as is currently practiced for all Committee grower and handler members.

Record evidence supports the addition of a public member and alternate public member to the Washington Cherry Marketing Committee. No opposition to this proposal was presented at the hearing.

#### **Material Issue Number 5—Tenure Limitations**

Section 923.21, Term of office, should be revised to establish a limit on the number of consecutive terms a person may serve on the Committee. Currently, the term of office of each member and alternate member of the Committee is three years. There are no provisions related to tenure in the marketing order. Members and alternates may serve on the Committee until their respective successors are selected and have qualified.

The record shows that USDA proposed tenure requirements for Committee members as a means to increase industry participation on the Committee, provide for more diverse

membership, provide the Committee with new perspectives and ideas, and increase the number of individuals in the industry with Committee experience.

Experience with other marketing order programs suggests that a period of six years would be appropriate. Since the current term of office for Washington Cherry Marketing Committee members and alternates is two years, the Department is proposing that no member serve more than three consecutive two-year terms or a total of six years. This proposal for a limitation on tenure would not apply to alternates. Once a member has served on the Committee for three consecutive terms, or six years, the member would sit out for one year before being eligible to serve as a member again. The member could serve as an alternate during that time.

One witness testified in opposition to tenure limitations. He indicated that finding growers and handlers willing to serve on the Committee could become more difficult, and the knowledge of experienced Committee members would be difficult to replace.

The Department believes that any additional efforts necessary to find eligible growers and handlers who are willing to serve on the Committee offset by the benefits derived by broader industry participation in order operations.

Therefore, it is recommended that the order be amended to establish tenure requirements for Committee members.

#### **Material Issue Number 6—Continuance Referenda**

Section 923.64, Termination, should be amended to require that continuance referenda be conducted every six years to ascertain industry support for the order.

Currently, there is no provision in the marketing order that requires periodic continuance referenda. The record evidence is that growers should have an opportunity to periodically vote on whether the marketing order should continue. Continuance referenda provide an industry with a means to measure grower support for the marketing order program. Experience has shown that programs need significant industry support to operate effectively. Under this proposal, the Department would consider termination of the marketing order if continuance is not favored by at least two-thirds of those voting, or at least two-thirds of the volume represented in the referendum. This is the same as that for issuance of an order. Experience in recent years indicates that six years is an appropriate

period to allow growers an opportunity to vote for continuance of the program. Therefore, the proposal sets forth that a referendum would be conducted six years after the effective date of this amendment and every sixth year thereafter.

One industry witness testified in opposition to this proposal. He indicated that the industry currently has the ability to request a continuance referendum at any time, and requiring unnecessary referenda would be costly and of little value to the industry or the Department. The program has worked successfully since its inception, and growers have been supportive of the order since that time.

The Department believes that growers should have an opportunity to periodically vote on whether the marketing order should continue.

Accordingly, it is recommended that the order be amended to require a continuance referendum every six years.

The Agricultural Marketing Service also proposed to make such changes as may be necessary to the order to conform to any amendment that may result from the hearing. The Department has identified no necessary conforming changes.

### Small Business Consideration

Pursuant to the requirements set forth in the Regulatory Flexibility Act (RFA), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities. Accordingly, the 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 so that small businesses will not be unduly or disproportionately burdened. Small agricultural growers have been defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of less than \$750,000. Small agricultural service firms are defined as those with annual receipts of less than \$5,000,000.

The record shows that there are approximately 1,500 growers of sweet cherries in the production area and approximately 62 handlers subject to regulation under the order. The average production of sweet cherries in Washington State for the last three years is 64,676 tons with an average grower price of \$1,943 per ton. Using this number, the average annual grower revenue is calculated to be approximately \$83,777, thus indicating that the average Washington sweet cherry grower would qualify as a small entity according to the SBA definition.

Using Committee data regarding each individual handler's total shipments during the 2002 marketing year, and an estimated average FOB price of \$24 per 20-pound container, 79 percent of the Washington sweet cherry handlers shipped under \$5 million worth of sweet cherries, and 21 percent shipped over \$5 million worth of sweet cherries. Therefore, the majority of Washington sweet cherry handlers may be classified as small entities.

The Committee is currently comprised of 10 growers and 6 handlers. Both small and large growers and handlers are members and member alternates on the Committee. Committee meetings are widely publicized in advance of the meetings and are held in a location central to the production area. The meetings are open to all industry members and all other interested persons, who are encouraged to participate in the deliberations and voice their opinions on topics under discussion.

At a May 22, 2003, full Committee meeting, all industry representatives present could present their views concerning the recommended amendments. Both large and small businesses were represented. The Committee believes that small and large entities would benefit equally from the proposed amendments.

Testimony indicates that the proposal to include paid advertising and production research under the order would assist both small and large growers and handlers in marketing Washington sweet cherry crops. While addition of this authority could result in increased assessments under the order, witnesses stated that the benefits arising from these activities, as evidenced by similar activities under the Commission, would outweigh the costs.

Similarly, the proposal to add authority for supplemental varietal assessments could require additional payments per individual variety of sweet cherry. However, witnesses stated that they believed the benefits of those research and promotion activities would outweigh the costs.

Witnesses used the example of recent Commission activities as evidence that research and promotion activities would lead to increased grower returns and market stability by providing tools to the industry to address expanding production and evolving consumer trends in the industry. Witnesses were unanimous in their belief that the benefits of the Commission's activities more than outweigh the costs of these programs. They stated that the same results would be expected from any

such activities conducted under the order.

The proposal to add authority for the Committee to accept voluntary contributions would not result in any increased costs or burdens to the industry. In fact, witnesses stated that this authority would benefit the industry greatly as it could provide for additional funding sources of research and promotional activities. Safeguards against donor control over the use of voluntary contributions would ensure that these funds would be used in the best interest of the industry. The Committee would decide how to use those funds, and the decision-making process would be open to industry input and feedback.

The proposal to add a public member and alternate public member to the Committee is not expected to result in any substantial cost increases. While the new members would be entitled to reimbursement for their expenses, the additional cost would be minimal. Additionally, the benefit of adding a non-industry, consumer perspective to Committee deliberations and decision-making could prove very beneficial. Witnesses stated that this additional perspective would improve the Committee's understanding of the consumer in the marketplace and could enhance Committee activities aimed at increasing consumer demand for Washington sweet cherries.

The proposed amendment to add tenure requirements for Committee members would allow more persons the opportunity to serve as members of the Committee. It would provide for more diverse membership, provide the Committee with new perspectives and ideas, and increase the number of individuals in the industry with Committee experience.

The proposal to require continuance referenda on a periodic basis to ascertain grower support for the order would allow growers to vote on whether to continue the operation of the program. The referenda would be conducted by USDA.

Interested persons were invited to present evidence at the hearing on the probable regulatory and informational impacts of the proposed amendments to the order on small entities. The record evidence is that while some minimal costs may occur, those costs would be outweighed by the benefits expected to accrue to the sweet cherry industry in designated counties of Washington.

The Department has not identified any relevant Federal rules that duplicate, overlap or conflict with this proposed rule. All of the amendments are designed to enhance the

administration and functioning of the program to the benefit of Washington cherry growers and handlers.

A 30-day comment period is provided to allow interested persons to respond to this proposal. Thirty days is deemed appropriate so that this rulemaking may be completed prior to the 2005–2006 season. All written exceptions timely received will be considered and a grower referendum will be conducted before these proposals are implemented.

#### **Paperwork Reduction Act**

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), AMS announces its intention to request OMB approval of any increase in information collection burden for the Washington Cherry marketing order.

The Washington Cherry Marketing Committee (Committee) recommended adding a public member and alternate public member to the Committee. In conformance with the recommendation, a confidential qualification and acceptance statement would be used to nominate and appoint the public and alternate public committee members. This form is based on the currently approved Confidential Background Statement for the Washington Cherry Marketing Committee. If this proposal is implemented the form would only be used after approval by OMB.

#### **Civil Justice Reform**

The amendments to Marketing Order 923 proposed herein have been reviewed under Executive Order 12988, Civil Justice Reform. They are not intended to have retroactive effect. If adopted, the proposed amendments would not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this proposal.

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 Department 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, the 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 the Department's ruling on the petition,

provided an action is filed not later than 20 days after the date of the entry of the ruling.

#### **General Findings**

The findings hereinafter set forth are supplementary to the findings and determinations which were previously made in connection with the issuance of the marketing agreement and order; and all said previous findings and determinations are hereby ratified and affirmed, except insofar as such findings and determinations may be in conflict with the findings and determinations set forth herein.

(1) The marketing agreement and order, as amended, and as hereby proposed to be further amended, and all of the terms and conditions thereof, would tend to effectuate the declared policy of the Act;

(2) The marketing agreement and order, as amended, and as hereby proposed to be further amended, regulate the handling of sweet cherries grown in the production area in the same manner as, and are applicable only to, persons in the respective classes of commercial and industrial activity specified in the marketing agreement and order upon which a hearing has been held;

(3) The marketing agreement and order, as amended, and as hereby proposed to be further amended, are limited in their application to the smallest regional production area which is practicable, consistent with carrying out the declared policy of the Act, and the issuance of several orders applicable to subdivisions of the production area would not effectively carry out the declared policy of the Act;

(4) The marketing agreement and order, as amended, and as hereby proposed to be further amended, prescribe, insofar as practicable, such different terms applicable to different parts of the production area as are necessary to give due recognition to the differences in the production and marketing of sweet cherries grown in the production area; and

(5) All handling of sweet cherries grown in the production area as defined in the marketing agreement and order, is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects such commerce.

#### **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. Section 923.20 is revised to read as follows:

##### **§ 923.20 Establishment and membership.**

There is hereby established a Washington Cherry Marketing Committee consisting of seventeen members, each of whom shall have an alternate who shall have the same qualifications as the member for whom he or she is an alternate. Ten members and their respective alternates shall be growers or officers or employees of corporate growers. Six of the members and their respective alternates shall be handlers, or officers or employees of handlers. One member and his or her respective alternate shall be a public member who is neither a grower nor a handler. The ten members of the committee who are growers or employees or officers of corporate growers are referred to in this part as “grower members” of the committee; and six members of the committee who shall be handlers, or officers or employees of handlers are referred to in this part as “handler members” of the committee. Five of the grower members and their respective alternates shall be growers of cherries in District 1, and five of the grower members and their respective alternates shall be growers of cherries in District 2. Three of the handler members and their respective alternates shall be handlers of cherries in District 1, and three of the handler members and their representative alternates shall be handlers of cherries in District 2.

3. Revise § 923.21 to read as follows:

##### **§ 923.21 Term of office.**

The term of office of each member and alternate member of the committee shall be for two years beginning April 1 and ending March 31. Members and alternate members shall serve in such capacities for the portion of the term of office for which they are selected and have qualified and until their respective successors are selected and have qualified. Committee members shall not serve more than three consecutive terms. Members who have served for three consecutive terms must leave the committee for at least one year before becoming eligible to serve again.

4. Amend § 923.22 by adding a new paragraph (b)(4) to read as follows:

**§ 923.22 Nomination.**

\* \* \* \*

(b) \* \* \*

(4) The grower and handler members of the committee shall nominate the public member and alternate public member at the first meeting following the selection of members for a new term of office.

5. In § 923.41, paragraph (c) is redesignated as paragraph (d) and a new paragraph (c) is added to read as follows:

**§ 923.41 Assessments.**

\* \* \* \*

(c) Based upon a recommendation of the committee or other available information, the Secretary shall fix the rate of assessment that handlers shall pay on all cherries handled during each fiscal period, and may also fix supplemental rates of assessment on individual varieties or subvarieties to secure sufficient funds to provide for projects authorized under § 923.45. At any time during the fiscal period when it is determined on the basis of a committee recommendation or other information that a different rate is necessary for all cherries or for any varieties or subvarieties, the Secretary may modify a rate of assessment and such new rate shall apply to any or all varieties or subvarieties that are shipped during the fiscal period.

\* \* \* \*

6. A new § 923.43 is added to read as follows:

**§ 923.43 Contributions.**

The committee may accept voluntary contributions but these shall only be used to pay expenses incurred pursuant to § 923.45. Furthermore, such contributions shall be free from any encumbrances by the donor and the committee shall retain complete control of their use.

7. Section § 923.45 is revised to read as follows:

**§ 923.45 Production and marketing research, promotion and market development.**

The committee, with the approval of the Secretary, may establish or provide for the establishment of projects involving production research, marketing research and development, and marketing promotion, including paid advertising, designed to assist, improve, or promote the marketing, distribution, consumption or efficient production of cherries. The expense of such projects shall be paid from funds collected pursuant to §§ 923.41 and 923.43.

8. Section 923.64 is amended by:

A. Revising paragraph (c).

B. Redesignating paragraph (d) as paragraph (e).

C. Adding a new paragraph (d).

The revisions read as follows:

**§ 923.64 Termination.**

\* \* \* \*

(c) The Secretary shall terminate the provisions of this part whenever it is found that such termination is favored by a majority of growers who, during a representative period, have been engaged in the production of cherries: *Provided*, that such majority has, during such representative period, produced for market more than 50 percent of the volume of such cherries produced for market.

(d) The Secretary shall conduct a referendum six years after the effective date of this section and every sixth year thereafter, to ascertain whether continuance of this subpart is favored by growers. The Secretary may terminate the provisions of this subpart at the end of any fiscal period in which the Secretary has found that continuance of this subpart is not favored by growers who, during a representative period determined by the Secretary, have been engaged in the production of cherries in the production area.

\* \* \* \*

Dated: September 29, 2004.

**A.J. Yates,**

*Administrator, Agricultural Marketing Service.*

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**BILLING CODE 3410-02-P**

**DEPARTMENT OF TRANSPORTATION****Federal Aviation Administration****14 CFR Part 39**

**[Docket No. 2003-NM-16-AD]**

**RIN 2120-AA64**

**Airworthiness Directives; Airbus Model A300 B2 and B4 Series Airplanes**

**AGENCY:** Federal Aviation Administration, DOT.

**ACTION:** Supplemental notice of proposed rulemaking; reopening of comment period.

**SUMMARY:** This document revises an earlier proposed airworthiness directive (AD), applicable to all Airbus Model A300 B2 and B4 series airplanes, that would have superseded an existing AD that currently requires determining the part and amendment numbers of the variable lever arm (VLA) of the rudder

control system to verify that the parts were installed using the correct standard, and corrective actions if necessary. For certain VLAs, the proposed AD would also have required repetitive inspections for damage, and replacement with a new VLA if necessary. This new action revises the proposed AD by mandating a terminating modification of the VLA, which would end the repetitive inspections. This new action also changes the applicability in the proposed AD. The actions specified by this new proposed AD are intended to prevent failure of both spring boxes of certain VLAs due to corrosion damage, which could result in loss of rudder control and consequent reduced controllability of the airplane. This action is intended to address the identified unsafe condition.

**DATES:** Comments must be received by October 26, 2004.

**ADDRESSES:** Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM-114, Attention: Rules Docket No. 2003-NM-16-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays. Comments may be submitted via fax to (425) 227-1232. Comments may also be sent via the Internet using the following address: [9-anm-nprmcomment@faa.gov](mailto:9-anm-nprmcomment@faa.gov). Comments sent via fax or the Internet must contain "Docket No. 2003-NM-16-AD" in the subject line and need not be submitted in triplicate. Comments sent via the Internet as attached electronic files must be formatted in Microsoft Word 97 or 2000 or ASCII text.

The service information referenced in the proposed rule may be obtained from Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.

**FOR FURTHER INFORMATION CONTACT:** 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.

**SUPPLEMENTARY INFORMATION:****Comments Invited**

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as