

# 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 930

[Docket No. AO-370-A8; AMS-FV-06-0213; FV07-930-2]

#### **Tart Cherries Grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin; Secretary's Decision and Referendum Order on Proposed Amendment of Marketing Agreement and Order No. 930**

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

**ACTION:** Proposed rule and referendum order.

**SUMMARY:** This decision proposes amendments to Marketing Agreement and Order No. 930 (order), which regulates the handling of tart cherries grown in Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin, and provides growers and processors with the opportunity to vote in a referendum to determine if they favor the changes. Seven amendments were proposed by the Cherry Industry Administrative Board (Board), which is responsible for local administration of the order. These amendments would: Authorize changing the primary reserve capacity associated with the volume control provisions of the order; authorize establishment of a minimum inventory level at which all remaining product held in reserves would be released to handlers for use as free tonnage; establish an age limitation on product placed into reserves; revise the nomination and election process for handler members on the Board; revise Board membership affiliation requirements; and update order language to more accurately reflect grower and handler participation in the nomination and election process in districts with only one Board representative. In addition, the Agricultural Marketing Service (AMS)

proposed to make any such changes as may be necessary to the order to conform to any amendment that may result from the hearing.

A Board proposal to revise the voting requirements necessary to approve a Board action is not recommended for adoption.

The amendments are designed to provide flexibility in administering the volume control provisions of the order and to update Board nomination, election, and membership requirements. The amendments are intended to improve the operation and administration of the order.

**DATES:** The referendum will be conducted from February 1, 2010, through February 13, 2010. The representative period for the purpose of the referendum will be July 1, 2008 through June 30, 2009.

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

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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, e-mail: [Jay.Guerber@usda.gov](mailto:Jay.Guerber@usda.gov).

**SUPPLEMENTARY INFORMATION:** Prior documents in this proceeding: Notice of Hearing issued on February 5, 2007, and published in the February 7, 2007, issue of the **Federal Register** (72 FR 5646), and a Recommended Decision issued on May 7, 2009 and published in the May 12, 2009, issue of the **Federal Register** (74 FR 22112).

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

The proposed amendments are based on the record of a public hearing held on February 21 and 22, 2007, in Grand Rapids, Michigan, and March 1 and 2, 2007, in Provo, Utah, to consider such amendments to the order. The hearing was held pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), 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).

Notice of this hearing was published in the **Federal Register** on February 7, 2007, and contained amendment proposals submitted by the Board.

The amendments included in this decision would:

1. Amend § 930.50 of the order to authorize changing the primary reserve capacity associated with the volume control provisions of the order.

2. Amend § 930.54 of the order to authorize establishment of a minimum inventory level at which all remaining product held in reserves would be released to handlers for use as free tonnage.

3. Amend § 930.55 to establish an age limitation on product placed into reserves.

4. Amend § 930.23 to revise the nomination and election process for handler members on the Board, including revisions to conform this section to amendment of § 930.20 regarding membership affiliation requirements.

5. Amend § 930.20 to revise Board membership affiliation requirements.

6. Amend § 930.23 to update order language to more accurately reflect grower and handler participation in the nomination and election process in Districts with only one Board representative.

In addition to the proposed amendments to the order, AMS proposed to make any such additional changes as may be necessary to the order to conform to any amendments that may result from the hearing. To the extent necessary, conforming changes have been made to the amendments.

A Board proposal to revise the voting requirements necessary to approve a Board action is not recommended for adoption.

Upon the basis of evidence introduced at the hearing and the record

thereof, the Administrator of AMS on May 7, 2009, filed a Recommended Decision and Opportunity to File Written Exceptions thereto by June 11, 2009.

Six exceptions were filed during the period provided. Five of the exceptions were filed by growers and processors of tart cherries, and one was filed on behalf of the Board. All of the exceptions expressed concern about Material Issue Number 6 regarding membership affiliation requirements. Five of the exceptions raised specific concerns with the changes AMS made in the Recommended Decision to the industry's proposed amendment under Material Issue Number 5 regarding the nomination and election process of Board members, and its application in conjunction with Material Issue Number 6. Two of the exceptions addressed Material Issue Number 4 regarding the proposal to change Board voting requirements. One exception addressed Material Issue Number 1 concerning changing the reserve capacity through informal rulemaking, Material Issue Number 2 concerning establishment of a minimum inventory level at which reserve product would be released to handlers as free tonnage, and Material Issue Number 3 concerning placing an age limitation on reserve products. The specific issues raised in these exceptions are discussed in the Findings and Conclusions; Discussions of Exceptions section of this document.

#### Small Business Considerations

Pursuant to the requirements set forth in the Regulatory Flexibility Act (RFA), 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 so that small businesses will not be unduly or disproportionately burdened. Marketing orders and amendments thereto are unique in that they are normally brought about through group action of essentially small entities for their own benefit.

Small agricultural producers 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, which include handlers regulated under the order, are defined as those with annual receipts of less than \$7,000,000.

There are approximately 40 handlers and processors of tart cherries subject to regulation under the order and approximately 900 producers of tart

cherries in the regulated area. A majority of the producers, processors, and handlers are considered small entities according to the SBA's definition.

The geographic region regulated under the order covers the States of Michigan, New York, Oregon, Pennsylvania, Utah, Washington, and Wisconsin. Acreage devoted to tart cherry production in the regulated area has declined in recent years. According to data presented at the hearing, bearing acreage in 1987–88 totaled 50,050 acres; by 2006–2007 it had declined to 37,200 acres. Michigan accounts for 74 percent of total U.S. bearing acreage with 27,700 bearing acres. Utah is second, with a reported 2,800 acres, or approximately eight percent of the total. The remaining States' acreage ranges from 700 to 2,000 acres.

Production of tart cherries can fluctuate widely from year to year. The magnitude of these fluctuations is one of the most pronounced for any agricultural commodity in the United States, and is due in large part to weather related conditions during the bloom and growing seasons. This fluctuation in supplies presents a marketing challenge for the tart cherry industry because demand for the product is relatively static. In addition, the demand for tart cherries is inelastic, which means a change in the supply has a proportionately larger change in the price level.

Authorities under the order include volume regulation, promotion and research, and grade and quality standards. Volume regulation is used under the order to augment supplies during short supply years with product placed in reserves during large supply years. This practice is intended to reduce the annual fluctuations in supplies and corresponding fluctuations in prices.

The Board is comprised of representatives from all producing areas based on the volume of cherries produced in those areas. The Board consists of a mix of handler and grower members, and a member that represents the public. Board meetings where regulatory recommendations and other decisions are made are open to the public. All members are able to participate in Board deliberations, and each Board member has an equal vote. Others in attendance at meetings are also allowed to express their views.

The Board appointed a subcommittee to consider amendments to the marketing order. The subcommittee met several times for this purpose, and ultimately recommended several amendments to the order. The Board

subsequently requested that USDA conduct a hearing to consider the proposed amendments. The views of all participants were considered throughout this process.

In addition, the hearing to receive evidence on the proposed amendments was open to the public and all interested parties were invited and encouraged to participate and express their views.

The proposed amendments are intended to provide additional flexibility in administering the volume control provisions of the order, and to update Board nomination, election, and membership requirements. The amendments are intended to improve the operation and administration of the order. Record evidence indicates the proposals are intended to benefit all producers and handlers under the order, regardless of size.

#### Amendment 1—Adding the Authority To Change the Primary Reserve Capacity

This amendment would revise § 930.50 of the order to authorize changing the primary reserve capacity associated with the volume provisions of the order through informal rulemaking. Changing the reserve capacity currently requires amendment of the order through the formal rulemaking process.

The order establishes a fixed quantity of 50-million pounds of tart cherries and tart cherry products that can be held in the primary reserve. Any reserve product in excess of the 50-million-pound limitation must be placed in the secondary reserve.

Free tonnage product can be sold to any market outlet, but most shipments are sold domestically, which is considered the primary market. Reserve product can be used only in specific outlets which are considered secondary markets. These secondary markets include development of export markets, new product development, new markets, and government purchases.

When the order was promulgated, a 50-million-pound limitation was placed on the capacity of the primary reserve. Proponents of the current order proposed a limitation on the quantity of product that could be placed into the primary reserve. That limitation was incorporated into the order, and can only be changed through the formal rulemaking process.

Economic data presented when the order was promulgated indicated that a reserve program could benefit the industry by managing fluctuating supplies. Witnesses at the February and March 2007 hearing indicated the order

has been successful in this regard. However, the record indicated that the order could be more flexible in allowing modifications to the 50-million-pound limitation should conditions warrant such a change in the future.

If the reserve capacity was changed, costs associated with storing product in reserves could also change. In addition, to the extent such a change could affect supplies in the marketplace; returns to both growers and handlers could also be affected.

Any Board recommendation to change the reserve capacity would be required to be implemented through the informal rulemaking process. As part of the informal rulemaking process, USDA expects that any Board recommendation will include an analysis of the pertinent factors and issues, including the impact of a proposed regulation on producers and handlers. During that process, the Board would recommend a change to USDA, and only if the recommendation was accompanied by adequate justification would USDA proceed with the change.

#### **Amendment 2—Adding the Authority To Establish a Minimum Inventory Level at Which Reserves Would Be Released**

This amendment would revise § 930.54 of the order to provide the Board with the authority to establish a minimum inventory level at which reserves would be released and made available to handlers as free tonnage. This amendment would allow the Board to clear out the primary reserve and subsequently the secondary reserve when a specified minimum inventory level of tart cherries is reached. The specified minimum level would be established through the informal rulemaking process.

Under current order provisions, handlers cannot access the secondary reserve until the primary reserve is empty. Based on current language of the order, one handler who has not completely disposed of or otherwise fulfilled its reserve obligation can prevent access to the secondary reserve.

The amendment would allow the Board to clear out the primary reserve when inventory levels are at a minimum level in order to provide the industry access to secondary reserve inventories.

If the amendment were implemented, costs to both handlers and the Board could be reduced. Handlers incur costs in maintaining reserves. According to the record, these costs include the cost of storage, which can be in the range of \$.01 per pound per month. Handlers also incur costs associated with tracking their own inventory levels. Witnesses

stated that when inventory levels reach a minimal amount the costs of tracking inventory outweigh the benefit from carrying inventory in the primary reserve.

A significant portion of the Board staff's time is directed at tracking reserve inventory maintained at handlers' facilities. Hearing witnesses testified that while it is difficult to quantify the exact value of the Board staff's time to conduct these activities, the time could be better spent on other industry issues, and it is unnecessary to track minimal levels of inventory.

The amendment, if implemented, could have a positive impact on the market. As inventories are released from the reserves, products could be sold, generating revenue for the industry.

If implemented, this amendment is expected to reduce costs to handlers and the Board, thus having a positive economic impact.

#### **Amendment 3—Establishing an Age Limitation on Products Placed Into Reserves**

This amendment would revise § 930.55 to require that products placed in reserves must have been produced in the current or immediately preceding two crop years. If implemented, this amendment would allow the Board to place an age limit on products carried in the reserve. The purpose of the amendment would be to help ensure that products of saleable quality are maintained in reserve inventories.

Witness supported the amendment by stating that it would add credibility to product quality for all products carried in the reserve. Currently, handlers can carry products they have no intention of selling just to meet their reserve obligation. This amendment would require handlers to rotate product in their reserve inventory, thus preventing them from maintaining the same product in the reserve year after year. Product held in inventory tends to deteriorate over time. When reserve product is ultimately released for sale to meet market demand, this proposed amendment would help ensure the reserve product available is in saleable condition and can satisfy the market's needs. Assuring product is available to satisfy the market helps to foster long-term market stability.

In terms of costs, handlers may experience some minimal costs associated with periodically rotating product through their reserve inventory. It would be difficult to estimate such costs because they would vary depending upon each handler's operation. To the extent costs would be increased, they would be proportionate

to each handler's share of the entire industry's reserve inventory. Each handler's reserve inventory obligation is based on the handler's share of the total crop handled. Thus, small handlers would not be disproportionately burdened.

It is anticipated that the benefits of providing a good quality product in reserves to ultimately supply markets when needed would outweigh any costs associated with implementation of this amendment.

#### **Amendment 4—Revision of Nomination and Election Process for Handler Members on the Board**

This amendment relates to nomination and election of Board members under § 930.23 of the order. It would require a handler to receive support from handlers that handled at least five percent of the average production of tart cherries in the applicable district in order to be a candidate and to be elected by the industry and recommended to the Secretary for Board membership. Under the current order, there is no accounting for handler volume in the nomination and balloting process. Each handler is entitled to one equal vote. This proposal would continue to allow each handler to have one vote, but would also require handler candidates to be supported by handlers representing at least five percent of the average production in the applicable district to be eligible to run for a Board position and to be elected by the industry for recommendation to the Secretary. This would help to ensure that handler members on the Board represent the interests of handlers in their district that account for at least a minimal percentage of the volume in the district. The amendment proposed by the Board was modified by AMS. The amendment as modified by AMS would not apply the five percent support requirements to candidates whose potential election could prevent a sales constituency conflict from occurring, as discussed under amendment number five. The modification would help to ensure that all qualified handlers could participate in the election process.

This proposed amendment is not anticipated to have a significant economic impact on small businesses. It only affects the nomination and election criteria for membership on the Board by adding volume as an element of support to help ensure that Board membership reflects the interests of its constituency. All qualified handlers, regardless of size, will continue to be able to participate in the nomination and election process. The process would continue to allow for both small and

large handlers to be represented on the Board.

#### **Amendment 5—Revision of Board Membership Affiliation Requirements**

This amendment would revise § 930.20 to allow more than one Board member to be affiliated with the same sales constituency from the same district, if such a conflict cannot be avoided.

Currently, § 930.20 does not allow more than one Board member to be affiliated with the same sales constituency from the same district under any circumstances. The purpose of this provision is to prevent any one sales constituency from having a controlling influence on Board issues and actions. However, a situation occurred in District 7, Utah, where this particular provision of the order did not allow the district from having two representatives on the Board, as it was entitled to under § 930.20 (b) of the order. In that situation, the only candidates willing to serve on the Board from Utah were affiliated with the same sales constituency. Thus Utah was only able, under the marketing order rules, to seat one of the two Board representatives it was entitled to.

The proposed amendment is designed to prevent this problem from occurring in the future by allowing more than one Board member affiliated with the same sales constituency to represent a district, if such a sales constituency conflict cannot be avoided. The hearing record is clear that the sales constituency provision should not prevent a district from having its allocated number of seats on the Board if there are eligible candidates willing to serve on the Board.

This amendment is not expected to have an economic impact on growers or handlers. It relates to representation on the Board, and is intended to help ensure each area covered under the order has the opportunity to achieve its allocated representation on the Board.

#### **Amendment 6—Update Order Language To Accurately Reflect Grower and Handler Participation in the Nomination and Election Process in Districts With Only One Board Representative**

This amendment to § 930.23 would revise and update order language to more accurately reflect grower and handler participation in the nomination and election process in districts with only one Board representative.

Sections 930.23(b)(5) and (c)(4) specifically reference Districts 5, 6, 8, and 9 in regard to the nomination and election process. Those were the

districts entitled to one Board seat when the order was initially promulgated. However, districts that are entitled to one Board seat have changed over time due to shifts in production. Amending §§ 930.23(b)(5) and (c)(4) by removing the specific references to Districts 5, 6, 8, and 9 and replacing it with generic language to cover any district that is entitled to only one Board representative based on the representative calculation established in § 930.20 would update order language to better reflect the constantly changing tart cherry industry.

This amendment updates order language to remove incorrect references to district representation in the event production shifts occur. It has no economic impact on handlers, growers, or any other entities.

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 some of the proposed amendments may result in some minimal cost increases while others will result in cost decreases. To the extent there are any cost increases, the benefits of the proposed changes are expected to outweigh the costs. In addition, changes in costs as a result of these amendments would be proportional to the size of businesses involved and would not unduly or disproportionately impact small entities. The informational impact of proposed amendments is addressed in the Paperwork Reduction Act discussion that follows.

USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this proposed rule. These amendments are intended to improve the operation and administration of the order to the benefit of the industry.

A Board proposal to change the voting requirements necessary to approve a Board action is not being recommended for adoption.

#### **Paperwork Reduction Act**

Information collection requirements for Part 930 are currently approved by the Office of Management and Budget (OMB), under OMB Number 0581-0177, Tart Cherries Grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin. Implementation of these amendments would not trigger any changes to those requirements. It is possible that a change to the reporting requirements may occur in the future if the Board believes it would be necessary to assist in program compliance efforts. Should any such changes become

necessary in the future, they would be submitted to OMB for approval.

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.

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.

#### **Civil Justice Reform**

The amendments to Marketing Order 930 proposed herein have been reviewed under Executive Order 12988, Civil Justice Reform. They are 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 no later than 20 days after the date of the entry of the ruling.

#### **Findings and Conclusions; Discussion of Exceptions**

The material issues, findings and conclusions, rulings, and general findings and determinations included in the Recommended Decision set forth in the May 12, 2009, issue of the **Federal Register** (74 FR 22112) are hereby approved and adopted subject to the following additions and modifications.

#### **Material Issue Number 1—Authority To Change the Primary Reserve Capacity**

Based on the briefs and exceptions filed, the findings and conclusions in Material Issue Number 1 of the Recommended Decision are amended by adding the following four paragraphs to read as follows:

One exception to the Recommended Decision concerning Material Issue Number 1 was filed by a grower and processor of tart cherries. The exception did not support amending the order to

authorize changing the capacity of the primary reserve pool through informal rulemaking. The exception stated that when the order was promulgated, a 50 million-pound limitation was established for the primary reserve, and that limitation was adequately justified at the time. Conversely, the proposed amendment was not adequately justified through documentation and economic testimony.

The proposed amendment in itself would not make a change to the reserve capacity. It would change the process by which a change to the reserve capacity could be made. Under the proposed amendment, such a change could be made through the informal rulemaking process rather than the formal rulemaking process that is currently required.

The hearing record supports that circumstances and conditions in the industry change over time which could warrant a change in the reserve capacity. If the proposed amendment is adopted and such circumstances occur, a change could be made through informal rulemaking. During that process, the Board would recommend a change to USDA, and only if the recommendation was accompanied by adequate justification would USDA proceed with the change.

The record supports allowing a change to the reserve capacity to be made through informal rulemaking rather than formal rulemaking. Thus, the exception concerning Material Issue Number 1 is denied.

*Material Issue Number 2—Authority To Establish a Minimum Level at Which Reserves Would Be Released*

Based on the briefs and exceptions filed, the findings and conclusions in Material Issue Number 2 of the Recommended Decision are amended by adding the following two paragraphs to read as follows:

One exception to the Recommended Decision concerning Material Issue Number 2 was filed by a grower and processor of tart cherries. The exception did not support amending the order to authorize establishing a minimum level at which cherries in the reserve would be released. The exception indicated that adequate justification for the proposed amendment was not provided. It further states that the Board did not present a reasonable definition of what the minimum level would be in order for the reserves to be released. The exception suggested that actual criteria for establishing a minimum level should be developed and incorporated into the proposed amendment.

This proposal would not establish a level at which reserves would be released. Informal rulemaking would be required to establish such a level. The Board would need to develop adequate justification in any recommendation it would make to USDA to implement a regulation that would authorize release of the reserve. The intent of the proposal is to provide additional flexibility in administering the reserve program, and could also reduce costs associated with tracking small amounts of reserve product. The record evidence indicates that these objectives may be achieved if the proposed amendment is adopted. For these reasons, the exception is denied.

*Material Issue Number 3—Establishment of a Minimum Age Limitation on Product Placed Into Reserves*

Based on the briefs and exceptions filed, the findings and conclusions in Material Issue Number 3 of the Recommended Decision are amended by adding the following three paragraphs to read as follows:

One exception to the Recommended Decision concerning Material Issue Number 3 was filed by a grower and processor of tart cherries. The exception stated that the age of fruit placed in reserves is not truly a regulation of fruit quality, and that handlers should be able to place whatever product they choose in the reserve. The exception states that handlers could still place poor quality product in reserves if the amendment is adopted.

According to the record evidence, the intent of this proposed amendment is to help maintain marketable products in the reserve. When reserves are ultimately released, they need to be in a condition to satisfy market demands.

While placing an age limitation on reserve products does not guarantee a specific level of quality, the record shows that product quality deteriorates over time. Placing an age limitation on product held in reserves will reduce the likelihood that product of a deteriorated quality will be carried in handlers' reserve inventories. Based on the record evidence, the proposed amendment should be implemented and the exception is therefore denied.

*Material Issue Number 4—Voting Requirements*

Based upon the briefs and exceptions filed, the findings and conclusions in Material Issue Number 4 of the Recommended Decision are amended by adding the following five paragraphs to read as follows:

Two exceptions to the Recommended Decision were filed regarding Material Issue Number 4. One exception was filed on behalf of the Board and the other was filed by a tart cherry producer and processor.

The exception filed on behalf of the Board was opposed to the conclusion in the Recommended Decision to not adopt the amendment as proposed by the Board. The proposal would have changed the voting requirements necessary for the Board to pass any action from two-thirds of the entire Board membership to two-thirds of the members present at a meeting. According to the exception, the stringent voting requirement was originally implemented because of a perception that an entity or entities or any particular dominant district in terms of representation on the Board may otherwise have too large an influence on Board actions. The exception stated that due to changes in industry structure, there is no longer a dominant entity or district in terms of Board representation, and a relaxation of the voting requirements would thus be appropriate. In addition, the exception stated that experience under the order has shown no evidence of control over the Board by any entity or region, and based on current industry demographics, no entity or region could gain such control. Finally, the exception states that safeguards exist under the order to protect the concerns of industry members against being adversely affected if the proposed changes to the voting requirements were adopted.

As stated in the Recommended Decision, the super-majority voting requirements were incorporated into the order to help ensure a high degree of support for issues at the Board level. These requirements were included in the order to help ensure minority interests were addressed and that the industry majority supported Board actions. These fundamentals are still relevant today. While it may be true that the industry demographics have changed since the order was promulgated, this does not establish a foundation that the current voting requirements are not working properly and should be changed. The record evidence does not show that the current voting requirements are having a negative impact on Board actions or the Board's ability to conduct business.

The other exception regarding Material Issue Number 4 expressed support for the determination in the Recommended Decision not to implement the proposed amendment.

The record supports leaving the current voting requirements under the

order in place, and the exception advocating a change to the Recommended Decision by adopting Material Issue Number 4 is therefore denied.

*Material Issue Number 6—Revising Board Membership Affiliation Requirements*

Based upon the briefs and exceptions filed, the findings and conclusions in Material Issue Number 6 of the Recommended Decision are amended by adding the following eight paragraphs to read as follows:

Six exceptions concerning Material Issue Number 6 were received. Five of the exceptions were from tart cherry growers and processors, and one was from the Board.

Five of the exceptions expressed concerns with the interaction of Material Issue Number 6 and Material Issue Number 5 as these two issues were discussed in the Recommended Decision. The amendment proposed by the Board and discussed in Material Issue Number 5 of the Recommended Decision would revise Board membership nomination procedures. The amendment would require a handler to receive support from handler(s) that handled at least five percent of the average production of tart cherries in the applicable district in order to be eligible to participate as a candidate in an election for Board membership. The proposed amendment would also require a handler to receive support from handler(s) that handled at least five percent of the average production of tart cherries in the applicable district in order to be elected by the industry and recommended to the Secretary for selection to the Board. The amendment proposed by the Board and discussed in Material Issue Number 6 of the Recommended Decision would revise Board membership affiliation requirements to allow more than one Board member per district to be affiliated with the same sales constituency if it cannot be avoided.

The Recommended Decision included adding a provision to the proposal in Material Issue Number 5 to conform to the proposed amendment to § 930.20 (g). The added provision would not apply the five percent support requirement for Board membership candidates in instances where such a requirement would result in a sales constituency conflict. (A sales constituency conflict is considered to exist if two persons from the same district are affiliated with the same sales constituency.)

The five exceptions that expressed concern with the interaction of Material Issues 5 and 6 were opposed to the

provisions added in the Recommended Decision regarding not applying the five percent support requirement in certain instances. These exceptions stated that the five percent support requirement should apply in all situations, regardless of potential sales constituency conflicts. According to these exceptions, having support from handlers with a minimum of five percent of the volume of cherries handled in the district requirement is more important than avoiding a potential sales constituency conflict. These exceptions further state that avoiding a sales constituency conflict is not as big an issue now as it was when the order was promulgated because the structure of the industry has changed and one sales constituency could no longer gain control of the Board. The exceptions also state that this amendment should not apply in one District but not another.

One exception expressed the view that the proposed amendment to revise Board membership affiliation requirements to allow more than one Board member per district to be from the same sales constituency if it cannot be avoided, should only apply in situations that are identical to those currently prevailing in Utah. In Utah, a situation occurred where there were no candidates from a different sales constituency that were willing to serve on the Board. Consequently, Utah (District 7) was unable to fill a Board position for a period of time.

One of the exceptions indicated that if the five percent support requirement was not applied in certain instances, it would preclude other handler candidates from seeking nomination and election if their election would present a sales constituency conflict.

The Recommended Decision took into account both the merits of the proposed amendment requiring Board candidates to receive support from handlers handling at least five percent of the volume in the District to be nominated and elected to the Board and also the merits of the proposed amendment to allow a sales constituency conflict to exist in Board membership if such a situation cannot be avoided, in the interest of each District achieving its allocated representation on the Board. The added provision in Material Issue Number 5 recognizes the importance of both issues. The changes would not preclude any qualified handler from seeking his or her candidacy for nomination or election to the Board. Any qualified handler would be able to seek a Board position, including those who may present a sales constituency conflict with an existing Board member. The effect of the changes to the proposal

would relieve those handlers that do not present a sales constituency conflict from the five percent support requirements. This would provide opportunity to avoid a sales constituency conflict among Board members if the handler without a sales constituency conflict were to win the election. In addition, this requirement would be the same in all districts. Although it currently appears to be an issue only in Utah at this time, as the record indicates and the exceptions note, changes and affiliations in the industry occur over time. It could possibly be an issue in another district in the future, and if so, it would be applied the same in all instances.

In order to address the issues raised as a result of the interaction of the provisions in proposals in Material Issue Numbers 5 and 6, and to maintain an open election process that allows all qualified handler candidates to participate, USDA believes the proposed provisions as presented in the Recommended Decision are appropriate. The exceptions are therefore denied.

**Rulings on Exceptions**

In arriving at the findings and conclusions and the regulatory provisions of this decision, the exceptions to the Recommended Decision were carefully considered in conjunction with the record evidence. To the extent that the findings and conclusions and the regulatory provisions of this decision are at variance with the exceptions, such exceptions are denied.

**Marketing Agreement and Order**

Annexed hereto and made a part hereof is the document entitled "Order Amending the Order Regulating the Handling of Tart Cherries Grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin." This document has been decided upon as the detailed and appropriate means of effectuating the foregoing findings and conclusions.

*It is hereby ordered*, that this entire decision be published in the **Federal Register**.

**Referendum Order**

It is hereby directed that a referendum be conducted in accordance with the procedure for the conduct of referenda (7 CFR part 900.400–407) to determine whether the annexed order amending the order regulating the handling of tart cherries grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin is approved or favored by

growers and processors, as defined under the terms of the order, who during the representative period were engaged in the production or processing of tart cherries in the production area.

The representative period for the conduct of such referendum is hereby determined to be July 1, 2008 through June 30, 2009.

The agents of the Secretary to conduct such referendum are hereby designated to be Kenneth G. Johnson and Patricia A. Petrella, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, Suite 2A04, 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) or [Patricia.Petrella@ams.usda.gov](mailto:Patricia.Petrella@ams.usda.gov).

#### List of Subjects in 7 CFR Part 930

Marketing agreements, Reporting and recordkeeping requirements, Tart cherries.

Dated: January 6, 2010.

**David R. Shipman,**

*Acting Administrator, Agricultural Marketing Service.*

#### Order Amending the Order Regulating the Handling of Tart Cherries Grown in Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin<sup>1</sup>

##### Findings and Determinations

The findings and determinations hereinafter set forth are supplementary to the findings and determinations that 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.

##### (a) Findings and Determinations Upon the Basis of the Hearing Record

Pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended, (7 U.S.C. 601-612), and the applicable rules of practice and procedure effective thereunder (7 CFR part 900), a public hearing was held upon proposed amendment of Marketing Agreement and Order No. 930 (7 CFR part 930), regulating the handling of tart cherries grown in Michigan, New York, Pennsylvania, Oregon, Utah,

Washington, and Wisconsin. Upon the basis of the evidence introduced at such hearing and the record thereof, it is found that:

(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 tart 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 tart cherries grown in the production area; and

(5) All handling of tart 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.

##### Order Relative to Handling

*It is therefore ordered,* That on and after the effective date hereof, all handling of tart cherries grown in Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin shall be in conformity to, and in compliance with the terms and conditions of the said order as hereby proposed to be amended as follows:

The provisions of the proposed marketing agreement and order amending the order contained in the Recommended Decision issued on May 7, 2009, and published in the **Federal Register** on May 12, 2009, will be and are the terms and provisions of this order amending the order and are set forth in full herein.

#### 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. Revise paragraph (g) of § 930.20 to read as follows:

##### § 930.20 Establishment and Membership.

\* \* \* \* \*

(g) In order to achieve a fair and balanced representation on the Board, and to prevent any one sales constituency from gaining control of the Board, not more than one Board member may be from, or affiliated with, a single sales constituency in those districts having more than one seat on the Board; *Provided*, That this prohibition shall not apply in a district where such a conflict cannot be avoided. There is no prohibition on the number of Board members from differing districts that may be elected from a single sales constituency which may have operations in more than one district. However, as provided in § 930.23, a handler or grower may only nominate Board members and vote in one district.

\* \* \* \* \*

3. In § 930.23 revise paragraphs (b)(2) and (b)(5), redesignate paragraph (c)(3) as paragraph (c)(3)(i), add a new paragraph (c)(3)(ii), and revise paragraph (c)(4) to read as follows:

##### § 930.23 Nomination and Election.

\* \* \* \* \*

(b) \* \* \*

(2) In order for the name of a handler nominee to appear on an election ballot, the nominee's name must be submitted with a petition form, to be supplied by the Secretary or the Board, which contains the signature of one or more handler(s), other than the nominee, from the nominee's district who is or are eligible to vote in the election and that handle(s) a combined total of no less than five percent (5%) of the average production, as that term is used § 930.20, handled in the district. *Provided*, that this requirement shall not apply if its application would result in a sales constituency conflict as provided in § 930.20(g). The requirement that the petition form be signed by a handler other than the nominee shall not apply in any district where fewer than two handlers are eligible to vote.

\* \* \* \* \*

(5) In districts entitled to only one Board member, both growers and handlers may be nominated for the

<sup>1</sup> This order shall not become effective unless and until the requirements of § 900.14 of the rules of practice and procedure governing proceedings to formulate marketing agreements and marketing orders have been met.



district's Board seat. Grower and handler nominations must follow the petition procedures outlined in paragraphs (b)(1) and (b)(2) of this section.

\* \* \* \* \*

(c) \* \* \*

(3)(i) \* \* \*

(ii) To be seated as a handler representative in any district, the successful candidate must receive the support of handler(s) that handled a combined total of no less than five percent (5%), of the average production, as that term is used in § 930.20, handled in the district; *Provided*, that this paragraph shall not apply if its application would result in a sales constituency conflict as provided in § 930.20(g).

(4) In districts entitled to only one Board member, growers and handlers may vote for either the grower or handler nominee(s) for the single seat allocated to those districts.

\* \* \* \* \*

4. Revise paragraph (i) of § 930.50 to read as follows:

**§ 930.50 Marketing policy.**

\* \* \* \* \*

(i) *Restricted Percentages.* Restricted percentage requirements established under paragraphs (b), (c), or (d) of this section may be fulfilled by handlers by either establishing an inventory reserve in accordance with § 930.55 or § 930.57 or by diversion of product in accordance with § 930.59. In years where required, the Board shall establish a maximum percentage of the restricted quantity which may be established as a primary inventory reserve such that the total primary inventory reserve does not exceed 50-million pounds; *Provided*, That such 50-million-pound quantity may be changed upon recommendation of the Board and approval of the Secretary. Any such change shall be recommended by the Board on or before September 30 of any crop year to become effective for the following crop year, and the quantity may be changed no more than one time per crop year. Handlers will be permitted to divert (at plant or with grower diversion certificates) as much of the restricted percentage requirement as they deem appropriate, but may not establish a primary inventory reserve in excess of the percentage established by the Board for restricted cherries. In the event handlers wish to establish inventory reserve in excess of this amount, they may do so, in which case it will be classified as a secondary inventory

reserve and will be regulated accordingly.

\* \* \* \* \*

5. Add a new paragraph (d) to § 930.54 to read as follows:

**§ 930.54 Prohibition on the use or disposition of inventory reserve cherries.**

\* \* \* \* \*

(d) Should the volume of cherries held in the primary inventory reserves and, subsequently, the secondary inventory reserves reach a minimum amount, which level will be established by the Secretary upon recommendation from the Board, the products held in the respective reserves shall be released from the reserves and made available to the handlers as free tonnage.

6. Revise paragraph (b) of § 930.55 to read as follows:

**§ 930.55 Primary inventory reserves.**

\* \* \* \* \*

(b) The form of the cherries, frozen, canned in any form, dried, or concentrated juice, placed in the primary inventory reserve is at the option of the handler. The product(s) placed by the handler in the primary inventory reserve must have been produced in either the current or the preceding two crop years. Except as may be limited by § 930.50(i) or as may be permitted pursuant to §§ 930.59 and 930.62, such inventory reserve portion shall be equal to the sum of the products obtained by multiplying the weight or volume of the cherries in each lot of cherries acquired during the fiscal period by the then effective restricted percentage fixed by the Secretary; *Provided*, That in converting cherries in each lot to the form chosen by the handler, the inventory reserve obligations shall be adjusted in accordance with uniform rules adopted by the Board in terms of raw fruit equivalent.

\* \* \* \* \*

[FR Doc. 2010-315 Filed 1-12-10; 8:45 am]

BILLING CODE 3410-02-P

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. FAA-2010-0027; Directorate Identifier 2008-NM-204-AD]

RIN 2120-AA64

**Airworthiness Directives; Sicma Aero Seat 9140, 9166, 9173, 9174, 9184, 9188, 9196, 91B7, 91B8, 91C0, 91C2, 91C3, 91C4, 91C5, and 9301 Series Passenger Seat Assemblies; and Sicma Aero Seat 9501311-05, 9501301-06, 9501311-15, 9501301-16, 9501441-30, 9501441-33, 9501311-55, 9501301-56, 9501441-83, 9501441-95, 9501311-97, and 9501301-98 Passenger Seat Assemblies; Installed on Various Transport Category Airplanes**

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

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

**SUMMARY:** We propose to adopt a new airworthiness directive (AD) for the products listed above. This proposed AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as: Cracks have been found on seat backrest links P/N (part number) 90-000200-104-1 and 90-000200-104-2. These cracks can significantly affect the structural integrity of seat backrests. Failure of the backrest links could result in injury to an occupant during emergency landing conditions. The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

**DATES:** We must receive comments on this proposed AD by March 1, 2010.

**ADDRESSES:** You may send comments by any of the following methods:

- **Federal eRulemaking Portal:** Go to <http://www.regulations.gov>. Follow the instructions for submitting comments.

- **Fax:** (202) 493-2251.

- **Mail:** U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

- **Hand Delivery:** U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-40, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.