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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 930

[Doc. No. AMS–SC–17–0071; SC18–930–1 FR]

Tart Cherries Grown in the States of Michigan, et al.; Free and Restricted Percentages for the 2017–18 Crop Year for Tart Cherries

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule implements a recommendation from the Cherry Industry Administrative Board (Board) to establish free and restricted percentages, or the proportion of 2017 tart cherries which may be handled in commercial outlets, for the 2017–18 crop year under the Marketing Order for tart cherries grown in the states of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin.

DATES: Effective October 22, 2018.

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Small businesses may request information on complying with this regulation by contacting Richard Lower, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, Fax: (202) 720–8938, or Email: *Richard.Lower@ams.usda.gov.*

SUPPLEMENTARY INFORMATION: This final rule, pursuant to 5 U.S.C. 553, amends regulations issued to carry out a marketing order as defined in 7 CFR 900.2(j). This final rule is issued under Marketing Order No. 930, both as amended (7 CFR part 930), regulating the handling of tart cherries produced in the states of Michigan, New York, Pennsylvania, Oregon, Utah, Washington and Wisconsin. Part 930 (referred to as the ''Order'') is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.'' The Board locally administers the Order and is comprised of producers and handlers of tart cherries operating within the production area, and a public member.

The Department of Agriculture (USDA) is issuing this final rule in conformance with Executive Orders 13563 and 13175. This action falls within a category of regulatory action that the Office of Management and Budget (OMB) exempted from Executive Order 12866 review. Additionally, because this rule does not meet the definition of a significant regulatory action, it does not trigger the requirements contained in Executive Order 13771. See OMB's Memorandum titled ''Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, titled 'Reducing Regulation and Controlling Regulatory Costs' '' (February 2, 2017).

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the Order provisions now in effect, free and restricted percentages may be established for tart cherries handled during the crop year. This final rule establishes free and restricted percentages for tart cherries for the 2017–18 crop year, beginning July 1, 2017, through June 30, 2018.

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

This final rule establishes free and restricted percentages, or the proportion of 2017 tart cherries which may be handled in commercial outlets, for the 2017–18 crop year at 69 percent and 31 percent, respectively. This action should stabilize marketing conditions by adjusting supply to meet market demand and help improve grower returns. The final percentages were recommended by the Board at a meeting on September 14, 2017 and have been designated by the Secretary.

Section 930.51(a) provides the Secretary authority to regulate volume by designating free and restricted percentages for any tart cherries acquired by handlers in a given crop year. Section 930.50 prescribes procedures for computing an optimum supply based on sales history and for calculating the aforesaid percentages. Free percentage volume may be shipped to any market. Restricted percentage volume must be held by handlers in a primary or secondary reserve, or be diverted or used for exempt purposes as prescribed in §§ 930.159 and 930.162. Exempt purposes include, in part, the development of new products, sales into new markets, the development of export markets, and charitable contributions. Sections 930.55 through 930.57 prescribe procedures for inventory reserve including that handlers would be responsible for storage and would retain title of the tart cherries.

Under § 930.52, only districts with an annual average production over the prior three years of at least six million pounds are subject to regulation, and any district producing a crop that is less than 50 percent of its annual average of the previous five years is exempt. The regulated districts for the 2017–2018 crop year are: District 1—Northern Michigan; District 2—Central Michigan; District 3—Southern Michigan; District 4—New York; District 7—Utah; District 8—Washington; and District 9—Wisconsin. Districts 5 and 6 (Oregon and Pennsylvania, respectively) will not be regulated for the 2017–18 season.

Demand for tart cherries and tart cherry products tends to be relatively stable from year to year. Conversely, annual tart cherry production can vary greatly. In addition, tart cherries are processed and can be stored and carried over from crop year to crop year, further impacting supply. As a result, supply and demand for tart cherries are rarely in balance.

Because demand for tart cherries is inelastic, total sales volume is not very responsive to changes in price. However, prices are very sensitive to changes in supply. As such, an oversupply of cherries would have a sharp negative effect on prices, driving down grower returns. Aware of this economic relationship, the Board focuses on using the volume control provisions in the Order to balance supply and demand to stabilize industry returns.

Pursuant to § 930.50, the Board meets on or about July 1 to review sales data, inventory data, current crop forecasts, and market conditions for the upcoming season and, if necessary, to recommend preliminary free and restricted percentages if anticipated supply would exceed demand. After harvest is complete, but no later than September 15, the Board meets again to update its calculations using actual production data, consider any necessary adjustments to the preliminary percentages, and determine if final free and restricted percentages should be recommended to the Secretary of Agriculture.

The Board uses sales history, inventory, and production data to determine whether there is a surplus and, if so, how much volume should be restricted to maintain optimum supply. The optimum supply represents the desirable volume of tart cherries that should be available for sale in the coming crop year. Optimum supply is defined as the average free sales of the prior three years plus desirable carry-out inventory. Desirable carry-out is the amount of fruit needed by the industry to be carried into the succeeding crop year to meet market demand until the new crop is available. Desirable carry-out is set by the Board after considering market circumstances and needs. Section 930.151(b) specifies that desirable carry-out can range from zero to a maximum of 100 million pounds.

In addition, USDA's ''Guidelines for Fruit, Vegetable, and Specialty Crop Marketing Orders'' (*http://www.ams.usda.gov/publications/content/1982-guidelines-fruit-vegetable-marketing-orders*) specify that 110 percent of recent years' sales should be made available to primary markets each season before recommendations for volume regulation are approved. This requirement is codified in § 930.50(g), which specifies that in years when restricted percentages are established, the Board shall make available tonnage equivalent to an additional 10 percent of the average sales of the prior three years for market expansion (market growth factor).

After the Board determines optimum supply, desirable carry-out, and market growth factor, it must examine the current year's available volume to determine whether there is an oversupply situation. Available volume includes carry-in inventory (any inventory available at the beginning of the season) along with that season's production. If production is greater than the optimum supply minus carry-in, the difference is considered surplus. This surplus tonnage is divided by the sum of production in the regulated districts to reach a restricted percentage. This percentage must be held in reserve or used for approved diversion activities, such as exports.

The Board met on June 22, 2017 and computed an optimum supply of 282.4 million pounds for the 2017–18 crop year using the average of free sales for the three previous seasons. Regarding the carry-out value, the Board discussed and considered a range of alternatives. One member suggested a carry-out value of 20 million pounds, approximately one tenth of three years' average annual sales. Last year's carry-out was set at 57 million pounds to cover the three-month gap between calculation of carry-out at the end of one season and the availability of fruit for the next season. One member, advocating for 60 million pounds, noted that a carry-out to supply only three months' worth of cherries makes it difficult for processors to serve their customers. Some Board members stated that in the past two seasons, the recommended carry-out was equivalent to approximately three months' sales but the industry ended up with a higher carry-out than anticipated, which puts downward pressure on prices. After the consideration of the alternatives, the Board determined a carry-out of 45 million pounds would be slightly less than the three-month estimate of 60 million pounds and would supply the industry's needs at the beginning of the next season.

The Board subtracted the estimated carry-in of 110.5 million pounds from the optimum supply to calculate the production quantity needed from the 2017–18 crop to meet optimum supply. This number, 171.9 million pounds, was subtracted from the Board's estimated 2017–18 total production (from regulated and unregulated districts) of 259 million pounds to calculate a surplus of 87.1 million pounds of tart cherries. The Board also complied with the market growth factor requirement by removing 23.7 million pounds (average sales for prior three years of 237.4 million times 10 percent) from the surplus. The adjusted surplus of 63.1 million pounds was then divided by the expected production in the regulated districts (252 million pounds) minus anticipated orchard diversion (12 million pounds) to reach a preliminary restricted percentage of 26 percent for the 2017–18 crop year.

The Board then discussed whether this calculation would provide sufficient supply to grow sales and supply orders that are already scheduled but not yet shipped, including filling remaining orders from USDA purchases. A motion to make an economic adjustment of five million pounds to adjust for USDA sales failed to receive Board support. After the discussion, the Board's preliminary restricted percentage remained at 26 percent (63 million pounds divided by 240 million pounds).

The Board met again on September 14, 2017, to consider final volume regulation percentages for the 2017–18 season. The final percentages are based on the Board's reported production figures and the supply and demand information available in September. In September and going forward, the Board revised the formula for calculating free sales. When the three-year sales average was recalculated in September, the revision lowered the sales average to 205 million pounds, which resulted in a revised optimum supply of 250 million pounds.

The total production for the 2017–18 season was 270.4 million pounds, 11.4 million pounds above the Board's June estimate. In addition, growers diverted 11.7 million pounds in the orchard, leaving 258.7 million pounds available to market, 251.1 million pounds of which are in the restricted districts. Using the actual production numbers, and accounting for the recommended desirable carry-out and economic adjustment, as well as the market growth factor, the restricted percentage was recalculated.

The Board subtracted the carry-in figure used in June of 110.5 million pounds from the optimum supply of 250 million pounds to determine 139.5 million pounds of 2017–18 production would be necessary to reach optimum supply. The Board subtracted the 139.5 million pounds from the actual production of 270.4 million pounds, resulting in a surplus of 130.9 million pounds of tart cherries. The Board also recommended an economic adjustment to adjust the supply in anticipation of increased sales from market expansion, new markets, and growth from the short crop this season in Europe. The surplus was then reduced by subtracting the economic adjustment of 33 million pounds and the market growth factor of 20.5 million pounds, resulting in an adjusted surplus of 77.4 million pounds. The Board then divided this final surplus by the available production of 251.1 million pounds in the regulated districts (262.8 million pounds minus 11.7 million pounds of in-orchard diversion) to calculate a restricted percentage of 31 percent with a corresponding free percentage of 69 percent for the 2017–18 crop year, as outlined in the following table:

	Millions of pounds
Final Calculations:	
(1) Average sales of the prior three years	205.0
(2) Plus desirable carry-out	45.0
(3) Optimum supply calculated by the Board	250.0
(4) Carry-in as of July 1, 2017	110.5
(5) Adjusted optimum supply (item 3 minus item 4)	139.5
(6) Board reported production	270.4
(7) Surplus (item 6 minus item 5)	130.9
(8) Total economic adjustments	33.0
(9) Market growth factor	20.5
(10) Adjusted Surplus (item 7 minus items 8 and 9)	77.4
(11) Supply in regulated districts	262.8
(12) In-orchard diversion	11.7
(13) Regulated production minus in-orchard diversion	251.1
Final Percentages:	Percent
Restricted (item 10 divided by item 13 × 100)	31
Free (100 minus restricted percentage)	69

The primary purpose of setting restricted percentages is an attempt to bring supply and demand into balance. If the primary market is oversupplied with cherries, grower prices decline substantially. Restricted percentages have benefited grower returns and helped stabilize the market as compared to those seasons prior to the implementation of the Order. The Board believes the available information indicates that a restricted percentage should be established for the 2017–18 crop year to avoid oversupplying the market with tart cherries. Consequently, based on its discussion of this issue and the result of the above calculations, the Board recommended final percentages of 69 percent free and 31 percent restricted by a vote of 18 in favor and 1 opposed.

The initial restriction percentage of 26 percent was lower than the final restriction of 31 percent. One factor affecting this change was the final production numbers that came in above the Board's June estimate. Additionally, in September the Board revised the formula for calculating the three-year sales average, which will be used going forward. The revision in the calculation of the free sales average lowered the sales calculation from the preliminary 237.4 million pounds to the final average of 205 million pounds. The desired carry-out remained the same at 45 million pounds, resulting in a revised optimum supply of 250 million pounds, down from the June calculation of 282.4 million pounds.

At the Board meeting on September 14, an economic adjustment of 33 million pounds was recommended in the Optimum Supply Formula (OSF). Several members indicated the factors in the marketplace prompted the need to make this economic adjustment to maintain market growth. These factors include serving new and expanded markets, a year over year increase in sales, and the expectation of increased sales as a result of a smaller than normal tart cherry crop in Europe this season.

One member opposed to the proposed restriction expressed opposition to the definition of sales used in the OSF. In particular, the member expressed concern that the definition of sales is misrepresented by not including imported cherries in the sales average, thus not capturing overall supply and demand. Another member agreed with this concern but did not oppose the proposed OSF calculation.

A motion was made to re-open the discussion about the OSF and consider an adjustment for imports. However, the motion failed to gain enough support for further discussion. One member indicated that the issue of imports continues to be a top priority for discussion and will be revisited moving forward into the winter season.

After reviewing the available data and considering the concerns expressed, the Board determined that a 31 percent restriction would meet sales needs and establish some reserves without oversupplying the market. Thus, the Board recommended establishing final percentages of 69 percent free and 31 percent restricted. The Board could meet and recommend the release of additional volume during the crop year if conditions so warranted. The Secretary finds, from the recommendation and supporting information supplied by the Board, that designating final percentages of 69 percent free and 31 percent restricted will tend to effectuate the declared policy of the Act, and so designates these percentages.

Final Regulatory Flexibility Analysis

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

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 600 producers of tart cherries in the regulated area and approximately 40 handlers of tart cherries who are subject to regulation under the Order. Small agricultural producers are defined by the Small Business Administration (SBA) as those having annual receipts of less than $750,000, and small agricultural service firms have been defined as those whose annual receipts are less than $7,500,000 (13 CFR 121.201).

According to the National Agricultural Statistics Service (NASS) and Board data, the average annual grower price for tart cherries utilized for processing during the 2016–17 season was approximately $0.273 per pound. With total utilization at approximately 323.1 million pounds for the 2016–17 season, the total 2016–17 value of the crop utilized for processing is estimated at $88.2 million. Dividing the crop value by the estimated number of producers (600) yields an estimated average receipt per producer of $147,000. This is well below the SBA threshold for small producers. A free on board (f.o.b.) price of $0.83 per pound for frozen tart cherries, which make up the majority of processed tart cherries, is a good estimate to represent the range of prices reported by the Food Institute during the 2017–2018 season. Multiplying the f.o.b. price by total utilization of 323.1 million pounds results in an estimated handler-level tart cherry value of $268 million. Dividing this figure by the number of handlers (40) yields an estimated average annual handler receipts of $6.7 million, which is below the SBA threshold for small agricultural service firms. Assuming a normal distribution, the majority of producers and handlers of tart cherries may be classified as small entities.

The tart cherry industry in the United States is characterized by wide annual fluctuations in production. According to NASS, the pounds of tart cherry production utilized for processing for the years 2014 through 2016 were 304 million, 253 million, and 329 million, respectively. Because of these fluctuations, supply and demand for tart cherries are rarely equal.

Demand for tart cherries is inelastic, meaning changes in price have a minimal effect on total sales volume. However, prices are very sensitive to changes in supply, and grower prices vary widely in response to the large swings in annual supply. Grower prices per pound for processed utilization have ranged from a low of $0.073 in 1987 to a high of $0.549 per pound in 2012.

Because of this relationship between supply and price, oversupplying the market with tart cherries would have a sharp negative effect on prices, driving down grower returns. Aware of this economic relationship, the Board focuses on using the volume control authority in the Order to align supply with demand and stabilize industry returns. This authority allows the industry to set free and restricted percentages as a way to bring supply and demand into balance. Free percentage cherries can be marketed by handlers to any outlet, while restricted percentage volume must be held by handlers in reserve, diverted, or used for exempted purposes.

This rule controls the supply of tart cherries by establishing percentages of 69 percent free and 31 percent restricted for the 2017–18 crop year. These percentages should stabilize marketing conditions by adjusting supply to meet market demand and help improve grower returns. This action will regulate tart cherries handled in Michigan, New York, Utah, Washington, and Wisconsin. The authority for this action is provided in §§ 930.50, 930.51(a), and 930.52. The Board recommended this action at a meeting on September 14, 2017.

This rule will result in some fruit being diverted from the primary domestic markets. However, as mentioned earlier, the USDA's ''Guidelines for Fruit, Vegetable, and Specialty Crop Marketing Orders'' (*http://www.ams.usda.gov/publications/content/1982-guidelines-fruit-vegetable-marketing-orders*) specify that 110 percent of recent years' sales should be made available to primary markets each season before recommendations for volume regulation are approved. The quantity that will be available under this regulation is greater than 110 percent of the average quantity shipped in the prior three years.

In addition, there are secondary uses available for restricted fruit, including the development of new products, sales into new markets, the development of export markets, and being placed in reserve. While these alternatives may provide different levels of return than the sales to primary markets, they play an important role for the industry. The areas of new products, new markets, and the development of export markets utilize restricted fruit to develop and expand the markets for tart cherries. In 2016–17, these activities accounted for over 37 million pounds in sales, 15.6 million of which were exports.

Placing tart cherries into reserves is also a key part of balancing supply and demand. Although handlers bear the handling and storage costs for fruit in reserve, reserves stored in large crop years are used to supplement supplies in short crop years. The reserves allow the industry to mitigate the impact of oversupply in large crop years, while allowing the industry to maintain supply to markets in years when production falls below demand. Further, storage and handling costs are more than offset by the increase in price when moving from a large crop to a short crop year.

In addition, the Board recommended a carry-out of 45 million pounds and made a demand adjustment of 33 million pounds in order to make the regulation less restrictive. The domestic market will have an ample supply of tart cherries, even with this restriction. There are 110.5 million pounds of carry-in, 7.7 million pounds of production in the unregulated districts, and there will be 173.7 million pounds of free tonnage from the regulated districts, leaving 291.8 million pounds of fruit available to the domestic market. Consequently, it is not anticipated that this regulation will unduly burden growers or handlers.

While this action could result in some additional costs to the industry, these costs are more than outweighed by the benefits. The purpose of setting restricted percentages is to attempt to bring supply and demand into balance. If the primary market (domestic) is oversupplied with cherries, grower prices decline substantially. Without volume control, the primary market would likely be oversupplied, resulting in lower grower prices.

The three districts in Michigan, along with the districts in New York, Utah, Washington, and Wisconsin, are the restricted areas for this crop year, and have a combined total production of 262.8 million pounds. A 31 percent restriction, after removing the 11.7 million pounds for in-orchard diversion, means 173.3 million pounds will be available to be shipped to primary markets from these five states. The 173.3 million pounds from the restricted districts, 7.7 million pounds from the unrestricted districts (Oregon and Pennsylvania), and the 110.5-million-pound carry-in inventory will make a total of 291.5 million pounds available as free tonnage for the primary markets. This is less than the 306 million pounds of free tonnage made available last year. However, this will be enough to cover 260 million pounds of Board reported sales in 2016–2017, while providing substantial carry-out. Further, the Board could meet and recommend the release of additional volume during the crop year if conditions so warrant.

Prior to the implementation of the Order, grower prices often did not cover the cost of production. The most recent costs of production determined by representatives of Michigan State University are an estimated $0.33 per pound. To assess the impact that volume control has on the prices growers receive for their product, an econometric model has been developed. Based on the model, the use of volume control will have a positive impact on grower returns for this crop year. With volume control, grower prices are estimated to be approximately $0.05 per pound higher than without restrictions. In addition, absent volume control, the industry could start to build large amounts of unwanted inventories. These inventories would have a depressing effect on grower prices.

Retail demand is assumed to be highly inelastic, which indicates that changes in price do not result in significant changes in the quantity demanded. Consumer prices largely do not reflect fluctuations in cherry supplies. Therefore, this regulation should have little or no effect on consumer prices and should not result in a reduction in retail sales.

The free and restricted percentages established by this rule provide the market with optimum supply and apply uniformly to all regulated handlers in the industry, regardless of size. As the restriction represents a percentage of a handler's volume, the costs, when applicable, are proportionate and should not place an extra burden on small entities as compared to large entities.

The stabilizing effects of this action benefit all handlers by helping them maintain and expand markets, despite seasonal supply fluctuations. Likewise, price stability positively impacts all growers and handlers by allowing them to better anticipate the revenues their tart cherries will generate. Growers and handlers, regardless of size, benefit from the stabilizing effects of this restriction. In addition, the carry-out should provide processors enough supply to meet market needs going into the next season.

The Board considered alternatives in its preliminary restriction discussions that affected this action. The Board had extensive discussions on carry-out inventory alternatives. The alternatives included four motions that failed to pass, ranging from carry-out inventory of 20 million pounds to 55 million pounds. The Board determined that if the carry-out number was too large, it could have a negative impact on grower returns. Some members were concerned that processors would not have enough fruit to maintain sales before the new crop was available. After consideration of the alternatives, the Board recommended a carry-out of 45 million pounds.

Regarding demand, the Board began in June with a sales average of 237.4 million pounds. However, in September the Board revised the formula for calculating the sales average going forward. This modification will provide a more accurate calculation of free sales each year. This revision lowered the three-year sales average for the final calculation made at the September meeting to 205 million pounds.

Additionally, at the September meeting, Board members discussed an expectation of increased sales over the coming year. This anticipated increase is from serving new and expanded markets and to adjust for a smaller than normal tart cherry crop in Europe this season. In order to avoid undersupplying the market, the Board determined that the calculation of the optimum supply should include an additional adjustment to account for the growth in new markets, market expansion, and the crop shortage in Europe. The Board could accept the calculated surplus without any change. After discussion, an adjustment of an additional 33 million pounds was made to the 2017–18 available supply of tart cherries as it was determined that this amount would best meet the industry's sales needs. A motion to re-open the discussion and consider a further adjustment for imports was made, but the motion failed to receive support. Thus, the alternatives were rejected.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Order's information collection requirements have been previously approved by OMB and assigned OMB No. 0581–0177, Tart Cherries Grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin. No changes are necessary in those requirements as a result of this action. Should any changes become necessary, they would be submitted to OMB for approval.

This action will not impose any additional reporting or recordkeeping requirements on either small or large tart cherry handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

As noted in the initial regulatory flexibility analysis, USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this final rule. One of the public comments received did reference the initial regulatory flexibility analysis. A review of that comment is included below as part of the review of all public comments received.

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

In addition, the Board's meetings were widely publicized throughout the tart cherry industry, and all interested persons were invited to attend the meetings and participate in Board deliberations on all issues. Like all Board meetings, the June 22, 2017, and September 14, 2017, meetings were public meetings, and all entities, both large and small, were able to express views on this issue.

A proposed rule concerning this action was published in the **Federal Register** on May 11, 2018 (83 FR 21941). Copies of the rule were sent via email to all Board members and tart cherry handlers. Finally, the rule was made available through the internet by USDA and the Office of the Federal Register. A 30-day comment period ending June 11, 2018, was provided to allow interested persons to respond to the proposal. Two comments were received.

Both comments point to an increase in imports as a reason for opposing this action. One commenter referenced imports as being well over 200 million pounds of raw product equivalency, and the other commenter stated imports are over 250 million pounds a year. One commenter noted it was impossible to determine a equilibrium point without acknowledging the total market and the volume of imports and suggested imported cherries may be replacing domestic product pound for pound. The other commenter noted imports are growing faster than U.S. sales.

AMS's analysis of data from the Foreign Agricultural Service's Global Agricultural Trade System (GATS) indicates a raw product equivalent quantity of 260 million pounds of tart cherry products were imported into the U.S. in 2017. The imported volume has remained at 230 million pounds or higher since 2014. Tart cherry juice concentrate represents by far the largest segment of imports and has experienced tremendous growth since 2012.

Under the Order, when computing and determining final percentages for recommendation to the Secretary, the Board must give consideration to several factors, including supplies of competing commodities and economic factors having a bearing on cherry markets. The Board is aware of the volume of imported cherries products, and at the meetings on June 22, 2017, and September 14, 2017, the Board discussed the economic impact of imports. At the September meeting, an economic adjustment of 33 million pounds was recommended in the OSF. This adjustment was based, in part, on providing additional fruit for new and expanded markets, including those previously served by imported product, and the expectation of increased sales as a result of a smaller than normal tart cherry crop in Europe this season.

Further, given the rapid increase in the imported volume of tart cherry juice, the continued level of imported product, and the relatively stable level of domestic shipments, the vast majority of imported tart cherry products are going to new markets not previously served by the domestic industry. While there may be some common markets, these new markets serviced by imported product far exceed the estimated 78 million pounds of tart cherries restricted by this regulation.

Should domestic handlers decide to compete in these new markets, in most cases, restricted cherries could be used, and the handler could receive diversion credits under the diversion provisions of the Order. In addition, USDA is reviewing extending the maximum length of these activities from three years to five years, and expediting the approval process for some projects, thus creating even more opportunities to pursue new markets. These changes should benefit the industry by creating new markets for domestic production, but also by utilizing restricted fruit as a tool to build additional markets rather than additional reserves. Consequently, handlers have ample opportunity to compete for new markets using restricted cherries while continuing to service traditional markets with free cherries. Should industry efforts cause demand to exceed available volume, USDA could release an additional volume.

Steps have also been taken in this and previous seasons to put additional fruit on the market through increased carry-out and economic adjustments, and domestic sales have shown modest growth. The final percentages calculation for this season includes an economic adjustment of 33 million pounds and a market growth factor of 20.5 million pounds for an additional 53.5 million pounds beyond the average sales. Moreover, the industry reported a remaining free carry-in inventory of over 110.5 million pounds for the 2017–18 crop year, nearly 54 million pounds more than the recommend desired carry-out from 2016–17.

Further, carry-in for the following season has exceeded the recommended carry-out for the previous season for each of the previous three volume regulations. This suggests that even with established restrictions, unrestricted fruit is available to meet domestic demand.

Both commenters expressed concern that restricted reserve tart cherry product is being held in inventory beyond Order requirements. Under the Order, any product placed by the handler in the inventory reserve must have been produced in either the current or the preceding two crop years. Handlers can exchange such reserves with more current product as it ages or divert it to other approved outlets. These inventories are reviewed and monitored for compliance.

One of the commenters also questioned the statement in the RFA that the tart cherry market is inelastic, stating that it is not true for all products, particularly juice, and that markets should be looked at on a product by product basis. While pricing may vary in the sales of various processed products, the Order, and this regulation apply to the entire domestic tart cherry market. Grower prices remain very sensitive to changes in supply while demand remains relatively stable from year to year. This inelastic nature was demonstrated by the sharp jump in average grower price in 2012 to $0.549 per pound with the substantial decrease in domestic supply and a $0.07 per pound drop in the grower price from 2015 to 2016 when there was above-average supply.

Finally, both commenters mentioned the decision in *Burnette Foods, Inc.* v. *USDA,*[1] and the trial court's conclusion regarding the Board's composition in light of 7 CFR 930.20(g), both of which are being considered on appeal. One of the commenters stated that in light of the district court's decision, the recommendation of the Board should not stand. However, as stated in the proposed rule and in this action, the Secretary reached the decision contained in this final rule and has designated these free and restricted percentages based on his own independent evaluation of the recommendation and supporting information supplied by the Board. Therefore, this rulemaking is an action taken on behalf of the USDA.[2]

Additional concerns raised in the comments pertained to issues not applicable to the proposed rule.

Accordingly, no changes will be made to the rule as proposed, based on the comments received.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *http://www.ams.usda.gov/rules-regulations/moa/small-businesses.* Any questions about the compliance guide should be sent to Richard Lower at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

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

[1] No. 16–cv–21 (W.D. Mich.).

[2] *See* 7 CFR 930.51(a).

List of Subjects in 7 CFR Part 930

Marketing agreements, Reporting and recordkeeping requirements, Tart cherries.

For the reasons set forth in the preamble, 7 CFR part 930 is amended as follows:

PART 930—TART CHERRIES GROWN IN THE STATES OF MICHIGAN, NEW YORK, PENNSYLVANIA, OREGON, UTAH, WASHINGTON, AND WISCONSIN

■ 1. The authority citation for 7 CFR part 930 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. Revise § 930.256 to read as follows:

§ 930.256 Free and restricted percentages for the 2017–18 crop year.

The percentages for tart cherries handled by handlers during the crop year beginning on July 1, 2017, which shall be free and restricted, respectively, are designated as follows: Free percentage, 69 percent and restricted percentage, 31 percent.

Dated: September 18, 2018.

Erin Morris,

Associate Administrator, Agricultural Marketing Service.

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DEPARTMENT OF ENERGY

10 CFR Part 430

[EERE–2016–BT–TP–0037]

RIN 1904–AD74

Energy Conservation Program: Test Procedures for Integrated Light-Emitting Diode Lamps

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Final rule.