

information, it is hereby found that the provision temporarily suspended does not tend to effectuate the declared policy of the Act.

List of Subjects in 7 CFR Part 930

Tart cherries, Marketing agreements, Reporting and recordkeeping requirements.

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 part 930 continues to read as follows:

Authority: 7 U.S.C. 601–674.

§ 930.83 [Suspended in part]

2. In paragraph (d), the sentence “The Secretary shall conduct a referendum within the month of March of every sixth year after the effective date of this part to ascertain whether continuation of this part is favored by the growers and processors” is suspended effective March 1 through March 31, 2002.

Dated: November 15, 2001.

A. J. Yates,

Administrator, Agricultural Marketing Service.

[FR Doc. 01–29111 Filed 11–20–01; 8:45 am]

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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 930

[Docket No. FV01–930–5 FIR]

Tart Cherries Grown in the States of Michigan, et al.; Suspension of Provisions Under the Federal Marketing Order for Tart Cherries

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: The Department of Agriculture (USDA) is adopting, as a final rule, without change, the provisions of an interim final rule suspending a provision in the Federal tart cherry marketing order (order) to allow handlers to receive diversion credit for exporting juice and juice concentrate to countries other than Canada and Mexico. The suspended provision does not allow diversion credit for domestic shipments of tart cherry juice or juice concentrate. The

Cherry Industry Administrative Board (Board) unanimously recommended this action to allow handlers of tart cherries to maintain and possibly expand market opportunities for juice and juice concentrate products in export outlets. The Board is responsible for local administration of the marketing order which regulates the handling of tart cherries grown in Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin.

EFFECTIVE DATE: December 21, 2001.

FOR FURTHER INFORMATION CONTACT:

Patricia A. Petrella or Kenneth G. Johnson, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, Suite 2A04, Unit 155, 4700 River Road, Riverdale, Maryland 20737, telephone: (301) 734–5243, Fax: (301) 734–5275 or George Kelhart, Technical Advisor, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, room 2525–S, P.O. Box 96456, Washington, DC 20090–6456; telephone: (202) 720–2491, Fax: (202) 720–8938.

Small businesses may request information on compliance with this regulation, or obtain a guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, P.O. Box 96456, room 2525–S, Washington, DC 20090–6456; telephone (202) 720–2491; Fax: (202) 720–8938, or E-mail: Jay.Guerber@usda.gov.

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Agreement and Order No. 930, both as amended (7 CFR part 930), regulating the handling of tart cherries grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin, hereinafter referred to as the “order.” The marketing agreement and order are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the “Act.”

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before

parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with 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. Such 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.

The order authorizes the use of volume regulation. In years when volume regulation is implemented to stabilize supplies, a certain percentage of the cherry crop is required to be set aside as restricted tonnage, and the balance may be marketed freely as free tonnage. The restricted tonnage is required to be maintained in handler-owned inventory reserve pools. Under § 930.59, Handler diversion privilege, handlers in regulated districts may fulfill any restricted percentage requirements by diverting cherries or cherry products in programs approved by the Board. One form of diversion which the Board may authorize is the use of cherries for exempt purposes under § 930.62. That section states that the Board, with the approval of USDA, may exempt from various requirements of the order (such as assessments, and reserve pool obligations) cherries used for certain purposes such as experimental use or new market development.

Section 930.162 of the regulations under the order contains various approved forms of exemption and the procedure for applying for, and obtaining, exempt use approval from the Board as well as diversion credit. One of the exempt uses authorized by regulation prior to the issuance of the interim final rule was the use of cherries or cherry products in the development of export markets (other than Canada and Mexico) provided that such products do not include juice or juice concentrate. The interim final rule modified this section to make exports of juice or juice concentrate to countries other than Canada and Mexico an exempt use. When recommending provisions of the order, the industry considered Canada and Mexico to be premium markets for tart cherries, not outlets for which exemptions and

diversion certificates should be given. The industry also was concerned about transshipments of lower priced cherries because of their close proximity to the United States and the primary domestic market. Thus, Canada and Mexico are excluded as eligible countries for the development of export markets.

The Board held a meeting on March 20, 2001, and unanimously recommended that the provision prohibiting handlers from receiving diversion credit through use of juice and juice concentrate be suspended from the order. However, the Board recommended that the suspension be only applicable to exports.

During the order promulgation process, producers and handlers from Oregon and Washington (Northwest), expressed concern that juice and/or juice concentrate could be established by the Board as a use eligible for diversion credit. Some handlers in the Northwest processed all or the majority of their cherries into juice/juice concentrate. At that time, this was the Northwest tart cherry industry's primary product and handlers in the Northwest would not be subject to volume regulation. Northwest producers and handlers were concerned that the juicing and concentrating of surplus or restricted cherries by handlers in regulated districts (Michigan, New York, and Utah) would oversupply the Northwest's juice market with low-quality, low-priced product. Record testimony indicated that cherries produced in the Northwest have a high brix (sugar content) level desirable for juice/juice concentrate which produces a high quality product. Because of these concerns, the provision preventing the issuance of diversion credit for tart cherry juice and juice concentrate were included in the order in 1996 to protect the juice market for tart cherry producers and handlers in the Northwest.

However, use of juice and juice concentrate for export was allowed under the exemption provisions for the 1997–1998 season. The 1997–1998 season was the first season of operation for this order and its provisions were new to the industry and complex to administer. Handlers new to the order provision had shipped or contracted to ship tart cherry juice or juice concentrate to eligible countries with the intention of applying for diversion certificates. If those handlers had been prohibited from receiving diversion certificates for those sales, the handlers would have incurred severe financial difficulties. Thus, the provision against exports of juice and juice concentrate

was suspended for the 1997–1998 season.

The Northwest tart cherry industry, specifically in Washington, is changing. Washington handlers are now producing 5 + 1 cherries (25 pounds of cherries to 5 pounds of sugar) in addition to packing juice and juice concentrate. According to the industry, the situation facing compliance with volume regulations for the 2001–2002 season is of significant concern for all regulated handlers and Washington handlers in particular. It is quite likely that the primary inventory reserve will be full at the onset of the harvest for the 2001–2002 crop year. The primary inventory reserve has a maximum limit of 50 million pounds of restricted cherries. If this reserve is full, the only reserve option for regulated handlers is a secondary reserve.

A secondary reserve is an option for a handler when the primary reserve is above the 50 million pound limit. However, from a practical standpoint, a secondary reserve is not a reasonable option. Handlers establishing secondary reserves are responsible for all costs of that reserve, including inspection costs. This could prove costly for handlers establishing secondary reserves as no cherries can be released from the secondary reserve until all cherries in the primary reserve have been released. Handlers, in order to meet restricted percentage requirements, would have to consider options other than using inventory reserves. Diversion options are available to handlers. In-orchard diversion of cherries takes place when cherries are not harvested and left in the orchard. At-plant diversion of cherries takes place at the handler's facility prior to placing cherries into the processing line. This is to ensure that the cherries diverted were not simply an undesirable or unmarketable product of processing. According to the Board, export diversion would probably be the most preferred of the options. However, this option would not be available to handlers if the previous limitation on exports of juice and/or juice concentrate had continued. Products that sell in the export markets are mostly hot-pack (canned), dried, IQF (Individually Quick Frozen), juice or concentrate. Five plus one (5 + 1) cherries do not generally sell in export markets. This type of processed product contains sugar and is subject to increased tariffs when exported.

Tart cherry handlers in Washington produce only a few products. As previously mentioned, they produce juice and juice concentrate and 5 + 1 products. Without the ability to export juice and/or juice concentrate for

diversion credit, Washington handlers could have difficulty in meeting their restricted percentage requirements. The suspension of the provision in § 930.59 of the order that previously prevented handlers from receiving diversion credit for juice and juice concentrate will allow Washington handlers as well as other handlers in volume regulated districts to receive diversion credit for such shipments. This will enable handlers to increase sales to new markets and fulfill their restricted reserve obligation for the 2001–2002 crop year.

The Board recommended that the proviso in § 930.59 concerning the exclusion of juice and concentrate products be suspended insofar as it applies to exports. In order to accomplish the intent of the Board's recommendation, the whole proviso was suspended. Diversion credit may be granted for uses which fall under the exemptions in § 930.62 of the order. The regulations in § 930.162 implement the authority in the order concerning exempt uses and contain the terms and conditions under which diversion credit may be approved. Consistent with the Board's recommendation, the regulation was amended to reflect the intent that exempt use approval, and diversion credit in the case of juice and juice concentrate will only be allowed for exports to countries other than Canada and Mexico.

The Regulatory Flexibility Act and Effects on Small Businesses

The Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities and has prepared this final regulatory flexibility analysis. The Regulatory Flexibility Act (RFA) allows AMS to certify that regulations do not have a significant economic impact on a substantial number of small entities. However, as a matter of general policy, AMS' Fruit and Vegetable Programs (Programs) no longer opts for such certification, but rather performs regulatory flexibility analyses for any rulemaking that would generate the interest of a significant number of small entities.

Performing such analyses shifts the Programs' efforts from determining whether regulatory flexibility analyses are required to the consideration of regulatory options and economic or regulatory impacts.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the

Act, and rules thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 900 producers of tart cherries in the production area and approximately 40 handlers subject to regulation under the marketing order. Small agricultural producers have been defined by the Small Business Administration (13 CFR 121.201) as those having annual receipts less than \$750,000, and small agricultural service firms are defined as those whose annual receipts are less than \$5,000,000. The standard for producers was changed from \$500,000 to \$750,000 after the interim final rule was issued. The majority of tart cherry producers and handlers may be classified as small entities.

Data from the National Agricultural Statistics Service (NASS) states that for 1999, tart cherry utilization for juice, wine, or brined uses was 34.5 million pounds for all districts covered under the order. The total processed amount for 1999 was 252.3 million pounds. Juice, wine, and brined tart cherries represented about 14 percent of the total processed crop, and about 10 percent over the last three seasons (1997 through 1999).

This rule continues in effect the suspension of a provision in the order to allow handlers to receive diversion credit for exporting tart cherry juice and juice concentrate to certain eligible countries. The Board met on March 20, 2001, and unanimously recommended that the provision prohibiting handlers from receiving diversion credit through use of juice and juice concentrate be suspended from the order. However, the Board recommended that the suspension be only applicable to exports.

During the order promulgation process, producers and handlers from Oregon and Washington (Northwest), expressed concern that juice and/or juice concentrate could be established by the Board as a use eligible for diversion credit. Some handlers in the Northwest processed all or the majority of their cherries into juice/juice concentrate. At that time, this was the Northwest's primary product and handlers in the Northwest would not be subject to volume regulation. Northwest producers and handlers were concerned that the juicing and concentrating of surplus or restricted cherries by handlers in regulated districts (Michigan, New York, and Utah) would oversupply the Northwest's juice market with low-quality, low-priced product.

Record testimony indicated that cherries produced in the Northwest have a high brix (sugar content) level desirable for juice/juice concentrate which produces a high quality product. Because of these concerns, the provision preventing the issuance of diversion credit for tart cherry juice and juice concentrate were included in the order in 1996 to protect the juice market for tart cherry producers and handlers in the Northwest. In the long run, it is anticipated that all businesses, whether large or small, will benefit from this suspension action because market growth will be increased for tart cherry products, grower returns will be improved, and less fruit will be abandoned in-orchard or at-plant by producers and handlers. Moreover, all regulated handlers will be allowed to participate in export markets and have access to diversion credits.

According to the industry, the situation facing compliance with volume regulations for the 2001–2002 season is of significant concern for all regulated handlers and Washington handlers in particular. It is quite likely that the primary inventory reserve will be full at the onset of the harvest for the 2001–2002 crop year. The primary inventory reserve has a maximum limit of 50 million pounds of restricted cherries. If this reserve is full, the only reserve option for regulated handlers is a secondary reserve.

A secondary reserve is an option for a handler when the primary reserve is above the 50 million pound limit. However, from a practical standpoint, a secondary reserve is not a reasonable option. Handlers establishing secondary reserves are responsible for all costs of that reserve, including inspection costs. This could prove costly for handlers establishing secondary reserves as no cherries can be released from the secondary reserve until all cherries in the primary reserve have been released. Handlers, in order to meet restricted percentage requirements, would have to consider options other than using inventory reserves. Diversion options are available to handlers. In-orchard diversion of cherries takes place when cherries are not harvested and left in the orchard. At-plant diversion of cherries takes place at the handler's facility prior to placing cherries into the processing line. This is to ensure that the cherries diverted were not simply an undesirable or unmarketable product of processing. According to the Board, export diversion would probably be the most preferred of the options. However, this option would not be available to handlers if the previous limitation on exports of juice and/or juice concentrate

had continued. The continued suspension of the order provision that prevents handlers from receiving diversion credit for juice and juice concentrate will allow Washington handlers as well as other handlers in volume regulated districts to receive diversion credit for such shipments. To be consistent with the Board's intent, the regulation prevents the use of juice or juice concentrate for exempt use or diversion credit in the domestic market. This will enable handlers to increase sales to new markets and fulfill their restricted reserve obligation for the 2001–2002 crop year. Industry estimates are that in Washington State alone, this suspension would affect up to 4,200 tons of juice/juice concentrate products, with an estimated value of \$1.5 to \$2.5 million dollars.

One alternative to this relaxation would have been to continue the status quo. However, this would not be favorable to cherry producers and handlers as they would have been forced to either destroy tons of cherries in-orchard or at-plant, or incur costly storage fees for maintaining a secondary reserve.

This action imposes no 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. In addition, USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

In compliance with Office of Management and Budget (OMB) regulations (5 CFR Part 1320) which implement the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the information collection and recordkeeping requirements imposed by this order have been previously approved by OMB and assigned OMB Number 0581–0177.

The Board's meeting was publicized and all Board members and alternate Board members, representing both large and small entities, were invited to attend the meeting and participate in Board deliberations. The Board itself is composed of 19 members, of which 18 members are growers and handlers and one represents the public. Also, the Board has a number of appointed committees to review certain issues and make recommendations.

An interim final rule concerning this action was published in the **Federal Register** on July 31, 2001. Copies of the rule were mailed by the Board's staff to all Board members and handlers. In

addition, the rule was made available through the Internet by the Office of the Federal Register and USDA. That rule provided for a 30-day comment period which ended August 30, 2001. One comment was received.

The comment was received from a tart cherry handler who supports the suspension, but is critical of the rule's timing. The effective date of this action was August 1, 2001. This date fell during harvest in some production areas and at the completion of harvest in other areas. The commenter is concerned that, for this season, all areas of production cannot take advantage of the expansion of exempt products available for export and diversion credit equitably. The commenter states that simply making such rule effective 30 days prior to harvest or 20 days after harvest would allow growers and handlers to be treated more equitably.

The interim final rule relaxed requirements on meeting restricted obligations in seasons with volume regulation, and USDA believed that the benefits anticipated should be made available to the industry as soon as possible. The relaxation has now been available since August 1, 2001, of the 2001/2002 season, and should be available to the industry for future seasons. Therefore, timing will no longer be an issue.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at the following website: <http://www.ams.usda.gov/fv/moab.html>. Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT SECTION**.

After consideration of all relevant material presented, including the information and recommendation submitted by the Committee, the comment received, and other available information, it is hereby found that the provision suspended does not tend to effectuate the declared policy of the Act, while the additional regulatory amendments are necessary to implement the suspension, and, therefore, will tend to effectuate the declared policy of the Act.

List of Subjects in 7 CFR Part 930

Marketing agreements, Reporting and recordkeeping requirements, Tart cherries.

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

Accordingly, the interim final rule amending 7 CFR part 930 which was published at 66 FR 39409 on July 31, 2001, is adopted as a final rule without change.

Dated: November 15, 2001.

A. J. Yates,
Acting Administrator, Agricultural Marketing Service.

[FR Doc. 01-29115 Filed 11-20-01; 8:45 am]

BILLING CODE 3410-02-P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 984

[Docket No. FV01-984-1 IFR]

Walnuts Grown in California; Decreased Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim final rule with request for comments.

SUMMARY: This rule decreases the assessment rate established for the Walnut Marketing Board (Board) for the 2001-02 and subsequent marketing years from \$0.0134 to \$0.0124 per kernelweight pound of assessable walnuts. The \$0.0010 decrease is necessary because this year's estimate of assessable walnuts is about 17 percent more than last year's estimate. The Board locally administers the Federal marketing order which regulates the handling of walnuts grown in California (order). Authorization to assess walnut handlers enables the Board to incur expenses that are reasonable and necessary to administer the program. The marketing year runs from August 1 through July 31. The assessment rate will remain in effect indefinitely unless modified, suspended, or terminated.

DATES: November 23, 2001. Comments received by January 22, 2002, will be considered prior to issuance of the a final rule.

ADDRESSES: Interested persons are invited to submit written comments concerning this rule. Comments must be sent to the Docket Clerk, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, room 2525-S, P.O. Box 96456, Washington, DC 20090-6456; Fax: (202) 720-8938, or E-mail: moab.docketclerk@usda.gov.

Comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: <http://www.ams.usda.gov/fv/moab.html>.

FOR FURTHER INFORMATION CONTACT: Toni Sasselli, Marketing Assistant, or Richard P. Van Diest, Marketing Specialist, California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 2202 Monterey Street, suite 102B, Fresno, California 93721; telephone: (559) 487-5901, Fax: (559) 487-5906; or George Kelhart, Technical Advisor, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, room 2525-S, P.O. Box 96456, Washington, DC 20090-6456; telephone: (202) 720-2491, Fax: (202) 720-8938.

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, room 2525-S, P.O. Box 96456, Washington DC 20090-6456; telephone: (202) 720-2491, Fax: (202) 720-8938, or E-mail: Jay.Guerber@usda.gov.

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Agreement and Order No. 984 both as amended, (7 CFR part 984), regulating the handling of walnuts grown in California, hereinafter referred to as the "order." The marketing agreement and order are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act."

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order now in effect, California walnut handlers are subject to assessments. Funds to administer the order are derived from such assessments. It is intended that the assessment rate as issued herein will be applicable to all assessable walnuts beginning on August 1, 2001, and continue until amended, suspended, or terminated. This rule will not preempt any State or local laws, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any