

Rules and Regulations

Federal Register

Vol. 62, No. 164

Monday, August 25, 1997

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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 56

Grading of Shell Eggs and U.S. Standards, Grades, and Weight Classes for Shell Eggs

CFR Correction

In Title 7 of the Code of Federal Regulations, parts 53 to 209, revised as of January 1, 1997, § 56.36 is corrected by revising the last sentence of paragraphs (a)(2) and (b)(2) to read as follows:

§ 56.36 Information required on and form of grademark.

* * * * *

(a) * * *

(2) * * * The size or weight class of the product may be omitted from the grademark, provided, it appears prominently on the main panel of the carton.

* * * * *

(b) * * *

(2) * * * The grademark shall be printed on the carton.

BILLING CODE 1505-01-D

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 930

[Docket No. FV97-930-5 IFR]

Tart Cherries Grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin; Issuance of Grower Diversion Certificates

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim final rule with request for comments.

SUMMARY: This rule establishes terms and conditions for the issuance of grower diversion certificates by the Cherry Industry Administrative Board (Board) under the newly promulgated marketing order for tart cherries. In the event volume regulations are issued by the Secretary for the 1997 crop year, handlers could use such certificates in order to satisfy their restricted percentage amounts. Tart cherries handlers in Oregon, Pennsylvania, Washington and Wisconsin (Districts 5, 6, 8, and 9) would not be subject to volume regulation, if implemented, because these districts do not currently produce adequate tonnage to trigger such regulation under the order.

DATES: Effective August 26, 1997; comments received by September 24, 1997, will be considered prior to issuance of a final rule.

ADDRESSES: Interested persons are invited to submit written comments concerning this rule. Comments must be sent in triplicate to the Docket Clerk, Fruit and Vegetable Division, AMS, USDA, room 2525-S, P.O. Box 96456, Washington, DC 20090-6456; Fax: (202) 720-5698. All comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be made available for public inspection in the Office of the Docket Clerk during regular business hours.

FOR FURTHER INFORMATION CONTACT:

Patricia A. Petrella or Kenneth G. Johnson, Marketing Order Administration Branch, F&V, AMS, USDA, room 2530-S, P.O. Box 96456, Washington, DC 20090-6456, telephone: (202) 720-5053, Fax: (202) 720-5698. Small businesses may request information on compliance with this regulation by contacting: Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, room 2525-S, Washington, DC 20090-6456; telephone (202) 720-2491; Fax: (202) 720-5698.

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Agreement and Order No. 930 (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." This 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 (Department) 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 provisions now in effect, preliminary free and restricted percentages have been established for tart cherries acquired by handlers during the 1997 crop year, July 1, 1997, through June 30, 1998. Final free and restricted percentages may be established at a later date. This rule authorizes the issuance of diversion certificates to growers for cherries diverted during the 1997 crop year. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

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

This rule provides for the issuance of diversion certificates to growers in volume regulated districts under the tart cherry marketing order for the 1997 crop year. The order became effective September 25, 1996, and the initial Cherry Industry Administrative Board was appointed in December 1996. The Board held several meetings in January, February, March and June 1997, to consider its start-up costs and establish rules and regulations to implement the order authorities. At its meetings, the Board unanimously recommended that

the regulations be forwarded to the Department for appropriate action.

In discussions concerning volume regulations for the 1997 crop year, the Board considered guidelines and procedures for grower diversion. Growers in the States which would be subject to volume regulation were sent information about diversion and were notified that participation in a diversion program would be completely voluntary. A majority of the growers (approximately 700 out of 1,220) in the districts which would be subject to volume regulation if it were imposed have been diverting their cherries this season based on preliminary free and restricted percentage figures announced by the Board. The Board, in its meetings, continued its review of applicable sections of the order, such as those pertaining to optimum supply, and making recommendations to specify guidelines for grower diversion.

The order in § 930.50 provides the method of establishing an optimum supply level of cherries for the crop year. The optimum supply consists of a free percentage amount which a handler could sell to any market and a restricted percentage amount, when warranted, which would have to be withheld from the market. Preliminary percentages were established by the Board on July 2, pursuant to § 930.50(b) of the order, using Department estimates of the upcoming crop. Preliminary free and restricted percentages of 66 and 34 percent, respectively, were announced to the industry in accordance with § 930.50(h) of the order. No later than September 15, after harvest and processing of the crop have been completed, the Board is required to compute, and recommend to the Secretary, final percentages based on actual crop amounts. A handler can satisfy restricted percentage obligations established by regulation by holding restricted percentage cherries in an inventory reserve that the handler maintains, by redeeming grower diversion certificates, or by diverting cherries.

Section 930.58 of the tart cherry marketing order provides authority for voluntary grower diversion. Growers can divert all or a portion of their cherries which otherwise, upon delivery to a handler, would become restricted percentage cherries. Growers would receive diversion certificates from the Board stating the weight of cherries diverted. The grower could then present this certificate to a handler in lieu of actual cherries. The handler could apply the weight of cherries represented by the certificate against the handler's restricted percentage amount.

The Board recommended rules and regulations specifying the guidelines for the grower diversion program. First, the Board recommended that any grower desiring to divert in the orchard should first apply to the Board. The application should include the name, address, phone number and a statement signed by the grower agreeing to abide by all the rules and regulations for diversion. In addition, the grower would provide maps of such grower's orchard.

The Board recommended two types of in-orchard diversion. These are random row diversion, in which orchard rows are randomly chosen by the Board, using a computer program, to be left unharvested, and whole block diversion, in which a whole definable orchard block is left unharvested. Trees six years old or younger would not qualify for diversion, since these trees are not yet in full production.

The Board recommended that all grower diversion certificates should be redeemed with handlers by November 1. After November 1, grower diversion certificates would not be valid. It was intended that diversion certificates be used within the same crop year that they were issued, as if a crop had been produced. The November 1 date would allow handlers adequate time to meet their restricted percentage amounts after final percentages have been established.

The Board also recommended guidelines concerning random row and whole block diversion and compliance procedures for growers to follow under the grower diversion program.

This crop year a majority of growers are voluntarily diverting cherries based on preliminary free and restricted percentages which have been established by the Board and on recommendations and guidance concerning diversion which the Board has developed, and will be requesting diversion certificates from the Board. This rule provides for the issuance of such certificates subject to certain specified terms and conditions. In order to receive a certificate, a grower must show, to the satisfaction of the Board, that cherries were in fact diverted. This may be accomplished in a number of ways. The Board needs information about the grower's production. In addition, the grower must agree to allow the Board to confirm reported diversion figures by allowing a Board compliance officer to visit the grower's orchard to determine whether rows or trees selected for diversion have not been harvested.

Once the Board has obtained the necessary information concerning diversion by a grower, it will issue a diversion certificate. The diversion

certificate would be issued for an amount equal to the estimated volume of cherries diverted by the grower.

For random row diversion, such estimated volume would be calculated by applying the percentage of the grower's production diverted to the actual average volume per acre of cherries produced and harvested. For example, Grower A farms 1,000 acres and elects to divert 20 percent of the harvestable acreage (200 acres). The grower harvests the remaining 800 acres and obtains 6,400,000 pounds of cherries, which represents a yield per acre of 8,000 pounds. Such grower would receive a diversion certificate for 1,600,000 pounds of cherries (8,000 lbs multiplied by the 20 percent of the total acreage diverted; in this instance, 200 acres).

For whole block diversion, the weight of a harvested sample of 5 percent of each block, provided by the grower, would be used to calculate the total volume of diverted cherries to be credited on the diversion certificate. For example, Grower B farms 1,000 acres and elects to whole block divert a 200 acre block. If the 5 percent of the harvested trees in the block diverted yield 80,000 pounds of cherries, the grower would receive a diversion certificate for 1,600,000 pounds (80,000 pounds divided by 5 percent (.05) yields 1,600,000 pounds). The rest of the block would remain unharvested.

After receiving a certificate from the Board, the grower could present the certificate to a handler to be redeemed. Based upon the recommendations of the Board, guidelines and procedures for grower diversion for 1998 and subsequent seasons will be established later through another rulemaking action.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions 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 40 handlers of tart cherries who are subject to regulation under the order and approximately 1,220 producers or growers of tart cherries in the regulated

area. Small agricultural service firms, which include handlers, have been defined by the Small Business Administration (13 CFR 121.601) as those having annual receipts of less than \$5,000,000, and small agricultural producers are defined as those having annual receipts of less than \$500,000. The majority of handlers and producers of tart cherries may be classified as small entities.

Section 930.58(b) authorizes the Board to issue diversion certificates to growers in volume regulated districts under the tart cherry marketing order if cherries are diverted according to terms and conditions specified in the order, or according to such other terms and conditions that the Board, with the approval of the Secretary, may establish. The tart cherry marketing order was recently promulgated and the Board met several times in 1997 to recommend rules and regulations to implement the order authorities. The Board is required under the order to review its marketing policy on or before July 1 and then make recommendations to the Secretary for volume regulation, if such regulation is deemed necessary.

The impact of this rule would be beneficial to growers. Grower diversion is one of the methods under the order that a handler can utilize to meet any such handler's restricted percentage. For example, growers may voluntarily choose to divert because they have an abundance of low value, poor quality cherries or because they are unable to find a processor willing to process some or all of their cherries. Before choosing to divert, the grower would most likely evaluate the harvesting and other cultural costs that could be saved by diverting and locate a handler that would be willing to redeem such grower's diversion certificate.

The Board discussed alternatives to its recommendation to issue grower diversion certificates for the 1997 crop year. The Board considered not issuing grower diversion certificates for the 1997 crop year but believed this action was needed.

The Board also discussed limiting the blocks to be diverted to no less than 5 acre blocks, but felt that this could have an adverse impact on small growers that produce on less than 5 acre blocks. Therefore, the Board recommended not to restrict the size of orchard blocks which could be diverted.

This rule will not impose any reporting or recordkeeping requirements on either small or large tart cherry growers or handlers in addition to those already considered or approved during the order promulgation proceeding. The only written information requested from

a grower for 1997 is an orchard map and the grower's final production volume. Since growers maintain this information as part of their normal farming operations, it takes approximately 10 minutes to prepare a map and less than a minute to total the final production volume. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sectors. In addition, the Department 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 (Pub. L. 104-13), the information collection and recordkeeping requirements have been previously approved by OMB and assigned OMB Number 0581-0177.

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. All Board meetings were open to the public and all entities, both large and small, were able to express their views on these issues. The Board itself is composed of 18 members, of which 17 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 to the Board. Finally, interested persons are invited to submit information on the regulatory and informational impacts of this action on small businesses.

After consideration of all relevant material presented, including the Board's recommendation, and other information, it is found that this interim final rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

This interim final invites comments on grower diversion. Any comments received will be considered prior to finalization of this rule.

Pursuant to 5 U.S.C. 553, it is also found and determined upon good cause that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice prior to putting this rule into effect and that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because: (1) The marketing order has been recently promulgated and the rule needs to be implemented as soon as possible since, based on announced preliminary percentages, volume

regulation may be recommended for the 1997 crop year; (2) the 1997 crop year for cherries is from July 1, 1997, through June 30, 1998; (3) over 700 growers participating in a diversion program and have been voluntarily diverting cherries based on preliminary free and restricted percentages announced by the Board; and, (4) this rule provides a 30-day comment period and any comments received will be considered prior to finalization of this rule.

List of Subjects in 7 CFR Part 930

Marketing agreements, Tart cherries, 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 7 CFR part 930 continues to read as follows:

Authority: 7 U.S.C. 601-674.

2. In part 930, a new § 930.100 is added to read as follows:

§ 930.100 Grower diversion certificates.

(a) In accordance with paragraph (b) of this section, the Board may, for the 1997 crop year, issue diversion certificates to growers, in districts subject to volume regulation (Northwest Michigan, Central Michigan, New York, and Utah) who have voluntarily elected to divert in the orchard all or a portion of their 1997 tart cherry production which otherwise, upon delivery to handlers, would become restricted percentage cherries. Growers may offer the diversion certificate to handlers in lieu of delivering cherries. Handlers may redeem diversion certificates with the Board through November 1 of the 1997 crop year. After November 1 of the 1997 crop year that crop year's grower diversion certificates are no longer valid.

(b) *Terms and conditions.* To be eligible to receive diversion credit, growers voluntarily choosing to divert cherries must meet the following terms and conditions:

(1) In order to receive a certificate, a grower must demonstrate, to the satisfaction of the Board, that rows or trees which were selected for diversion were not harvested. Trees six years old or younger do not qualify for diversion.

(2) The grower must furnish the Board with a total harvested production amount so the Board can calculate the amount of grower diversion tonnage to

be placed on the diversion certificate. The Board will confirm the grower's production amount with information provided by handlers (to which the grower delivers cherries) on Board Form Number Two.

(3) The grower must agree to allow a Board compliance officer to visit the grower's orchard to confirm that diversion has actually taken place.

(c) *Calculation of diversion amounts.* The weight of cherries diverted and left unharvested shall be calculated by the Board after growers furnish the Board with the necessary information concerning their production. After verification of the volume of cherries diverted, the Board shall calculate the amounts of grower diversion tonnage to be placed on the diversion certificates and issue such certificates to growers. Such amounts shall be determined as follows:

(1) For whole block diversion, the weight of a harvested sample of 5 percent of each diverted block, provided by the grower, will be used to calculate the total volume of diverted cherries to be credited on the diversion certificate. For example, a grower farms 1,000 acres and elects to whole block divert a 200 acre block. If 5 percent of the harvested trees in the block diverted yield 80,000 pounds of cherries, the grower would receive a diversion certificate for 1,600,000 pounds (80,000 pounds divided by 5 percent (.05) yields 1,600,000 pounds). The rest of the block would remain unharvested.

(2) For random row diversion, such estimated volume would be calculated by applying the percentage of the grower's production diverted to the actual average volume per acre of cherries produced and harvested. For example, a grower farms 1,000 acres and elects to divert 20 percent of the harvestable acreage (200 acres). The grower harvests the remaining 800 acres and obtains 6,400,000 pounds of cherries, which represents a yield per acre of 8,000 pounds. Such grower would receive a diversion certificate for 1,600,000 pounds of cherries (8,000 lbs multiplied by the 20 percent of the total acreage diverted; in this instance, 200 acres).

Dated: August 18, 1997.

Robert C. Keeney,

Director, Fruit and Vegetable Division.

[FR Doc. 97-22578 Filed 8-20-97; 4:06 pm]

BILLING CODE 3410-02-P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 931

[Docket No. FV97-931-2 IFR]

Fresh Bartlett Pears Grown in Oregon and Washington; Reduced Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim final rule with request for comments.

SUMMARY: This interim final rule decreases the assessment rate established for the Northwest Fresh Bartlett Pear Marketing Committee (Committee) under Marketing Order No. 931 for the 1997-98 and subsequent fiscal periods. The Committee is responsible for local administration of the marketing order which regulates the handling of fresh Bartlett pears grown in Oregon and Washington. Authorization to assess fresh Bartlett pear handlers enables the Committee to incur expenses that are reasonable and necessary to administer the program. The 1997-98 fiscal period for this marketing order covers the period July 1 through May 31. The assessment rate will continue until amended, suspended, or terminated.

DATES: Effective on August 26, 1997. Comments received by September 24, 1997, will be considered prior to issuance of a final rule.

ADDRESSES: Interested persons are invited to submit written comments concerning this rule. Comments must be sent in triplicate to the Docket Clerk, Fruit and Vegetable Division, AMS, USDA, room 2525-S, P.O. Box 96456, Washington, DC 20090-6456; Fax (202) 720-5698. 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.

FOR FURTHER INFORMATION CONTACT:

Teresa L. Hutchinson, Northwest Marketing Field Office, Fruit and Vegetable Division, AMS, USDA, 1220 SW Third Avenue, Room 369, Portland, OR 97204; *Telephone:* (503) 326-2724, *Fax:* (503) 326-7440 or *George J. Kelhart*, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, Room 2525-S, P.O. Box 96456, Washington, DC 20090-6456; *Telephone:* (202) 690-3919, *Fax:* (202) 720-5698. Small businesses may request information on compliance with this regulation by

contacting *Jay Guerber*, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, Room 2525-S, P.O. Box 96456, Washington, DC 20090-6456; *Telephone:* (202) 720-2491, *Fax:* (202) 720-5698.

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Agreement No. 141 and Order No. 931, both as amended (7 CFR part 931), regulating the handling of fresh Bartlett pears grown in Oregon and Washington 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 (Department) 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, fresh Bartlett pear 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 fresh Bartlett pears beginning July 1, 1997, and continuing until amended, suspended, or terminated. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

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

This rule decreases the assessment rate established for the Committee for the 1997-98 and subsequent fiscal periods from \$0.0375 to \$0.03 per standard box.

The fresh Bartlett pear marketing order provides authority for the