

Rules and Regulations

Federal Register

Vol. 70, No. 27

Thursday, February 10, 2005

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 319

[Docket No. 03-022-6]

RIN 0579-AB81

Mexican Hass Avocado Import Program

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final rule; correction.

SUMMARY: We are correcting an error in the rule portion of our final rule amending the fruits and vegetables regulations to expand the number of States in which fresh Hass avocado fruit grown in approved orchards in approved municipalities in Michoacan, Mexico, may be distributed and to allow the distribution of the avocados during all months of the year. The final rule was published in the **Federal Register** on November 30, 2004 (69 FR 69747-69774, Docket No. 03-022-5), and became effective on January 31, 2005.

EFFECTIVE DATE: January 31, 2005.

FOR FURTHER INFORMATION CONTACT: Ms. Karen Bedigian, Import Specialist, Phytosanitary Issues Management Team, PPQ, APHIS, 4700 River Road Unit 140, Riverdale, MD 20737-1236; (301) 734-6799.

SUPPLEMENTARY INFORMATION: In a final rule published in the **Federal Register** on November 30, 2004 (69 FR 69747-69774, Docket No. 03-022-5), and effective on January 31, 2005, we amended the fruits and vegetable regulations in 7 CFR part 319 to expand the number of States in which fresh Hass avocado fruit grown in approved orchards in approved municipalities in Michoacan, Mexico, may be distributed and to allow the distribution of the avocados during all months of the year.

In the rule portion of the final rule, it was our intention to amend paragraph (a) of § 319.56-2ff by revising paragraph (a)(2) and by removing paragraph (a)(3). These changes were discussed in the **SUPPLEMENTARY INFORMATION** section of the final rule, and the text of revised (a)(2) was presented in the rule portion of the final rule along with the other changes made to § 319.56-2ff. However, we inadvertently failed to include a specific amendatory instruction directing the revision of paragraph (a)(2) and the removal of paragraph (a)(3). This document corrects that error.

PART 319—[CORRECTED]

■ In FR Doc. 04-26336, published on November 30, 2004 (69 FR 69747-69774), make the following correction:

§ 319.56-2ff [Corrected]

- 1. On page 69773, in the amendments to 7 CFR part 319, in instruction 3 for § 319.56-2ff, an instruction h. is added to read as follows:
- h. By revising paragraph (a)(2) to read as set forth below and removing paragraph (a)(3).

Done in Washington, DC, this 7th day of February 2005.

Elizabeth E. Gaston,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 05-2668 Filed 2-9-05; 8:45 am]

BILLING CODE 3410-34-P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 923

[Docket No. FV04-923-1 FR]

Sweet Cherries Grown in Designated Counties in Washington; Establishment of Minimum Size and Maturity Requirements for Lightly Colored Sweet Cherry Varieties

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule establishes a minimum size requirement of 11-row size ($6\frac{1}{64}$ -inch diameter) and a minimum maturity requirement of 17 percent soluble solids for all lightly colored sweet cherry varieties shipped to fresh markets under the Washington

sweet cherry marketing order. This rule was recommended by the Washington Cherry Marketing Committee (Committee), the agency responsible for local administration of the marketing order. Previously, only the Rainier variety of lightly colored sweet cherries met these requirements. This rule is intended to enhance the quality and image of all lightly colored sweet cherry varieties shipped to the fresh market, thereby increasing sales and improving returns to producers.

EFFECTIVE DATE: April 1, 2005.

FOR FURTHER INFORMATION CONTACT:

Teresa L. Hutchinson, Marketing Specialist, Northwest Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1220 SW., Third Avenue, Suite 385, Portland, OR 97204; telephone: (503) 326-2724; Fax: (503) 326-7440; or George J. Kelhart, Technical Advisor, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250-0237; telephone: (202) 720-2491; Fax: (202) 720-8938.

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250-0237; telephone: (202) 720-2491, Fax: (202) 720-8938, or e-mail: Jay.Guerber@usda.gov.

SUPPLEMENTARY INFORMATION: This final rule is issued under Marketing Agreement and Order No. 923 (7 CFR part 923) regulating the handling of sweet cherries grown in designated counties in Washington, hereinafter referred to as the "order." 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 Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

This final 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 not later than 20 days after the date of the entry of the ruling.

This final rule establishes a minimum size requirement of 11-row size ($6\frac{1}{64}$ -inch diameter) and a minimum maturity requirement of 17 percent soluble solids for all lightly colored sweet cherry varieties shipped to fresh markets. Previously, Rainier variety cherries were the only lightly colored sweet cherries under these requirements. This rule establishes the same requirements for all other varieties of lightly colored sweet cherries as are established for Rainier variety cherries.

Section 923.52 of the order authorizes the establishment of grade, size, quality, maturity, pack, and container regulations for any variety or varieties of cherries grown in the production area. Section 923.53 further authorizes the modification, suspension, or termination of regulations issued under § 923.52. Section 923.55 provides that whenever cherries are regulated pursuant to § 923.52 or § 923.53, such cherries must be inspected by the Federal-State Inspection Service, and certified as meeting the applicable requirements of such regulations.

On May 18, 2004, the Committee recommended, by a nine to four vote, the establishment of a minimum size requirement of 11-row size ($6\frac{1}{64}$ -inch diameter) and a minimum maturity requirement of 17 percent soluble solids for all lightly colored sweet cherry varieties shipped to fresh markets under the order. The Committee recommended the requirement become effective on April 1, 2005, which is the beginning of the 2005–2006 marketing season.

Supporters of the recommendation believe that this regulation is in the best interests of producers and consumers. Growing lightly colored sweet cherries

for the fresh market is more labor intensive and costly than producing dark colored varieties. Trees that produce lightly colored sweet cherries need to be pruned more heavily than the trees that produce dark colored sweet cherries to ensure acceptable size fruit. The lightly colored sweet varieties are fragile and susceptible to damage during handling with most lightly colored sweet cherries being sorted and packed by hand. Producers need to offer a quality product in order to recoup the higher production costs. The sale of small, immature or poor quality cherries results in buyer dissatisfaction, which reduces repeat purchases and damages the market for all lightly colored sweet cherries.

Supporters of the recommendation believe that the requirements currently in place for Rainier variety cherries (59 FR 31917, June 21, 1994) have benefited producers. Concern was also expressed that the non-regulation of new varieties of lightly colored sweet cherries would have an adverse effect in the future on the marketing of Rainier variety cherries if the newer varieties are not regulated in the same manner. It is difficult to distinguish between the different varieties of lightly colored cherries and this can result in confusion in the marketplace.

Those opposed to the recommendation believe that the tonnage of the newer lightly colored sweet cherry varieties is not enough to impact the Rainier market at this time. They believe that the regulation of all lightly colored sweet cherries will reduce the volume of such cherries on the market and reduce overall returns on the crop. Some believe that the additional cost of inspection will increase costs with little added return to the producer.

The Committee estimates that there were less than 500 tons of lightly colored sweet cherry varieties other than the Rainier variety marketed during the 2004 marketing season. By comparison, there were 8,080 tons (Committee records) of Rainier cherries marketed from the production area in 2004.

This rule adds a new provision to § 923.322 to establish a minimum size requirement of $6\frac{1}{64}$ -inch in diameter for all lightly colored sweet cherries which corresponds to the 11-row size. To provide for variances in packing, a tolerance of 10 percent is provided for undersized lightly colored sweet cherries. Further, the regulation provides that not more than 5 percent of lightly colored sweet cherries in any lot can be less than $5\frac{7}{64}$ -inch in diameter, or 11½-row size. These tolerances are

identical to those in effect for Rainier cherries and comparable to those in effect for dark colored sweet cherry varieties.

Section 923.322 is also revised to include a requirement that any lot of lightly colored sweet cherries must contain a minimum of 17 percent soluble solids. The percentage of soluble solids will be determined by using a refractometer to measure the sugar level in a composite sample of cherries. This maturity test can be taken prior to packing, at the time of packing, or at time of shipment, provided that individual lots shall not be combined with other lots to meet soluble solids requirements.

This rule also changes the heading of § 923.322 from “Washington Cherry Regulation 22” to “Washington Cherry Handling Regulation” to more accurately describe the requirements contained therein.

Final Regulatory Flexibility Analysis

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

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued 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 1,800 producers of sweet cherries grown in designated counties in Washington. In addition, there are approximately 69 handlers subject to regulation under the order. Small agricultural producers are defined by the Small Business Administration (13 CFR 121.201) as those having annual receipts of less than \$750,000, and small agricultural service firms are defined as those whose annual receipts are less than \$5,000,000.

Based on a three-year (2001–2003) average fresh cherry production of 79,763 tons (Committee records), a three-year average producer price of \$1,390 per ton as reported by the National Agricultural Statistics Service, USDA, and 1,800 Washington cherry producers, the average annual producer revenue is approximately \$61,595. In addition, based on Committee records and an average 2003 f.o.b. price of \$28.00 per 20-pound container as

reported by AMS Market News, approximately 75 percent of the Washington sweet cherry handlers ship under \$5,000,000 worth of cherries. Based on this information, the majority of Washington sweet cherry producers and handlers may be classified as small entities.

This final rule establishes a minimum size requirement of 11-row size ($6\frac{1}{64}$ -inch diameter) and a minimum maturity requirement of 17 percent soluble solids for all lightly colored sweet cherry varieties shipped to fresh markets. Previously, Rainier variety cherries were the only lightly colored sweet cherries under these requirements.

Rainier and other lightly colored sweet cherry varieties are typically marketed from mid-June through July. AMS Market News data shows that prices are the highest for the earliest offerings of these cherries, and that such prices decline as the season progresses. In 2003, for example, the opening f.o.b. price on June 23 ranged from \$45.00 to \$45.50 per carton. This declined to \$35.00 to \$36.50 a week later, and f.o.b. prices were \$38.00 to \$40.50 per carton at season's end for similar quality and sizes. This price trend serves as an incentive for producers to harvest early, which has resulted in immature and poor quality lightly colored sweet cherries being marketed.

The Committee reports that cherry size and quality are important to buyers. Consistency and dependability are equally important. Shipments of immature, low quality, under-sized lightly colored sweet cherries in recent seasons have disappointed buyers and consumers. This reduces repeat purchases and results in declines in prices and overall sales volumes.

Cherry size is related to maturity and other quality factors. That is, larger sized cherries tend to be sweeter and of higher overall quality. This is supported by prices received for different sizes of Bing (dark colored) cherries. AMS Market News data show that f.o.b. prices for 12 row sized Bing cherries ($5\frac{1}{64}$ -inch diameter) averaged about \$18.00 per carton in mid-June 2003. At the same time, 10½ row sized (1-inch diameter) Bing cherries were selling for \$24.50 to \$26.50 per carton. This price relationship held steady throughout the season. Further, the Committee has conducted research showing that larger sizes correlate with higher maturity levels, and that larger sizes are preferred by cherry consumers. While research results and prices by size specifically for Rainier or other lightly colored sweet cherry varieties are currently unavailable, industry consensus is that the same relationships are true for

Rainier and other lightly colored sweet cherries, and Bings.

The Committee discussed alternatives to this rule, including not establishing a minimum size and maturity requirement. The general consensus of the industry is that mandatory size and quality requirements are needed to ensure product quality and to encourage repeat purchases. Previous voluntary standards for lightly colored sweet cherries such as Rainier variety cherries have not been successful.

This final rule will establish a minimum size requirement of 11-row size ($6\frac{1}{64}$ -inch diameter) and a minimum maturity requirement of 17 percent soluble solids for lightly colored sweet cherry varieties shipped to fresh markets. Accordingly, this action will not impose any additional reporting or recordkeeping requirements on either small or large sweet cherry handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplications 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. Further, the public comments received concerning the proposal did not address the initial regulatory flexibility analysis.

In addition, the Committee's meeting was widely publicized throughout the Washington sweet cherry industry and all interested persons were invited to attend and participate in the Committee's deliberations on all issues. Like all Committee meetings, the May 18, 2004, meeting was a public meeting 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 November 3, 2004 (69 FR 63958). Copies of the rule were mailed or sent via facsimile to all Committee members. Finally, the rule was made available through the Internet by USDA and the Office of the Federal Register. A 60-day comment period ending January 3, 2005, was provided to allow interested persons to respond to the proposal.

Two comments were received during the comment period in response to the proposal. One commenter opposed the proposed requirements indicating that regulation was overly restrictive. The second commenter was of the view that cherries should not be regulated by size at all.

We disagree with the commenters. Implementation of a minimum size of

$6\frac{1}{64}$ -inch diameter and a 17 percent soluble solids requirement for all varieties of lightly colored cherries should help enhance their quality and image. With such a minimum size and maturity, the Committee believes that consumers will purchase more cherries, thereby increasing sales and improving returns to producers.

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

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: <http://www.ama.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 matter presented, including the information and recommendation submitted by the Committee, 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.

List of Subjects in 7 CFR Part 923

Cherries, Marketing agreements, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, 7 CFR part 923 is amended as follows:

PART 923—SWEET CHERRIES GROWN IN DESIGNATED COUNTIES IN WASHINGTON

■ 1. The authority citation for 7 CFR part 923 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. In § 923.322, the section heading, paragraphs (b) introductory text, (b)(1), and (c) are revised to read as follows:

§ 923.322 Washington cherry handling regulation.

* * * * *

(b) *Size*. No handler shall handle, except as otherwise provided in this section, any lot of cherries unless such cherries meet the following minimum size requirements:

(1) For the Rainier variety and similar varieties commonly referred to as "lightly colored sweet cherries," at least 90 percent, by count, of the cherries in any lot shall measure not less than $6\frac{1}{64}$ -inch in diameter and not more than 5 percent, by count, may be less than $5\frac{7}{64}$ -inch in diameter.

* * * * *

(c) *Maturity*. No handler shall handle, except as otherwise provided in this

section, any lot of Rainier cherries or other varieties of "lightly colored sweet cherries" unless such cherries meet a minimum of 17 percent soluble solids as determined from a composite sample by refractometer prior to packing, at time of packing, or at time of shipment:

Provided, That individual lots shall not be combined with other lots to meet soluble solids requirements.

* * * * *

Dated: February 4, 2005.

Kenneth C. Clayton,

Acting Administrator, Agricultural Marketing Service.

[FR Doc. 05-2545 Filed 2-9-05; 8:45 am]

BILLING CODE 3410-02-P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 984

[Docket No. FV04-984-2 FIR]

Walnuts Grown in California; Decreased Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: The Department of Agriculture (USDA) is adopting, as a final rule, an interim final rule which decreased the assessment rate established for the Walnut Marketing Board (Board) for the 2004-05 and subsequent marketing years from \$0.0101 to \$0.0094 per kernelweight pound of assessable walnuts. The Board locally administers the marketing order (order) which regulates the handling of walnuts grown in California. Authorization to assess walnut handlers enables the Board to incur expenses that are reasonable and necessary to administer the program. The marketing year began August 1 and ends July 31. The assessment rate will remain in effect indefinitely unless modified, suspended, or terminated.

EFFECTIVE DATE: March 14, 2005.

FOR FURTHER INFORMATION CONTACT: Toni Sasselli, Program Analyst, or Kurt J. Kimmel, Regional Manager, 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, 1400 Independence Avenue SW., Stop 0237, Washington, DC 20250-0237;

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, 1400 Independence Avenue SW., Stop 0237, Washington DC 20250-0237; 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."

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, 2004, and continue 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 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 not later than 20 days after the date of the entry of the ruling.

This rule continues in effect the action that decreased the assessment rate established for the Board for the 2004-05 and subsequent marketing

years from \$0.0101 to \$0.0094 per kernelweight pound of assessable walnuts.

The order provides authority for the Board, with the approval of the USDA, to formulate an annual budget of expenses and collect assessments from handlers to administer the program. The members of the Board are producers and handlers of California walnuts. They are familiar with the Board's needs and with the costs for goods and services in their local area and are thus in a position to formulate an appropriate budget and assessment rate. The assessment rate is formulated and discussed in a public meeting. Thus, all directly affected persons have an opportunity to participate and provide input.

For the 2003-04 and subsequent marketing years, the Board recommended, and USDA approved, an assessment rate of \$0.0101 per kernelweight pound of assessable walnuts that would continue in effect from year to year unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Board or other information available to USDA.

The Board met on September 10, 2004, and unanimously recommended 2004-05 expenditures of \$2,749,500 and an assessment rate of \$0.0094 per kernelweight pound of assessable walnuts. In comparison, last year's budgeted expenditures were \$2,863,350. The assessment rate of \$0.0094 is \$0.0007 lower than the \$0.0101 rate previously in effect. The lower assessment rate is necessary because this year's crop is estimated by the California Agricultural Statistics Service (CASS) to be 325,000 tons (292,500,000 kernelweight pounds merchantable), and the budget is about 4 percent less than last year's budget. Sufficient income should be generated at the lower rate for the Board to meet its anticipated expenses.

Major categories in the budget recommended by the Board for 2004-05 include \$2,037,500 for research and marketing programs (\$1,393,500 for market research and development, \$550,000 for production research, and \$94,000 to the California Agricultural Statistics Service for a crop estimate), \$332,000 for employee expenses (administrative and office salaries, payroll taxes, workers compensation, and other employee benefits), \$97,000 for office expenses (rent, office supplies, telephone, fax, postage, printing, equipment maintenance, and furniture), \$96,000 for other operating expenses (management travel, field travel, insurance, and financial audits), \$5,000