



**DEPARTMENT OF AGRICULTURE**

**Agricultural Marketing Service**

**7 CFR Part 929**

**[Doc. No. AMS-FV-14-0091; FV15-929-1 FR]**

**Cranberries Grown in States of Massachusetts, et al.;**

**Revising Determination of Sales History**

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

**ACTION:** Final rule.

**SUMMARY:** This rule implements a recommendation from the Cranberry Marketing Committee (Committee) to revise the determination of sales history provisions currently prescribed under the cranberry marketing order (order). The Committee, which consists of 13 growers and 1 public member, locally administers the order regulating the handling of cranberries grown in Massachusetts, Rhode Island, Connecticut, New Jersey, Wisconsin, Michigan, Minnesota, Oregon, Washington, and Long Island in the State of New York. Under the order, there are two different sales history calculations that have been established for this program. This action clarifies when the different methods for calculating sales history will be used. This

action also removes the fresh fruit exemption from one of the calculations.

**DATES:** Effective July 2, 2015.

**FOR FURTHER INFORMATION CONTACT:** Doris Jamieson, Marketing Specialist, or Christian D. Nissen, Regional Director, Southeast Marketing Field Office, Marketing Order and Agreement Division, Fruit and Vegetable Program, AMS, USDA; Telephone: (863) 324-3375, Fax: (863) 291-8614, or E-mail: Doris.Jamieson@ams.usda.gov or Christian.Nissen@ams.usda.gov.

Small businesses may request information on complying with this regulation by contacting Jeffrey Smutny, Marketing Order and Agreement Division, Fruit and Vegetable Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491, Fax: (202) 720-8938, or E-mail: Jeffrey.Smutny@ams.usda.gov.

**SUPPLEMENTARY INFORMATION:** This final rule is issued under Marketing Agreement and Order No. 929, as amended (7 CFR part 929), regulating the handling of cranberries grown in the states of Massachusetts, Rhode Island, Connecticut, New Jersey, Wisconsin, Michigan, Minnesota, Oregon, Washington, and Long Island in the State of New York, 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 Orders 12866, 13563, and 13175.

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect.

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

the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

There are two sales history calculations in effect under two separate sections of the order. This final rule clarifies when the different methods for calculating sales history will be used. This final rule also removes the exemption for fresh fruit from the sales history calculation found in § 929.149. The Committee unanimously recommended these changes at meetings held on February 10 and August 20, 2014.

The order provides authority for volume control in the form of a producer allotment program. When in effect, this program limits the quantity of cranberries that handlers may purchase or handle on behalf of growers in years of oversupply. Each year, prior to determining if volume regulation is needed, grower sales histories are calculated. The sales history averages recent years' sales data using information submitted by each grower on a production and eligibility report filed with the Committee. If the Committee determines that volume regulation is needed, a producer allotment percentage is calculated. Each grower's allotment of cranberries eligible for

handling is then calculated by multiplying the allotment percentage by the grower's sales history.

Section 929.48 of the order contains provisions for computing an annual grower sales history. Section 929.48 also provides that the Committee, with the approval of the Secretary, may establish alternative grower's sales history calculations as warranted. One such alternative calculation is established in § 929.149. This alternative calculation supplements the calculation found in § 929.48 by including an additional sales history for growers with new and renovated acreage. It also provides that the sales history be computed for processed fruit only, with fresh fruit sales deducted from the calculation. The alternative calculation method established in § 929.149 was developed for the 2001-02 marketing year, the last time volume regulation was implemented, and was recently revised so that it could be used for any season.

The Committee believes the provisions in the alternative sales history calculation are beneficial and provide equity to growers who have recently planted or renovated acreage. However, the alternative method for calculating sales history requires physical verification of the renovated or new acreage, thus resulting in additional

costs to the Committee. When considering the costs and the benefits of both sales history calculation methods, the Committee concluded that the method in § 929.48 was adequate for annual calculations when volume regulation was not anticipated. However, due to the importance of a grower's sales history in the determination of that grower's allotment during years of volume regulation, the inclusion of new and renovated acreage is paramount. Accordingly, the Committee concluded that the sales history calculation in § 929.149 should be used in all years when volume regulation is anticipated.

Consequently, at its February 10 and August 20, 2014, meetings, the Committee recommended that the alternative calculation method found in § 929.149 only apply during times when a producer allotment volume regulation is being implemented. When a producer allotment volume regulation is not being implemented, the Committee will calculate grower's sales history according to the provisions provided in § 929.48 of the order.

The Committee also recommended revising the alternative calculation method in § 929.149 by removing the exemption for fresh fruit sales. Committee members stated that automatically exempting fresh fruit from the sales

history calculation provides the grower with an inaccurate representation of their total sales. Further, the exclusion of fresh fruit affects the industry's total sales history, which is used to determine the allotment percentage under a producer allotment program. The Committee believes if any exemptions to future producer allotment calculations are warranted, such exemptions should be considered and recommended to USDA as part of a proposed volume regulation. Removing the fresh exemption provision from the alternative calculation allows the Committee to determine, on an as-needed basis, whether or not volume regulation should apply to the fresh cranberry supply.

#### **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 1,300 cranberry growers in the regulated area and approximately 45 cranberry handlers who are subject to regulation under the marketing 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 are defined as those having annual receipts of less than \$7,000,000 (13 CFR 121.201).

According to industry and Committee data, grower prices ranged between \$15 and \$47 per barrel for cranberries during the 2012-13 marketing year, and total sales were around 7.8 million barrels. Based on production data and grower prices, the average annual grower revenue is below \$750,000. Using Committee information and shipment data, 44 out of the 45 cranberry handlers could also be considered small businesses under SBA's definition. Therefore, the majority of cranberry growers and handlers may be classified as small entities.

This final rule revises the rules and regulations pertaining to the determination of sales history currently

prescribed in § 929.149 of the order. There are two sales history calculations under two separate sections of the order. This action clarifies when the different methods for calculating sales history will be used. It also removes the exemption for fresh fruit from the calculation method found in § 929.149. These changes were unanimously recommended by the Committee at meetings held on February 10 and August 20, 2014. Authority for these changes is provided in § 929.48 of the order.

It is not anticipated that this action will impose any additional costs on the industry. Each year, the Committee is required to calculate a sales history for each grower. This rule clarifies that the alternative sales history calculation method established under § 929.149 will only apply when a producer allotment regulation is being implemented. The calculation method found in § 929.48 will be used when volume regulation is not being implemented.

Removing the fresh exemption provision from the calculation found in § 929.149 allows the Committee to determine, on an as-needed basis, whether or not volume regulation should apply to the fresh cranberry supply. It also provides growers, and the Committee, with a more accurate representation of their sales history. The

benefits of this rule are not expected to be disproportionately greater or lesser for small handlers or producers than for large entities.

The Committee considered the alternative of making no changes to the rules and regulations pertaining to the determination of sales history. However, the Committee recognized that this change would help the industry avoid the additional costs of acreage verification in years when volume regulation is not being implemented. Also, the Committee agreed that the current grower sales history tabulation exempting fresh fruit was not representative of the actual sales. Therefore, this alternative was 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 the Office of Management and Budget (OMB) and assigned OMB No. 0581-0189, Generic Fruit Crops. No changes in those requirements as a result of this action are necessary. 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

cranberry 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.

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.

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.

In addition, the Committee's meetings were widely publicized throughout the cranberry industry, and all interested persons were invited to attend the meetings and participate in Committee deliberations on all issues. Like all Committee meetings, the February 10 and August 20, 2014, 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 April 22, 2015 (80 FR 22431). Copies of the rule were mailed or sent via facsimile to all

Committee members and cranberry handlers. Finally, the rule was made available through the internet by USDA and the Office of the Federal Register. A 15-day comment period ending May 7, 2015, was provided to allow interested persons to respond to the proposal. No comments were received. Accordingly, 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.ams.usda.gov/MarketingOrdersSmallBusinessGuide>.

Any questions about the compliance guide should be sent to Jeffrey Smutny 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.

It is further found that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** (5 U.S.C. 553) because the Committee is beginning discussions regarding

establishing a producer allotment volume regulation for the coming season. As such, it is important to have these changes in place as the Committee moves forward with these discussions and potential implementation. Further, handlers are aware of this rule, which was recommended at a public meeting. Also, a 15-day comment period was provided for in the proposed rule.

**List of Subjects in 7 CFR Part 929**

Cranberries, Marketing agreements, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 929 is amended as follows:

PART 929 - CRANBERRIES GROWN IN THE STATES OF MASSACHUSETTS, RHODE ISLAND, CONNECTICUT, NEW JERSEY, WISCONSIN, MICHIGAN, MINNESOTA, OREGON, WASHINGTON, AND LONG ISLAND IN THE STATE OF NEW YORK

1. The authority citation for 7 CFR part 929 continues to read as follows:

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

§ 929.149 [Amended]

2. In § 929.149, the words "when a producer allotment volume regulation is in effect" are added to the end of the introductory text, and paragraphs (e) and (f) are removed.

Dated: June 26, 2015

Rex A. Barnes  
Associate Administrator  
Agricultural Marketing Service

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