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**DEPARTMENT OF AGRICULTURE**

**Agricultural Marketing Service**

**7 CFR Part 923**

[Doc. No. AMS-SC-16-0077; SC16-923-1 FR]

**Cherries Grown in Designated Counties in Washington;  
Increased Assessment Rate**

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

**ACTION:** Final rule.

**SUMMARY:** This rule implements a recommendation from the Washington Cherry Marketing Committee (Committee) to increase the assessment rate established for the 2016-2017 and subsequent fiscal periods from \$0.15 to \$0.25 per ton of Washington cherries handled. The Committee locally administers the marketing order and is comprised of growers and handlers of cherries operating within the production area. Assessments upon cherry handlers are used by the Committee to fund reasonable and necessary expenses of the marketing order. The fiscal period begins April 1 and ends March 31. The assessment rate will remain in effect indefinitely unless modified, suspended or terminated.

**DATES:** Effective [INSERT DATE 1 DAY AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Teresa Hutchinson or Gary D. Olson, Northwest Marketing Field Office, Marketing Order

and Agreement Division, Specialty Crops Program, AMS, USDA;  
Telephone: (503) 326-2724, Fax: (503) 326-7440, or E-mail:  
Teresa.Hutchinson@ams.usda.gov or GaryD.Olson@ams.usda.gov.

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

**SUPPLEMENTARY INFORMATION:** This rule is issued under Marketing Order No. 923, as amended (7 CFR part 923), regulating the handling of 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 Orders 12866, 13563, and 13175.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the order now in effect, Washington cherry 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 Washington cherries beginning April 1, 2016, and continue until amended, suspended, or terminated.

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 increases the assessment rate for the 2016-2017 and subsequent fiscal periods from \$0.15 to \$0.25 per ton of Washington cherries handled.

The order provides authority for the Committee, with the approval of USDA, to formulate an annual budget of expenses and collect assessments from handlers to administer the program. The members of the Committee are growers and handlers of Washington cherries. They are familiar with the Committee'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 2013-2014 and subsequent fiscal periods, the Committee recommended, and the USDA approved, an assessment rate of \$0.15 per ton of Washington cherries that would continue in effect from fiscal period to fiscal period unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other information available to USDA.

The Committee met on May 18, 2016, and unanimously recommended expenditures of \$57,150 for the 2016-2017 fiscal period. In comparison, the previous fiscal period's budgeted expenditures were \$59,750. The Committee also unanimously recommended an assessment rate of \$0.25 per ton

of Washington cherries. The recommended assessment rate of \$0.25 is \$0.10 higher than the rate currently in effect.

The expenditures recommended by the Committee for the 2016-2017 fiscal period include \$25,000 for the management fee; \$7,000 for compliance; \$5,000 for the data management fee; \$5,000 for accounting administration; \$5,000 for research; \$4,000 for Committee travel; \$3,000 for an audit; and \$3,150 for other miscellaneous expenses. In comparison, expenditures for the 2015-2016 fiscal period were \$25,000 for the management fee; \$7,000 for compliance; \$5,000 for the data management fee; \$7,000 for accounting administration; \$5,000 for research; \$4,000 for Committee travel; \$4,000 for an audit; and \$2,750 for other miscellaneous expenses.

Committee members estimated the 2016 fresh cherry production to be approximately 150,000 tons, which would be less than the 2015 production of 165,358 tons by 15,358 tons. However, cherry production tends to fluctuate due to the effects of weather, pollination, and tree health. The Committee's recommended assessment rate was derived by dividing the 2016-2017 anticipated expenses by the expected shipments of Washington cherries, while also taking into account the Committee's monetary reserve. The recommended

assessment rate of \$0.25 per ton, when multiplied by the 150,000 tons of estimated 2016 Washington cherry shipments, is expected to generate \$37,500 in handler assessments. The projected revenue from handler assessments, together with funds from the Committee's monetary reserve, should be adequate to cover the 2016-2017 budgeted expenses of \$57,150. The Committee expects its monetary reserve to decrease from \$49,661 at the beginning of the 2016-2017 fiscal period to approximately \$30,011 at the end of the 2016-2017 fiscal period. That amount will be within the provisions of the order and will provide the Committee with greater ability to absorb fluctuations in assessment income and expenses into the future.

The assessment rate established in this rule will continue in effect indefinitely unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other available information.

Although this assessment rate will be in effect for an indefinite period, the Committee will continue to meet prior to or during each fiscal period to recommend a budget of expenses and consider recommendations for modification of the assessment rate. The dates and times of Committee meetings are available from the Committee and USDA.

Committee meetings are open to the public and interested persons may express their views at these meetings. USDA will evaluate Committee recommendations and other available information to determine whether modification of the assessment rate is needed. Further rulemaking will be undertaken as necessary. The Committee's 2016-2017 budget and those for subsequent fiscal periods will be reviewed and, as appropriate, approved by USDA.

### **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 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 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 the 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 53 handlers of Washington sweet cherries subject to regulation under the order and approximately

1,500 growers in the regulated production area. Small agricultural service firms are defined by the Small Business Administration (13 CFR 121.201) as those having annual receipts of less than \$7,500,000, and small agricultural growers are defined as those having annual receipts of less than \$750,000.

National Agricultural Statistics Service has prepared a preliminary report for the 2015 shipping season showing that prices for the 171,600 tons of sweet cherries that entered the fresh market averaged \$2,380 per ton. Based on the number of growers in the production area (1,500), the average grower revenue from the sale of sweet cherries in 2015 can therefore be estimated at approximately \$272,272 per year. In addition, the Committee reports that most of the industry's 53 handlers reported gross receipts of less than \$7,500,000 from the sale of fresh sweet cherries last fiscal period. Thus, the majority of growers and handlers of Washington sweet cherries may be classified as small entities.

This action increases the assessment rate established for the Committee and collected from handlers for the 2016-2017 and subsequent fiscal periods from \$0.15 to \$0.25 per ton of Washington cherries handled. The Committee

unanimously recommended 2016-2017 expenditures of \$57,150 and an assessment rate of \$0.25 per ton. The assessment rate of \$0.25 is \$0.10 higher than the rate established for the 2013-2014 fiscal period.

The 2016-2017 Washington cherry crop is estimated at 150,000 tons. At the \$0.25 per ton assessment rate, the Committee anticipates that assessment income of approximately \$37,500, along with reserve funds, should be adequate to cover budgeted expenses for the 2016-2017 fiscal period. With the increased assessment rate and budgeted expense level, the Committee anticipates that \$19,650 will need to be deducted from the monetary reserve. As such, reserve funds are estimated to be at \$30,011 on March 31, 2017. That reserve level is within the maximum permitted by the order of approximately one fiscal period's operational expenses (§ 923.42(a)(2)).

The expenditures recommended by the Committee for the 2016-2017 fiscal period include \$25,000 for the management fee; \$7,000 for compliance; \$5,000 for the data management fee; \$5,000 for accounting administration; \$5,000 for research; \$4,000 for Committee travel; \$3,000 for the audit; and \$3,150 for other miscellaneous expenses.

In comparison, expenditures for the 2015-2016 fiscal period were \$25,000 for the management fee; \$7,000 for compliance; \$5,000 for the data management fee; \$7,000 for accounting administration; \$5,000 for research; \$4,000 for Committee travel; \$4,000 for the audit; and \$2,750 for other miscellaneous expenses.

The Committee discussed alternatives to this action, including recommending alternative expenditure levels and assessment rates. Although lower assessment rates were considered, none were selected because they would not have generated sufficient income to administer the order.

A review of historical data and preliminary information pertaining to the upcoming fiscal period indicates that the grower price for the 2016-2017 fiscal period could average \$2,380 per ton of sweet cherries. Therefore, the estimated assessment revenue for the 2016-2017 fiscal period, as a percentage of total grower revenue, is approximately 0.01 percent.

This action increases the assessment obligation imposed on handlers. While assessments impose some additional costs on handlers, the costs are minimal and uniform on all handlers. Some of the additional costs may

be passed on to growers. However, these costs are offset by the benefits derived by the operation of the order.

In addition, the Committee's meeting was widely publicized throughout the Washington cherry industry and all interested persons were invited to attend the meeting and participate in Committee deliberations on all issues. Like all Committee meetings, the May 18, 2016, meeting was a public meeting and all entities, both large and small, were able to express views on this issue.

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 (Marketing Orders for Fruit Crops). No changes in those requirements are necessary as a result of this action. Should any changes become necessary, they would be submitted to OMB for approval.

This rule imposes no additional reporting or recordkeeping requirements on either small or large Washington cherry handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. As noted in the

initial regulatory flexibility analysis, USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this final rule.

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.

A proposed rule concerning this action was published in the **Federal Register** on September 21, 2016 (81 FR 64785). Copies of the proposed rule were also emailed to all commodity handlers. Finally, the proposal was made available through the internet by USDA and the Office of the Federal Register. A 15-day comment period ending October 6, 2016, was provided for interested persons to respond to the proposal.

One comment was received during the comment period in response to the proposal. The commenter was concerned about the impact that the increased assessment rate would have on growers. The commenter also questioned why the assessment is only applied to certain counties in Washington, and not others. In addition, the commenter stated that the opinions of sweet cherry growers and

handlers should be taken into consideration when establishing assessment rates, and that there should be flexibility during the transitional period when a new assessment rate is implemented. Lastly, the commenter offered recommendations with regards to the assessment rate establishment process and took exception to the indefinite period that assessment rates are in effect.

Under the order, it is handlers that are assessed, not growers. As such, growers will not be directly impacted by this action. However, as mentioned previously in this rule, some of the additional costs to handlers as a result of this action may be passed on to growers. Nevertheless, USDA believes that such additional costs will be offset by the benefits derived by the operation of the order.

Furthermore, the commenter's request for clarity with regards to why only certain counties are covered by this regulatory change is addressed in the order's provisions. Section 923.4 defines the order's production area as the counties of Okanogan, Chelan, Kittitas, Yakima, Klickitat in the State of Washington and all of the counties in Washington lying east thereof. Only handlers who handle cherries grown within the specific production area are subject to assessment.

Lastly, the commenter's thoughts regarding the assessment rate establishment process and effective period have been previously addressed in this rule. The Committee meets prior to, or during, each fiscal period to recommend a budget of expenses and consider recommendations for modification of the assessment rate. The dates and times of Committee meetings are available from the Committee or USDA. Committee meetings are open to the public and interested persons may express their views at these meetings.

Meetings are widely publicized throughout the Washington cherry industry and all interested persons are invited to attend the meetings and participate in Committee deliberations on all issues. In addition, interested persons are invited to submit comments on any proposed assessment rules. All comments are considered prior to finalization of a proposed rule. Once established, assessment rates remain in effect until modified by USDA upon the recommendation of the Committee.

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

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and

orders may be viewed at: <http://www.ams.usda.gov/rules-regulations/moa/small-businesses>. Any questions about the compliance guide should be sent to Richard Lower at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant material 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.

Pursuant to 5 U.S.C. 553, it also found and determined 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 2016-2017 fiscal period began on April 1, 2016, and the order requires that the assessment rate for each fiscal period apply to all assessable Washington cherries handled during such fiscal period; (2) the Committee needs to have sufficient funds to pay its expenses, which are incurred on a continuous basis; (3) handlers have already shipped Washington cherries from the 2016 crop; and (4) handlers are aware of this action, which was unanimously recommended by the Committee at a

public meeting and is similar to other assessment rate actions issued in past years.

**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 - 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. Section 923.236 is revised to read as follows:  
§ 923.236 Assessment rate.

On and after April 1, 2016, an assessment rate of \$0.25 per ton is established for the Washington Cherry Marketing Committee.

Dated: December 12, 2016

Bruce Summers  
Associate Administrator  
Agricultural Marketing Service

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