



DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 930

[Doc. No. AMS-SC-16-0104; SC16-930-4 FR]

**Tart Cherries Grown in the States of Michigan, New York,
Pennsylvania, Oregon, Utah, Washington and Wisconsin;**

Modification of Allocation of Assessments

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule implements a recommendation from the Tart Cherry Industry Administrative Board (Board) to increase the portion of assessments allocated to research and promotion activities from \$0.005 to \$0.0065 per pound of tart cherries and decrease the portion allocated to administrative expenses from \$0.0025 to \$0.001 per pound of tart cherries handled under the marketing order (order). This rule also corrects the allocation numbers from \$0.006 per pound for research and promotion activities and \$0.0015 per pound for administrative expenses as stated in the proposed rule based on a comment received. The overall assessment rate remains unchanged at \$0.0075 per pound of tart cherries. The Board locally administers the order and is comprised of producers and handlers of tart cherries operating within the area of production, and one public

member. Assessments upon tart cherry handlers are used by the Board to fund reasonable and necessary expenses of the program. The fiscal period begins October 1 and ends September 30. The assessment rate will remain in effect indefinitely unless modified, suspended, or terminated.

DATES: Effective September 6, 2017.

FOR FURTHER INFORMATION CONTACT: Jennie M. Varela, Marketing Specialist, or Christian D. Nissen, Regional Director, Southeast Marketing Field Office, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA; Telephone: (863) 324-3375, Fax: (863) 291-8614, or E-mail: Jennie.Varela@ams.usda.gov or Christian.Nissen@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 Agreement and Order No. 930, both as amended (7 CFR part 930), regulating the handling of tart cherries produced in the States of Michigan, New York, Pennsylvania,

Oregon, Utah, Washington and Wisconsin, 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 final rule in conformance with Executive Orders 13563 and 13175. This rule does not meet the definition of a significant regulatory action contained in section 3(f) of Executive Order 12866 and is not subject to review by the Office of Management and Budget (OMB). Additionally, because this rule does not meet the definition of a significant regulatory action, it does not trigger the requirements contained in Executive Order 13771. See OMB's Memorandum titled, "Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, titled 'Reducing Regulation and Controlling Regulatory Costs' " (February 2, 2017).

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order now in effect, tart 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 tart cherries beginning on October 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 portion of the assessment rate allocated to research and promotion activities from \$0.005 to \$0.0065 per pound of tart cherries handled and decreases the portion allocated to administrative expenses from \$0.0025 to \$0.001 per pound of tart cherries handled under

the order. This rule also corrects the allocation numbers from \$0.006 per pound for research and promotion activities and \$0.0015 per pound for administrative expenses as stated in the proposed rule based on a comment received. The overall assessment rate for the 2016-17 and subsequent fiscal periods remains unchanged at \$0.0075 per pound of tart cherries.

The tart cherry marketing order provides authority for the Tart Cherry Industry Administrative Board (Board), 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 Board are producers and handlers of tart cherries, and one public member. They are familiar with the Board's needs and with the costs of goods and services in their local areas 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 2010-11 and subsequent fiscal periods, the Board recommended, and USDA approved, an assessment rate of \$0.0075 per pound of tart 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 Board or other information available to USDA.

The Board met on September 8, 2016, and unanimously recommended 2016-17 expenditures of \$2,523,550 and an assessment rate of \$0.0075 per pound of tart cherries. In comparison, last year's budgeted expenditures were \$1,725,000. The total assessment rate remains unchanged by this action. However, this rule increases the portion of the assessment rate allocated to research and promotion activities from \$0.005 to \$0.0065 per pound of tart cherries handled and decreases the portion allocated to administrative expenses from \$0.0025 to \$0.001 per pound of tart cherries handled under the order. This shift in allocation will allow for expanded research and promotion activities to help market this season's above-average crop, while helping to ensure that funds held in the Board's authorized reserve are consistent with the order's limits on the reserve.

The major expenditures recommended by the Board for the 2016-17 fiscal year include \$2,045,550 for promotion, \$255,000 for personnel, and \$106,000 for office expenses.

Budgeted expenses for these items in 2015-16 were \$1,150,000, \$236,000, and \$102,000, respectively.

The assessment rate recommended by the Board was derived by considering expected shipments of tart cherries and examining the needs of the industry with regard to research and promotion and the authorized reserve. Tart cherry shipments for the 2016-17 year are estimated at 314.7 million pounds, which should provide \$2,360,250 in assessment income. Income derived from handler assessments, interest income, and funds from the Board's authorized reserve should be adequate to cover budgeted expenses. Funds in the reserve (approximately \$894,000) will be kept within the maximum permitted by the order of no more than approximately one year's operational expenses as stated in §930.42(a).

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

Although this assessment rate will be in effect for an indefinite period, the Board 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 Board meetings are available from the Board or USDA. Board meetings are open to the public, and interested persons may express their views at these meetings. USDA will evaluate Board recommendations and other available information to determine whether modification of the assessment rate is needed. Further rulemaking would be undertaken as necessary. The Board's budget for future 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 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 600 producers of tart cherries in the regulated area and approximately 40 handlers of tart cherries who are subject to regulation under the 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 have been defined as those whose annual receipts are less than \$7,500,000 (13 CFR 121.201).

According to the National Agricultural Statistics Service and Board data, the average annual grower price for tart cherries during the 2015-16 season was approximately \$0.347 per pound. With total utilization at 251.1 million pounds, the total 2015-16 crop value is estimated at \$87 million. Dividing the crop value by the estimated number of producers (600) yields an estimated average receipt per producer of \$145,000. This is well below the SBA threshold for small producers. In 2015, The Food Institute estimated a free on board (f.o.b.) price of \$0.96 per pound for frozen tart cherries, which make up the majority of processed tart cherries. Multiplying the f.o.b price by total utilization of 251.1 million pounds results in an estimated handler-level tart cherry value of \$241 million. Dividing this figure by the number of handlers (40) yields

an estimated average annual handler receipts of \$6 million, which is below the SBA threshold for small agricultural service firms. Assuming a normal distribution, the majority of producers and handlers of tart cherries may be classified as small entities.

This rule increases the portion of the assessment rate allocated to research and promotion activities from \$0.005 to \$0.0065 per pound of tart cherries handled and decreases the portion allocated to administrative expenses from \$0.0025 to \$0.001 per pound of tart cherries handled under the order. This rule also corrects the allocation numbers from \$0.006 per pound for research and promotion activities and \$0.0015 per pound for administrative expenses as stated in the proposed rule based on a comment received. The overall assessment rate established for the Board for the 2016-17 and subsequent fiscal periods remains unchanged at \$0.0075 per pound of tart cherries. The quantity of assessable tart cherries for the 2016-17 season is estimated at 314.7 million pounds. Thus, the \$0.0075 rate should provide \$2,360,250 in assessment income. Income derived from handler assessments, interest income, and funds from the Board's authorized reserve should provide sufficient funds to meet this year's anticipated expenses.

The major expenditures recommended by the Board for the 2016-17 year include \$2,045,550 for promotion, \$255,000 for personnel, and \$106,000 for office expenses. Budgeted expenses for these items in 2015-16 were \$1,150,000, \$236,000, and \$102,000, respectively.

This rule shifts the allocation of the assessment rate to increase the portion allocated for research and promotion, while decreasing the portion allocated for administrative costs. This adjustment will allow for expanded research and promotion activities to help market this season's above-average crop, while helping to ensure that funds held in the Board's authorized reserve are consistent with the order's limits on the reserve.

Prior to arriving at this budget and assessment rate, the Board considered production history, crop estimates, its financial statements, and the need to both reduce financial reserves and increase its marketing efforts to increase demand for tart cherries. The Board also considered not taking this action but determined that 2016-17 expenditures of \$2,523,550 were appropriate, and the recommended assessment rate and allocation, along with funds from interest income, block grants, and funds from reserves, would be adequate to cover budgeted expenses.

A review of historical information and preliminary information pertaining to the upcoming crop year indicates that the average grower price for the 2016-17 season could be approximately \$0.348 per pound of tart cherries. Therefore, the estimated assessment revenue for the 2016-17 crop year as a percentage of total grower revenue could be approximately 2 percent.

This action does not increase 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 costs may be passed on to producers. However, these costs are offset by the benefits derived by the operation of the marketing order.

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 on all issues. Like all Board meetings, the June 23, 2016, and September 8, 2016, meetings were public meetings, 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 OMB and assigned OMB No. 0581-0177, Tart Cherries Grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin. 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 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. 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 May 25, 2017(82 FR 24080).

Copies of the proposed rule were also mailed or sent via facsimile to all tart cherry handlers. Finally, the proposal was made available through the internet by USDA and the Office of the Federal Register. A 30-day comment period ending June 26, 2017, was provided for interested persons to respond to the proposal.

One comment was received from Board staff indicating that the Board minutes stated the recommendation was for assessment allocation of \$0.0065 per pound of tart cherries for promotion and \$0.001 per pound of tart cherries for administration rather than the \$0.006 and \$0.0015, respectively, as published in the proposed rule. Accordingly, the allocation numbers were revised 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 Board 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 is 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 the fiscal year ends on September 30, 2017, and the change in allotment of assessments collected is necessary to ensure sufficient funds are available to cover the increase in research and promotion expenses that were incurred to help market the 2016-17 above-average crop. Further, handlers are aware of this rule, which was recommended at a public meeting. Also, a 30-day comment period was provided for in the proposed rule and no negative comments were received.

List of Subjects in 7 CFR Part 930

Marketing agreements, Reporting and recordkeeping requirements, Tart cherries.

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. Section 930.200 is revised to read as follows:

§ 930.200 Assessment rate.

On and after October 1, 2016, the assessment rate imposed on handlers shall be \$0.0075 per pound of tart cherries grown in the production area and utilized in the production of tart cherry products. Included in this rate is \$0.0065 per pound of tart cherries to cover the cost of the research and promotion program and \$0.001 per pound of tart cherries to cover administrative expenses.

Dated: August 30, 2017

Bruce Summers
Acting Administrator
Agricultural Marketing Service

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