



**DEPARTMENT OF AGRICULTURE**

**Agricultural Marketing Service**

**7 CFR Part 929**

[Doc. No. AMS-SC-17-0061; SC17-929-2 FR]

**Cranberries Grown in States of Massachusetts, et al.; Free and Restricted Percentages for the 2017-18 Crop Year for Cranberries**

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

**ACTION:** Final rule.

**SUMMARY:** This rule implements a recommendation to establish free and restricted percentages for the 2017-18 crop year under the marketing order for cranberries grown in the production area (Order). This action establishes the proportion of cranberries from the 2017-18 crop which may be handled and allows for the disposal of 2017-18 processed cranberry products. It also establishes a minimum quantity exemption and an exemption for handlers with no carryover inventory, exempts organically grown cranberries, and defines outlets for restricted fruit. This action adjusts supply to more closely meet market demand, improves grower and handler returns and reduces inventory. This final rule also contains formatting changes to subpart references to

bring the language into conformance with the Office of the Federal Register requirements.

**DATES:** Effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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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 final rule, pursuant to 5 U.S.C. 553, amends regulations issued to carry out a marketing order as defined in 7 CFR 900.2(j). 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. Part 929 (referred to as 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 Cranberry Marketing Committee (Committee) locally administers the Order and is comprised of growers and handlers of cranberries operating within the production area, and a public member.

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Orders 13563 and 13175. This action falls within a category of regulatory actions that the Office of Management and Budget (OMB) exempted from Executive Order 12866 review. 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. Order provisions provide that the Committee may recommend and implement, subject to USDA approval, volume control regulation that would decrease the available supply of cranberries, whenever the Secretary finds that "such regulation will tend to effectuate the declared policy of the Act." Accordingly, this rule establishes free and restricted percentages for cranberries for the 2017-18 crop year, beginning September 1, 2017, through August 31, 2018.

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.

This final rule establishes free and restricted percentages for the 2017-18 crop year. This rule establishes the proportion of cranberries from the 2017-18 crop that may be handled at 85 percent free and 15 percent restricted. This action also allows for the disposal of 2017-18 processed cranberry products to meet up to 50 percent of a handler's restriction. It also establishes a minimum quantity exemption, exempts handlers with no carryout inventory, exempts organically grown cranberries, and defines outlets for restricted fruit. This action adjusts supply to more closely meet market demand, improves grower returns, and helps reduce inventory.

The Committee met on August 4, 2017, and August 31, 2017, and recommended establishing these free and restricted percentages for the 2017-18 season, providing handlers with the option to divert processed cranberry products to meet up to 50 percent of their restricted percentage, and designating outlets for restricted fruit. The Committee also recommended establishing a minimum

exemption of 125,000 barrels for each handler. After much consideration, USDA determined the minimum exemption portion of the recommendation should be revised.

Consequently, this rule only exempts small handlers who process less than 125,000 barrels or handlers who will not have carryover inventory at the end of the 2017-18 fiscal year from the restriction. The 125,000 barrel exemption does not apply to handlers who do not meet these criteria. The Committee met again on January 17, 2018, to discuss the proposed rule following its publication in the *Federal Register*. The Committee recommended that USDA consider reducing the restricted percentage from 15 percent to 5 percent. After considering the recommendation and the data available, USDA determined the restricted percentage should remain at 15 percent.

Sections 929.52 and 929.54 authorize the Secretary of Agriculture (Secretary) to control volume by designating free and restricted percentages for cranberries acquired by handlers in a given crop year. Section 929.52 provides that the Secretary shall control the handling of cranberries whenever the Secretary finds, from the recommendations and information submitted by the Committee,

or from other such information, that such volume control will tend to effectuate the declared policy of the Act. Free percentage volume may be shipped to any market, while restricted percentage volume must be diverted or used for noncompetitive purposes as prescribed in § 929.57. Section 929.51 requires the Committee to consider certain conditions, including supply and demand, prior to recommending a handler withholding program, and that any recommendation to do so be made by August 31.

Section 929.58(a) provides the authority to exempt from any or all requirements the handling of cranberries in such minimum quantities as the Committee, with the approval of the Secretary, may prescribe. Section 929.58(b) provides, in part, the authority to exempt from any or all requirements the handling of cranberries of such forms or types, including organic cranberries, as the Committee, with the approval of the Secretary, may prescribe.

Domestic cranberry production has been increasing over the past few years, up from 8.0 million barrels in 2012 to 9.6 million barrels in 2016. During the last few years, demand has remained relatively flat, and has not kept pace with the increases in supply. This has led to increasing

levels of inventories. Ending inventory levels have increased from 5.8 million barrels in 2012 to 9.7 million barrels in 2016.

Demand for cranberries is inelastic, meaning changes in consumer price have a minimal effect on total sales volume. However, grower prices are very sensitive to changes in supply. As such, higher inventory levels place downward pressure on grower prices for cranberries and reduce grower returns. Data reviewed by the Committee indicates that the price per barrel received by some growers has fallen from \$30 a barrel in 2011 to \$10 a barrel in 2016. With the cost of production estimated at approximately \$35 a barrel, for many growers returns have fallen below the cost of production.

On August 4, 2017, and again on August 31, 2017, the Committee met to discuss the levels of supply and demand and how market conditions were impacting the industry. The Committee discussed the approximate levels of production for the 2017-18 season, forecasting production at approximately 9.1 million barrels. Carry-in inventory was estimated at approximately 9.9 million barrels and foreign acquired cranberries are expected to provide an additional

2.1 million barrels, for a total available supply of approximately 21.1 million barrels for the year. After accounting for shrinkage, the Committee agreed on an adjusted supply of 20.4 million barrels for the 2017-18 season.

The Committee also reviewed anticipated sales for the upcoming season. Sales for fresh fruit were estimated at 333,000 barrels and processed fruit sales were estimated at 9.2 million barrels. Based on these expectations, inventory at the end of the 2017-18 crop year was anticipated to be roughly 10.9 million barrels, a 10 percent increase from the previous year. Using these numbers, end of year inventories would be approximately 115 percent of average annual sales.

After calculating the anticipated level of surplus for the 2017-18 season, the Committee agreed the industry is faced with a large inventory that continues to build. In its discussions of how to address this issue, the Committee considered several options. During the discussion of regulating the volume for the 2017-18 season, some members preferred establishing a producer allotment for the 2018-19 season over implementing a handler withholding for the

current season. However, other members stated that if no action was taken to control supply for the 2017-18 season, another million barrels of cranberries would be added to the surplus inventory. In addition, not regulating the 2017-18 crop would require greater levels of restriction on the 2018-19 crop, and grower returns may decline further.

The Committee discussed various levels of restriction, being sensitive to the impact volume control could have on small handlers. Some small handlers are able to sell all their production each year and do not maintain an inventory. Several Committee members stated a large restriction would place a hardship on these small handlers.

The Committee also recognized a small restriction would not immediately balance supply with demand. However, even a small restriction would remove a portion of the volume from the market and help prevent an additional increase in inventory. Therefore, based on these discussions, the Committee recommended establishing free and restricted percentages at 85 percent free and 15 percent restricted.

The Committee also recommended an allowance for the diversion of 2017-18 processed cranberry products to meet

up to 50 percent of a handler's restriction. The Committee made this recommendation recognizing that processing fresh fruit to produce one of its top-selling items, sweetened dried cranberries (SDC), results in juice concentrate as a by-product. A significant amount of current carryover inventory is in the form of juice concentrate. By allowing for the diversion of processed cranberry products, such as juice concentrate, to meet a portion of a handler's restriction, the Committee believes this will help prevent additional build-up of carryover inventory. The ability to use cranberry processed products in addition to fresh berries to meet diversion requirements may also help handlers who find they need to divert additional volume late in the year when the availability of fresh berries may be limited.

To ensure the disposal of processed products in lieu of fresh berries is correctly accounted for under the restriction, the Committee also recommended including a conversion table, Table 1, in the regulations. The table recognizes different conversion equivalencies of berries to processed product based on the volume of Brix concentrate.

Brix is the method for measuring the amount of sugar contained in the cranberry products, and the industry average is 50 Brix per concentrate. The Committee acknowledged that the Brix level can vary depending on the growing region and farming practices. This table assists in ensuring that the disposal of processed product in lieu of fresh berries is applied equitably among all handlers.

Table 1: Conversion Table

Region	Brix Average	Concentrate yield for one barrel of cranberries
Oregon	9.8	1.91 gallons 50 Brix concentrate
Washington	9.3	1.81 gallons 50 Brix concentrate
New Jersey	8.8	1.72 gallons 50 Brix concentrate
Wisconsin	8.7	1.70 gallons 50 Brix concentrate
Massachusetts	8.4	1.64 gallons 50 Brix concentrate
All others	8.7	1.70 gallons 50 Brix concentrate

For example, using the conversion table above, handlers could determine the amount of cranberry concentrate they would need to divert, in lieu of fresh berries, to cover any restricted percentage. Juice concentrate should comprise the vast majority of processed product used for diversion. Should requests be made to use other processed products for diversion, conversion rates for those products will be provided by the Committee based on information provided by the requesting handler. The

means for approving and appealing those conversion rates will be provided in a separate rulemaking action.

For example, a handler covered under the restriction whose acquired volume is 1,000,000 barrels would have 1,000,000 barrels in regulated volume with 850,000 barrels of free use cranberries ( $1,000,000 \times .85$ ) and 150,000 barrels of restricted use cranberries ( $1,000,000 \times .15$ ) for the 2017-18 season. Under this rule, the handler could divert fresh fruit to outlets for restricted cranberries as prescribed in the Order, or divert up to 50 percent of the restriction, or a 75,000 barrel equivalent ( $150,000 \text{ barrels} \div 2$ ) in processed products from the 2017-18 harvest, with the remaining amount fulfilled using fresh berries. For cranberries produced in Wisconsin, this would equate to 127,500 gallons of concentrate ( $75,000 \text{ barrels} \times 1.7 \text{ gallons}$ ) that would need to be diverted to outlets for restricted cranberries.

Section 929.57 states that cranberries withheld from handling may only be diverted through such outlets as the Committee, with the approval of the Secretary, finds are noncompetitive to outlets for unrestricted (free percentage) cranberries. The Committee discussed various

outlets and recommended the following: Foreign countries, except Canada; charitable institutions; any nonhuman food use; and, research and development projects approved by the Committee dealing with the development of foreign and domestic markets, including, but not limited to dehydration, radiation, freeze drying, or freezing of cranberries as outlets for withheld cranberries. They further recommended that cranberries may not be converted into canned, frozen, or dehydrated cranberries or other cranberry products by any commercial process prior to diversion to foreign countries. These outlets for restricted cranberries will be added to the rules and regulations under the Order by creating a new § 929.108.

The Committee also recommended organically grown cranberries be exempt from this regulation as they serve a niche market and represent a very small portion of the total crop. All other cranberry production, including fresh cranberries, is subject to regulation under the handler withhold volume regulation.

To address the burden the volume regulation would have on small handlers, the Committee also recommended providing a minimum quantity exemption of 125,000 barrels. Under the

Committee's recommendation, the exemption would be given to handlers of record for the 2016-17 (previous) crop year and the 125,000 barrels would be subtracted from the handler's 2017-18 acquired volume before the restricted percentage would be applied. Small handlers whose acquired volume is 125,000 barrels or less would be exempt from the volume regulation, and handlers with slightly larger volumes would face minimal restrictions.

After much consideration, USDA determined the minimum exemption recommendation should be revised under this rule. Rather than provide an exemption of 125,000 barrels for each handler, this action exempts small handlers who process less than 125,000 barrels from the 15 percent restriction. Further, only handlers who have carryover inventory that is not sold or under contract at the end of the 2017-18 fiscal year are subject to the 15 percent restriction. These changes reflect the Committee's goal of reducing the burden on small handlers, and allow handlers that have matched their production with market demand to continue to serve their customer base and protect their market share. Handlers subject to the restriction should

be able to meet any market shortfalls by utilizing cranberries or cranberry products they have in inventory.

With this change, only those handlers carrying inventory will be subject to the restriction. In reviewing the Committee's recommendation and other available industry information, it is the existing inventories in excess of 9 million barrels that are putting the most downward pressure on returns to both growers and handlers. Consequently, this change will put more focus on reducing the volume in inventory.

The Committee met again on January 17, 2018, to discuss the proposed rule on this action as published in the *Federal Register* on January 2, 2018 (83 FR 72). At the meeting, members discussed current market conditions. When the Committee had recommended the 15 percent restriction in August 2017, domestic production had been estimated at 9.14 million barrels. Since that time, Committee members stated that weather conditions had impacted production and that domestic production would actually be closer to 8 million barrels. Based on the reduced crop estimate, in a vote of 12 in favor, one against, and one abstention, the Committee voted to recommend reducing the restricted percentage from

15 percent to 5 percent. Members stated that the reduction in the crop, in combination with the reduced restriction, would still combine to remove a similar amount of fruit from the market as was originally projected under the 15 percent restriction.

USDA reviewed the recommendation made by the Committee to reduce the restricted percentage from 15 percent to 5 percent. Based on a revised 2017 domestic production of 8.085 million barrels, down from an estimated 9.14 million barrels, revising the restricted percentage to 5 percent, and considering exempt production, would remove approximately 366,000 barrels of cranberries from the market, leaving inventory as a percentage of sales at approximately 90.5 percent. Keeping the restricted percentage at 15 percent would remove approximately 1.1 million barrels of cranberries from the market, resulting in inventory as a percentage of sales of 82.9 percent. In addition, as some handlers may be exempt from the regulation as they are not carrying cranberries in inventory, the actual volume of cranberries removed from the market may be less. Given that the purpose of the volume regulation is to help reduce the existing levels of

inventory, USDA has determined that the restricted percentage should remain at 15 percent.

Accordingly, this rule establishes free and restricted percentages of 85 percent and 15 percent, respectively, for the 2017-18 season, provides handlers with the option to divert processed cranberry products to meet up to 50 percent of their restricted percentage, and defines outlets for restricted fruit. This rule also exempts small handlers who process less than 125,000 barrels from the restriction, as well as handlers with no carryover inventory.

#### **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 1,100 cranberry growers in the regulated area and approximately 65 cranberry handlers 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 are defined as those whose annual receipts are less than \$7,500,000 (13 CFR 121.201).

According to industry and Committee data, the average grower price for cranberries during the 2016-17 season was \$23.50 per barrel and total sales were approximately 9.5 million barrels. The value for cranberries that year totaled \$223,250,000 (\$23.50 per barrel multiplied by 9.5 million barrels). Taking the total value of production for cranberries and dividing it by the total number of cranberry growers provides an average return per grower of \$202,955. Using the average price and utilization information, and assuming a normal distribution, the majority of cranberry growers receive less than \$750,000 annually.

According to USDA's Market News report, the average free on board (f.o.b.) price for cranberries was approximately \$30.00 per barrel. Multiplying the f.o.b. price by total utilization of 9.5 million barrels results in an estimated handler-level cranberry value of \$285 million. Dividing this figure by the number of handlers (65) yields an estimated average annual handler receipt of \$4.3 million, which is below the SBA threshold for small agricultural service firms. Therefore, the majority of producers and handlers of cranberries may be classified as small entities.

While cranberry production has continued to rise, demand has failed to keep pace, and inventories have been increasing. In an industry such as cranberries, product can be stored in inventory for long periods of time. Large inventories are costly to maintain, difficult to market, and have a price-depressing effect. When supply outpaces demand resulting in high levels of inventories, grower and handler returns can be negatively impacted.

Demand for cranberries is inelastic, meaning changes in consumer price have a minimal effect on total sales. However, grower prices are very sensitive to changes in

supply. With an inelastic demand, even a small shift in supply can affect grower prices. Setting free and restricted percentages will more closely align supply with demand. Free percentage cranberries can be marketed by handlers to any outlet, while restricted percentage volume can only be used for noncompetitive purposes. Establishing free and restricted percentages results in a decrease in supply, as handlers can only deliver a certain portion of their cranberries into the competitive marketplace. Therefore, using volume regulation to reduce supply should increase grower and handler prices and revenues.

This final rule controls the supply of cranberries by establishing free and restricted percentages at 85 percent free and 15 percent restricted for the 2017-18 crop year. It also allows for the diversion of 2017-18 processed cranberry products to meet up to 50 percent of a handler's restriction. In addition, this rule establishes a minimum quantity exemption, exempts handlers with no carryout inventory, exempts organically grown cranberries, and defines outlets for restricted fruit. These actions are designed to help stabilize market conditions, reduce burdensome inventories, and improve grower and handler

returns. This rule establishes new §§ 929.107, 929.108 and 929.252. The authority for these actions is provided for in §§ 929.51, 929.52, 929.54, 929.57, and 929.58. These changes are based on Committee recommendations from meetings on August 4 and August 31, 2017.

While these actions could result in some additional costs to the industry, the benefits are expected to outweigh them. The purpose of establishing free and restricted percentages is to address oversupply conditions and to stabilize grower prices. The industry has a significant volume in inventory, and this has had a negative impact on grower and handler returns. Without volume control, inventories would likely continue to increase, further lowering returns.

Inventories have more than doubled since 2011. In 2011, existing inventories were around 4.6 million barrels. By the end of the 2016-17 season, inventories are anticipated to be approximately 9.9 million barrels. Inventories as a percentage of total sales have also been increasing from approximately 50 percent in 2010 to approximately 103 percent in 2016, and will reach an anticipated 115 percent after the 2017-18 season if volume

control is not implemented. These inventories have had a depressing effect on grower prices, which for many has fallen below their cost of production.

Retail demand for cranberries is highly inelastic, which indicates changes in consumer price do not result in significant changes in the quantity demanded. Consumer prices largely do not reflect small changes in cranberry supplies. Therefore, this action should have little or no effect on consumer prices and should not result in a reduction in retail sales. However, even a small shift in supply can increase grower and handler returns. The use of free and restricted percentages will likely have a positive impact on grower and handler returns for this crop year.

This final rule will result in some fruit being taken off the market. However, a sufficient amount of fruit will still be available to supply all aspects of the market. In addition, allowing handlers the option to divert 2017-18 processed cranberry products to meet up to 50 percent of their restriction provides handlers some additional flexibility and may help reduce inventories of juice concentrate, one of the largest segments of existing inventory.

This action also exempts small handlers who process less than 125,000 barrels from the restriction.

Consequently, small handlers whose acquired volume is 125,000 barrels or less are exempt from the volume restriction. This reduces the burden the volume restriction has on small handlers and their growers.

In addition, only handlers who have carryover inventory that is not sold or under contract at the end of the 2017-18 fiscal year are subject to the 15 percent restriction. This allows handlers that have matched their production with market demand to continue to serve their customer base and protect their market share. Handlers subject to the restriction should be able to meet any shortfalls by utilizing cranberries or cranberry products they have in inventory.

There are also secondary uses available for restricted fruit, including foreign markets except Canada, charitable institutions, nonhuman food use, and research and development projects. While these alternatives may provide different levels of return than sales to primary markets, they play an important role for the industry. In addition, if demand is greater than anticipated, there are

significant amounts of fruit in inventory that could be utilized to meet demand.

As the restriction represents a percentage of a handler's volume, the costs, when applicable, are proportionate and should not place an extra burden on small entities as compared to large entities. Likewise, growers and handlers, regardless of size, benefit from the stabilizing effects of this restriction.

One alternative considered was not to impose volume restrictions during the 2017-18 crop year. However, Committee members believed that inventory levels were such that some form of volume control was necessary to help stabilize marketing conditions.

The Committee also considered other levels of free and restricted percentages. However, some members were concerned that setting a restriction that was too high could negatively impact small handlers. The Committee also considered not recommending a provision to allow the disposal of 2017-18 processed cranberry products to meet up to 50-percent of a handler's restriction. However, the Committee determined allowing the diversion of cranberry products to meet up to 50 percent of the restriction allows

large handlers to reduce inventory and not add additional volumes of juice concentrate to the existing inventory levels. Therefore, for the reasons mentioned above, these alternatives were rejected by the Committee.

However, the Committee later recommended an alternative to USDA. After its January 17, 2018 meeting, the Committee recommended reducing its previously requested 15 percent restriction to 5 percent. USDA determined that lowering the restricted percentage by this amount would not sufficiently reduce carryover inventory, and thus would not relieve the downward pressure on grower prices.

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. 0581-0189, Generic Fruit Crops.

This final rule establishes free and restricted percentages and handler diversion options under the Order. On February 15, 2018, USDA published a proposed rule in the *Federal Register* (83 FR 6800) seeking comment on new information requirements and Committee forms to support diversion procedures when volume regulation is established. The impact of the new requirements will be addressed in

that rulemaking. 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.

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 August 4 and August 31, 2017, and January 17, 2018, meetings were public meetings and all entities, both large and small, were able to express views on these issues.

A proposed rule concerning this action was published in the *Federal Register* on January 2, 2018 (83 FR 72). Copies of the proposed rule were sent via email to Committee members and cranberry handlers. Finally, the proposed rule was made available through the internet by USDA and the Office of the Federal Register. A 30-day comment period ending February 1, 2018, was provided to allow interested persons to respond to the proposal.

During the comment period, 174 comments were received in response to the proposal. Of the comments received, 13 were in support of the proposed regulation, 123 comments supported regulation with some changes to the proposal (101 of these comments were from growers affiliated with the major industry cooperative), 37 were opposed to the proposed regulation, and 1 took no position.

Four of the comments in support of the rule stated USDA should maintain the restricted percentage at 15 percent even with the reduction in the size of the 2017-18 crop. Three commenters stated a five percent restriction would do little to support the industry, especially as the decrease in the 2017-18 crop could be offset by an increase in the 2018-19 crop. One commenter stated that maintaining

the higher percentage, along with the reduction in the 2017-18 crop, would have an even greater impact on inventories. Another commenter stated that keeping the restricted percentage at 15 percent sends a message that the oversupply will be dealt with. One commenter stated full support for the proposed regulation as a way to keep the industry healthy and profitable. Another commenter recognized that the industry has enough cranberries in inventory to supply the next 12 months. One commenter also indicated they thought the percentage of restricted cranberries could have been even higher. Support of the exemption for organic cranberries was voiced by one commenter, who stated that a restriction on this sector would inhibit future market growth.

In the comments that supported volume regulation, but with changes from what was included in the proposed rule, 107 commenters stated that they supported volume regulation as a way to reduce the volume of cranberries available in the marketplace and help increase returns. Of these, 106 commenters indicated that oversupply conditions had reached such levels that some action needed to be taken, and 104 commenters also referenced the positive impact of previous

volume regulations established for the 2000 and 2001 seasons. Three commenters also indicated that the decrease in the 2017-18 crop size has already had a positive impact on price, and that the proposed regulation has also had a positive effect.

Three other commenters requesting adjustments to the proposal stated their support for maintaining the restricted percentage at 15 percent. One of those commenters stated that dropping the restriction to five percent would be too low to effectively impact the oversupply. Another commenter stated that a timely reduction in supply is essential. Another comment stated that the industry should hold the restriction at 15 percent and take advantage of the short crop as a bonus.

Of those commenters requesting a change to the proposed rule, 119 commenters supported reducing the restricted percentage from 15 percent to 5 percent. Of these, 112 referenced the decrease in the volume of the 2017-18 crop as rationale for reducing the restricted percentage.

As stated above, USDA reviewed the Committee's recommendation to reduce the restricted percentage from 15

percent to five percent based on an approximate 10 percent reduction in the 2017-18 crop. The industry began the year with approximately 9.7 million barrels in inventory, an amount greater than estimated total sales for the 2017-18 season. Using the revised 2017-18 domestic production estimate of 8.085 million barrels, revising the restricted percentage to five percent would remove approximately 366,000 barrels of cranberries from the market, leaving inventory as a percentage of sales at around 90.5 percent.

Maintaining the restricted percentage at 15 percent would remove approximately 1.1 million barrels of cranberries from the market, resulting in inventory as a percentage of sales of 82.9 percent. Further, since handlers with no carryover inventory are exempt from the regulation, the actual volume of cranberries removed from the market may be less than calculated with either a 15 or 5 percentage restriction. In addition, handlers have already been establishing plans to comply with a 15 percent restriction. Given that the purpose of the volume regulation is to help reduce supply and inventory, USDA has determined that the restricted percentage should remain at 15 percent.

Another 103 commenters requested that the final rule clarify that processed products may be used for charitable purposes as an outlet for restricted cranberries. This final rule adds § 929.108, which specifies the outlets for restricted cranberries. As stated above, the Committee recommended that cranberries may not be converted into canned, frozen, or dehydrated cranberries or other cranberry products by any commercial process prior to diversion to foreign countries. The limitation is written specifically into § 929.108(a). However, this restriction of whole fruit only does not apply to diversion to charitable institutions, any nonhuman food use, or research and development projects approved by the Committee dealing with the development of foreign and domestic markets, including as processed fruit.

In addition, these same commenters also asked that processed products sent to outlets for restricted cranberries, specifically for charity, not count toward the diversion of 2017-18 processed cranberry products to meet up to 50 percent of a handler's restriction. When free and restricted percentages are established, restricted percentage volume must be diverted or used in

noncompetitive outlets. The restricted percentage is applied to each individual handler's volume to establish the volume of cranberries that need to be diverted. Under the final rule, 50 percent of this amount can be met using 2017-18 processed cranberry products. Consequently, regardless of how the handler is diverting processed products into noncompetitive outlets, 2017-18 processed products can only be used to meet 50 percent of the handler's restriction. Restriction aside, handlers are always able, and encouraged, to donate as much whole fruit or processed products to charity as they can.

Thirteen commenters indicated the exemption added by USDA for handlers that have no inventory after August 31, 2018, is problematic and should be changed. Two of these commenters indicated that inventory is not clearly defined for the purposes of this exemption, and that some handlers need inventory beyond that date in order to operate. Two comments also expressed concern about how the Committee would be able to track compliance with this change. One commenter said this provision should be removed.

Another 11 commenters also expressed concerns regarding the change USDA made to the 125,000 barrel

exemption recommended by the Committee. Five commenters stated this would adversely affect midsize handlers. Three commenters indicated the exemption for the first 125,000 barrels for each handler as recommended by the Committee was fair, but with this change it is no longer equitable. One commenter stated this change would cost growers money in extra charges from the handlers.

In reviewing the Committee's recommendation and other available industry information, USDA has determined that the existing inventories in excess of 9 million barrels are putting the most downward pressure on returns to both growers and handlers. Rather than provide an exemption of 125,000 barrels for each handler, this action exempts small handlers who process less than 125,000 barrels from the 15 percent restriction. Small handlers processing less than 125,000 barrels make up nearly 88 percent of all handlers, yet combined only account for less than 10 percent of the total volume.

Further, only handlers who have carryover inventory at the end of the 2017-18 fiscal year are subject to the 15 percent restriction. These changes further reduce the burden on small handlers and provide an exemption to

handlers that have matched their production with market demand allowing them to continue to serve their customer base and protect their market share. With this change, only those handlers carrying inventory would be subject to the restriction.

As stated above, inventory is product that is not sold or under contract at the end of the 2017-18 fiscal year. If a handler is carrying inventory from the 2017-18 season, and/or previous seasons, at the end of the 2017-18 fiscal year (August 31, 2018) the handler will be subject to the restriction. In regards to compliance, the Committee has hired additional support to assist with this volume regulation. Further, handlers maintain information on inventory and should be able to supply the paperwork necessary to demonstrate if they qualify for the inventory exemption.

Three commenters stated that the rule should be changed to allow handlers to meet 100 percent of their restriction using processed product. Four others stated handlers should not be allowed to substitute byproduct concentrate to meet 50 percent of the restriction. While a significant portion of existing inventory is concentrate,

not all handlers produce concentrate or concentrate as a byproduct of SDC production. Allowing the use of 50 percent of 2017-18 cranberry products to meet the required restriction represents a compromise that recognizes the need to reduce the inventory volume of cranberry concentrate, while also acknowledging the overall oversupply facing the industry.

Some of the comments from those in opposition to the proposed rule echo the comments made by those requesting changes to the proposal. Twelve commenters in opposition to the proposed rule stated the weather had taken care of the problem of oversupply for the current season, negating the need for establishing the restriction. Five commenters referenced the change to the 125,000 barrel exemption, and another four commenters referenced the exemption for handlers with no inventory at the end of the 2017-18 fiscal year as reasons for opposing the regulation. Comments similar to these are addressed above.

Seven commenters opposed the proposal, citing the oversupply of concentrate as the cause of the industry's problems. Two additional commenters opposed the proposed regulation because handlers could divert 50 percent of

2017-18 products to meet their restriction. While concentrate does represent a large portion of the existing inventory, the level of frozen berries is even higher. Industry data shows that at the end of the 2016-17 fiscal year, of the estimated 9.7 million barrels in inventory, approximately 4.2 million barrels were frozen berries, while approximately 3.7 million barrels were from concentrate. Consequently, the rule provides for the diversion of product to meet 50 percent of the restriction as a way to reduce the inventory of concentrate. However, reducing overall supply, including whole fruit, is also important in addressing the current level of inventory.

Twelve comments stated that the proposed regulation would negatively impact growers by reducing their returns. Seven commenters stated the proposed regulation originated from the major cooperative. Another six commenters stated that if finalized this regulation would adversely affect midsize handlers. While these actions could result in some additional costs to the industry, the benefits are expected to outweigh them. The purpose of establishing free and restricted percentages is to address oversupply conditions and to stabilize grower prices. The industry has a

significant volume in inventory, and this has had a negative impact on grower and handler returns. Growers and handlers, both large and small, should benefit from this regulation. It is estimated that approximately 1.1 million barrels of cranberries will be removed from inventories as a result of this rule. Lowering inventory levels is expected to result in positive returns for the entire industry.

Four commenters opposed the regulation because the restriction does not apply to Canada or other foreign production. These commenters stated that without it being restricted, foreign product could be used to offset the domestic product being restricted. USDA has not made any revisions as a result of these comments because, as an initial matter, the Order cannot regulate imported volume. Moreover, for this argument to be relevant, the 15 percent restriction would need to cause a market shortfall in the production area. However, given that the production area market entered the 2017-18 season with more cranberries and product in inventory than anticipated sales, and on top of that had an additional 8.1 million barrels of production, USDA has determined there is ample domestic supply to meet

sales requirements and there is no risk of an impending market shortfall.

Four comments in opposition to the proposal also stated that it would be implemented too late to have benefit, as growers have already incurred the cost of producing their full crop. In discussing this issue, the Committee recognized that utilizing a producer allotment allowed growers to make adjustments to reduce their costs, they determined that the situation with the oversupply was such that something needed to be done for the 2017-18 season. Committee members were concerned that delaying action would only result in higher inventories for the 2018-19 season and the need for an even larger volume regulation in the future. Despite the timing, the Committee anticipates that use of handler free and restricted percentages will likely have a positive impact on grower and handler returns for the current crop year.

Finally, three commenters stated that nothing should be done and that the market be allowed to dictate what happens with industry. Under the Order, the Committee has the authority to recommend volume regulation to the Secretary to help manage supply and demand. The Committee

chose to utilize this authority to address the current oversupply situation and to help industry returns.

Additional comments were received that addressed issues outside the scope of the proposed rule.

For the reasons discussed above, no changes will be made to the rule as proposed, based on the comments 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 matter presented, including the information and recommendation of 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 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 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 part 929 continues to read as follows:

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

**[Subpart Redesignated as Subpart A]**

2. Redesignate "Subpart - Order Regulating Handling" as "Subpart A - Order Regulating Handling".

**[Subpart Redesignated as Subpart B and Amended]**

3. Redesignate "Subpart - Rules and Regulations" as subpart B and revise the heading to read as follows:

**Subpart B - Administrative Requirements**

4. Add § 929.107 to read as follows:

**§929.107 Conversion.**

During a year of volume regulation, cranberry concentrate and other processed products made from excess or restricted cranberries harvested in that year may be diverted according to the provisions of this part. Any

handler disposing of concentrate or other processed products must report the whole-berry equivalent to the Committee so that all excess or restricted cranberries are accounted for and reported per rules and regulations in effect. Table 1-Conversion Table provides a conversion rate for concentrate to barrels of whole berries based on Brix average by production region. Should requests be made to use other processed products for diversion, conversion rates for those products would be provided by the Committee based on information provided by the requesting handler.

TABLE 1 to §929.107- CONVERSION TABLE

Region	Brix Average	Concentrate yield for one barrel of cranberries
Oregon	9.8	1.91 gallons 50 Brix concentrate
Washington	9.3	1.81 gallons 50 Brix concentrate
New Jersey	8.8	1.72 gallons 50 Brix concentrate
Wisconsin	8.7	1.70 gallons 50 Brix concentrate
Massachusetts	8.4	1.64 gallons 50 Brix concentrate
All others	8.7	1.70 gallons 50 Brix concentrate

5. Add § 929.108 to read as follows:

**§929.108 Outlets for restricted cranberries.**

In accordance with § 929.57, restricted cranberries may be diverted only to the following noncommercial or

noncompetitive outlets:

(a) Foreign countries, except Canada, provided that restricted cranberries diverted under this provision may not be converted into canned, frozen, or dehydrated cranberries or other cranberry products by any commercial process, prior to diversion;

(b) Charitable institutions;

(c) Any nonhuman food use, or;

(d) Research and development projects approved by the Committee dealing with the development of foreign and domestic markets, including, but not limited to dehydration radiation, freeze drying, or freezing of cranberries.

**[Subpart Redesignated as Subpart C]**

6. Redesignate "Subpart - Assessment Rate" as "Subpart C - Assessment Rate".

7. Add § 929.252 to read as follows:

**§929.252 Free and restricted percentages for the 2017-18 crop year.**

(a) The percentages for cranberries handled by handlers during the crop year beginning on September 1, 2017, which shall be free and restricted, respectively are

designated as follows: Free percentage, 85 percent and restricted percentage, 15 percent.

(b) Handlers have the option to process restricted cranberries into dehydrated cranberries or other processed products. Handlers also have the option to divert concentrate or other processed products as provided in § 929.107 to account for up to 50 percent of their restriction.

(c) Organically grown fruit shall be exempt from the volume regulation requirements of this section. Small handlers who process less than 125,000 barrels during the 2017-18 fiscal year are exempt from the restriction. Any handlers who do not have carryover inventory at the end of the 2017-18 fiscal year are also exempt.

Dated: March 30, 2018.

**Erin Morris,**

*Associate Administrator,*

*Agricultural Marketing Service.*

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