



**DEPARTMENT OF AGRICULTURE**

**Agricultural Marketing Service**

**7 CFR Part 930**

**[Doc. No. AMS-SC-20-0036; SC20-930-3 FR]**

**Tart Cherries Grown in the States of Michigan, New York,**

**Pennsylvania, Oregon, Utah, Washington and Wisconsin;**

**Changes to Subcommittee Size and Addition of Term Limits**

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

**ACTION:** Final rule.

**SUMMARY:** This rule implements a recommendation from the Cherry Industry Administrative Board (Board) to change subcommittee size and add term limits under the marketing order for tart cherries grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington and Wisconsin.

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

**FOR FURTHER INFORMATION CONTACT:** Jennie M. Varela, Senior 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@usda.gov](mailto:Jennie.Varela@usda.gov) or [Christian.Nissen@usda.gov](mailto:Christian.Nissen@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@usda.gov](mailto:Richard.Lower@usda.gov).

**SUPPLEMENTARY INFORMATION:** This action, 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 rule is issued under Marketing Agreement and Order No. 930, as amended (7 CFR part 930), regulating the handling of tart cherries grown in the states of Michigan, New York, Pennsylvania, Oregon, Utah, Washington and Wisconsin. Part 930 (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 Board locally administers the Order and is comprised of producers and handlers of tart cherries 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 the 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. 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 a marketing order may file with USDA a petition stating that the marketing order, any provision of the marketing order, or any obligation imposed in connection with the marketing order is not in accordance with law and request a modification of the marketing 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 rule changes subcommittee size and adds term limits to subcommittee appointments under the Order. This action modifies the composition of the subcommittee which reviews exemption requests by increasing the subcommittee from three members and an alternate to a maximum of five members with no alternate. This rule also adds a five-year term limit to these appointments. This should provide more opportunities for participation and additional flexibility in staffing the subcommittee. The Board unanimously recommended this change at its March 19, 2020, meeting.

Section 930.31 of the Order authorizes the Board to have committees and subcommittees as may be necessary. Section 930.59 authorizes handler diversion of tart cherries from the reserve for specific uses including, but not limited to, new product and new market development. Section 930.62 authorizes the Board, with approval of the Secretary, to exempt cherries from the assessment, volume regulation, and reserve provisions of the Order for specified uses. Both sections authorize the Board, with the approval of the Secretary, to establish requirements necessary and incidental to the administration of the Order.

Section 930.159 of the Order's administrative requirements specifies methods of handler diversion, including using cherries or cherry products for exempt

purposes prescribed under § 930.162. Section 930.162, in part, establishes a Board appointed subcommittee, as authorized under § 930.31 stated above, to assist the Board staff in reviewing the applications for exemptions. The changes will impact this subcommittee.

In seasons with volume regulation, handlers can sell cherries for exempt uses, including new products and new markets, and receive diversion credit rather than keeping that tonnage in reserve. The Board established the review subcommittee to review and grant exemption requests that have the potential to expand new markets. The subcommittee works with Board staff to carry out these tasks. Prior to this action, this subcommittee consisted of three members and one alternate, each having no handler affiliation but knowledge of the tart cherry industry. Section 930.162 further specifies that one of the members or the alternate should be the Board's public member or the Board's public member alternate, if either are available to serve. This rule increases the size of the subcommittee and includes term limits for all subcommittee appointments. The current requirement regarding the service of the Board's public member or their alternate continues to remain in effect.

The Board formed a New Product New Market Committee (Committee) to examine the current regulations regarding the subcommittee responsible for reviewing applications for

exemption or the renewal of exemption. The formation and tasking of this Committee was largely the result of growing Board member perceptions that the exemption process was not fully understood or utilized by industry. The Committee reviewed the process for selecting subcommittee members, assessed subcommittee operations, and identified improvement opportunities.

During Board meetings in January and March 2020, the Committee outlined some of the challenges associated with the subcommittee, including subcommittee participation. The Committee stated the requirements, which stipulate the subcommittee shall consist of three members and one alternate, were limiting. The Committee did not recommend any changes to existing qualification requirements to serve on the subcommittee. Any subcommittee meeting and quorum requirements would be addressed in the Board's bylaws.

The Committee recommended expanding the size of the subcommittee to five members without mandating a set number of members required to conduct business. The Committee noted this adjustment would provide some flexibility in staffing the subcommittee while allowing the subcommittee to fulfill its responsibility to review and grant exemptions.

The Committee also recommended the inclusion of five-year term limits for all subcommittee appointments as this

would help balance preserving subcommittee institutional knowledge with the need to include new participants and perspectives in the exemption review process. One Committee member also noted a fixed term may encourage more qualified people to pursue subcommittee participation because they would know their commitment to the Board would not be open-ended. The Committee also believed establishing a regular schedule of appointments through term limits should lead to increased awareness of when participation opportunities would be coming available.

In discussing the Committee's suggested changes, the Board was supportive of the recommendations to increase the number of seats on the subcommittee and to establish term limits for subcommittee participants. In reviewing the increase in the size of the subcommittee, the Board did not recommend a specific quorum requirement for the subcommittee to meet. However, the Board believes the additional subcommittee members would provide more candidates to draw from when scheduling subcommittee meetings and would help ensure some members were in attendance for each scheduled subcommittee meeting. The Board also agreed increasing the number of seats on the subcommittee would provide the opportunity for more participation. The Board concluded no changes should be made to the existing requirement that the public member or

alternate public member, when available, serve on the subcommittee, but did decide removing the requirement for an alternate subcommittee member would simplify the structure of the subcommittee.

The Board was also supportive of establishing term limits for subcommittee members. Members agreed having term limits would increase opportunities for others to serve on the subcommittee, and qualified candidates may be more willing to participate if there is a fixed term.

Accordingly, the Board unanimously voted to increase the size of the subcommittee to a maximum of five total members with a five-year term limit for all appointments to the subcommittee. The Board believes the changes will not only improve operational flexibility and administration of the subcommittee but encourage greater industry and small business participation on the subcommittee and in new product and new market projects.

### **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 are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 400 producers of tart cherries in the production area and 40 handlers subject to regulation under the Order. Small agricultural producers are defined by the Small Business Administration (SBA) as those having annual receipts less than \$1,000,000, and small agricultural service firms are defined as those whose annual receipts are less than \$30,000,000 (13 CFR 121.201).

According to the National Agricultural Statistics Service and Board data, the average annual price for tart cherries during the 2018-19 season was approximately \$0.196 per pound. With total utilization at 288.8 million pounds for the 2018-2019 season, the total 2018-2019 value of the crop utilized for processing is estimated at \$56.6 million. Dividing the crop value by the estimated number of producers (400) yields an estimated average receipt per producer of \$141,500. This is well below the SBA threshold for small producers. A free on board (FOB) price of \$0.80 per pound for frozen tart cherries was reported by the Food Institute during the 2018-2019 season. Based on utilization, this price represents a good estimate of the

price for processed cherries. Multiplying the FOB price by total utilization of 288.8 million pounds results in an estimated handler-level tart cherry value of \$231 million. Dividing this figure by the number of handlers (40) yields estimated annual handler receipts of \$5.8 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 will increase the size of the subcommittee and add term limits to subcommittee appointments under § 930.162. This action modifies the composition of the subcommittee which reviews exemption requests from three members and an alternate to a maximum of five members with no alternate. This rule also adds a five-year term limit to these appointments. This will provide more opportunities for participation and additional flexibility in staffing the subcommittee. The authority for these actions is provided in §§ 930.31, 930.59 and 930.62. These changes were unanimously recommended by the Board at its meeting on March 19, 2020.

It is not anticipated that this action will impose any additional costs on growers or handlers. This change is administrative in nature, does not increase reporting

requirements, and will provide the Board with improved flexibility in staffing the subcommittee.

This action will have a beneficial impact as it will encourage greater industry and small business participation in applying for diversion credit for new product and new market projects under § 930.162, and expanding the market for tart cherries. The subcommittee performs the function of reviewing and granting exemption requests that have the potential to expand these markets. Increasing the maximum size of the subcommittee without mandating that all seats be filled allows for more flexibility in conducting subcommittee business. The Board also believes the additional members will provide more candidates to draw from when scheduling subcommittee meetings and help ensure some members are in attendance for each scheduled meeting. Adding a five-year term limit to subcommittee membership helps maintain subcommittee institutional knowledge while ensuring the inclusion of the perspective and insight from new participants.

This rule is expected to benefit the industry. The effects of this rule are not expected to be disproportionately greater or lesser for small handlers or producers than for larger entities.

The Board considered one alternative to this change. The Board considered making no changes either to the

structure of the subcommittee or the lack of term limits for serving thereon. However, when discussing the alternative, Board members assessed that increasing the subcommittee size and the inclusion of term limits would not only increase the likelihood of subcommittee participation, but also promote increased industry confidence and trust in the subcommittee's composition and function. Therefore, the 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 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 final rule will not impose any 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. USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this final rule. Further, the

public comment received concerning the proposal did not address the initial regulatory flexibility analysis.

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.

The Board's meeting was widely publicized throughout the tart cherry industry. All interested persons were invited to attend the meeting and participate in Board deliberations on all issues. Like all Board meetings, the March 19, 2020, meeting was a public meeting, and all entities, both large and small, were able to express views on this issue.

A proposed rule concerning this action was published in the **Federal Register** on July 24, 2020 (85 FR 44792). Copies of the proposed rule were also mailed or sent via e-mail to all tart cherry handlers. The proposal was made available through the internet by USDA and the Office of the Federal Register. A 30-day comment period ending August 24, 2020, was provided for interested persons to respond to the proposal.

One comment was received in response to the proposal. However, this comment did not address the merits of the

proposal. Accordingly, 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: <https://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 will tend to effectuate the declared policy of the Act.

#### **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. Amend § 930.162 by revising paragraph (d) to read as follows:

**§ 930.162 Exemptions.**

\* \* \* \* \*

(d) *Review of applications.* A Board appointed subcommittee shall review applications for exemption or renewal of exemption and either approve or deny the exemption. The subcommittee shall consist of up to five total members, each having no handler affiliation but knowledge of the tart cherry industry, one of whom shall be the public member or the alternate public member if available to serve. Each subcommittee appointment shall be limited to a five-year term. Any denial of an application for exemption or renewal of an existing exemption shall be served on the applicant by certified mail and shall state the reasons for the denial. Within 10 days after the receipt of a denial, the applicant may file an appeal, in writing, with the Deputy Administrator, Specialty Crops Program, supported by any arguments and evidence the applicant may wish to offer as to why the application for exemption or renewal of exemption should have been approved. The Deputy Administrator, upon consideration of such appeal, will take such action as deemed appropriate with respect to the application for exemption or renewal of exemption.

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**Bruce Summers,**  
*Administrator,*  
*Agricultural Marketing Service.*

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