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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 929

[Doc. No. AMS-FV-12-0042; FV12-929-2 FR]

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; Revising Determination of Sales History

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule revises the determination of sales history provisions currently prescribed under the cranberry marketing order (order). The order regulates the handling of cranberries grown in Massachusetts, Rhode Island, Connecticut, New Jersey, Wisconsin, Michigan, Minnesota, Oregon, Washington, and Long Island in the State of New York, and is administered locally by the Cranberry Marketing Committee (Committee). This rule modifies sales history calculations so that they are applicable for future seasons and adjusts the number of years that can be considered when determining the highest four years of past sales.

EFFECTIVE DATE: [INSERT DATE 1 DAY AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Doris Jamieson, Marketing Specialist, or Christian D. Nissen, Regional Director, Southeast Marketing Field Office, Marketing Order and Agreement Division, Fruit and Vegetable Program, AMS, USDA; Telephone: (863) 324-3375, Fax: (863) 325-8793, or E-mail: Doris.Jamieson@ams.usda.gov or Christian.Nissen@ams.usda.gov.

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

SUPPLEMENTARY INFORMATION: This final rule is issued under Marketing Agreement and Order No. 929, as amended (7 CFR part 929), regulating the handling of cranberries produced in Massachusetts, Rhode Island, Connecticut, New Jersey, Wisconsin, Michigan, Minnesota, Oregon, Washington, and Long Island in the State of New York, hereinafter referred to as the "order." The order is effective under the

Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act."

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

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

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This final rule revises the order's rules and regulations pertaining to the determination of grower sales history. This change modifies sales history calculations so that they are applicable for future seasons and adjusts the number of years that can be considered when determining the highest four years of past sales. These changes were unanimously recommended by the Committee at a meeting on February 20, 2012.

The order provides authority for volume control in the form of a grower allotment program. This program provides a method for limiting the quantity of cranberries that handlers may purchase or handle on behalf of growers in years of oversupply. Under this program, a marketable quantity and allotment percentage are established by the Committee. Each grower's sales history is calculated by averaging recent years' sales data using information submitted by the grower on a production and eligibility report filed with the Committee. If volume control regulations are to be implemented, each grower's allotment is then calculated by multiplying the allotment percentage by the grower's sales history.

Section 929.48 of the order prescribes provisions for computing grower sales history. These provisions include a

requirement that a new sales history be calculated for each grower after each crop year, using the formula established in § 929.48(a) or such other formula as determined by the Committee, with the approval of the Secretary. Section 929.149 provides another formula for calculating grower sales history, which includes provisions for additional sales history to make calculations more equitable for growers with new acreage. The calculations in this section are currently based on, and specifically reference, the six years immediately preceding the last year volume regulation was in effect, 2001-02, making them applicable for only the one season. This section also specifies that sales history can be calculated using the average of the highest four of the most recent seven years of sales for acreage with seven or more years of sales history.

In an effort to update the regulations pertaining to the calculation of grower sales history, the Committee recommended two changes to § 929.149. The first change removes the outdated references to specific years used in calculating sales history. The second change reduces the maximum number of years of sales that can be used to determine the highest four years of sales from seven years to six years.

The formula for determining sales history in § 929.149 was developed specifically for the implementation of volume regulation during the 2001-02 season, the last time volume regulation was used under the order. The Committee developed the formula to address potential inequities that could result when calculating sales history, especially in regards to new acreage. Because a cranberry bog does not reach full production capacity until several years after being planted, using an average of early sales for bogs which have not reached maturity could result in a sales history that does not reflect future sales potential. Because calculated sales history impacts the amount of allotment received under volume regulation, it is important that the calculated sales history is as representative of grower sales as possible.

Therefore, in 2001 the Committee created a formula to determine an amount of additional sales history per acre to be applied to acreage planted in 1995, 1996, 1997, 1998, 1999, and 2000. To help establish the additional amount of sales volume to be provided for new acreage, the Committee and USDA conducted surveys to determine average yields on new acreage over the first five years of production. Recognizing that the averages may not be reflective of all

growers, the averages were adjusted upward by 25 barrels and were used to calculate the numbers for additional sales history provided in Table 1 in § 929.149 for bogs planted from 1995 through 2000.

At its February 20, 2012, meeting, the Committee discussed the volume regulation provisions in the order's rules and regulations and how these provisions may need to be updated for upcoming seasons in the event volume regulation is implemented. The Committee reviewed § 929.149 and how it calculates sales history and agreed that the adjustments for additional sales history were still important in establishing equity for new acreage.

Recognizing the specific dates currently in § 929.149 are not applicable for future seasons, the Committee recommended revising this section to remove the date-specific language so that it is applicable to each individual season. Rather than referring to acreage planted in the years 1995 through 2000, this revision refers to acreage planted between one and six years prior to the current season. With this change, § 929.149 is applicable to the calculation of grower sales history for any season, making the additional sales history adjustment available to growers with new acreage.

In regards to the specific amounts of additional sales history per acre provided for new acreage in Table 1 in § 929.149, the Committee recommended no change. While the amounts were based on production data collected in 2000, the majority of cranberry production still comes from the same variety as in 2000, as do the majority of new plantings. Further, with the average yields used to calculate the amounts increased by 25 barrels, the calculated yields used to develop the additional sales history should still be reflective of the average yields for new acreage. Therefore, the current amounts of additional sales history to be applied per acre for new or re-planted cranberry acreage remain unchanged by this final rule.

The Committee also discussed the time period that should be used to determine a grower's highest four years of sales when calculating sales history. Section 929.149 currently uses the average of the highest four of the most recent seven years of sales for acreage with seven or more years of sales history. The formula in § 929.48 calculates sales history using the average of the highest four of the most recent six years of sales. The additional year provided for in § 929.149 was to compensate growers for

possible lower sales numbers stemming from volume regulation in 2000-01, so that grower sales history would be more reflective of their typical sales. Committee members agreed that since volume regulation has not been implemented for more than six years, the additional year is no longer needed, and that the most recent six years of sales data is adequate for determining a grower's highest four years of sales.

Therefore, this final rule revises § 929.149 to remove the outdated references to specific years so that its provisions can be utilized to calculate a grower's sales history for all future seasons. The final rule also reduces the time period used to determine the highest four years of sales from seven years to six years.

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 business 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 55 handlers of cranberries who are subject to regulation under the marketing order and approximately 1,200 cranberry producers in the regulated area. Small agricultural service firms are defined by the Small Business Administration (SBA) as those having annual receipts of less than \$7,000,000, and small agricultural producers are defined as those having annual receipts of less than \$750,000 (13 CFR 121.201).

Based on Committee data and information from the National Agricultural Statistics Service, the average annual f.o.b. price of cranberries during the 2012 season was approximately \$41.25 per barrel and total shipments were approximately 8.0 million barrels. Using the average f.o.b. price and shipment data, the majority of cranberry handlers could be considered small businesses under SBA's definition. In addition, based on production, producer prices, and the total number of cranberry growers, the average grower revenue is less than \$750,000. Therefore,

the majority of growers and handlers of cranberries may be considered small entities.

This final rule revises the rules and regulations pertaining to the determination of sales history currently prescribed under the order in § 929.149. This change updates sales history calculations so that they are applicable for future seasons and adjusts the number of years that can be considered when determining the highest four years of past sales. These changes were unanimously recommended by the Committee at a meeting on February 20, 2012. Authority for these changes is provided in § 929.48 of the order.

It is not anticipated that this action will impose any additional costs on the industry. Each year, the Committee is required to calculate a sales history for each grower. This rule updates § 929.149 making its provisions for calculating grower sales history applicable to any season. Reducing the number of seasons that can be considered when determining the highest four years of sales from seven years to six years in this section, could result in a slightly lower average for the highest four years. However, as this change makes this section reflect the calculation currently used by the industry for the highest

four, and given that a grower allotment volume regulation has not been implemented in more than ten years, the effects of this change should be minimal.

Further, the provisions in § 929.149 were developed to make the calculations of sales history more equitable for growers with new acreage. Because a cranberry bog does not reach full production capacity until several years after being planted, using an average of early sales for bogs which have not reached maturity could result in sales histories that do not reflect future sales potential. As calculated sales history impacts the amount of allotment received under volume regulation, it is important that the calculated sales history is as representative of grower sales as possible. Revising the calculations in § 929.149 could actually increase the calculated amount of sales history for new acreage, which in turn would provide the grower with additional allotment should volume regulation be implemented. The benefits of this rule are not expected to be disproportionately greater or less for small handlers or growers than for large entities.

The Committee considered one alternative to these changes: making no change to the rules and regulations pertaining to the determination of sales history. The

Committee recognized making no revisions to the way sales history is calculated under § 929.149 could mean new acreage not yet producing at full capacity could receive sales history below their potential average. Therefore, this alternative was rejected.

In accordance with the Paperwork Reduction Act of 1995, (44 U.S.C. Chapter 35), the order's information collection requirements have been previously approved by the Office of Management and Budget (OMB) and assigned OMB No. 0581-0189, Generic Fruit Crops. No changes in those requirements as a result of this action are necessary. Should any changes become necessary, they would be submitted to OMB for approval.

This final rule will not impose any additional reporting or recordkeeping requirements on either small or large cranberry handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

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. Further, no public comments were received concerning

the proposal not addressing 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.

In addition, the Committee's meeting was widely publicized throughout the cranberry industry and all interested persons were invited to attend the meeting and participate in Committee deliberations on all issues. Like all Committee meetings, the February 20, 2012, 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 May 14, 2013 (78 FR 28149). Copies of the rule were mailed or sent via facsimile to all Committee members and cranberry handlers. Finally, the rule was made available through the Internet by USDA and the Office of the Federal Register. A 30-day comment period ending June 13, 2013, was provided to allow interested persons to respond to the proposal. No comments were received.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: www.ams.usda.gov/MarketingOrdersSmallBusinessGuide. Any questions about the compliance guide should be sent to Jeffrey Smutny at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant matter presented, including the information and recommendation submitted by the Committee and other available information, it is hereby found that this rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

It is further found that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** (5 U.S.C. 553) because the Committee is planning its next industry meeting for August, and having this final rule in place would be helpful to any discussion involving volume control. Further, the industry is aware of this rule, which was recommended at a public meeting. Also, a 30-day comment period was provided for in the proposed rule.

List of Subjects in 7 CFR Part 929

Cranberries, Marketing agreements, Reporting and recordkeeping requirements.

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

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

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

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

2. Section 929.149 is amended by revising paragraph (a), the first sentence in paragraph (b), paragraphs (c) and (d), and Table 1 read as follows:

§ 929.149 Determination of sales history.

* * * * *

(a) For each grower with acreage with 6 or more years of sales history, a new sales history shall be computed using an average of the highest 4 of the most recent 6 years of sales. If the grower has acreage with 5 years of sales history and such acreage was planted more than 6 years ago, a new sales history shall be computed by averaging the highest 4 of the 5 years.

(b) For growers whose acreage has 5 years of sales history and was planted 6 years ago or later, the sales history shall be computed by averaging the highest 4 of the 5 years and shall be adjusted as provided in paragraph (d).

* * *

(c) For growers with acreage with no sales history or for the first harvest of re-planted acres, the sales history will be 75 barrels per acre for acres planted or re-planted 1 year ago and first harvested in the current crop year and 156 barrels per acre for acres planted or re-planted 2 years ago and first harvested in the current crop year.

(d) In addition to the sales history computed in accordance with paragraphs (a) and (b) of this section, additional sales history shall be assigned to growers with acreage planted in the last 6 years. The additional sales histories depending on the date the acreage is planted are shown in Table 1.

Table 1 - Additional Sales History Assigned to Acreage

| Date planted | Additional current crop year sales history per acre |
|--------------|---|
| 6 years ago | 49 |
| 5 years ago | 117 |
| 4 years ago | 157 |
| 3 years ago | 183 |
| 2 years ago | 156 |
| 1 year ago | 75 |

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Dated: August 14, 2013

Rex A Barnes
Associate Administrator
Agricultural Marketing Service

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