



DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 930

[Doc. No. AMS-SC-19-0091; SC19-930-3 PR]

Tart Cherries Grown in the States of Michigan, et al.;

Decreased Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This proposed rule would implement a recommendation from the Cherry Industry Administrative Board (Board) to decrease the assessment rate established for the 2019-20 and subsequent fiscal years. The proposed assessment rate would remain in effect indefinitely unless modified, suspended, or terminated.

DATES: Comments must be received by [INSERT DATE 30 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Interested persons are invited to submit written comments concerning this proposed rule. Comments must be sent to the Docket Clerk, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250-0237; Fax: (202) 720-8938; or internet: <http://www.regulations.gov>. Comments should reference the

document number and the date and page number of this issue of the *Federal Register* and will be available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at:

<http://www.regulations.gov>. All comments submitted in response to this rule will be included in the record and will be made available to the public. Please be advised that the identity of the individuals or entities submitting the comments will be made public on the internet at the address provided above.

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 Email: Jennie.Varela@usda.gov or 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 Email: Richard.Lower@usda.gov.

SUPPLEMENTARY INFORMATION: This action, pursuant to 5 U.S.C. 553, proposes an amendment to regulations issued to carry out a marketing order as defined in 7 CFR 900.2(j). This proposed 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. 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 proposed rule in conformance with Executive Orders 13563 and 13175. This proposed rule falls within a category of regulatory actions that the Office of Management and Budget (OMB) exempted from Executive Order 12866 review.

Additionally, because this proposed 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 proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the 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 would be applicable to all assessable tart cherries for the 2019-20 crop year 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 no later than 20 days after the date of the entry of the ruling.

This proposed rule would decrease the assessment rate from \$0.0075, the rate that was established for the 2016-17 and subsequent fiscal years, to \$0.00575 per pound of tart cherries handled for the 2019-20 and subsequent fiscal years. Under the marketing order, the Board also recommends an allocation of assessments for operations and for promotion activities. This action would decrease the portion of assessments allocated to research and promotion activities from \$0.0065 to \$0.005 per pound of tart cherries and decrease the portion allocated to administrative expenses from \$0.001 to \$0.00075 per pound of tart cherries.

The Order provides authority for the Board, with the approval of USDA, to formulate an annual budget of expenses and collect assessments from handlers to administer the program. The members are familiar with the Board's needs and with the costs of goods and services in their local area and are thus in a position to formulate an appropriate budget and assessment rate. The assessment rate is formulated and discussed in a public meeting. Thus, all

directly affected persons have an opportunity to participate and provide input.

For the 2016-17 and subsequent fiscal years, the Board recommended, and USDA approved, an assessment rate that would continue in effect from fiscal year to fiscal year 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 12, 2019, and unanimously recommended 2019-20 expenditures of \$1,956,500, and an assessment rate of \$0.00575 per pound of tart cherries, divided into \$0.005 for promotional expenses and \$0.00075 for administrative expenses. In comparison, last year's budgeted expenditures were \$2,374,450. The assessment rate of \$0.00575 is \$0.00175 lower than the rate currently in effect. The Board recommended decreasing the assessment rate to reduce the assessment burden on handlers and utilize funds from the authorized reserve to help cover its expenses.

The major expenditures recommended by the Board for the 2019-20 year include \$1,514,500 for research and promotion, \$250,000 for salaries and wages, and \$130,000 for administrative expenses. Budgeted expenses for these

items in 2018-19 were \$1,867,450, \$275,000, and \$130,000, respectively.

The Board derived the recommended assessment rate by considering anticipated expenses, an estimated crop of 230.74 million pounds of tart cherries, and the amount of funds available in the authorized reserve. Income derived from handler assessments, calculated at \$1,326,755 (230.74 million pounds x \$0.00575/pound), along with interest income and funds from the Board's authorized reserve, would be adequate to cover budgeted expenses of \$1,956,500. Funds in the reserve are estimated to be \$81,553 at the end of the 2019-20 fiscal year.

The assessment rate proposed in this rule would 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 would be in effect for an indefinite period, the Board will continue to meet prior to or during each fiscal year 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 would 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 2019-20 budget and those for subsequent fiscal years will be reviewed and, as appropriate, approved by USDA.

Initial 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 proposed rule on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 400 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 \$1,000,000, and small agricultural service firms have been defined as those whose annual receipts are less than \$30,000,000 (13 CFR 121.201).

According to the National Agricultural Statistics Service (NASS) and Board data, the average annual grower price for tart cherries utilized for processing during the 2018-19 season was approximately \$0.196 per pound. With total utilization at 288.8 million pounds for the 2018-19 season, the total 2018-19 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 2018-19 season. Based on utilization, this price represents a good estimate of the price for processed cherries. Multiplying this 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 average 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 proposal would decrease the assessment rate collected from handlers for the 2019-20 and subsequent fiscal years from \$0.0075 to \$0.00575 per pound of tart cherries, with \$0.005 per pound allocated to promotion and research and \$0.00075 per pound allocated to administrative expenses. The Board unanimously recommended 2019-20 expenditures of \$1,956,500, and an assessment rate of \$0.00575 per pound of tart cherries. The proposed assessment rate of \$0.00575 per pound is \$0.00175 lower than the 2018-19 rate. The volume of assessable tart cherries for the 2019-20 fiscal year is estimated at 230.74 million. Thus, the \$0.00575 rate should provide \$1,326,755 in assessment income (230.74 million pounds x \$0.00575/pound). Income derived from handler assessments, along with interest income and funds from the Board's authorized reserve, would be adequate to cover budgeted expenses.

The major expenditures recommended by the Board for the 2019-20 year include \$1,514,500 for research and promotion, \$250,000 for salaries and wages, and \$130,000 for administrative expenses. Budgeted expenses for these items in 2018-19 were \$1,867,450, \$275,000, and \$130,000, respectively.

The Board recommended decreasing the assessment rate and utilizing funds from its authorized reserve in order to relieve the assessment burden on handlers. This action would also use the Board's reserve balance and maintain it below the levels authorized under the Order.

Prior to arriving at this budget and assessment rate, the Board considered information from the Board's Executive Committee (Committee). Alternative expenditure levels were discussed by the Committee, which reviewed the relative value of various activities to the tart cherry industry. The Committee determined all program activities were adequately funded and essential to the functionality of the Order; thus, no alternate expenditure levels were deemed appropriate. Additionally, the Board discussed alternatives of maintaining the current assessment rate of \$0.0075 per pound or reducing marketing expenditures to achieve a lower rate. However, the Board determined it

would be appropriate to reduce the assessment burden to handlers using some of the reserves built up following recurring seasons with large crops. The Board also determined the recommended promotion expenditures, which are lower than in previous seasons, were appropriate and further reduction might hinder sales growth.

Based on these discussions and estimated deliveries, the recommended assessment rate of \$0.00575 per pound of tart cherries would provide \$1,326,755 in assessment income. Further, the Board recommended allocating \$0.005 for promotional expenses and \$0.00075 for administrative expenses. The Board determined that assessment revenue, along with funds from the reserve and interest income, would be adequate to cover budgeted expenses for the 2019-20 fiscal year.

A review of historical information and preliminary information pertaining to the upcoming fiscal year indicates that the average grower price for the 2019-20 crop year should be approximately \$0.20 per pound of tart cherries. Therefore, the estimated assessment revenue for the 2019-20 crop year as a percentage of total grower revenue would be about 2.9 percent.

This proposed rule would decrease the assessment obligation imposed on handlers. Assessments are applied uniformly on all handlers, and some of the costs may be passed on to producers. However, decreasing the assessment rate reduces the burden on handlers and may also reduce the burden on producers.

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 September 12, 2019, meeting was a public meeting, and all entities, both large and small, were able to express views on this issue. Finally, interested persons are invited to submit comments on this proposed rule, including the regulatory and information collection impacts of this action on small businesses.

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 OMB and assigned OMB No. 0581-0177, Tart Cherries Grown in Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin. No changes in those requirements would be necessary as a result of this proposed rule. Should any

changes become necessary, they would be submitted to OMB for approval.

This proposed rule would 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.

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.

USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this proposed rule.

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.

A 30-day comment period is provided to allow interested persons to respond to this proposed rule.

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 proposed to be 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, 2019, the assessment rate imposed on handlers shall be \$0.00575 per pound of tart cherries grown in the production area and utilized in the production of tart cherry products. Included in this rate is \$0.005 per pound of tart cherries to cover the cost of the research and promotion program and \$0.00075 per pound of tart cherries to cover administrative expenses.

Dated: November 21, 2019

Bruce Summers,

Administrator,

Agricultural Marketing Service.

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