



DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 930

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

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: Proposed rule.

SUMMARY: This proposed rule invites comments on 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: Comments must be received by [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Interested persons are invited to submit written comments concerning this proposal. 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:

<https://www.regulations.gov>. All comments should reference the document number and the date and page number of this issue of the *Federal Register* and will be made available for public inspection in the Office of the Docket Clerk during regular business hours or can be viewed at:

<https://www.regulations.gov>. All comments submitted in response to this proposal 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, 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 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 E-mail: 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, 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 proposed 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 proposed 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 proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. This proposed 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 proposed rule invites comments on changing subcommittee size and adding term limits to subcommittee

appointments under the Order. This action would modify 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 proposed rule would also add a five-year term limit to these appointments. This would 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 proposed changes would 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.

Currently, this subcommittee consists 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 proposed rule would increase the size of the subcommittee and include term limits for all subcommittee appointments. The current requirement regarding the service of the

Board's public member or their alternate would continue 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 current 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 proposed changes would not only improve operational flexibility and administration of the subcommittee but could encourage greater industry and small business participation on the subcommittee and in new product and new market projects.

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 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 proposed rule would increase the size of the subcommittee and add term limits to subcommittee appointments under § 930.162. This proposed action would modify 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 proposed rule would also add a five-year term limit to these appointments. This would provide more opportunities for participation and additional flexibility in staffing the subcommittee. The authority for these proposed actions is provided in §§ 930.31, 930.59 and 930.62. These proposed changes were unanimously recommended by the Board at its meeting on March 19, 2020.

It is not anticipated that this action would impose any additional costs on growers or handlers. This proposed change is administrative in nature, would not increase reporting requirements, and would provide the Board with improved flexibility in staffing the subcommittee.

This proposed action would have a beneficial impact as it would 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 would provide more candidates to draw from when scheduling subcommittee meetings and would help ensure some members were 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 proposed 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 proposal. 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 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. USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this proposed 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.

The Board's meeting was widely publicized throughout the tart cherry industry, and all interested persons were invited to attend the meetings and participate in Board deliberations on all issues. Like all Board meetings, the March 19, 2020, meeting was a public meeting, and all entities, both large and small, were able to express their views on this issue. Interested persons are invited to submit comments on this proposed rule, including the regulatory and information collection impacts of this action on small businesses.

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.

A 30-day comment period is provided to allow interested persons to respond to this proposal. All written comments timely received will be considered before a final determination is made on this matter.

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. 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.

* * * * *

Bruce Summers,

Administrator,

Agricultural Marketing Service.

[FR Doc. 2020-15201 Filed: 7/23/2020 8:45 am; Publication Date: 7/24/2020]