



Agricultural Marketing Service

7 CFR Part 930

[Doc. No. AMS-SC21-0026; SC21-930-1 FR]

Tart Cherries Grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin; Changes to Reporting Requirements

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule implements a recommendation from the Cherry Industry Administrative Board to revise the reporting requirements prescribed under the Federal marketing order regulating the handling of tart cherries. This action modifies reporting requirements to include the information necessary to determine the portion of total inventory that is greater than five years old.

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

FOR FURTHER INFORMATION CONTACT: Jennie M. Varela, Marketing Specialist, or Christian D. Nissen, Regional Director, Southeast Region Office, Market Development Division, Specialty Crops Program, AMS, USDA; Telephone: (863) 324-3375, 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, Market Development Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491, or Email: 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, (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 Cherry Industry Administrative Board (Board or CIAB) 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 12866 and 13563. Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. This action falls within a category of regulatory actions that the Office of Management and Budget (OMB) exempted from Executive Order 12866 review.

This rule has been reviewed under Executive Order 13175 – Consultation and Coordination with Indian Tribal Governments, which requires agencies to consider whether their rulemaking actions would have tribal implications. Agricultural Marketing Service (AMS) has determined that this rule is unlikely to have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

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 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 not later than 20 days after the date of the entry of the ruling.

This action revises the reporting requirements to include the sales and inventory information necessary to segregate between inventory that is five years old and inventory that is less than five years old. This modification will allow the industry to better estimate how much inventory on-hand is still marketable and help ensure relevant inventory information is available when considering volume restrictions. This action was unanimously recommended by the Board at its February 25, 2021 meeting.

Section 930.70 of the Order provides, in part, authority to require handlers to submit reports of inventory. Section 930.70 further provides, with the approval of the Secretary, authority for the Board to collect other such information from handlers as needed to perform its duties. This rule utilizes this authority to establish a new § 930.170 under the rules and regulations of the Order. This new section codifies existing inventory reporting requirements and requires handlers of tart cherries to annually report inventory that exceeds five years of age.

During Board meetings held on June 25, 2020 and January 14, 2021, the Board received industry's feedback about enhancing tart cherry inventory transparency and developing a clearer understanding of the age of product in inventory. In these

discussions, several members expressed concern that some of the inventory currently being reported may be product beyond its saleable date, which could create a misleading view of the actual amount of tart cherries available for market.

Currently, handlers submit inventory reports four times per year for the reporting periods ending November 30, February 28, May 31, and June 30, with reports for those periods due on December 10, March 10, June 10, and July 10, respectively. This information is submitted on CIAB Form 3 (Sales/Inventory Report) as previously approved by OMB and assigned OMB No. 0581-0177. The report includes information on the type, form, and the amount of product, but does not include data regarding the age of the products in inventory. The Board agreed the existing reporting requirements may limit their knowledge of the industry's on-hand tart cherry inventory and formed a subcommittee to review the inventory reporting requirements.

The Board reviewed the subcommittee findings at the January 14, 2021, meeting, and expressed support for the subcommittee's recommendation to adjust reporting requirements to account for inventory greater than five years old. The Board noted a five-year inventory cutoff date was appropriate because this period would sufficiently accommodate the lifespans of nearly all existing products likely to be inventoried. Board members agreed having this additional information regarding the age of inventory would be beneficial.

The Order includes the authority for establishing volume regulation, and one element considered during those discussions is the amount of tart cherries available in inventory. The regulated season runs from July 1 through June 30. The current reporting aggregates the industry's inventory data and does not separately track older inventory, and this compilation could provide an incomplete view of the industry's marketable inventory. By segregating the accounting of inventory older than five years, the Board would have more precise information regarding inventory when discussing market issues.

As part of their discussions, the Board also provided clarifying information on how to calculate inventory age for reporting purposes. To determine product age, the date used would either be the date of harvest and processing or date of remanufacturing. Board members emphasized the starting point for calculating inventory age would be reset if the inventory were remanufactured into a new product.

For example, if a handler was completing their routine inventory report on May 31, 2021, any tart cherries harvested in 2014 or earlier would be considered over five years old. Although cherries harvested in 2014 would be considered part of the 2014-15 harvest year, based on the date they were harvested and processed, they would be greater than five years old for reporting purposes by the end of May 2021. If the cherries harvested in 2014 were remanufactured into another product, the date of remanufacturing would become the date used for calculating the age for inventory purposes. The Board stated this is the same dating procedure as used for calculating the age of cherries held in reserve under volume regulation. Using these dates, inventory older than five years would be reported each May on the modified report.

Several members commented the age of inventory is already recorded by handlers as part of their normal business activities, and as a result, this requirement would not be overly burdensome. Members further expressed the separate reporting of inventory over five years old would at most require a few extra minutes of a handler's time and would only be required once annually.

Consequently, the Board voted to add a section to the inventory report to include the total volume of inventory over five years old. The Board recommended including this information on the inventory report for the reporting period ending May 31 due on June 10. The Board agreed this was the appropriate time to have the information available as this report would be used to develop the industry inventory data when the

Board meets in June to consider the need to establish a volume control recommendation for the coming season.

This rule adds sales and inventory report requirements to the administrative provisions under the Order and requires handlers to report inventory older than five years. These reporting requirements will be added in a new § 930.170 and will include information on the handler submitting the form; the reporting period; beginning inventory for each product; the amount packed for each product; sales; information on transfers of product between handlers, including the name of the selling handler, name of the receiving handler, and form type, number of units; information on product repacked or remanufactured during the reporting period, including the form and number of units of source products and the form and number of units of end products; and information on the amount of ending inventory for each product, including the amount of ending inventory for each product over five years old. Only the May 31 report will require handlers to record the amount of inventory over five years old.

This information will support the industry's ability to make marketing decisions by providing more descriptive information than currently available when evaluating the need for volume regulation. Besides providing important information for industry reports regarding sales and inventory, this action will also help ensure compliance with this reporting requirement by including it in the rules and regulations under the Order.

Final Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612), 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 to ensure 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 450 producers of tart cherries in the regulated area and approximately 40 handlers who are subject to the Order. Small agricultural growers 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 information from the National Agricultural Statistics Service (NASS) and Board data, the average annual grower price for tart cherries during the 2019-20 season was approximately \$0.15 per pound. With total utilization at 236.34 million pounds, the total 2019-20 crop value is estimated at \$35.45 million (236.34 million pounds times \$0.15). Dividing the crop value by the estimated number of producers (450) yields an estimated average receipt per producer of \$78,778. This is well below the SBA threshold for small producers.

A free on board (FOB) price of \$0.82 per pound for processed tart cherries was derived from USDA's 2020 purchases of dried tart cherries at an average price of \$4.11 per pound. The dried cherry price was converted to a raw product equivalent price at an industry recognized ratio of five to one. Based on utilization, this price represents a good estimate of the price for processed cherries. Multiplying this FOB price (\$0.82) by total utilization of 236.34 million pounds results in an estimated handler-level tart cherry value of \$193.8 million. Dividing this figure by the number of handlers (40) yields estimated average annual handler receipts of \$4.85 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 final rule adds the sales and inventory report requirements to the administrative provisions under the Order and will require handlers to report inventory

older than five years. This rule establishes a new § 930.170 under the rules and regulations of the Order. The authority for this action is provided in § 930.70 of the Order.

AMS anticipates that this final rule will impose minimal, if any, additional costs on handlers or growers, regardless of their size. This action will impose a small increase in the reporting burden for each tart cherry handler. However, because handlers currently maintain data about the age of their inventory in the regular course of business, they should be able to readily access this information. Consequently, any additional costs associated with this change should be minimal (not significant) and apply equally to all handlers.

This action should also benefit the entire industry by providing more precise information on tart cherry product in inventory. This information will provide accurate information regarding available inventory and help with marketing and planning for the industry. Further, having these requirements codified under the rules and regulations would also benefit compliance enforcement of this reporting requirement. The benefits of this rule are expected to be equally available to all tart cherry growers and handlers, regardless of their size.

The Board discussed other alternatives to this action, including reporting inventory older than three years for the purposes of classifying the age of inventory, reporting the age of inventory quarterly, and leaving the current reporting requirements unchanged. When discussing the alternatives, the Board concluded a three-year timeframe would not sufficiently cover the normal lifespan of all products held in inventory. The Board also commented that quarterly reporting of older inventory was unnecessary because this information would be most useful at the end of the season, prior to making annual volume restriction recommendations. Therefore, the alternatives were 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. This final rule will require changes to the Board's existing CIAB Form 3. However, the changes are minor and the currently approved burden for the form will be minimally increased by the changes. The revised form has been submitted to OMB for approval.

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 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.

Further, the Board's meetings are widely publicized throughout the tart cherry industry. The meetings are public and virtual or in a hybrid style with participants having a choice whether to attend in person or virtually. All interested persons are invited to attend the meetings and participate in Board deliberations on all issues. The Board's meetings on June 25, 2020, January 14, 2021, and February 25, 2021, were each conducted via videoconference. 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 August 13, 2021 (86 FR 44647). Copies of the proposed rule were sent via email to Board members and known tart cherry 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 September 13, 2021 was provided to allow interested

persons to respond to the proposal. No comments were received. Accordingly, no changes will be made to the proposed rule.

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

Cherries, Marketing agreements, Reporting and recordkeeping requirements.

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. Add § 930.170 to read as follows:

§ 930.170 Sales and inventory report.

(a) Handlers shall submit to the Board a sales and inventory report for the reporting period ending November 30, February 28, May 31, and June 30 of each crop year. Handlers shall file such reports by the tenth day of the month following the reporting period, December 10, March 10, June 10, and July 10, respectively. Should the filing due date fall on a Saturday, Sunday, or federal holiday, reports are due by the first

business day following the due date. Such reports shall be reported to the Board on

CIAB Form 3 and include:

- (1) The name, address, telephone number, and identifying number of the handler;
- (2) The reporting period covered by the report;
- (3) The form, type, and unit size for each product;
- (4) The total beginning of year inventory for each product;
- (5) The packed amount for each product;
- (6) Total inter-handler transfers, and total volume repackaged or remanufactured

for each product, year-to-date;

- (7) Total sales outside the industry for each product, year-to-date;
- (8) The amount of ending inventory for each product, year-to-date;
- (9) List of inter-handler transfers, both in and out, during the reporting period

including:

- (i) Name of the selling handler;
 - (ii) Name of the receiving handler; and
 - (iii) Form, type, number of units.
- (10) List of repacks and remanufactures during the reporting period including:
- (i) Form, type, and number of units of source products; and
 - (ii) Form, type, and number of units of end products.
- (b) The amount of inventory for each product over 5 years old shall be reported

annually on the sales and inventory report for the reporting period ending May 31.

Product age is based on the crop year in which the current product was processed or remanufactured.

Erin Morris,

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Agricultural Marketing Service.*

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