

interim final rule, without change, as published in the **Federal Register** (71 FR 43643, August 2, 2006) will tend to effectuate the declared policy of the Act.

#### List of Subjects in 7 CFR Part 922

Apricots, Marketing agreements, Reporting and recordkeeping requirements.

#### PART 922—APRICOTS GROWN IN DESIGNATED COUNTIES IN WASHINGTON

■ Accordingly, the interim final rule amending 7 CFR part 922 which was published at 71 FR 43643 on August 2, 2006, is adopted as a final rule without change.

Dated: November 7, 2006.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

[FR Doc. E6-19079 Filed 11-9-06; 8:45 am]

BILLING CODE 3410-02-P

#### DEPARTMENT OF AGRICULTURE

##### Agricultural Marketing Service

##### 7 CFR Part 930

[Docket No. FV06-930-1 FIR]

#### Tart Cherries Grown in the States of Michigan, et al.; Change in Certain Provisions/Procedures Under the Handling Regulations for Tart Cherries

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

**ACTION:** Final rule.

**SUMMARY:** The Department of Agriculture (USDA) is adopting, as a final rule, with a change, an interim final rule removing volume limitations on new product development, new market development and market expansion activities to facilitate such activities; allowing handlers to receive diversion credit for the voluntary destruction of finished, marketable products that have deteriorated in condition to provide handlers more flexibility; adding a procedure to keep Cherry Industry Administrative Board (Board) representation in line with current district production levels; and revising grower application and mapping procedures under the grower diversion program to make the process less burdensome. These changes are intended to improve the operation of the marketing order and to increase the demand for tart cherries and tart cherry products. The changes were unanimously recommended by the Board, the body that locally administers

the marketing order. The marketing order regulates the handling of tart cherries grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin.

**EFFECTIVE DATE:** December 13, 2006.

#### FOR FURTHER INFORMATION CONTACT:

Patricia A. Petrella or Kenneth G. Johnson, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, Unit 155, 4700 River Road, Riverdale, MD 20737; Telephone: (301) 734-5243, or Fax: (301) 734-5275.

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491, Fax: (202) 720-8938, or e-mail: [Jay.Guerber@usda.gov](mailto:Jay.Guerber@usda.gov).

**SUPPLEMENTARY INFORMATION:** 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, 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 rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

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 exempt 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 in equity 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 continues in effect changes to § 930.162, Exemptions, that removed volume limitations on new product development, new market development, and market expansion activities utilized by handlers to earn diversion credits to meet restricted percentage regulation withholding requirements. Handler diversion is authorized under § 930.59 of the order and, when volume regulation is in effect, handlers may fulfill restricted percentage requirements by diverting cherries or cherry products rather than placing tart cherries in an inventory reserve. Volume regulation is intended to help the tart cherry industry stabilize supplies and prices in years of excess production. Volume regulation percentages are in effect for the 2005-2006 crop year (71 FR 1915, January 12, 2006). This rule also continues in effect an action that allowed handlers to receive diversion credit for the voluntary destruction of finished marketable product; added a procedure to keep Board representation in line with district production levels; and revised grower application and mapping procedures.

Section 930.62 provides that the Board, with the approval of the Secretary, may exempt from the provisions of §§ 930.41 (Assessments), 930.44 (Quality control), 930.51 (Issuance of volume regulations), 930.53 (Modification, suspension, or termination of regulations), and 930.55 through 930.57 (Reserve regulations) cherries which are diverted in accordance with § 930.59. According to § 930.62, cherries that are diverted in accordance with § 930.59 may be used for new product development and new market development, used for experimental purposes, or used for any other purpose designated by the Board, including cherries processed into products for markets for which less than 5 percent of the preceding 5-year average production of cherries were utilized.

Section 930.162 specifies procedures for obtaining approval for exempt uses which include new product development, new market development, and market expansion. Currently, these provisions specify volume limitations for these exempt uses. The limitations are specified in § 930.162(b)(1) which states that once total industry utilization for a new product exceeds 2 percent of the 5-year average production of tart cherries, the product shall no longer be considered under development and not be eligible for a new product development exemption. The maximum

duration of any new product credit activity is three years from the first date of shipment.

Section 930.162(b)(2) regarding new market development and market expansion specifies the annual industry-wide maximum diversion credit volume at 10 million pounds RPE (Raw Product Equivalent) of cherry products for all expansion activities which is allocated pro rata among participating handlers.

When these limitations were added, the Board believed that these markets should be developed slowly. However, it now believes that these limitations are a disincentive to new product, market development, and market expansion activities involving large quantities. If a handler's new product activity involves moving 8 million pounds of exempt tart cherries, and 2 percent of the 5-year average production is 5 million pounds, the handler would only receive 5 million pounds of diversion credit, not 8 million pounds. The Board now believes that this unnecessarily restricts these handler activities and that handlers should receive diversion credit for the full diversion amount to stimulate handler interest and facilitate new product development activities.

With respect to new market development and market expansion activities, if the same handler had a pro rata allocation representing 20 percent of the industry-wide 10 million pound limitation for all handlers participating in these activities, this handler would only receive diversion credit for 1.6 million pounds, not 8 million pounds. The Board believes that this provision should be removed to facilitate handler interest in new market development and market expansion.

To facilitate these activities, the Board recommended that the volume limitations be removed from paragraphs (b)(1) and (b)(2) of § 930.162 to foster further handler interest in new product, new market development, and market expansion activities. This is expected to result in an increase in demand for tart cherries and tart cherry products. The time limitation for new product development will remain in effect.

As previously stated in this document, handler diversion is authorized under § 930.59. Section 930.159 of the rules and regulations under the order allows handlers to divert cherries by destruction of the cherries at the handler's facility. At-plant diversion of cherries takes place prior to placing cherries into the processing line to ensure that the cherries diverted were not simply an undesirable or unmarketable byproduct of processing. Handlers also can receive diversion credit for finished, marketable

tart cherry products that were accidentally destroyed. Finished, marketable cherry products might be accidentally destroyed in a fire, explosion, or because of a freezer malfunction.

Handlers sometimes voluntarily destroy finished, marketable cherry products if the cherry products sustain a loss of condition that renders them unacceptable for use in normal market channels (free tonnage outlets). To permit handlers to recover some of their costs incurred in acquiring, processing, and storing such cherries, the Board unanimously recommended that the at-plant diversion procedures be broadened so handlers can receive diversion credit for the voluntary destruction of such cherries. The handler would not have to purchase additional cherries to meet his/her restricted percentage obligation, but could simply use the diversion credit received for the voluntarily destroyed product.

To receive diversion credit under this added option, the Board recommended that the cherry products meet similar criteria as accidentally destroyed marketable product. That is, such cherry products must: (1) Be owned by the handler at the time of the voluntary destruction; (2) be a marketable product at the time of processing; (3) be included in the handler's end of year handler plan; and (4) have been assigned a Raw Product Equivalent (RPE) by the handler to determine the volume of cherries. In addition, the condition and the voluntary destruction as well as the disposition of the finished tart cherry product must be verified by a USDA inspector or a Board agent or employee.

Handlers wishing to obtain diversion certificates for finished tart cherry products that are voluntarily destroyed must apply for such diversion certificates and sign an agreement that disposition of the destroyed product will take place under the supervision of USDA's Processed Products Branch inspectors or Board inspectors. This will allow the Board to verify that the finished product was marketable, but sustained a loss of condition, and that it was disposed of properly.

Once diversion is satisfactorily accomplished, handlers will receive diversion certificates from the Board stating the weight of cherries diverted. Such diversion certificates can be used to satisfy a handler's restricted percentage obligation.

Section 930.158 provides that growers, in districts subject to volume regulation, may voluntarily divert their tart cherry production. Growers may

then offer their diversion certificates to handlers for their use in meeting their restricted percentage obligation. The four types of grower diversion are: Random row, whole block, partial block, and in-orchard tank diversion. This action changes the procedures for grower mapping under the grower diversion program. Currently, under § 930.158 growers that wish to divert cherries using methods other than in-orchard tank must file maps every year if they intend to participate in the voluntary grower diversion program. Growers applying for diversion must sign a Grower Diversion Application which states that the grower agrees to comply with the regulations established for the tart cherry diversion program. Each map must contain the grower's name and number assigned by the Board, the grower's address, the block name or number when appropriate, the location of the orchard or orchards, and other information which may be necessary to accomplish the desired diversion.

Growers then inform the Board what type of diversion will be used: Random row, partial block, whole block or in-orchard tank diversion. Growers who have filed a Grower Diversion Application but have not submitted an orchard map with the Board can only participate in in-orchard tank diversion activities.

The Board has recommended that the original map and application have an ongoing, continuing effect. Annual resubmissions of the map and application would no longer be required. Growers will only submit an application and map if they are participating in the grower diversion program for the first time. Growers would need only to submit a new orchard map if he/she added a new block of trees or changed the orchard layout differently from the map previously submitted to the Board. This action will slightly decrease reporting burdens on growers participating in the grower diversion program.

This action continues in effect a revision to the provisions to § 930.120 for reallocating Board representation. Currently, § 930.20 allocates producer and handler representation on the Board based upon the previous 3-year average production of each district in the production area. When the production level in a district reaches various specified thresholds, the number of representatives from that district either increases or decreases: districts with production up to and including 10 million pounds shall have one member; districts with production greater than 10 million and up to and including 40

million pounds shall have 2 members; and districts with production greater than 40 million pounds and up to and including 80 million pounds shall have 3 members; and districts with production greater than 80 million pounds shall have 4 members.

The Board recommended that in the event that a district's 3-year average production decreases to a level requiring a reduction in membership on the Board, representation of the district shall be determined by: (1) Agreement of the elected members and alternate members of the specific district; or (2) if an agreement cannot be reached, the members and alternates having the shortest amount of time remaining in their terms of office would be removed from the Board. However, the Board's recommendation required modification.

Because the Secretary of Agriculture (Secretary) has sole authority to remove and select persons who can serve on the Board, it would not be appropriate to give direct responsibility to current Board members in a specific district to determine who is removed from the Board when production levels decrease. Accordingly, when a district is faced with losing Board representation, the regulations will require the members of the specific district to make a recommendation to the Board as to who should be removed from the Board, and the Board will then submit its recommendation to the Secretary for approval.

In the event a district's 3-year average production increases such that it warrants additional seats on the Board, the seats shall be allocated following the criteria in § 930.20(b)(5). Nomination and selection of members to fill the additional seats would follow the procedures specified in §§ 930.23 and 930.24.

In addition, § 930.158(a) was revised to delete obsolete dates in that section and § 930.158(b) was revised to clarify the requirement to submit a map for random-row diversion use.

#### **Final Regulatory Flexibility Analysis**

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), 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. Thus, both statutes have small entity orientation and compatibility.

There are approximately 40 handlers of tart cherries who are subject to regulation under the tart cherry marketing order and approximately 900 producers of tart cherries in the regulated area. Small agricultural service firms, which includes handlers, have been defined by the Small Business Administration (13 CFR 121.201) as those having annual receipts of less than \$6,000,000, and small agricultural producers are defined as those having annual receipts of less than \$750,000. A majority of the producers and handlers of tart cherries under the order are considered small entities under SBA's standards.

The principal demand for tart cherries is in the form of processed products. Tart cherries are dried, frozen, canned, juiced, and pureed. During the period 2000/2001 through 2004/2005, approximately 93.4 percent of the U.S. tart cherry crop, or 216.8 million pounds, was processed annually. Of the 216.8 million pounds of tart cherries processed, 59 percent was frozen, 28 percent was canned, and 13 percent was utilized for juice and other products.

Based on National Agricultural Statistics Service data, acreage in the United States devoted to tart cherry production has been trending downward. Bearing acreage has declined from a high of 50,050 acres in 1987/88 to 36,950 acres in 2004/2005. This represents a 26 percent decrease in total bearing acres. Michigan leads the nation in tart cherry acreage with 73 percent of the total and produces about 70 percent of the U.S. tart cherry crop each year.

This action continues in effect a rule that removed volume limitations on market expansion activities used by handlers to earn diversion credits to meet their restricted volume obligations; allowed handlers to earn diversion credits when they voluntarily destroy finished marketable products that have been damaged or deteriorated in condition in some manner; revised grower application/mapping procedures under the grower diversion program to make the procedures less burdensome; and added a procedure regarding the reallocation of Board representation to reflect current district production levels. These changes to the marketing order are authorized under §§ 930.62, 930.59, 930.58, and 930.20, respectively.

It is expected that the benefits resulting from this rulemaking will impact both small and large handlers positively by helping them increase

market demand and by improving the operation of the marketing order. It also will benefit producers by making the in-orchard diversion application/mapping procedures less burdensome and improve the operation of the program.

Regarding alternatives, the Board discussed leaving the provisions unchanged, but determined that the changes were a more viable course of action. The program improvements expected to result because of these changes will positively impact producers and handlers under the marketing order, regardless of size.

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

USDA has determined that this action will have a small impact on the reporting and recordkeeping requirements imposed under the tart cherry marketing order. 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.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the information collection and recordkeeping requirements that are contained in this rule have been previously approved by the Office of Management and Budget (OMB) under OMB No. 0581-0177, Tart Cherries Grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin, M.O. No. 930.

This rule, which changes procedures for growers submitting applications and maps, will result in a slight decrease in reporting and recordkeeping requirements on growers who participate in the voluntary diversion program. In addition, a slight increase in reporting and recordkeeping requirements for handlers who voluntarily destroy tart cherry products would be within the current information collection burden approved by OMB.

Reporting and recordkeeping requirements are necessary for compliance purposes and for developing statistical data for maintenance of the program. The forms require information which is readily available from handler records and which can be provided without data processing equipment or trained statistical staff. As with other, similar marketing order programs, reports and forms are periodically studied to reduce or eliminate duplicate information collection burdens by industry and public sector agencies.

AMS is committed to compliance 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.

An interim final rule concerning this action was published in the **Federal Register** on April 5, 2006 (71 FR 16982). Copies of the rule were mailed by the Board's staff to all Board members and tart cherry handlers. In addition, the rule was made available through the Internet by USDA and the Office of the Federal Register. That rule provided for a 60-day comment period which ended June 5, 2006. Two comments were received. One comment was received from a tart cherry grower and the other comment was from the Executive Director of the Board.

The comment from the grower supported USDA's modification to the Board's recommendation concerning the authority of the Secretary to remove or select members of the Board. The Board had recommended that current Board members in a specific district determine who is removed from the Board when production levels decrease. USDA modified the recommendation so it stated that when a district falls below the threshold level, members from the district should make a recommendation to the Board. The Board would then submit its recommendation to the Secretary for approval. The commenter agreed with this modification.

The comment from the Executive Director of the Board concerned two issues contained in the interim final rule: (1) Grower mapping requirements; and (2) reallocating Board representation. With respect to the first issue, the commenter urges USDA to remove the requirement now included in § 930.158(b) that if a grower decides not to participate in the grower diversion program for a year, the grower must inform the Board of his/her non-participation. USDA agrees that this requirement is not necessary for the operation of the grower diversion program. As such, this requirement is being deleted from § 930.158(b).

The second issue the Executive Director addressed concerned the reallocation of Board membership. The commenter asserted that the recommendation of the Board, concerning reallocation, should be adopted without the USDA modification that the Secretary will make the final decision based on a Board recommendation. The Board's recommendation, however, did not take into account the Secretary's sole authority to remove and select persons to serve on the Board. As previously discussed, it would not be appropriate

to give direct responsibility to current Board members in a specific district to determine who is removed from the Board when production levels decrease. Therefore, the commenter's second suggestion is not adopted in this 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/fv/moab.html>. Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant material presented, including the Board's recommendation, and other information, it is found that finalizing the interim final rule, with a change, as published in the **Federal Register** (71 FR 16982, April 5, 2006) 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**

■ Accordingly, the interim final rule amending 7 CFR part 930 which was published at 71 FR 16982 on April 5, 2006, is adopted as a final rule with the following change.

#### **PART 930—TART CHERRIES GROWN IN THE STATES OF MICHIGAN, NEW YORK, PENNSYLVANIA, OREGON, UTAH, WASHINGTON, AND WISCONSIN**

■ 1. The authority citation for part 930 continues to read as follows:

**Authority:** 7 U.S.C. 601–674.

■ 2. In § 930.158, the introductory text of paragraph (b) is revised to read as follows:

#### **§ 930.158 Grower diversion and grower diversion certificates.**

\* \* \* \* \*

(b) *Application and mapping for diversion.* Any grower desiring to divert cherries using methods other than in-orchard tank shall submit a map of the orchard or orchards to be diverted, along with a completed Grower Diversion Application, to the Board by April 15 of each crop year. The application includes a statement which

must be signed by the grower which states that the grower agrees to comply with the regulations established for a tart cherry diversion program. Each map shall contain the grower's name and number assigned by the Board, the grower's address, block name or number when appropriate, location of orchard or orchards and other information which may be necessary to accomplish the desired diversion. On or before July 1, the grower should inform the Board of such grower's intention to divert in-orchard and what type of diversion will be used. The four types of diversion are random row diversion, whole block diversion, partial block diversion and in-orchard tank diversion. A grower who informs the Board about the type of diversion he or she wishes to use by July 1 can elect to use any diversion method or combination of diversion methods. Only random row or in-orchard tank diversion methods may be used if the Board is not so informed by July 1. Trees that are four years or younger do not qualify for diversion. Annual resubmissions of either the map or application will no longer be required. Growers will only submit a new application and map if they are participating in the grower diversion program for the first time. Growers will need only to submit a new orchard map if he/she adds a new block of trees to the orchard or changes the orchard layout differently from the map previously submitted to the Board.

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Dated: November 7, 2006.

**Lloyd C. Day,**

*Administrator, Agricultural Marketing Service.*

[FR Doc. E6–19078 Filed 11–9–06; 8:45 am]

BILLING CODE 3410–02–P

#### **FEDERAL DEPOSIT INSURANCE CORPORATION**

#### **12 CFR Part 328**

#### **RIN 3064–AD05**

#### **Advertisement of Membership**

**AGENCY:** Federal Deposit Insurance Corporation (FDIC).

**ACTION:** Final rule.

**SUMMARY:** The FDIC is promulgating a final rule revising its regulation governing official FDIC signs and advertising of FDIC membership. The final rule replaces the separate signs used by Bank Insurance Fund (BIF) and Savings Association Insurance Fund (SAIF) members with a new sign, or insurance logo, to be used by all insured