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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 926

[Docket No. FV01-926-1 FR]

#### Proposed Data Collection, Reporting, and Recordkeeping Requirements Applicable to Cranberries Not Subject to the Cranberry Marketing Order

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

**ACTION:** Final rule.

**SUMMARY:** This final rule establishes a new Part 926 in the Code of Federal Regulations which requires persons engaged in the handling or importation of fresh cranberries or cranberry products (including handlers, producer-handlers, processors, brokers, and importers) not subject to the reporting requirements of the Federal cranberry marketing order (order) to report sales, acquisition, and inventory information to the Cranberry Marketing Committee (Committee), and to maintain adequate records on such activities. The establishment of the data collection, reporting, and recordkeeping requirements for entities not subject to the order is authorized under an amendment to section 8(d) of the Agricultural Marketing Agreement Act of 1937. The additional information is needed by the Committee to make more informed recommendations to USDA for regulations authorized under the cranberry marketing order. This rule also finalizes the Agricultural Marketing Service's intention to request approval of the new data collection and reporting requirements by the Office of Management and Budget.

**EFFECTIVE DATE:** February 11, 2005.

**FOR FURTHER INFORMATION CONTACT:** Patricia A. Petrella or Kenneth G. Johnson, DC Marketing Field Office, Marketing Order Administration

Branch, Fruit and Vegetable Programs, AMS, USDA, Suite 6C02, Unit 155, 4700 River Road, Riverdale, Maryland 20737; telephone: (301) 734-5243, Fax: (301) 734-5275; or George Kelhart, Technical Advisor, 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.

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 pursuant to the Agricultural Marketing Agreement Act of 1937, as amended [7 U.S.C. 601-674], and as further amended October 22, 1999, by Pub. L. 106-78, 113 Stat. 1171, 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 is not intended to have retroactive effect. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule. There are no administrative procedures which must be exhausted prior to any judicial challenge to the provisions of this rule.

This action is necessary to implement authority on cranberry data collection consistent with a 1999 amendment to section 8(d) of the Act. If a cranberry order is in effect, the amendment authorizes the Secretary to require persons engaged in the handling or importation of fresh cranberries or cranberry products (including producer-handlers, second handlers, processors, brokers, and importers) to provide to the USDA certain information including information on sales, acquisitions, and inventories of fresh cranberries or cranberry products. Under the provisions of Part 926, such persons include handlers, producer-handlers, processors, brokers, and importers.

Under the rule, the Committee will collect such information.

According to the Committee, the number of end users of cranberries and cranberry products has increased in recent years. This has increased the number of entities in the marketing chain acquiring, selling, and maintaining inventories of cranberries and cranberry products produced domestically and outside the United States. Significant quantities of cranberries and cranberry products are now being marketed by handlers, producer-handlers, processors, importers, brokers, and others not subject to the reporting requirements of the cranberry marketing order (7 CFR Part 929). The cranberry marketing order authorizes the Committee to obtain information on sales, acquisitions, and inventories of cranberries and cranberry products from handlers regulated under the order. Such handlers are those who can, freeze, or dehydrate cranberries produced within the production area, or who sell, consign, deliver, transport (except as a common or contract carrier of cranberries owned by another person) fresh cranberries or in any other way place fresh cranberries in the current of commerce within the production area or between the production area and any point outside thereof in the United States and Canada.

Prior to the 1999 amendment of the Act, the Committee and USDA did not have the authority to obtain information from entities not subject to the reporting requirements of the order. The 1999 amendment provides authority for USDA to expand the Committee's information gathering capability. With more complete information, the Committee would be able to make better-informed regulation recommendations to USDA. The Committee would also publish periodic reports aggregating the data on cranberry and cranberry products for use by all members of the industry.

Prior to the mid-1990's, the majority of cranberry inventories were held by handlers subject to the order, and the Committee was able to account for practically all of the cranberry and cranberry product inventory under the order. Under § 929.9 of the order, the term handler is defined as any person who handles cranberries. Handle means to sell, consign, deliver or transport

(except as a common or contract carrier of cranberries owned by another person) fresh cranberries or in any other way to place fresh cranberries in the current of commerce within the production area and any point outside thereof in the United States or Canada (7 CFR 929.10). However, with increased domestic production and imports of cranberries, the number of entities not regulated under the Federal cranberry marketing order has expanded to include handlers, producer-handlers, processors, brokers, and importers who are not subject to the mandatory reporting requirements of the cranberry marketing order. Therefore, the Committee does not have complete information on sales, acquisitions and inventories of cranberries. Allowing the Committee to collect this information will help it make better informed regulation recommendations to USDA.

Section 929.46 of the cranberry marketing order requires the Committee to develop a marketing policy each year prior to May 1. Currently, in its marketing policy discussions, the Committee projects expected supply and market conditions for an upcoming season, based on information provided by growers and, particularly, handlers who are regulated under the order. These projections include an estimate of the marketable quantity (defined as the number of pounds of cranberries needed to meet total market demand and to provide for an adequate carryover to the next season). The Committee believes that its marketing policy is limited in some respects because it does not have the ability to include sales, acquisitions, and inventory reports from all segments of the cranberry industry.

Increased production, stagnant demand, and high inventory levels have compounded the problem of unreported inventories. With increased production and stagnant markets, the industry is producing far more cranberries than needed for current market needs. This situation has led to higher inventory levels. However, the Committee's inability to obtain needed information on cranberry sales, acquisitions, and inventories from entities not regulated under the marketing order has prevented it from obtaining complete information from all segments of the industry. With understated sales, acquisition, and inventory information, the Committee has been limited somewhat in making recommendations under the marketing order.

The ability to closely monitor levels of sales, acquisitions, and inventory is critical to the Committee in making more thorough recommendations. The 1999 amendment to the Act provides a means for collecting this information.

Section 8(d)(3) of the amended Act specifies that if an order is in effect with respect to cranberries, USDA may require persons engaged in the handling or importation of cranberries or cranberry products (including handlers, producer-handlers, processors, brokers, and importers) to provide such information as USDA considers necessary to effectuate the declared policy of the Act (which is to promote orderly marketing conditions and improve returns to producers), including information on acquisitions, inventories, and dispositions of cranberries and cranberry products. The amendment allows USDA to delegate to the Committee the authority to collect sales, acquisition, and inventory data from persons, other than regulated handlers under the marketing order, engaged in the handling or importation of cranberries. Under this proposal, the Committee would collect such information. Typically, marketing order committees collect information and require record keeping to ensure that USDA can verify handler reports. Additionally, the Committee also compiles collected information in its aggregate form to use when discussing cranberry supplies, inventories, and market strategies during its marketing policy discussions. This rule will assist the Committee in making more informed marketing recommendations.

A new Part 926 will be added to the regulations to authorize the Committee to collect data from such entities. New Part 926 will define terms and establish rules and regulations relative to the reporting and recordkeeping requirements necessary to effectuate the declared policy of the Act.

Several examples are listed below as to how data collection currently is conducted under the marketing order and how it will operate under the new data collection process. For instance, a grower harvests and delivers cranberries to a handler regulated under the cranberry marketing order. The regulated handler sells the cranberries to a processor. The regulated handler reports to the Committee the name, address, and amount of cranberries sold to the processor on a Handler Inventory Report—Supplement Form (HIR—SUP), and that completes the current marketing order data collection process. Under the new data collection process, the Committee, noting information used from marketing order reports to identify newly regulated entities, will send a report form (Handler/Processor Cranberry Inventory Report Form; HPCIR A—D) to the processor. The processor will complete the form by indicating names, sources, and amounts

of domestic/foreign barrels of cranberries acquired, domestic/foreign sales, and beginning and ending inventories of cranberries (in freezers and in processed form, including concentrate) and submit the report form to the Committee.

In another example, a regulated handler sells cranberries to a broker. The broker sells the cranberries to three processors. The Committee receives the initial information (barrels acquired, sold, and in inventory) from the regulated handler and that ends the current marketing order data collection process. Under the data collection process, the Committee will also contact and send a report form (Importer Cranberry Inventory Report; Form ICIR A—D) to the broker to track the cranberries to the three processors. This form filed by the broker will provide the Committee with names, sources, and amounts of cranberry barrels acquired, amount sold to and received by the broker, processor and handler, and the beginning and ending inventories of cranberries (in freezers and in processed form, including concentrate) held by the broker. After receiving the broker's report, the Committee will send a Handler/Processor Cranberry Inventory Report Form to each of the three processors to complete and return to the Committee.

In a third example, a non-regulated handler acquires cranberries (imports or domestically produced cranberries from a non-marketing order production area). The non-regulated handler is outside the scope of the marketing order and thus, not required to report to the Committee under the current marketing order reporting process. However, through the information supplied from other producer-handlers, importers, processors and brokers, the Committee might be able to identify the non-regulated handler and send him/her a Handler/Processor Cranberry Inventory Report Form. The non-regulated handler will complete the form by indicating names, sources, and amounts of domestic/foreign barrels of cranberries acquired, foreign/domestic sales, and beginning and ending inventories of cranberries (in freezers and in processed form, including concentrate) and submit the report form to the Committee.

In the last example, a broker imports cranberries into the United States. The broker is outside the scope of the marketing order and not a regulated handler. Thus, there is no mandatory reporting or recordkeeping requirements that he/she has to meet. Under the new data collection requirements, the importer will be required to submit quarterly reports (on an Importer

Cranberry Inventory Report Form CIR A–D) to the Committee. This form is to be filed by an importer to provide the Committee with names, sources and amounts of cranberry barrels imported, amounts sold to and received by the broker, processor and handler, and the beginning and ending inventories of cranberries (in freezers and in processed form, including concentrate) held by the importer. Once that information is obtained, the Committee can contact the individuals/firms receiving the imported cranberries and have them report on the distribution.

All of these reports will be on the same reporting cycle (4 times a year or quarterly) as regulated handlers under the marketing order. Handlers, producer-handlers, processors, brokers, and importers will report any/all cranberry transactions that occurred during each of the reporting cycles. The purpose of this action is to provide the Committee with the ability to account for cranberries in the marketing pipeline after they have been sold by the regulated handler or if imported, brought into the United States.

All cranberries and cranberry products will be covered. This includes fresh cranberries, frozen cranberries, and cranberry concentrate. Currently, if a handler regulated under the order has juice, sauce or other finished cranberry products in inventory, the handler is required to determine the barrel equivalency of cranberries contained in those products and report this as inventory. Handlers, producer-handlers, processors, brokers, and importers will be required to do the same.

Data collection requirements will not apply once fresh cranberries or cranberry products reached retail markets. For example, a regulated handler (handler A), sells concentrate to processor B. Processor B uses the concentrate to bottle private label juice. The product is shipped to a wholesale/retail distribution center. The Committee will receive an initial report from handler A and subsequently from processor B. Processor B will continue to file reports for each cycle that the concentrate and cranberry products remained in his/her possession. The reporting requirement extends up to, but does not include, the retailer level.

Failure on the part of handlers, producer-handlers, processors, brokers, and importers to comply with the new data collection and recordkeeping requirements could lead to enforcement action, including the levying of penalties provided under 8c(14) of Act against the violating person or entity. False representation to an agency of the United States in any matter, knowing it

to be false, is a violation of 18 U.S.C. 1001 which provides for a fine or imprisonment or both.

#### 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 proposed 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 business subject to such actions in order that small businesses will not be unduly or disproportionately burdened.

Small agricultural service firms have been defined by the Small Business Administration [13 CFR 121.201] as those having annual receipts less than \$5,000,000, and small agricultural producers are those with annual receipts of less than \$750,000. There are about 20 handlers currently regulated under Marketing Order No. 929. In addition, there are about 1,250 producers of cranberries in the production area. Based on recent years' price and sales levels, AMS finds that nearly all of the cranberry producers and some of the handlers are considered small under the SBA definition.

In 2003, a total of 39,400 acres were harvested with an average U.S. yield per acre of 155.1 barrels. Grower prices in 2003 averaged \$31.80 per barrel. Average total annual grower receipts for 2003 are estimated at \$155,203 per grower. Of the 1,250 cranberry producers in the marketing order production area, between 86 and 95 percent are estimated to have sales equal to or less than \$750,000. Few growers have sales that exceeded this threshold in recent years.

Under the marketing order, five handlers handle over 97 percent of the cranberry crop. Using Committee data on volumes handled, AMS has determined that none of these handlers qualify as small businesses under SBA's definition.

The remainder of the crop in the marketing order production area is marketed by about a dozen producer-handlers who handle their own crops. Dividing the remaining 3 percent of the crop by these producer-handlers, all are considered small businesses.

Cranberries are produced in 10 States under Marketing Order No. 929, but the vast majority of farms and production is concentrated in Massachusetts, New Jersey, Oregon, Washington, and Wisconsin. Average farm size for cranberry production is very small. The average across all producing States is about 33 acres. Wisconsin's average is

twice the U.S. average at 66.5 acres, and New Jersey averages 83 acres. Average farm size is below the U.S. average for Massachusetts (25 acres), Oregon (17 acres) and Washington (14 acres).

Small cranberry growers dominate in all States: 84 percent of growers in Massachusetts harvest 10,000 or fewer barrels of cranberries, while another 3.8 percent harvest fewer than 25,000 barrels. In New Jersey, 62 percent of growers harvest less than 10,000 barrels, and 10 percent harvest between 10,000 and 25,000 barrels. More than half of Wisconsin growers raise less than 10,000 barrels, while another 29 percent produce between 10,000 and 25,000 barrels. Similar production patterns exist in Washington and Oregon. Over 90 percent of the cranberry crop is processed, with the remainder sold as fresh fruit.

According to the National Agricultural Statistics Service (NASS), the 2003 overall U.S. cranberry crop totaled 6.1 million barrels (1 barrel equals 100 pounds of cranberries). Total barrels of cranberry imports acquired were 1.06 million pounds. The U.S. 2003 preliminary price for fresh and processed cranberries was \$50.90 and \$30.60 per barrel respectively.

Under Part 926, the Committee estimates that there are approximately 130 handlers, producer-handlers, processors, brokers, and importers subject to the data collection requirements. Taking into account the profile of the size of the industry under the marketing order, we estimate that most of these entities are considered small under the SBA criteria.

Public Law 106–78, enacted October 22, 1999, amended section 608(d) of the Act to authorize USDA to require persons engaged in the handling of cranberries or cranberry products (including handlers, producer-handlers, processors, brokers, and importers) not subject to the order to maintain adequate records and report sales, acquisitions, and inventory information. The data collection and reporting requirements will help the Committee make more informed recommendations to USDA for regulations authorized under the cranberry marketing order.

This rule implements the reporting and recordkeeping requirements authorized by the amendment to the Act. Under the regulations, handlers, producer-handlers, processors, brokers, and importers are required to submit reports four times annually regarding sales, acquisitions, movement for further processing and disposition of cranberries and cranberry products.

The Committee discussed alternatives to this action, including continuing to

ask those entities not subject to the marketing order to voluntarily submit inventory data to the Committee. This has not been successful. To make well informed regulatory decisions, the Committee needs complete inventory, sales and acquisition information from handlers, producer-handlers, processors, brokers, and importers who handle cranberries and cranberry products produced in the United States and outside the United States. This rule establishes reporting and recordkeeping requirements.

USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this rule. While the data collection and reporting requirements are similar to those reporting requirements regulated handlers must comply with under the cranberry marketing order, this action is necessary to assist the Committee in its volume regulation recommendations.

A proposed rule concerning this action was published in the **Federal Register** on April 12, 2004 (69 FR 19118). Copies of the rule were mailed or sent via facsimile to all Committee members and handlers. Finally, the rule was made available through the Internet by the Office of the Federal Register. A comment period ending June 11, 2004, was provided to allow interested persons to respond to the proposal.

Seven comments were received during the comment period in response to the proposal. Comments were submitted by the Committee, two cranberry grower associations, a cranberry handler and a juice products association. The growers' associations and the Committee believe it is imperative that the Committee have the ability to collect cranberry data from all cranberry handlers and importers. These commenters contend that the Committee cannot have a concise measurement of industry inventory supplies unless it also obtains this information from second-handlers, processors, importers, and brokers. These commenters also stated that in developing its annual marketing policy, the Committee must estimate the carryover (inventory) of frozen cranberries and other cranberry products. Presently, the Committee can only obtain this data from first handlers with processing facilities within the production area. This action will allow the Committee to have more accurate information in formulating its marketing policy that is used in the decision making process to regulate the cranberry crop, if necessary.

The cranberry handler and the juice products association, in their respective comments, urged the Committee to adopt standard factors for converting

processed products to raw fruit. According to the commenters, this would ensure consistent reporting and prevent the release of confidential yield data. Under the expanded data collection authority, all entities reporting to the Committee would use a similar form to report cranberry inventories as those used by handlers regulated under the Federal marketing order. For example, all entities, (under both the expanded data collection and the order), would report on the number of barrels of cranberries, both foreign and domestic, acquired, received, transferred or sold within or outside their respective districts or sold to the Government. No information on specific types of products is requested (*i.e.* number of gallons of juice or cases of cranberry sauce) that could identify any entities' business practices. As previously mentioned, the information collected by the Committee, will be compiled in aggregate form and used when it discusses supplies, inventories, and market strategies during its marketing policy meeting.

Both commenters suggested that conversion factors be incorporated into the reporting requirements. The Committee is aware of the generally accepted conversion factors within the industry. However, there is no table or chart of standard factors for converting processed products to raw fruit equivalents maintained or published by the Committee. The development of a table or chart of standard conversion factors would eliminate any guess work by the Committee when converting processed products to raw fruit equivalents. The development of this conversion table/chart has no relevance to the release of proprietary information. Further, the Committee is prohibited under the data collection provisions from disclosing any proprietary information to any person other than the Secretary or her designee(s). Civil and criminal charges can be levied for failing to comply with this provision. We have requested the Committee to meet following the adoption of this rule to discuss this matter and to recommend conversion factors to be implemented by USDA. The Committee could use the suggested conversion factors as a starting point for its discussions. Such factors would be implemented following notice and comment rulemaking procedures. USDA recognizes the importance of consistent reporting.

Two comments opposed to the proposed data collection, reporting, and recordkeeping requirements were received from an individual, and an importer of cranberry products.

One commenter does not want a cranberry committee to be established by the government since it would be a burden on the taxpayers. However, the Committee is already established and funded by assessments levied on handlers covered under the Federal cranberry marketing order. Taxpayer money is not used to pay Committee expenses.

This commenter further stated that importers should not have to file forms quarterly, but every five years. The submission of reports every five years would not help the Committee obtain complete data. Cranberries are produced every year and the Committee needs this information annually to make sound recommendations to USDA. Other statements made by this commenter were not germane to the proposed rule and are not addressed in this final rule.

The cranberry product importer opposes the proposal for five reasons: (1) It violates the spirit of free trade and the North American Free Trade Agreement (NAFTA); (2) it proposes the release of proprietary information; (3) it duplicates efforts and information already available; (4) there are no benefits for non-members of the Committee; and (5) the real issue is surplus versus new markets, not obtaining more information.

The commenter believes that this action violates free trade and the NAFTA agreement. USDA believes that such action would promote free trade and the initiatives under NAFTA by providing access to more complete and accurate cranberry inventory for use in conducting business in the domestic and world markets.

The commenter also asserts that this action will release proprietary information by divulging information about their product sources and acquisitions, inventory levels and sales, and open their premises to authorized agents of the Committee. The requested information will be collected by the Committee under the authority of the Agricultural Marketing Agreement Act of 1937 (Act). The Act does not allow proprietary and confidential business information to be released. Information distributed by the Committee would be released in aggregate numbers to protect the confidentiality of the firms reporting information to the Committee. The information will be used for the purpose of deciding whether volume regulation would be necessary for a particular cranberry crop.

This commenter further believes that this action is duplicative in nature since the U.S. Bureau of Customs and Border Protection Service (Customs) and the U.S. Food and Drug Administration

(FDA) already has this information. The Committee has had difficulty obtaining information on cranberries and cranberry products regulated under the order from Customs and FDA. The cranberry marketing order regulates the *Vaccinium macrocarpon* and *Vaccinium oxycoccus* cranberry species. However, there are over 15 different cranberry varieties within the two cranberry species. Customs Service and FDA do not separate the varietal types in their reports, they combine all of the varieties into one category. Therefore, this action requesting cranberry information and data from handlers, producer-handlers, processors, brokers, and importers is not duplicative in nature, and is needed by the Committee to further program objectives.

This commenter further believes that since it does not have members on the Committee, it would receive no benefits from this action and that the Committee should be developing programs to market more cranberries to absorb the excess production. The Committee operates generic domestic and export promotional programs that are designed to increase the demand and sales of cranberries that benefit the cranberry industry overall. Cranberry exporters and importers benefit from such activities whether or not they are Committee members. Moreover, all meetings of the Committee are public meetings and all interested persons can attend to express the views. Information on meeting times and locations can be obtained from the Committee and USDA. The export promotion program has been in operation for several years and focuses on several export markets. The domestic program is in the early development stages. The Committee recognizes that the industry needs to develop new markets and to expand existing markets for its increasing production. Marketing promotion programs provide a means to accomplish these objectives.

Accordingly, no changes will be made to the rule based on the comments received.

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.

This action requires a collection of information. These information collection requirements are discussed in the following section.

### Paperwork Reduction Act

In compliance with Office of Management and Budget (OMB) regulations (5 CFR part 1320) which implement the Paperwork Reduction Act of 1995 (Pub. L. 104-13), the information collection and recordkeeping requirements under the data collection, reporting, and recordkeeping requirements applicable to cranberries not subject to the cranberry marketing order have been previously approved by OMB and assigned OMB number 0581-0222.

Data collection, reporting and recordkeeping burdens are necessary for developing statistical data for maintenance of this program. The forms require information that is readily available from handlers, producer-handlers, processors, brokers and importers records which can be provided without data processing equipment or trained statistical staff.

It is estimated that it will take each person or entity approximately 20 minutes to complete each form. One of these forms, (Importer Cranberry Inventory Report Form; Form ICIR A-D) directs importers and brokers to indicate the name, address, variety acquired, amount sold to and received by brokers, processors, and handlers, and the beginning and ending inventories of cranberries held by the importer. The second form, (Handler/Processor Cranberry Inventory Report Form; Form HPCIR A-D) directs handlers, producer-handlers, and processors to indicate the name, address, variety acquired, domestic/foreign sales, acquisitions, and beginning and ending inventories. The forms will be required to be filed four times a year.

These forms were designed to capture the type of information the Committee needs on inventory and sales data for the entire cranberry industry. If all of the entities complete each form, it is estimated that the total annual burden on the respondents would be 1 hour and 20 minutes or a total of 174.66 hours. The regulations also require the retention of information for a total of three years.

For the purposes of checking and verifying reports filed under the regulations hereinafter, provisions are included which allows USDA or the Committee, through duly authorized agents, to have access to any premises where cranberries and cranberry products may be held. Authorized agents, at any time during regular business hours, will be permitted to inspect any cranberries and cranberry products held and any and all records with respect to the acquisition, holding

or disposition of any cranberries and cranberry products which may be held or which may have been disposed of by that entity. All reports and records furnished or submitted by handlers, producer-handlers, processors, brokers, and importers to the Committee which include data or information constituting a trade secret or disclosing the trade position or financial condition, or business operations from whom received, will be in the custody and control of the authorized agents of the Committee, who will disclose such information to no person other than USDA.

Failure on the part of handlers, producer-handlers, processors, brokers, and importers to comply with the data collection and recordkeeping requirements could lead to enforcement action, including the levying of fines against the violating person or entity. Any violation of this regulation is subject to a penalty levied under 8c(14) of the Act. False representation to an agency of the United States in any matter, knowing it to be false, is a violation of 18 U.S.C. 1001 which provides for a fine or imprisonment or both.

The reporting requirements are expected to help the entire cranberry industry. While this rule increases reporting and recordkeeping requirements on affected entities, the benefits of this rule, however, could be substantial. By implementing this rule, the Committee will have access to more complete acquisition, sales, and inventory data and be able to make recommendations based on more detailed information. This, in turn, could lead to more effective marketing decisions and higher returns for producers and non-regulated entities.

After consideration of all relevant matter presented, including the comments received 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.

### List of Subjects in 7 CFR Part 926

Cranberries and cranberry products, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, 7 CFR Part 926 is added to read as follows:

### **PART 926—DATA COLLECTION, REPORTING AND RECORDKEEPING REQUIREMENTS APPLICABLE TO CRANBERRIES NOT SUBJECT TO THE CRANBERRY MARKETING ORDER**

Sec.  
926.1 Secretary.

- 926.2 Act.
- 926.3 Person.
- 926.4 Cranberries.
- 926.5 Fiscal period.
- 926.6 Committee.
- 926.7 Producer.
- 926.8 Handler.
- 926.9 Handle.
- 926.10 Acquire.
- 926.11 Processed cranberries or cranberry products.
- 926.12 Producer-handler.
- 926.13 Processor.
- 926.14 Broker.
- 926.15 Importer.
- 926.16 Reports.
- 926.17 Reporting requirements.
- 926.18 Records.
- 926.19 Confidential information.
- 926.20 Verification of reports and records.
- 926.21 Suspension or termination.

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

#### § 926.1 Secretary.

*Secretary* means the Secretary of Agriculture of the United States or any officer or employee of the United States Department of Agriculture who is, or who may hereafter be authorized to act in her/his stead.

#### § 926.2 Act.

*Act* means Public Act No. 10, 73d Congress [May 12, 1933], as amended, and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, as amended (Secs. 1-19, 48 Stat. 31, as amended; 7 U.S.C. 601 *et seq.*).

#### § 926.3 Person.

*Person* means an individual, partnership, corporation, association, or any other business unit.

#### § 926.4 Cranberries.

*Cranberries* means all varieties of the fruit *Vaccinium Macrocarpon* and *Vaccinium oxycoccus*, known as cranberries.

#### § 926.5 Fiscal period.

*Fiscal period* is synonymous with fiscal year and crop year and means the 12-month period beginning September 1 and ending August 31 of the following year.

#### § 926.6 Committee.

*Committee* means the Cranberry Marketing Committee, which is hereby authorized by USDA to collect information on sales, acquisitions, and inventories of cranberries and cranberry products under this part. The Committee is established pursuant to the Federal cranberry marketing order regulating the handling of 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 (7 CFR part 929).

#### § 926.7 Producer.

*Producer* is synonymous with grower and means any person who produces cranberries for market and has a proprietary interest therein.

#### § 926.8 Handler.

*Handler* means any person who handles cranberries and is not subject to the reporting requirements of Part 929.

#### § 926.9 Handle.

*Handle* means to can, freeze, dehydrate, acquire, sell, consign, deliver, or transport (except as a common or contract carrier of cranberries owned by another person) fresh or processed cranberries produced within or outside the United States or in any other way to place fresh or processed cranberries into the current of commerce within or outside the United States. This term includes all initial and subsequent handling of cranberries or processed cranberries up to, but not including, the retail level.

#### § 926.10 Acquire.

*Acquire* means to obtain cranberries by any means whatsoever for the purpose of handling cranberries.

#### § 926.11 Processed cranberries or cranberry products.

*Processed cranberries or cranberry products* means cranberries which have been converted from fresh cranberries into canned, frozen, or dehydrated cranberries or other cranberry products by any commercial process.

#### § 926.12 Producer-handler.

*Producer-handler* means any person who is a producer of cranberries for market and handles such cranberries.

#### § 926.13 Processor.

*Processor* means any person who receives or acquires fresh or frozen cranberries or cranberries in the form of concentrate from handlers, producer-handlers, importers, brokers or other processors and uses such cranberries or concentrate, with or without other ingredients, in the production of a product for market.

#### § 926.14 Broker.

*Broker* means any person who acts as an agent of the buyer or seller and negotiates the sale or purchase of cranberries or cranberry products.

#### § 926.15 Importer.

*Importer* means any person who causes cranberries or cranberry products produced outside the United States to be brought into the United States with

the intent of entering the cranberries or cranberry products into the current of commerce.

#### § 926.16 Reports.

(a) Each handler, producer-handler, processor, broker, and importer engaged in handling or importing cranberries or cranberry products who is not subject to the reporting requirements of the Federal cranberry marketing order, (7 CFR Part 926) shall, in accordance with § 926.17, file promptly with the Committee reports of sales, acquisitions, and inventory information on fresh cranberries and cranberry products using forms supplied by the Committee.

(b) Upon the request of the Committee, with the approval of the Secretary, each handler, producer-handler, processor, broker, and importer engaged in handling or importing cranberries or cranberry products who is not subject to the Federal cranberry marketing order (7 CFR Part 926) shall furnish to the Committee such other information with respect to fresh cranberries and cranberry products acquired and disposed of by such entity as may be necessary to meet the objectives of the Act.

#### § 926.17 Reporting requirements.

Handlers, producer-handlers, importers, processors, and brokers not subject to the Federal cranberry marketing order (7 CFR Part 926) shall be required to submit four times annually, for each fiscal period reports regarding sales, acquisitions, movement for further processing, and dispositions of fresh cranberries and cranberry products using forms supplied by the Committee. An Importer Cranberry Inventory Report Form shall be required to be completed by importers and brokers. This report shall indicate the name, address, variety acquired, the amount sold to and received by brokers, processors, and handlers, and the beginning and ending inventories of cranberries held by the importer for each applicable fiscal period. A Handler/Processor Cranberry Inventory Report Form shall be completed by handlers, producer-handlers, and processors and shall indicate the name, address, variety acquired, domestic/foreign sales, acquisitions, and beginning and ending inventories.

#### § 926.18 Records.

Each handler, producer-handler, processor, broker, and importer shall maintain such records of all fresh cranberries and cranberry products acquired, imported, handled, withheld from handling, and otherwise disposed of during the fiscal period to

substantiate the required reports. All such records shall be maintained for not less than three years after the termination of the fiscal year in which the transactions occurred or for such lesser period as the Committee may direct.

#### § 926.19 Confidential information.

All reports and records furnished or submitted pursuant to this part which include data or information constituting a trade secret or disclosing the trade position or financial condition, or business operations from whom received, shall be in the custody and control of the authorized agents of the Committee, who shall disclose such information to no person other than the Secretary.

#### § 926.20 Verification of reports and records.

For the purpose of assuring compliance and checking and verifying records and reports required to be filed by handlers, producer-handlers, processors, brokers, and importers, USDA or the Committee, through its duly authorized agents, shall have access to any premises where applicable records are maintained, where cranberries and cranberry products are received, acquired, stored, handled, and otherwise disposed of and, at any time during reasonable business hours, shall be permitted to inspect such handler, producer-handler, processor, broker, and importer premises, and any and all records of such handlers, producer-handlers, processors, brokers, and importers. The Committee's authorized agents shall be the manager of the Committee and other staff under the supervision of the Committee manager.

#### § 926.21 Suspension or termination.

The provisions of this part shall be suspended or terminated whenever there is no longer a Federal cranberry marketing order in effect.

Dated: January 5, 2005.

**Kenneth C. Clayton,**

*Associate Administrator, Agricultural Marketing Service.*

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## NUCLEAR REGULATORY COMMISSION

### 10 CFR Part 30

RIN 3150-AH06

#### Security Requirements for Portable Gauges Containing Byproduct Material

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Final rule.

**SUMMARY:** The Nuclear Regulatory Commission (NRC) is amending its regulations governing the use of byproduct material in specifically licensed portable gauges. The final rule requires a portable gauge licensee to use a minimum of two independent physical controls that form tangible barriers to secure portable gauges from unauthorized removal whenever the portable gauges are not under the control and constant surveillance of the licensee. The primary intent of this rulemaking is to increase licensees' control of portable gauges to reduce the opportunity for unauthorized removal or theft.

**EFFECTIVE DATE:** This final rule is effective on July 11, 2005.

**FOR FURTHER INFORMATION CONTACT:** Lydia Chang, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, telephone (301) 415-6319, e-mail [lwc1@nrc.gov](mailto:lwc1@nrc.gov).

#### SUPPLEMENTARY INFORMATION:

##### Background

Portable gauges are devices containing licensed material that are used to determine physical properties (such as density and moisture content of soil, concrete, and other materials) in a field setting. The most commonly used portable gauges contain two encapsulated sources of radioactive material. One source is a sealed gamma source containing 0.30 to 0.37 gigabecquerels (8 to 10 millicuries) of cesium-137 (Cs-137) used to measure density. Another source is a sealed neutron source containing 1.48 to 1.85 gigabecquerels (40 to 50 millicuries) of americium-241/beryllium (Am-241/Be) used to measure moisture content. Other sources have also been utilized in portable gauges. When not in use, portable gauges are generally stored in a permanent storage location within a licensed facility. Sometimes, portable gauges are stored at a jobsite, at a temporary storage location, or on a vehicle. When transporting a portable gauge in a vehicle, the gauge is often placed in a transportation case, and then is secured in or onto the vehicle.

Under the authority of the Atomic Energy Act of 1954, NRC, together with the 33 Agreement States, regulates byproduct material used in portable gauges. There are approximately 1100 NRC specific licensees for portable gauges in non-Agreement States and approximately 4000 State specific licensees for portable gauges in Agreement States. There are an estimated 22,000 to 25,000 portable gauges in use in the United States.

Subpart I of 10 CFR part 20 addresses storage and control of licensed material. Specifically, § 20.1801, "Security of stored material," requires licensees to secure from unauthorized removal or access licensed materials that are stored in controlled or unrestricted areas. Section 20.1802, "Control of material not in storage," requires licensees to control and maintain constant surveillance of licensed material that is in a controlled or unrestricted area and that is not in storage. Despite these requirements, the theft of portable gauges continues at a rate of approximately 50 gauges per year with a less than 50-percent recovery rate, based on reports in NRC's Nuclear Materials Events Database (NMED). More than two-thirds of the stolen gauges were taken from vehicles parked outdoors. In most of these incidents, the gauge was in a U.S. Department of Transportation (DOT) "Type A" transportation case, which was then secured with a metal chain to the open bed of a pickup truck. Frequently, the chain was cut or the transportation case was broken, and then the gauge was stolen. NRC has issued several "Information Notices" to increase licensees' awareness of security concerns regarding portable gauges. However, the yearly number of reported incidents has not changed in response to these notices.

Although the amount of radioactive material used in a portable gauge is relatively small, and the radioactive material is encapsulated in stainless steel, unauthorized removal of portable gauges still poses a potential public health and safety concern. A portable gauge that is not under the control of a licensee poses a potential radiation hazard to individuals that may come in close contact with the source. It also creates a concern if the portable gauge that is removed without authorization is abandoned, inadvertently recycled, or used inappropriately.

#### Discussion

To reduce the potential risk to public health and safety, a working group with participation of personnel from the Agreement States of Florida and