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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 930

[Docket No. AMS-FV-08-0066; FV08-930-2 IFR]

#### Tart Cherries Grown in the States of Michigan, et al.; Change to Fiscal Period

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

**ACTION:** Interim final rule with request for comments.

**SUMMARY:** This rule changes the fiscal period prescribed under the tart cherry marketing order (order). The order regulates the handling of tart cherries grown in Michigan, New York, Pennsylvania, Oregon, Utah, Washington and Wisconsin and is administered locally by the Cherry Industry Administrative Board (Board). The fiscal period is changed from July 1 through June 30 to October 1 through September 30. This will improve the administration and the fiscal operation of the Board.

**DATES:** Effective date December 16, 2008. Comments received by February 13, 2009 will be considered prior to issuance of a final rule.

**ADDRESSES:** Interested persons are invited to submit written comments concerning this rule. Comments must be sent to the Docket Clerk, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250-0237; Fax: (202) 720-8938, or Internet: <http://www.regulations.gov>. All comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be available for public inspection in the Office of the Docket Clerk during regular

business hours or can be viewed at: <http://www.regulations.gov>.

#### FOR FURTHER INFORMATION CONTACT:

Patricia A. Petrella or Kenneth G. Johnson, Marketing Order Administration Branch, F&V, AMS, USDA, Unit 155, 4700 River Road, Riverdale, Maryland 20737, telephone: (301) 734-5243; Fax: (301) 734-5275 or E-mail at [Patricia.Petrella@usda.gov](mailto:Patricia.Petrella@usda.gov) or [Kenneth.Johnson@usda.gov](mailto:Kenneth.Johnson@usda.gov).

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 Order No. 930 (7 CFR part 930) (order) regulating the handling of tart cherries grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin. 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 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.

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. A handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on

the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This action changes the fiscal period from July 1 through June 30 to October 1 through September 30. This action was unanimously recommended by the Cherry Industry Administrative Board (Board) at its June 19, 2008 meeting.

Section 930.7 of the order currently defines fiscal period as the 12-month period beginning on July 1 of any year and ending on June 30 of the following year or such other period as the Board, with approval of the Secretary, may establish.

According to the Board, the July through June fiscal period is inconsistent with needs of the industry, the Board's changed activities, and its cash flow.

The Board's and industry's activities have changed since the order's inception. Initially, Board's activities consisted primarily of the administrative duties associated with the marketing order, and relatively moderate expenditures were incurred for that purpose. The Board and industry's focus has recently changed to include promotional activities, and annual expenditures have increased significantly. The majority of the Board's expenditures are now used on promotional activities. Changing the Board's fiscal period allows the Board to better coordinate with its promotion activities and to make its fiscal cycle consistent with its major program expenditures.

In addition, changing the fiscal period brings the Board's collection of assessment revenues into line with program expenses. Handler assessments, which fund program expenses, are collected in October. This changed fiscal period thus enables the Board to receive its funding at the beginning of its fiscal period so the revenue to fund program expenses is available when needed. The Board believes it can increase its operational efficiency by making its fiscal period consistent with its promotional activities. An October through September fiscal period also brings revenue collection in line with funding needs of the program. Therefore, changing the fiscal period from July through June to October through September will improve the administration and fiscal operation of the Board.

### The Regulatory Flexibility Act and Effects on Small Businesses

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 initial 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 are defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of less than \$7,000,000, and small agricultural producers are defined as those having annual receipts of less than \$750,000.

A majority of the producers and handlers are considered small entities under SBA's standards. There were 37 handlers operating during the 2007–2008 season, the last completed crop year. Eight of these handlers, representing 20.5 percent of all handlers and 69.3 percent of production, processed more than 10 million pounds of cherries. Six handlers, representing 15.4 percent of all handlers and 16.9 percent of production, processed more than 5 million pounds and less than 10 million pounds of cherries. Seven handlers, representing 17.9 percent of all handlers and 9.6 percent of production, processed between 2.1 and 5 million pounds of cherries. The 16 remaining handlers, representing 43.2 percent of all handlers and 4.1 percent of production, processed less than 2 million pounds of cherries. Handlers accounting for 10 million pounds or more cherries would be classified as large businesses. Thus, a majority of tart cherry handlers (79.5 percent by number) could be classified as small entities.

During the 3-year period 2005–2007, production of tart cherries averaged 259 million pounds. Dividing the total production by the average number of growers, the average grower produces about 386,000 pounds of tart cherries

annually. With grower returns of about 25 cents per pound, average annual revenues would be \$96,497. At 25 cents per pound, a grower would have to produce 3 million pounds of tart cherries to reach the \$750,000 receipt threshold to be classified as a large entity using the SBA definition for agricultural producers. According to Cherry Industry Administrative Board data, not more than 9 growers (1 percent of the average number of growers) produced 3 million pounds or more of tart cherries during the 2005–2007 crop years, and those growers would be classified as large. The remaining 99 percent of growers would be classified as small entities.

This action changes the fiscal period from July 1 through June 30 to October 1 to through September 30. This action is administrative in nature and will have little impact on producers or handlers. It will allow the Board to increase its operational efficiency by making its fiscal period consistent with its promotional activities. It will also bring revenue collection in line with funding needs of the program. Changing the fiscal period from July through June to October through September will improve the administration and fiscal operation of the Board.

One alternative to this action would be to continue the status quo. However, this would not improve program administration inconsistencies in the Board's fiscal operations.

This rule will not impose any additional reporting or recordkeeping requirements on either small or large tart cherry handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

AMS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

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

Further, the Board's meeting was widely publicized and all Board members and alternate Board members, representing both large and small entities, were invited to attend the meeting and participate in Board deliberations. The Board itself is composed of 19 members, of which 18 members are growers and handlers and one represents the public. Also, the Board has a number of appointed

committees to review certain issues and make recommendations. Finally, interested persons are invited to submit comments on this interim final rule, including the regulatory and informational impacts of this action on small businesses.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at the following Web site: <http://www.ams.usda.gov/AMSV1.0/ams.fetch>

*TemplateData.do?template=TemplateN&page=MarketingOrdersSmallBusinessGuide*. 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 rule invites comments on changing the fiscal period prescribed under the tart cherry marketing order. Any comments received will be considered prior to finalization of this rule.

After consideration of all relevant matter presented, including the information and recommendation submitted by the Board, and other available information, it is hereby found that this interim final rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it is also found and determined upon good cause that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice prior to putting this rule into effect and that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because: (1) This rule has little or no effect on industry operations; (2) this rule improves program administration and fiscal operations of the Board; (3) the Board unanimously recommended the change at a public meeting and interested parties had an opportunity to provide input; and (4) this rule provides a 60-day comment period and any comments will be considered prior to finalization of this rule.

### List of Subjects in 7 CFR Part 930

Tart 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. Section 930.107 is added to read as follows:

**§ 930.107 Fiscal period.**

Pursuant to § 930.7, fiscal period shall mean the period beginning October 1 and ending September 30 of each year.

Dated: December 9, 2008.

**James E. Link,**

*Administrator, Agricultural Marketing Service.*

[FR Doc. E8–29599 Filed 12–12–08; 8:45 am]

BILLING CODE 3410–02–P

**DEPARTMENT OF AGRICULTURE****Agricultural Marketing Service****7 CFR Part 946**

[Docket No. AMS–FV–08–0036; FV08–946–1 FIR]

**Irish Potatoes Grown in Washington; Relaxation of Handling and Import Regulations**

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

**ACTION:** Final rule.

**SUMMARY:** The Department of Agriculture (USDA) is adopting, as a final rule, without change, an interim final rule relaxing the size requirement prescribed under the Washington potato marketing order. The marketing order regulates the handling of Irish potatoes grown in Washington, and is administered locally by the State of Washington Potato Committee (Committee). This rule continues in effect the action that relaxed the minimum size required for all fresh market red, yellow fleshed, and white types of potatoes from 1 inch (25.4 mm) to ¾ inch (19.1 mm) in diameter, if the potatoes otherwise meet the requirements of U.S. No. 1 grade. This rule also continues in effect the action that relaxed the minimum size requirement from July 1 through September 30 of each year for imported red-skinned, round type potatoes under the import regulations as required by section 8e of the Agricultural Marketing Agreement Act of 1937. The Committee recommended this change in response to the recently revised U.S. Standards

for Grades of Potatoes which added a definition for Creamer potatoes. This change is intended to provide potato handlers with greater marketing flexibility, growers with increased returns, consumers with a greater supply of small potatoes, and to bring the section 8e potato import regulation into conformity with the marketing order.

**DATES:** *Effective Date:* January 14, 2009.

**FOR FURTHER INFORMATION CONTACT:**

Teresa Hutchinson or Gary Olson, Northwest Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, Telephone: (503) 326–2724, Fax: (503) 326–7440, or e-mail: [Teresa.Hutchinson@usda.gov](mailto:Teresa.Hutchinson@usda.gov) or [GaryD.Olson@usda.gov](mailto:GaryD.Olson@usda.gov).

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 Order No. 946, as amended (7 CFR part 946), regulating the handling of Irish potatoes grown in Washington, 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.”

This rule is also issued under section 8e of the Act, which provides that whenever certain specified commodities, including potatoes, are regulated under a Federal marketing order, imports of these commodities into the United States are prohibited unless they meet the same or comparable grade, size, quality, or maturity requirements as those in effect for the domestically produced commodities. Section 8e also provides that whenever two or more marketing orders regulating the same commodity produced in different areas of the United States are concurrently in effect, a determination must be made as to which of the areas produces the commodity in most direct competition with the imported commodity. Imports must meet the same or comparable requirements established for that particular area. The requirements for red-skinned, round type potatoes imported from July 1 through September 30 are based on the Washington potato marketing order requirements.

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.

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. A handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA’s ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

There are no administrative procedures which must be exhausted prior to any judicial challenge to the provisions of import regulations issued under section 8e of the Act.

This rule continues in effect the action that relaxed the size required for all fresh market red, yellow fleshed, and white types of potatoes produced in Washington State from 1 inch (25.4 mm) to ¾ inch (19.1 mm) minimum, if the potatoes otherwise meet the requirements of U.S. No. 1 grade. This change is intended to provide potato handlers with greater marketing flexibility, growers with increased returns, and consumers with a greater supply of small potatoes. This rule also continues in effect the action that relaxed the minimum size requirement from July 1 through September 30 of each year for imported red-skinned, round type potatoes under the import regulations as required by section 8e of the Agricultural Marketing Agreement Act of 1937. This rule will not affect the current import requirements for all other round type or long type potatoes.

Section 946.52 of the order authorizes the establishment of grade, size, quality, or maturity regulations for any variety or varieties of potatoes grown in the production area. Section 946.52 also authorizes the regulation of the size, capacity, weight, dimensions, pack, and marking or labeling of the container, or