federal register

Wednesday
April 22, 1998

Part III

Department of Agriculture

Agricultural Marketing Service

7 CFR Part 930

Tart Cherries Grown in the States of Michigan, et al.; Temporary Suspension of a Proviso for Exporting Juice and Juice Concentrate; Establishment of Rules and Regulations Concerning Exemptions From Certain Order Provisions; Establishment of Regulations for Handler Diversion; Issuance of Grower Diversion Certificates; Rules

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 930

[Docket No. FV97–930–4 FIR]

Tart Cherries Grown in the States of Michigan, et al.; Temporary Suspension of a Proviso for Exporting Juice and Juice Concentrate; Establishment of Rules and Regulations Concerning Exemptions From Certain Order Provisions; and Establishment of Regulations for Handler Diversion

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: The Department of Agriculture (Department) is adopting, as a final rule, with a change, the provisions of an interim final rule implementing provisions of the Federal tart cherry marketing order (order) by establishing regulations concerning handler diversion, including diversion credit for exempt uses, and by defining certain terms relating to exemptions. In addition, this rule temporarily suspends language in a provision of the order which results in allowing handlers to receive diversion credit for exporting juice and juice concentrate to eligible countries for the 1997–98 crop year only. Handlers handling cherries harvested in a regulated district may fulfill any restricted percentage requirement when volume regulation is in effect by diverting cherries or cherry products rather than by placing them in an inventory reserve.

EFFECTIVE DATE: May 22, 1998.

FOR FURTHER INFORMATION CONTACT: Patricia A. Petrella or Kenneth G. Johnson, Marketing Order Administration Branch, F&V, AMS, USDA, room 2525–S, P.O. Box 96456, Washington, DC 20090–6456, telephone: (202) 720–5053, Fax: (202) 720–5698. Small businesses may request information on compliance with this regulation by contacting: Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, P.O. Box 96456, room 2525–S, Washington, DC 20090–6456; telephone (202) 720–2491; Fax: (202) 720–5698.

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Agreement and Order No. 930 (7 CFR part 930) regulating the handling of tart cherries grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin, hereinafter referred to as the ''order.'' This 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 (Department) 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 the Secretary 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 the Secretary 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 the Secretary's ruling on the petition, provided an action is filed not later than 20 days after date of the entry of the ruling.

The tart cherry marketing order was recently promulgated and the Cherry Industry Administrative Board (Board) met March 12–13, June 26–27, and September 11–12, 1997, to establish, and recommend to the Secretary, rules and regulations to implement the order authorities, and to consider volume regulation for this crop year. On or about July 1 of each crop year the Board is required to review sales data, inventory data, crop forecasts and market conditions in order to establish an optimum supply volume which is then used in calculating a preliminary free market tonnage percentage. In the event that a restricted percentage is recommended and imposed, handler diversion is one method under the order that handlers can utilize to meet restricted percentage requirements. The Board established and announced the optimum supply level and preliminary free and restricted percentages for the 1997–98 crop year as required by the order. On September 11–12, 1997, the Board reviewed its marketing policy and previous recommendations, and recommended a 55 percent final free market tonnage and a restricted percentage of 45 percent for this crop year.

All handlers were notified of this recommendation pursuant to § 930.50(h) of the order. Pursuant to § 930.50, final percentages for volume regulation are required to be recommended to the Secretary by September 15. Whenever it is found by the Secretary that it would be appropriate to set free market tonnage and restricted percentages for cherries acquired by handlers, volume regulations would be issued through informal rulemaking.

This rule establishes procedures for handler diversion. 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. Volume regulation is intended to help the tart cherry industry stabilize supplies and prices in years of excess production. The volume regulation provisions of the order provide for a combination of processor owned inventory reserves and grower or handler diversion of excess tart cherries. Reserve cherries may be released for sale into commercial outlets when the current crop is not expected to fill demand. Under certain circumstances, such cherries may also be used for charity, experimental purposes, nonhuman use, and other approved purposes.

Section 930.59(b) of the order provides for the designation of allowable forms of handler diversion. These include: uses exempt under § 930.62; contribution to a Board approved food bank or other approved charitable organization; acquisition of grower diversion certificates that have been issued in accordance with § 930.58; or other uses, including diversion by destruction of the cherries at the handler's facilities.

A new § 930.159 is added to the rules and regulations concerning handler diversion. One method of diversion available to handlers is by destruction of cherries at the handler's facility. Disposal at the handler's facility will take place prior to placing the product into the processing line. This is to ensure that the product diverted is not simply an undesirable by-product of processing. Handlers electing to divert cherries or cherry products must first notify the Board and submit a plan for approval. Such notification and plan shall include an agreement that diversion will take place under the supervision of the USDA Processed Products Inspection Service or Board employee inspectors, and that the costs of such supervision are to be paid by the handler. USDA inspectors will

supervise diversion of cherry products at the current hourly rate of $41.00, which is subject to change, under USDA's inspection fee schedule (7 CFR § 54.42). Board employees will supervise diversion at the same rate. Diversion may also be accomplished by handlers donating cherries to charitable organizations, utilizing cherries in exempt outlets, or redeeming grower diversion certificates obtained from growers who have diverted cherries by non-harvest, and who have been issued diversion certificates by the Board in accordance with rules and regulations governing the issuance of grower diversion certificates in § 930.100. Diversion by means other than destruction of cherries at handlers' facilities would also be subject to supervision as found necessary by the Board. Fees would be charged as discussed above.

Once diversion is satisfactorily accomplished, handlers will receive diversion certificates stating the weight of cherries diverted. Such diversion certificates can be used to satisfy handlers' restricted percentage obligations. Cherries and cherry products which have been diverted shall not be subject to assessment.

A handler will have one crop year to fulfill the diversion plan which was submitted and approved by the Board. The details of the plan shall show, among other things, the name and address of the handler, the total product processed at-plant, cherries diverted at-plant, in-orchard diversion certificates redeemed, and anticipated donations to charitable outlets. A handler will also have one crop year to dispose of cherries or cherry products for exempt uses approved by the Board, unless granted a renewal. By February 5, 1998, for the 1997 crop year only, and November 1 for subsequent crop years, each handler must submit on Board Form No. 4 the details of how such handler will satisfy the restricted percentage obligation. The Board may extend this date in individual cases pursuant to a written request showing good cause why the plan cannot be provided by the due date. The November 1 date corresponds with the date that grower diversion certificates are no longer valid (for the 1997–98 crop year this date is February 5, 1998). Other reports detailing the inventory reserve summary were also due by February 5, 1998, for the 1997 crop year only, and November 1 for subsequent crop years. Any information obtained by the Board which is of a confidential and/or proprietary nature would be protected from disclosure pursuant to section 930.73 of the order.

Section 930.59(b) which specifies the diversion options for handlers, includes uses exempt under § 930.62. Section 930.62 provides that the Board, with the approval of the Secretary, may exempt from the provisions of §§ 930.41, 930.44, 930.51, 930.53, and 930.55 through 930.57 cherries which are diverted in accordance with § 930.59, which are used for new product and new market development, which are used for experimental purposes, or which are 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. One such use which may be designated as an exempt use and granted diversion credit is the exportation of cherries. Tart cherries used for exempt purposes are not subject to certain marketing order provisions. These provisions include assessment, quality control, volume regulation, and reserve provisions.

For the purposes of the regulation concerning exempt uses, the Board has recommended that certain terms be defined. Also, the Board recommended that handlers who use cherries or cherry products for approved exempt purposes receive diversion credit pursuant to section 930.59(b).

Thus, a new section 930.162 was added to the rules and regulations defining exempt use terms and authorizing exemptions under the marketing order. Terms defined include new product development, new market development, development of export markets, and experimental purposes.

The first term defined is ''new product development.'' New product development includes the production or processing of a tart cherry product using a technique not presently being utilized commercially in the tart cherry industry. For example, a handler may ask for an exemption for product such as ground meat in combination with raw tart cherries to form a leaner meat product. The Board determined that when a new product is commercially viable, which is defined as the time when total industry utilization for the product exceeds 2 percent of the five year average production of tart cherries, the exemption shall terminate. Therefore, the Board has recommended that when the utilization of the product exceeds 2 percent of the five year average production, the product has received consumer acceptance and should no longer be eligible for a new product development exemption.

The second term which is defined is ''new market development.'' Under the definition, new market development means the development of markets for cherry products which are not commercially established markets and which are not competitive with commercial outlets presently utilized by the tart cherry industry. For example, a handler may seek to establish sales of cherry preserves to India or China, currently undeveloped markets. The Board determined that a new market becomes commercially established when the total industry utilization in that market exceeds 2 percent of the five year average production of tart cherries.

The third term which is defined is ''development of export markets.'' This is defined as exports to countries other than Canada, Mexico and Japan, including the development of sales for new or different tart cherry products or the expansion of sales for existing tart cherry products. An example of development of sales for new or different tart cherry products could be a handler seeking to establish sales of dried cherries in Germany, which is primarily a hot pack market. Board members and meeting participants discussed the favorable export market this season. Handlers have exports to many countries, including Italy, France, Belgium, Germany and the Netherlands and have enjoyed a significant increase in volume of exports into these countries. Handlers have indicated that exports of tart cherry products have increased significantly over previous years' exports. Board members indicated that last year's exports totaled about 10 million pounds. This year, handlers are expected to experience the largest volume of exports on record, estimated at up to 50 million pounds. Handlers have been able to expand existing export markets and establish new markets for the future. Board members also commented that hot pack product (canned tart cherries) have been shipped to export markets that have never received such product before. Contributing to their success is the excellent quality of this year's crop. Growers and handlers have experienced high quality fruit due to favorable growing conditions for tart cherries this season. This high quality fruit has resulted in high quality products which are very competitive in export markets. The availability of such high quality cherry products increases the likelihood of maintaining such markets in future seasons. Handlers also have experienced a growth in IQF (Individually Quick Frozen) sales in the export market this season. If handlers are not able to use this option, more product might be destroyed to avoid the possibility of processing and storage costs associated

with placing cherries into an inventory reserve. Exports to Mexico, Canada, and Japan are not included in this exemption because, according to the Board, tart cherry markets are well established in those countries.

The fourth term which is defined is ''experimental purposes.'' Uses for experimental purposes include preliminary and/or developmental activities, such as a handler working with cereal companies to develop a cereal using dried cherries. Such experimental purposes should be intended to result in new products, new applications and/or new markets for existing tart cherry products. Any exemption for experimental purposes shall be limited in scope, duration, and volume which the applicant shall specify at the time a request for exemption is made. In no case shall an exemption for experimental purposes last longer than five years or exceed 100,000 pounds raw product equivalent per handler of tart cherries during the duration of the experiment. The Board has recommended that the five year or 100,000 pound raw product equivalent per handler limits are sufficient to determine whether such cherries for experimental purposes can be developed into new products or uses.

To qualify for an exemption under § 930.62, a handler must apply to the Board for a new exemption or for renewal of an existing exemption by November 1 for the next succeeding year. Handlers should have applied for an exemption through February 5, 1998, for the 1997 crop year only, and by November 1 for subsequent crop years. These dates were changed from the Board's recommendation of June 1 in order to provide handlers ample time to harvest and assess their crop each year. When applying to the Board for an exemption, the handler must detail the nature of the product or market, how it differs from current, existing products and/or markets and the estimated short and long term sales volume for the exemption. In addition, in order to obtain diversion credit for cherries used for exempt purposes, the application must also contain an agreement that the proposed exempt use diversion is to be carried out under the supervision of the Board, and that the cost of any such supervision that is needed is to be paid by the applicant. The fees for such USDA or Board supervision, as previously stated, will be the current hourly rate of $41.00, which is subject to change, under USDA's inspection fee schedule (7 CFR 54.42). The information which is provided will allow Board staff to assess the request for exemption and render a determination concerning its approval. Any information received by the Board which is of a confidential and/or proprietary nature would be protected from disclosure pursuant to § 930.73 of the order.

The Board discussed providing assistance to its staff with reviewing applications pertaining to exemptions. The Board recommended that a subcommittee be formed to assist staff members to ensure that exemptions are properly reviewed and granted. The Board suggested that a subcommittee of three persons, which could include the manager, a public member and one industry member who is not on the Board, be established. Handlers whose requests for exemption or renewal of exemption are denied would be able to appeal such denial to the Deputy Administrator, Fruit and Vegetable Programs.

Each handler that is granted an exemption must submit to the Board an annual progress report, due May 1 of each year. The progress report shall include the results of the exemption activity (comparison of intended activity with actual activity) for the year in its entirety, the volume of exempted fruit, an analysis of the success of the exemption program, and such other information the Board may request.

As previously discussed, the Board has recommended that exports to countries other than Canada, Mexico, and Japan be exempted pursuant to § 930.62. The Board has also recommended that diversion credit be granted for such exports. Handlers wishing to receive diversion credit for exports must provide to the Board on-board bill of lading documentation or other documentation to verify export before the Board will issue diversion credit.

The Board will grant diversion credit for exempted products after it has received the necessary information concerning the particular exemption and when it is satisfied that the handler requesting the diversion credit has satisfied all the requirements relevant to the exemption. The Board recommended for the 1997 season (July 1, 1997 through June 30, 1998) only, that handlers receive diversion credit for up to one million pounds of exempted products per handler for new market development and new product development. The Board believes this will provide adequate flexibility for individual handlers to obtain diversion credit for exempt uses this season, but recommended providing some restriction on the absolute volume of such allowable diversions until more experience with the program has been obtained. However, the one million pound limit for exempted products per handler does not apply to handlers desiring to receive diversion credit for exports. As stated previously, this is the first season this program is in effect and handlers have exported or contracted to export tart cherry products. Some of these handlers may have shipped in excess of the one million pound limit. Allowing full diversion credit for the amount of product shipped abroad, will prevent both growers and handlers from incurring financial losses. The Board is continuing to review the issue of what limits to impose on exempted products.

Handlers desiring to receive diversion credit for donations to charitable organizations should follow the requirements specified in the regulations. For contributions to qualify for diversion credit, the contributed product should be marked clearly ''NOT FOR RESALE''. The receiving organization must be approved by the Board as a qualified recipient of contributions of tart cherry products. Such organizations must be tax-exempt, must not sell the donated products and must be noncompetitive with other tart cherry industry sales outlets. Once products are donated to an organization, the Board must receive satisfactory documentation of the transaction. Handlers should provide the Board with information on how the product was used and the volume of product used.

Handlers desiring to receive diversion credit for cherries diverted under § 930.59, including uses exempt under § 930.62, but who fail to meet the terms and conditions in the regulation for such diversion would not receive diversion credit for the cherries or cherry products. Any cherries not properly diverted in accordance with Board Form No. 4 must be placed into the handler's secondary reserve if one has been established or the primary reserve if a secondary reserve has not been established. The primary reserve is the first reserve where handlers in volume regulated districts can place tart cherries or tart cherry products to hold from primary markets in order to meet restricted percentage obligations. The primary reserve is limited to a capacity of 50 million pounds. A secondary reserve is established only after the primary reserve has been filled to the 50 million pound capacity. The secondary reserve is where the balance of reserve cherries or cherry products are held. There is no maximum capacity for the secondary reserve. Both primary and secondary reserves are operated at the handler's expense and no cherries can be removed from the secondary reserve until the primary reserve has been depleted. Upon termination of an

exemption, any volume of tart cherry products that were exempted from order requirements but which were not utilized should be placed into the secondary inventory reserve if one has been established, or into the primary reserve. It is the handler's responsibility to fulfill the restricted percentage obligations established by volume regulation. A handler may fulfill the restricted percentage obligation by either transferring cherries from his/her own inventory, purchasing additional cherries or cherry products or obtaining diversion certificates from other handlers to meet such obligation.

In addition to the recommendation already discussed, the Board, at its March 1997 meeting, also recommended that the Department modify the optimum supply formula by deducting exports from the calculation. The Department is not proceeding with this recommendation since the order promulgation record indicates that average sales should include sales to all markets, including exports.

At its meeting in March 1997, when discussing exports, the Board also recommended that juice and juice concentrate, to countries other than Canada, Mexico, and Japan, receive diversion credit. During the production and processing of the crop, handlers have exported, or have contracted to export, tart cherry juice or juice concentrate for this season. Many of these exports were for the purpose of expanding existing markets or developing new markets. According to the Board, if diversion credit is not allowed for export juice or juice concentrate, some of these handlers could suffer substantial financial losses since they would have to pack or purchase additional cherries to place in their inventory reserves or default on contracts. These costs would likely be passed on to growers. Therefore, the Board recommended at its September 11–12, 1997, meeting that the proviso in § 930.59(b) of the order be suspended for this year only and that diversion credit for exports of juice and juice concentrate be allowed for the 1997–1998 crop year. The temporary suspension of the proviso for the 1997–98 crop year will allow handlers to receive diversion credit for juice and juice concentrate exported to countries other than Canada, Mexico and Japan.

New export sales of juice and juice concentrate this crop year are estimated to be in the range of 4–7 million pounds. While significant to the handlers making such sales, traditional sellers of juice and juice concentrate products in established domestic and export markets should not experience any undue increase in competition. This is because indications are that the bulk of the new export sales of juice and juice concentrate represent sales to new markets or expansion of existing markets. This suspension action is not intended to establish a precedent for future seasons. Its purpose is to correct any misunderstandings that have occurred in the industry about order operations concerning juice and juice concentrate, to prevent disorderly marketing conditions and unnecessary financial losses by handlers. Not proceeding with the suspension this season could result in disorderly marketing in the domestic market, since, in addition to the problems already mentioned, juice and juice concentrate intended for export would likely have to be sold domestically. This situation will be avoided in subsequent seasons since handlers should be fully aware of the order's restrictions.

The Regulatory Flexibility Act and Effects on Small Businesses

The Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities and has prepared this final regulatory flexibility analysis. The Regulatory Flexibility Act (RFA) will allow AMS to certify that regulations do not have a significant economic impact on a substantial number of small entities. However, as a matter of general policy, AMS' Fruit and Vegetable Programs (Programs) no longer opt for such certification, but rather perform regulatory flexibility analyses for any rulemaking that would generate the interest of a significant number of small entities. Performing such analyses shifts the Programs' efforts from determining whether regulatory flexibility analyses are required to the consideration of regulatory options and economic impacts.

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 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 order and approximately 1,220 producers of tart cherries in the regulated area. Small agricultural service firms, which include handlers, have been defined by the Small Business Administration (13 CFR 121.601) as those having annual receipts of less than $5,000,000, and small agricultural producers are defined as those having annual receipts of less than $500,000. The majority of handlers and producers of tart cherries may be classified as small entities.

Section 930.59 of the tart cherry marketing order provides authority for handler diversion. Handlers handling cherries harvested in a regulated district may fulfill any restricted percentage requirements which may be in effect in full or in part through diversion of cherries or cherry products in a program approved by the Board, rather than placing cherries in an inventory reserve. Handlers can divert by destruction of the cherries at the handler's facility, making charitable donations, and using cherries or cherry products for exempt purposes, or by redeeming grower diversion certificates obtained from growers who have diverted cherries by non-harvest, and who have been issued diversion certificates by the Board. Once diversion is satisfactorily accomplished, handlers will receive a diversion certificate stating the weight of cherries diverted. Such diversion certificates can be used to satisfy the handler's restricted percentage obligation. This enables handlers to either place cherries into an inventory reserve or select the diversion option most advantageous to their particular business operation. Costs for supervision of such actions will take place under the supervision of the USDA Processed Products Inspection Service or Board employee inspectors, and that the costs of such supervision is to be paid by the handler. USDA inspectors will supervise diversion of cherry products at the current hourly rate of $41.00, which is subject to change, under USDA's inspection fee schedule (7 CFR § 54.42). Board employees will supervise diversion at the same rate. Diversion may also be accomplished by handlers donating cherries to charitable organizations, utilizing cherries in exempt outlets, or redeeming grower diversion certificates obtained from growers who have diverted cherries by non-harvest, and who have been issued diversion certificates by the Board in accordance with rules and regulations governing the issuance of grower diversion certificates in § 930.100. Diversion by means other than destruction of cherries at handlers' facilities would also be subject to supervision as found necessary by the Board. Fees would be charged as discussed above. Providing such options allows handlers to minimize processing and storage costs associated with

meeting restricted percentage obligations. Such cost savings may also be passed on to growers and consumers. Thus, providing these options accomplishes the purposes of the order and the Act.

The Board also recommended granting handlers diversion credit for cherries used for exempt purposes under § 930.62. Those purposes include cherries used for new product development, for the development of export markets, for experimental purposes, and the export of cherries and cherry products, including juice or juice concentrate, to approved countries.

In order to provide for juice and juice concentrate as a diversion outlet, the Board recommended that the proviso under § 930.59(b) of the order be suspended. Therefore, this rule temporarily suspends language in the proviso under § 930.59(b) of the order. The suspension would temporarily remove a prohibition against allowing diversion credit for juice and juice concentrate for this crop year only. However, the Board would only grant diversion credit for juice or juice concentrate exported to eligible countries. The Board recommended this suspension be used to correct any misunderstandings that have occurred in the industry about order operations concerning juice and juice concentrate, to prevent disorderly marketing conditions and unnecessary financial losses by handlers.

The temporary suspension of the juice and juice concentrate proviso was discussed at the most recent Board meeting. It was the Board's view that if the proviso is not suspended, affected handlers will have to expend additional funds to meet their restricted obligations by placing products that they could have sold in export markets into an inventory reserve or at-plant divert. The costs of these actions would likely be passed on to growers.

New export sales of juice and juice concentrate this crop year are estimated to be in the range of 4–7 million pounds. While significant to the handlers making such sales, traditional sellers of juice and juice concentrate products in established domestic and export markets should not experience any undue increase in competition this season. This is because indications are that the bulk of the new export sales of juice and juice concentrate represent sales to new markets or expansion of existing markets, rather than an increase in competition among sellers for previously developed markets. As previously stated, handlers have indicated that exports of tart cherry products have increased significantly over previous years' exports. Board members indicated that last year's exports totaled about 10 million pounds. This year, handlers are expected to experience the largest volume of exports on record, estimated at up to 50 million pounds. Handlers have been able to expand existing export markets and establish new markets for the future. Board members also commented that hot pack product (canned tart cherries) have been shipped to export markets that have never received such product before. Contributing to their success is the excellent quality of this year's crop. Growers and handlers have experienced high quality fruit due to favorable growing conditions for tart cherries this season. This high quality fruit has resulted in high quality products which are very competitive in export markets. The availability of such high quality cherry products increases the likelihood of maintaining such markets in future seasons. Not proceeding with the suspension this season could result in disorderly marketing in the domestic market.

The impact of this rule would be beneficial to growers and handlers. Authorizing various diversion outlets and allowing diversion credit for exempt uses means handlers will not be required to divert excess cherries at their plants. Instead, fruit can be processed into a usable form, thereby promoting the development of new products and the expansion of new markets for tart cherries. Authorizing exemptions for various uses of tart cherries should also promote such market development and expansion, as well as making cherries available for charitable purposes. Suspending an order provision for this season only will allow handlers to take advantage of export markets and obtain diversion credit for such exports, increasing the utilization of this season's crop and grower and handler returns.

The Board considered alternatives to these recommendations. With respect to handler diversion and diversion credit for exempt uses, if handlers who are subject to volume regulation are unable to receive diversion credit, they would have to divert cherries by other means or place cherries in an inventory reserve which may not be desirable because of storage costs. For example, the Board discussed not granting handlers diversion credit for at-plant diversion. However, the Board felt that providing such a diversion option increased handler flexibility to process and pack the best cherries available during a year when volume regulation is in effect and to reduce the costs of processing and storing reserve cherries.

The Board also discussed not granting exemptions, and diversion credit for such exemptions, for exports to eligible countries (including juice and juice concentrate), other exempt uses, and charitable donations. However, the Board felt this would not be in the best interest of the industry or the public. As previously discussed, the Board expressed that not allowing the export and other exemptions would have a detrimental effect on the market this season if free and restricted percentages are imposed. Without such exemptions and diversion credits for export sales, new market development and other specified uses, about 50 million pounds of cherries would not be removed from the domestic market this season, depressing grower returns for all cherries. The marketing order was designed to increase grower returns by stabilizing supplies with demand as well as stabilizing prices and creating a more orderly and predictable marketing environment. Expanding markets and developing new products is key to meeting this marketing order's goals.

Not granting exemptions and diversion credit for exports to countries other than Canada, Mexico, and Japan was also discussed at Board meetings. However, the Board expressed that this recommendation is very important to creating stable conditions in the export marketplace this season and would encourage future market growth. The Board further stated that such action will improve returns to growers because of the tremendous growth in the export market this season.

This rule imposes certain reporting and recordkeeping requirements on 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 sectors. In addition, the Department has not identified any relevant Federal rules which duplicate, overlap or conflict with this rule.

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 imposed by the order have been previously approved by OMB and assigned OMB Number 0581–0177. This includes the requirements contained in this regulation (i.e. progress reports, applications).

The components of the Handler Reserve Plan and Final Pack Report

which handlers must submit to utilize at-plant and exempt use diversion and the requirements for other reports related to handler diversion and handlers meeting their restricted percentage obligations (i.e., Inventory Reserve Summary, Cherries Acquired from Producers, Handler Reserve Plan and Final Pack Report, and Inventory Location Report) have received approval by OMB. It was anticipated that as many as 45 handlers might be regulated if volume regulations are established. Many reports are submitted a single time each season, while some are submitted more frequently. In addition, the bulk of the information handlers must report is obtained during the normal course of their business operations. It would take handlers approximately 15 minutes per report to complete for a total of 60 minutes per handler and approximately 2,700 minutes annually for the estimated 45 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.

The Board's meetings were publicized throughout the tart cherry industry and all interested persons were invited to attend them and participate in Board deliberations. Like all Board meetings, the March, June, and September 1997, meetings were public meetings and all entities, both large and small, were able to express their views on these issues. The Board itself is composed of 18 members, of which 17 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. The Board's Diversion Subcommittee met on March 12, 1997, and discussed handler diversion in detail. That meeting was also a public meeting and both large and small entities were able to participate and express their views. A majority of these entities expressed that, in their opinion, the recommendations made by the Board would have a positive impact on both small and large entities. Finally, interested persons were invited to submit information on the regulatory and informational impacts of the action on small businesses.

The following discussion concerns comments raised about the initial regulatory flexibility analysis and statements made therein. A comment received from a tart cherry handler stated that the text of the interim final rule exhibits no detail of any analysis as required by the RFA. The commenter asserts that such analyses are required and that this industry includes both large and small entities. The commenter also states that this interim final rule should not be advanced as final until such analysis is completed, documented and published for comment. We disagree with this comment. Both the initial regulatory flexibility analysis published in the January 6, 1998, **Federal Register** (63 FR 399) and this final regulatory flexibility analysis are consistent with the provisions of the RFA. Accordingly, we are of the view that the Department has met the requirements of the RFA. Further, the comment offered no further explanation for this assertion but did go on to discuss part of the initial regulatory flexibility analysis as it relates to both large and small entities.

Second, the commenter stated that the regulatory flexibility analysis lacked an understanding that tart cherries produced in, for instance, Oregon and Washington are handled in a manner that they become a high quality puree or juice concentrate by intent. Tart cherries produced in other parts of the production area under the order enter the stream of commerce generally in another form. The commenter contends that it is the sort outs or culls from these other products that become puree and juice concentrate and that these products, puree and juice concentrate made with these sort outs or culls, are not equivalent commodities. The commenter believes that allowing a one-year period where these sort outs or culls can receive diversion credit will unfairly compete with someone else's primary market product. The commenter went on to state that prevention of this inequity was part of the reason the order was written as it was.

The Board made the recommendation to suspend the juice and juice concentrate provisions for one year only. The Department allowed the suspension of the juice and juice concentrate provisions on the basis that the bulk of the new export sales of juice and juice concentrate would probably represent sales to new markets or expansion of existing markets. It was expected that such shipments would not be in direct competition with juice and juice concentrate markets established by Oregon and Washington handlers. Present indications are that the bulk of sales of juice and juice concentrate are going to new export markets or are being used for the expansion of existing export markets and are thus not in direct competition with existing markets for juice and juice concentrate.

Third, the commenter disagreed with a statement in the regulatory flexibility analysis and was of the view that meetings are not widely publicized in advance and are not held in a location central to the production area. Meetings have been central only to those producers and handlers in the Michigan districts. The commenter stated that the Board does a poor job of publicizing Board meetings.

In regard to the commenter's statement, the Board also has to consider the cost of travel for all Board members since the Board pays travel expenses for all of its members. The first meetings held in December of 1996 and throughout 1997 were attended by all members and their alternates. A Board recommendation was passed that the start-up meetings be attended by the alternates so they would be involved and aware of Board activities. It would have resulted in considerable expense to the Board to hold the meetings outside of Michigan since 16 members and alternates are from the State of Michigan. The Board realizes the time spent in travel and has made a commitment to hold the June marketing policy meeting in Michigan and the September marketing policy meeting in a district outside of Michigan. The Board is also committed to holding meetings outside the Michigan districts to allow producers and handlers to attend the meetings and cut down on travel time for those not located in Michigan. In regard to the commenter's contention that the Board does a poor job of publicizing Board and subcommittee meetings, we disagree. The Board has and will continue to take appropriate action to provide the widest possible notice of upcoming meetings to all handlers and Board members and alternate Board members. The Board sends meeting notices to all Board members and several tart cherry industry organizations. In fact, the Board is currently developing a newsletter which will be distributed to all growers and handlers of record to further publicize upcoming Board meetings.

An interim final rule concerning this action was published in the **Federal Register** on January 6, 1998. Copies of the rule were mailed by the Board's staff to all Board members and cherry handlers. In addition, the rule was made available through the Internet by the Office of the Federal Register. That rule provided for a 30-day comment period which ended February 5, 1998. Two comments were received. One comment was received from a tart cherry association representing tart cherry growers and processors in the State of Oregon and the other from a handler.

The first commenter representing the tart cherry association also commented on the proposed rule published on January 21, 1998, in the **Federal Register** (63 FR 3048) that proposed final free and restricted percentages for the 1997–98 crop year. To the extent that the comment addressed or identified issues relating to the January 21, 1998, publication, that portion of the comment will be discussed, as appropriate, in the final action concerning that document which will be published separately from this action.

The first commenter stated that they objected to the use of export markets for disposal of tart cherries for exempt or diversion purposes. The commenter stated that the use of exports in this manner will create a two-tiered pricing system. Some exports have been cheaply priced even though domestic prices warrant a stronger approach. The commenter states further that this will draw down the domestic price, as well as the export price for those cherries not receiving diversion credit. The commenter believes that if the domestic market strengthens as a result of these activities, the industry may become over enthusiastic and begin planting and create a worse oversupply in the future. There must be well maintained compliance to ensure that tart cherry products exported and receive diversion credit are not returned to the domestic market.

In response to the commenter's statements, the Board has recommended that exports to certain countries receive diversion credit. The Board has indicated exports have increased due to the diversion credit option and short supplies in other countries. The Board will be able to analyze results of this year's activity to determine if such program worked. The Board will continue to monitor activities to ensure that exported cherries are not reexported into the domestic market.

The first commenter also commented that the Department rule soon on the identity and nature of CherrCo, Inc., a new entity in the tart cherry industry, as it relates to the marketing order. The Department is continuing to work with the Board on this issue. This issue will be addressed separately.

Finally, the first commenter noted that there is reference made to a limit for diversion credit of 1 million pounds of product per year. The commenter further states that in the interim final rule, the Board's intent that there be no limit on export credits at all needs to be properly reflected. The regulatory text inadvertently states that under § 930.159(f) that the one million pound exemption limitation for diversion credit does not apply to handlers exporting juice or juice concentrate. The one million pound limitation does not apply to any exports, not just juice and juice concentrate. The supplementary information of the interim final rule explains this limitation correctly. Therefore, this final rule corrects this error in the amendatory language as suggested by the commenter. Additionally, this commenter stated that they agree with the comments submitted by the second commenter discussed below.

The second commenter raised ten points in his comment, three of which related to the initial regulatory flexibility analysis and have been discussed previously in this document. First, the commenter stated that it is not equitable that cherries which have been authorized for diversion or exemption from restrictions are excused from assessment. All tonnage produced should be subject to assessment. A majority of the Board's budget is earmarked for compliance expenses. The compliance costs are generated in districts with the bulk of the diversions and exemptions. Handlers and producers in districts which are not subject to tonnage restrictions should not be penalized for maintaining production at moderate levels.

The Board, after its initial 1997–98 crop year, is reviewing the order and considering several amendment proposals to assist the order to operate more efficiently in future crop years. One proposal the Board is considering is that any cherries produced, which would be those diverted or exempted, be subject to assessments. Only those cherries that are diverted at the orchard would not be subject to assessments.

Secondly, the commenter stated that it is not equitable that diversion credits are issued in situations involving exemption. Based on its category of use, destruction or reserve, a cherry product should qualify either as a diversion or an exemption. The commenter asserted the two terms are not synonymous and stated that this confusion should be clarified with a re-publication for subsequent comment prior to the interim final rule becoming truly final. We disagree.

The terms used in this rule are not used synonymously. These terms are different because diversion credit is provided to growers who voluntarily divert their crop if such crop is of poor quality due to hail damage or some other climatic condition. Diversion credit is provided to handlers if such handlers, in order to meet their restricted percentage obligations, when volume regulations are implemented, by placing cherries in a primary inventory reserve or diverting cherries, or a combination of both. Whereas, tart cherries can be exempted from certain order provisions if they are diverted in accordance with the order by being used for new products or new market development or for experimental purposes or other uses designated by the Board. The Board has the authority to grant diversion credit under § 930.59 for products that are exempted under § 930.62. There is no reason to clarify this authority under the order, since the recommendations made by the Board are clearly authorized under marketing order provisions.

Thirdly, the commenter stated that the Board should not be allowed to deviate from the marketing order authorities, even for a season, because some participants in the industry did not clearly understand what they could and could not utilize as either diversionary or exempted products. The commenter further stated that it was clear during the promulgation that the order was to be very specific in the authorities that would be granted to the Board.

The Board may recommend suspensions of the order or provisions thereof. The Board felt that it would be in the best interests of the industry to suspend the order language with regard to juice and juice concentrate. This is a new order and difficult to administer in its first year of operation. The Board's recommendation will be used to correct any misunderstandings that have occurred in the industry about order operations concerning juice and juice concentrate and allow the industry to expand the export market for this season. As explained in the rule this suspension is for one year only. Accordingly, no change is made to the temporary suspension as a result of this comment.

Fourth, the commenter stated that it is simply untrue that interested parties have an opportunity to provide input concerning the recommendations of the Board to the Secretary. The commenter further stated that the record of Board meetings will also show that not all these recommendations were made unanimously as stated in the rule.

Since the meetings are public, interested persons have an opportunity to provide input on these actions. Also, during this informal rulemaking process, comments are solicited. Most of the actions discussed herein were recommended unanimously by the Board.

Fifth, the commenter stated that the Board needs to have an approved compliance plan prior to issuing supply

control regulations. The Board has approved a compliance plan at its January 29–30, 1998, meeting.

Sixth, the commenter believes it is a particularly serious matter that the Board appears to be functioning under the control of CherrCo, Inc., a new entity in the tart cherry industry. The Department is continuing to work with the Board on this issue. This issue will be addressed separately.

Finally, the commenter urges the Department to insist that the Board randomly conduct unannounced compliance inspections prior to next harvest to insure that reserves are maintained as certified and that required documentation is maintained properly by handlers.

The Board has the authority to inspect reserves and audit handlers as required. The Board will audit handlers, as appropriate, to ensure that proper inventory reserves are being maintained.

Accordingly, one change will be made to the rule as proposed, based on the comments received.

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** (63 FR 399, January 6, 1998), will tend to effectuate the declared policy of the Act.

It is also found that, for the 1997–98 crop year only, the proviso under § 930.59(b), which prohibits handlers from receiving diversion credit for juice and juice concentrate, should be suspended since such proviso does not tend to effectuate the declared policy of the Act.

List of Subjects in 7 CFR Part 930

Cherries, Marketing agreements, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 930 is amended as follows:

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

Accordingly, the interim final rule amending 7 CFR part 930 which was published at 63 FR 399 on January 6, 1998, 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. Paragraph (f) of § 930.159 is revised to read as follows:

§ 930.159 Handler diversion.

* * * * *

(f) *Exempt uses.* To receive diversion credit for cherries used for exempt purposes, handlers must meet the terms and conditions specified in § 930.162. Each handler may receive diversion credit for up to one million pounds of exempted products each crop year, except that, for the 1997 season only, the one million pound exemption limitation for diversion credit does not apply to handlers exporting tart cherry products.

Dated: April 16, 1998.

Robert C. Keeney,

Deputy Administrator, Fruit and Vegetable Programs.

[FR Doc. 98–10659 Filed 4–21–98; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 930

[Docket No. FV97–930–5 FIR]

Tart Cherries Grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin; Issuance of Grower Diversion Certificates

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: The Department of Agriculture (Department) is adopting, as a final rule, with an appropriate modification to reflect a change in a certificate redemption date, an interim final rule establishing terms and conditions for the issuance of grower diversion certificates by the Cherry Industry Administrative Board (Board) under the marketing order for tart cherries. Handlers may use such certificates in order to satisfy their restricted percentage amounts when volume regulations are issued by the Secretary. Tart cherry handlers in Oregon, Pennsylvania, Washington and Wisconsin (Districts 5, 6, 8, and 9) are not subject to volume regulation at this time because these districts do not currently produce adequate tonnage to trigger such regulation under the order.

EFFECTIVE DATE: May 22, 1998.

FOR FURTHER INFORMATION CONTACT: Patricia A. Petrella or Kenneth G. Johnson, Marketing Order Administration Branch, F&V, AMS, USDA, room 2525–S, P.O. Box 96456, Washington, DC 20090–6456, telephone: (202) 720–2491, Fax: (202) 720–5698. Small businesses may request information on compliance with this regulation by contacting: Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, P.O. Box 96456, room 2525–S, Washington, DC 20090-6456; telephone (202) 720–2491; Fax: (202) 720–5698.

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Agreement and Order No. 930 (7 CFR Part 930), regulating the handling of tart cherries grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin, hereinafter referred to as the ''order.'' This marketing agreement and order are 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 is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order provisions now in effect, preliminary free and restricted percentages for tart cherries acquired by handlers during the 1997 crop year were established by the Board during its June 26–27, 1997, meeting. Final free and restricted percentages were recommended by the Board to the Secretary during its September 11–12, 1997, meeting and a proposed rule setting the final free and restricted percentages for the 1997–98 crop year at 55 percent and 45 percent, respectively. Final action concerning the final free and restricted percentages is being published separately in the **Federal Register**. This finalization of an interim final rule provides for the issuance of diversion certificates to growers for cherries diverted during the 1997 crop year. 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