Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 927

[Docket No. FV00–927–3]

Winter Pears Grown in Oregon and Washington; Recommended Decision and Opportunity To File Written Exceptions to Proposed Amendment of Marketing Agreement and Order No. 927

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule and opportunity to file exceptions.

SUMMARY: This recommended decision invites written exceptions on proposed amendments to the marketing agreement and order for winter pears grown in Oregon and Washington (order). The amendments are based on those proposed by the Winter Pear Control Committee (Committee), which is responsible for local administration of the order. The amendments include: authorizing the Committee to recommend maturity regulations; authorizing the Committee to recommend container or marking requirements; and changing provisions related to alternate Committee members serving for absent members at Committee meetings. The proposed amendments are intended to improve the operation and functioning of the winter pear marketing order program.

DATES: Written exceptions must be filed by May 3, 2002.

ADDRESSES: Written exceptions should be filed with the Hearing Clerk, U.S. Department of Agriculture, room 1081–S, Washington, DC 20250–9200, Facsimile number (202) 720–9776. Four copies of all written exceptions should be submitted and they should reference the docket number and the date and page number of this issue of the **Federal Register**. Exceptions will be made available for public inspection in the Office of the Hearing Clerk during regular business hours, or can be viewed at: *http://www.ams.usda.gov/fv/moab.html.*

FOR FURTHER INFORMATION CONTACT: Melissa Schmaedick, Marketing Specialist, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, Stop 0237, room 2522–S, Washington, DC 20250–0237; telephone: (202) 720–2491, or Fax: (202) 720–8938. Small businesses may request information on compliance with this proposed regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, Stop 0237, room 2525–S, Washington, DC 20250–0237; telephone (202) 720–2491; Fax (202) 720–8938, or E-mail: Jay.Guerber@usda.gov.

SUPPLEMENTARY INFORMATION: Prior documents in this proceeding: Notice of Hearing issued on November 2, 2000, and published in the November 8, 2000, issue of the **Federal Register** (65 FR 66935).

This administrative action is governed by the provisions of sections 556 and 557 of Title 5 of the United States Code and, therefore, is excluded from the requirements of Executive Order 12866.

Preliminary Statement

Notice is hereby given of the filing with the Hearing Clerk of this recommended decision with respect to the proposed amendment of Marketing Agreement and Order No. 927 regulating the handling of winter pears grown in Oregon and Washington, and the opportunity to file written exceptions thereto. Copies of this decision can be obtained from Melissa Schmaedick whose address is listed above.

This action is issued pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*), hereinafter referred to as the ''Act,'' and the applicable rules of practice and procedure governing the formulation of marketing agreements and orders (7 CFR Part 900).

The proposed amendments of the order are based on the record of a public hearing held in Portland, Oregon, on November 29, 2000. Notice of this hearing was published in the **Federal Register** on November 8, 2000. The notice of hearing contained proposals submitted by the Committee and AMS.

The Committee's proposed amendments included: Authorizing the Committee to recommend maturity regulations; authorizing the Committee to recommend container and marking requirements; and changing provisions related to alternate Committee members serving for absent members at Committee meetings.

The Fruit and Vegetable Programs of AMS proposed to allow such changes as may be necessary to the order, if any of the proposed changes are adopted, so that all of the order's provisions conform with the effectuated amendments.

Seven witnesses testified at the hearing. These witnesses represented winter pear growers and handlers throughout the production area. All witnesses supported the Committee's recommended changes. Most witnesses addressed the need for maturity requirements and the perceived impact those requirements could have on market returns. Witnesses also spoke to the need for the Committee to have container and marking regulatory authority, and the effect uniform regulations would have on marketing practices and costs of production. In conjunction with this proposed amendment, it was put forth by witnesses at the hearing that definitions for pack and container be added to the order's list of definitions. Another amendment that was supported at the hearing was the proposal to allow additional alternates to serve at Committee meetings when both a member and his or her alternates are unable to attend.

At the conclusion of the hearing, the Administrative Law Judge fixed January 12, 2001, as the final date for interested persons to file proposed findings and conclusions or written arguments and briefs based on the evidence received at the hearing. None were filed.

Material Issues

The material issues of record addressed in this decision are as follows:

(1) Whether to add ''maturity'' to the list of attributes that may be regulated under the order;

(2) Whether to add authority to the order to allow the Committee to recommend container and marking requirements; and

(3) Whether to amend the order to authorize additional alternates to serve

in the place of absent Committee members.

Findings and Conclusions

The following findings and conclusions on the material issues are based on evidence presented at the hearing and the record thereof.

Material Issue Number 1: The Authority To Recommend Maturity Regulation

The order should be amended to include maturity among the characteristics of winter pears which may be regulated by USDA based on recommendation of the Committee.

The order currently provides for regulation to limit the grade, size, quality or combination thereof, of any variety of pears grown in the production area. Whenever such regulations are in effect, pears are required to be inspected and certified as meeting those requirements as provided in § 927.60 of the order. The Committee proposes adding specific authority to set maturity regulations.

According to testimony given during the hearing, ''maturity'', as it is commonly used in the winter pear industry, describes a characteristic or phase of senescence in the cycle of a pear when it reaches its ideal time for harvest based primarily upon a pressure index. Testing for maturity can be accomplished through the use of pressure testing devices and inspection.

In the winter pear industry, maturity is a characteristic, and partial consideration, in determining the ripening ability of the fruit. Ripeness is not a precursor criteria for maturity. Rather, adequate maturity in terms of the growth process of the pear is a necessary element to the successful ripening of the fruit after harvest. One witness during the hearing described the relationship between maturity and ripeness by explaining immaturity, which can be detected by a high pressure test result, results in a pear's inability to ripen after harvest. A maturity test would indicate whether a pear is fully mature at the time of harvest, therefore also indicating the pear's ability to ripen after harvest and in the hands of the consumer.

Maturity of pears is tracked throughout the season through pressure indices. As pressure indices reduce from their initial harvest level to lower pressures, pears approach that stage of senescence known as maturity. Maturity indices are used to harvest winter pear varieties at the optimum time that accommodates eventual ripening, as well as long-term cold storage and full season marketability. Because of differences in varietal growing patterns, maturity criteria would most likely vary by variety.

While the current method for measuring maturity is via pressure test, witnesses testifying understood that, by adding the authority to define maturity regulations, testing methods would be allowed to evolve with advances in industry technology. As one witness stated, the authority to regulate maturity would give the Committee not only the ability to set maturity regulations based on current research, but to update and revise those regulations as maturity testing methods evolve over time.

According to record testimony, the proposed amendment to add maturity to the list of regulated attributes would allow the Committee to set uniform regulations within the industry. This would assure that pears will physiologically have the ability to ripen properly at any stage of the marketing season. It was considered by witnesses that this additional quality definition is imperative to the industry's future ability to uniformly address and set regulations for ripen ability.

By establishing maturity regulations, the Winter Pear industry also aims to present a more consumer-friendly product to the market. Historically, the winter pear industry has not directly concerned itself with the ripening process of pears once they reach the retail sector or the consumer. The task of ripening prior to consumption has generally been left to the end buyer, while the Committee provided basic education about how a pear can be ripened at home.

One witness stated that the proposed authority to regulate maturity would enable the industry to ensure that winter pears have the best opportunity to either ripen or be ripe at time of purchase. Under the current system without maturity regulations, it can take up to seven days for a winter pear to ripen at room temperature. The witness further added that in today's modern lifestyle, convenience is often the greatest consideration for consumers when selecting food products. For this reason, maturity requirements are needed in order for the industry to better meet consumer needs and satisfaction.

In addition, increasing competition from imported fruit in the domestic market has caused the Oregon and Washington winter pear industry to market its harvest much earlier than in previous years. However, selling too early in the harvest season places the Oregon and Washington winter pear industry at a disadvantage as without careful monitoring of maturity indices to ensure timely picking, ripening is more difficult to achieve. Traditionally, the industry has relied upon the late Spring and early Summer sales to profitably move the crop as, under these conditions, winter pears are more inclined to ripen naturally and maturity indices are not as much of a concern.

Another witness testifying at the hearing explained that geometrically increasing imported pears from outside the production area have seriously disrupted the traditional marketing scheme for Oregon and Washington pears. According to his testimony, imported pears currently approach five million boxes per marketing season, directly competing with Northwest product in the late Winter and Spring months. One of the main competitors, Bartlett pears imported from the Southern Hemisphere, poses a particularly difficult challenge, as Bartletts ripen more easily than winter pears and are considered more consumer friendly by announcing their edibility through a color change. Winter pears from Oregon and Washington are considered by some to be less user friendly, remaining green throughout the process of senescence.

The dramatically increasing imports are altering Oregon and Washington winter pear marketing schemes, forcing more sales early in the season when pears are less inclined to ripen naturally. In order to meet consumer requirements and expectations, the Committee has identified maturity indices as a method to improve harvesting techniques earlier in the growing and harvest process. By having the authority to establish maturity regulations, the Committee envisions being able to market a more salable, more desirable product earlier in the market season.

The authority to consider maturity in the regulatory criteria could feasibly enhance product quality throughout the industry harvest and storage regimen by establishing pressure regulations, shorten the consumer's waiting period for the fruit to ripen, and provide greater assurance to the consumer that the product will properly ripen at the time of purchase.

The Oregon and Washington winter pear grower community has also recently demonstrated their support for pressure testing by recommending to the USDA the establishment of a maximum pressure limit for all D'Anjou pears entering the marketplace in 2000. While this standard was established through the informal rulemaking process under the authority to establish quality regulations, witnesses attending the hearing expressed the importance of including specific authority in the order

to regulate maturity regulations for any or all varieties of winter pears grown in the production area.

Record evidence supports amending the marketing order to authorize the Committee to recommend maturity regulations for any or all varieties of pears grown in the winter pear industry. This would allow the Committee to recommend, and USDA to implement, minimum maturity requirements through informal rulemaking procedures. Furthermore, there was no opposition to the above proposal, described as Material Issue Number 1 in this recommended decision, voiced at the hearing.

The Department is proposing that § 927.51 of the order be amended to include the authority to establish maturity requirements.

Material Issue Number 2: The Authority To Fix the Size, Capacity, Weight, Dimensions, Markings, or Pack of Winter Pear Packaging or Handling Containers

The order should be amended to add authority to fix the size, capacity, weight, dimensions, markings, or pack of the container, or containers, which may be used in the packaging or handling of winter pears. The definition of ''Size'' should also be amended to remove the currently defined dimensions of a standard pear box.

Currently, the Winter Pear Control Committee, under the order, has no authority to implement container regulations. The Committee believes that adding this authority to the marketing order is necessary to engender coherency and consistency in the Washington and Oregon winter pear industry. The primary reasons to allow container regulations are: to eliminate confusion in the marketplace, standardize containers, provide for compliance, and, most importantly, to level the playing field, in terms of calculating the cost per unit of carton sales, among all suppliers to the market. The Committee believes that this authority would help reduce instances of confusion in the marketplace.

The Committee also believes that any additional costs to the industry would be minimal and outweighed by the gains outlined above. Growers would benefit because their returns would be measurable against other industry returns, and production/packing systems would become more streamlined and efficient.

Record testimony stated that widespread retail consolidation in the domestic market has resulted in a shrinking number of terminal market sellers. As such, Oregon and Washington winter pear growers and handlers have come under increasing pressure to compete against growers and handlers from outside the production area for retailer business. This pressure has been compounded by an influx of imported pears into the domestic market. The net result has been an oversupply of product in the market, and downward pressure on producer prices.

In addition to competition with imported product, the Washington and Oregon winter pear industry is facing international marketing disadvantages associated with a strong U.S. dollar and lower demand for U.S. products abroad. The combination of increased supply and limited market outlets has presented ever-increasing challenges to the winter pear industry, causing it to consider competition and efficiency gaining techniques, such as container regulations.

While the standard container used in the Washington and Oregon pear industry has historically been the ''Pakcart'', a 44-pound net weight box, retailer demand for new and innovative packaging of pears has resulted in a proliferation of new packages in the marketplace. While many packers have conformed to new packaging demands, maintaining competitiveness has become increasingly difficult due to the increase in container variety and the cost of maintaining inventories.

Maintaining a varied inventory of package types, especially for smaller handlers, is costly and inefficient in warehouse packing systems. The majority of the increased container related production costs are passed on to the producer in the form of a lower net return on his or her product. As one witness testifying at the hearing stated, ''Unfortunately, the way the industry works is all of the costs are accumulated and deducted from the (free on board) FOB price, and then the grower gets what's left.''

A witness testifying at the hearing noted that due to consolidation of retail supermarkets, one of the main sources of distribution for winter pears, substantial pressure is placed on individual growers, packers and shippers to conform to container shipment demands. The witness indicated that it was not unusual for retail supermarkets to request special packaging, including special carton sizes, weights and other characteristics. With each special request for a unique package type, handling costs increase due to the need to keep a variety of containers in inventory and special packing requirements for each type of container. Uniform regulations for packaging would assist the handlers in not only avoiding additional costs but gaining increased operational efficiencies. Moreover, increased handling costs are more often than not passed on to the grower in the form of reduced payment for their product. Thus, it was argued that uniform packing requirements would also benefit the grower in the form of potentially higher returns.

Witnesses also indicated that it is in the industry's best interest to work with its customers, specifically retail supermarkets, to provide efficient packaging for the mutual benefit of all parties, including growers, customers and consumers. As a representative of the industry and local administrative body of the order, it was suggested that the Winter Pear Control Committee is in the best position to work with the industry and customers to develop the correct regulations relating to container size, capacity, weight, and dimensions.

Witnesses demonstrated the need for uniformity in container size and dimensions by describing some of the various container varieties currently at use in the market. It was explained that cartons not only differ in dimension, but also in the number of stacking tabs, container material and liners. One type of container described was the ''Defore carton,'' also referred to as the ''Euro carton.'' This container, measuring 60 x 40 centimeters, is smaller and generally has a lighter net weight than the traditional container used in the production area. In addition to being a smaller box, some retailers differentiate their requests by specifying the number of desired tabs for stacking. The number of stacking tabs requested per Euro carton can vary from four to six to eight.

Another type of carton requested by retailers is known as a corrugated ''Kraft carton'' (similar to the Packart, described above), while others request the Kraft carton with a black inside liner.

In addition to differing container dimensions and other physical characteristics, containers of varying weight have become prevalent in the market. One witness used as an example the California Bartlett industry, which has implemented a system in which some fruit is at a 40-pound net weight, and some at a 44-pound net weight. Moreover, imported South American pears are packed in an 18-kilogram carton, or a 40-pound net weight box, while pears imported from New Zealand and South Africa are generally packed in the Euro 60 x 40 carton.

Witnesses testifying on the need for the authority to establish container regulation argued that a market supplied

with a proliferation of container types and weights leads to confusion among buyers and sellers, inevitably resulting in inequitable net returns to producers. Packages that are not consistent in size or weight across the market make it difficult for retailers to easily conduct cost per unit comparisons among packers. The authority to regulate container regulations would level the playing field by standardizing transaction units between all sellers and buyers. One witness reasoned that with uniform container and packing regulations, a buyer would know exactly what he or she is purchasing regardless of where or from what source it is purchased. Packers would have the same size, weight, marking and pack requirements, assuring that the buyer is getting the same product. Growers would know exactly what amount of product is being sold and promoted at what return. Furthermore, the witness stated that, ''Presently it is not uncommon for us to be comparing 'pears to apples' because of the lack of standardization within our industry. The proposal will eliminate confusion in the market and I believe help streamline the process.'' It was further argued that the adoption of this proposal would allow buyers, consumers, packers and growers of winter pears to compare ''pears to pears,'' regardless of the source.

Without a consistent standard developed by the industry, individual growers and packers will attempt to respond to each individual customer's demand, adding confusion in the marketplace. A packer may have multiple inventories of the same package, once again increasing costs to the parties involved.

Moreover, without enforced container regulations, buyers of winter pears are not always aware of the net weight of the container that they are being quoted. As winter pear sales are typically negotiated in numbers of cartons, markedly different carton weights result in pears being purchased at differing prices per pound.

The authority to establish container regulations, and to adjust those regulations in step with changing retailer demand, would enable the Committee to maintain coherency within the winter pear market packaging regulations.

Historically, the size of winter pears is determined by the number of pears contained in a standard 44-pound container. This concept is also commonly referred to as ''Pack.'' As one witness explained at the hearing, ''Pack'' refers to the amount of product that is put in each box and describes to the purchaser the size of the product that they are buying. For example, if purchaser is buying size 100 pears, the pack definition indicates that there are 100 pears in a standard 44-pound box. However, with non-traditional boxes entering the marketplace, the term pack has lost some significance in that the standard 44-pound box is no longer the industry point of reference.

As one witness testified, retail price calculations, which have traditionally been based on the number of pears per standard 44-pound box, are no longer uniform throughout the marketplace as industry packing material is not standardized. If a retailer is in error on what the actual poundage of a box is, he or she may be computing higher or lower retail prices, which ultimately affects the volume of product sold.

Members of the Committee attending the hearing testified that the proposal to grant authority to fix the size, capacity, weight, dimensions, markings, or pack of a container, or containers, used in the packaging or handling of winter pears has been widely discussed within the grower community. Among the witnesses testifying, it was widely stated that implementing this authority would equally benefit small and large producers by standardizing containers and packing requirements and enhancing uniformity in the market.

It was also requested by witnesses at the hearing that definitions for ''pack'' and ''container'' be added to the list of definitions in the order to further clarify Proposal No. 2. Adding these two definitions would assist in clarifying future requirements established under the above proposed authority. Proposed definitions of both terms were presented at the hearing and are supported by the hearing record.

Record evidence supports amending the marketing order to authorize the Committee to recommend size, capacity, weight, dimensions, markings, or pack of the container, or containers, which may be used in the packaging or handling of winter pears. This would allow the Committee to recommend, and USDA to implement, such pack and container requirements through informal rulemaking procedures. Furthermore, there was no opposition to the above proposal, described as Material Issue Number 2 in this recommended decision, voiced at the hearing.

Accordingly, the Department is proposing that § 927.51 be amended by adding a new subparagraph (a)(3), which would provide the authority to fix the size, capacity, weight, dimensions, markings, or pack of the container, or containers, which may be used in the packaging or handling of winter pears. The Department is also proposing that § 927.5 be amended to remove the currently defined dimensions of a standard pear box. This would allow the flexibility to establish, and revise as needed, new container dimensions, and would be consistent with this amendment.

The Department is also proposing that definitions for ''pack'' and ''container'' be added to the order. Adding these two definitions would assist in defining future requirements established under the above proposed authority.

Material Issue Number 3: Designation of a Temporary Alternate To Act for an Absent Committee Member

The order should be amended to include the authority for a Committee member, when that Committee member and his or her alternates are unable to attend a Committee meeting, to designate any alternate from the same group (handler or grower) to serve in their stead. However, the Department believes that this discretion should not be given to the Committee or its chairperson in the event the member in question chooses not to designate another alternate to serve in his or her place.

The Committee is composed of 12 members, with the industry members allocated among four geographic districts. Each Committee member has two alternates who have the same qualifications as the member. Committee members and alternates are nominated by their peers in the district they represent.

Section 927.28 of the order provides that if a Committee member is absent from a meeting, one of his or her alternates shall act in that member's place. There is no provision for a situation in which both the member and that member's alternates are unavailable.

The Committee proposed changing § 927.28 as follows. If both a member and his or her alternates cannot attend a Committee meeting, the member or the alternates (in that order) could designate another alternate member to act in their stead. The temporary alternate would be chosen from the group of other Committee member alternates and would represent both the same district and group (grower or handler) as the Committee member needing an alternate. If neither the Committee member nor that Committee member's alternates choose to make such a designation, the Committee chairperson would be free to do so with the concurrence of a majority of the present members.

In support of the Committee's proposal, witnesses testifying at the hearing felt strongly about the need to ensure grower and handler representation at all meetings. One witness stated, ''Being denied an important vote because of a technicality of succession, and thus not being represented, is not fair to the growers who pay the assessment to the Winter Pear Control Committee.''

Witnesses testifying believed that the authority to temporarily appoint additional alternates was justifiable for many reasons. Most importantly, the small size of grower districts, and the proximity of growers and handlers in their local communities, makes for a tight-knit group who are generally savvy of their community's needs and opinions. Thus, testimony strongly supported the idea that district positions could be accurately represented by appointing temporary alternates from the same district and group (grower or handler). As one witness pointed out, ''We're not strangers to each other, and our views on pear marketing are generally well known.''

According to the record, it was recommended that the selection process of temporary alternates would be somewhat of an ''informal'' process, whereby a temporary alternate would be recommended to the Control Committee by the absent Committee member, or one of his or her alternates. Selection of the temporary alternate would ultimately be overseen and rely on the discretion of the Control Committee.

An example presented at the hearing is as follows. In the Hood River district, there are four Committee members (two growers and two handlers), each having two alternates. In the event that one of the Hood River Committee members and both his or her alternates were unable to attend a Committee meeting, a temporary alternate would be selected from the second (grower or handler) Hood River Committee member's two alternates. As described above, the selection would be recommended by the absent Committee member and approved by the Control Committee. If the Committee member was absent, then the selection would be made by one of his or her alternates and approved by the Control Committee.

The Department agrees that full participation at Committee meetings should be encouraged. The Department also believes that there is merit in allocating membership among districts because the conditions in one district may vary considerably from those in another. However, if a member chooses not to name someone to fill his or her seat and cast votes on his or her behalf, the choice should neither revert to the Committee or its chairperson nor the absent member's alternates. Committee members are nominated by their grower and handler peers to represent them at Committee meetings. The absent Committee member's charge to represent, or provide alternate representation for, his or her peers is an important part of fulfilling his or her responsibilities as a Committee member for that district. In light of the above, should a situation arise where neither a Committee member nor his or her alternates are able to attend a meeting, the Committee member should arrange for a temporary alternate. For these reasons, we believe that only a Committee member should be able to choose a temporary alternate to serve in his or her place when that member and that member's alternates are unavailable.

With regard to the language suggested by the Committee that would only apply to two out of the four winter pear production area districts, the proposed language does not take into consideration a selection process for districts having only one grower or one handler Committee member.

Only the Hood River-White Salmon-Underwood and Wenatchee districts have four Committee members (two growers and two handlers), hence a total of four alternate members for each group meeting the proposed district and group criteria. However, the Medford and Yakima districts only have two Committee members (one grower and one handler) each. In the event that a Medford or Yakima Committee member and both of that member's alternates could not attend a Committee meeting, their ability to find a temporary alternate who would meet both the district and group criteria would be restricted under the Committee's proposal.

In order to make the proposed amendment more practicable, the Committee's proposed language has been modified to provide that a temporary alternate may be selected from the collective pool of all Committee member alternates, but must represent the same group (grower or handler) as the absent member. Thus, in the event that all alternates for Committee members in the same group representing a given district are unavailable, selection of a temporary alternate would rely on the availability of other Committee members' alternates from the remaining districts, provided that the selected temporary alternate represented the same group (grower or handler).

Drawing from the Hood River district example given above, in the event that one of the Hood River grower Committee members and both his or her alternates were unable to attend a Committee meeting, the selection process of a temporary alternate for that meeting would begin with the second Hood River grower Committee member's two alternates. If neither of those two alternates were available, the selection process would proceed to the availability of other, non-Hood River grower Committee members' alternates until a temporary alternate was found.

In the case of districts having only two Committee members, a temporary alternate would be selected by the absent Committee member from the collective pool of alternates from all districts and would represent the same group (grower or handler).

Given these considerations, the Department proposes the following language be added to § 927.28: In the event that both a member of the Control Committee and that member's alternates are unable to attend a Control Committee meeting, the member may designate any other alternate member from the same group (handler or grower) to serve in that member's place and stead.

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 so that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act and amendments thereto are unique in that they are normally brought about through group action of essentially small entities acting on their own behalf. Thus, both the RFA and the Act are compatible with respect to small entities.

According to the Small Business Administration (13 CFR 121.201) small handlers are those having annual receipts of less than $5,000,000 and small agricultural producers are defined as those with annual receipts of less than $750,000. Based on testimony presented at the hearing, a majority of the winter pear producers are considered small under the SBA definition. Of the 1,800 winter pear growers, 80 to 85 percent are estimated to have sales equal to or less than $750,000. There are 90 handlers

operating in the production area. The majority of these handlers fit the SBA definition of a small handler. Thus, this action will apply primarily to small entities.

This recommended decision proposes making the following amendments to the winter pear marketing order: (1) To amend § 927.51(a)(1) of the order to specifically authorize the establishment of maturity regulations; (2) To amend § 927.51 of the order to authorize the establishment of container requirements which would encompass capacity, weight, dimensions, and packing of the container, or containers, which may be used in packaging or handling of pears; and (3) To amend § 927.28 of the order to authorize additional alternates to serve for a Committee member in the event that both that member and that member's alternates are unable to attend a Committee meeting.

These actions are designed to enhance the quality of winter pears at consumer outlets through the regulation of maturity regulations, to create more orderly marketing conditions for winter pears through the implementation of container uniformity, to improve grower returns through these combined actions, and to ensure grower and handler representation at all Committee meetings.

Members of the Winter Pear Control Committee attending the hearing testified that the proposal to grant authority to establish maturity regulations has been widely discussed within the grower community, an estimated 80 to 85 percent of which qualify as small producers. Moreover, among the witnesses testifying, it was often stated that implementing maturity requirements would equally benefit small and large producers by standardizing industry requirements and enhancing overall product quality in the market.

Small handlers from both Oregon and Washington were present and participated in the hearing, and indicated their support for this proposal. When asked if such regulations would increase handler costs, one small handler responded that while some additional inspection costs would be incurred, those costs are expected to be offset with the increase in consumption. Ultimately, witnesses testifying at the hearing indicated that net returns to both handlers and producers would increase.

Testimony also indicated that the proposal to grant authority to fix the size, capacity, weight, dimensions, markings, or pack of the container, or containers, used in the packaging or handling of winter pears has been widely discussed within the winter pear industry. The proposed provisions in this recommended decision also include definitions of ''pack'' and ''container'' that are added based upon testimony at the hearing. Among the witnesses testifying, it was widely stated that implementing this authority would equally benefit both small and large handlers and growers. By standardizing container and packing requirements, handling costs would decrease through reduced inventories and more efficient packing procedures. Uniformity in the market would also facilitate standardized transactions by ensuring more equitable cost per unit comparisons and producer returns on product.

Small handlers testifying at the hearing indicated their support for this proposal. When asked if such regulations would increase handler costs, one small handler explained that the costs of new containers are likely to be offset by gains in packing efficiency and a more transparent cost per unit comparisons in handler to retailer transactions. Small producers testifying to this issue realized that increased costs in packing material would more than likely be passed from the handler to the grower, but the net gain from container standardization will ultimately benefit the industry as a whole, including the small producer. It was stated that by removing confusion related to container size in the marketplace, growers should get a fairer return on their product.

In the case of districts having only two Committee members, a temporary alternate will be selected by the absent Committee member from the collective pool of alternates from all districts and will represent the same group (grower or handler). The proposed provisions in this recommended decision represents a modification to the Committee's proposal in order to better effectuate its terms. This method of selecting a temporary alternate would ensure representation of all growers and handlers (both large and small) at Committee meetings while having little or no increase in Committee administrative costs. Moreover, testimony demonstrated that the authority to temporarily assign alternates would improve representation of the small producers and handlers.

USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this proposed rule. All of these amendments are designed to enhance the administration and functioning of the marketing order to the benefit of the industry.

Committee meetings held to discuss these proposals, as well as the hearing, were widely publicized throughout the Oregon and Washington winter pear production area. All interested persons were invited to attend the meetings and the hearing, and participate in Committee deliberations on all issues. All Committee meetings and the hearing were public forums, and all entities, both large and small, were able to express views on these issues. The Committee itself is composed of 12 members, of whom six are handlers and six are producers. Finally, interested persons are invited to submit information on 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/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.

A 30-day comment period is deemed to allow interested persons to respond to this proposal and facilitate the completion of this proceeding.

Civil Justice Reform

The amendments proposed herein have been reviewed under Executive Order 12988, Civil Justice Reform. They are not intended to have retroactive effect. If adopted, the proposed amendments will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with the amendments.

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 date of the entry of the ruling.

General Findings

The findings hereinafter set forth are supplementary to the findings and determinations which were previously made in connection with the issuance of the marketing agreement and order; and all said previous findings and determinations are hereby ratified and affirmed, except insofar as such findings and determinations may be in conflict with the findings and determinations set forth herein.

(1) The marketing agreement and order, as amended, and as hereby proposed to be further amended, and all of the terms and conditions thereof, would tend to effectuate the declared policy of the Act;

(2) The marketing agreement and order, as amended, and as hereby proposed to be further amended, regulate the handling of winter pears grown in the production area in the same manner as, and are applicable only to, persons in the respective classes of commercial and industrial activity specified in the marketing agreement and order upon which a hearing has been held;

(3) The marketing agreement and order, as amended, and as hereby proposed to be further amended, are limited in their application to the smallest regional production area which is practicable, consistent with carrying out the declared policy of the Act, and the issuance of several orders applicable to subdivisions of the production area would not effectively carry out the declared policy of the Act;

(4) The marketing agreement and order, as amended, and as hereby proposed to be further amended, prescribe, insofar as practicable, such different terms applicable to different parts of the production area as are necessary to give due recognition to the differences in the production and marketing of winter pears cherries grown in the production area; and

(5) All handling of winter pears grown in the production area as defined in the marketing agreement and order, is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects such commerce.

List of Subjects in 7 CFR Part 927

Marketing agreements, Pears, Reporting and record keeping requirements.

Recommended Amendment of the Marketing Agreement and Order

For the reasons set out in the preamble, 7 CFR part 927 is proposed to be amended as follows:

PART 927—WINTER PEARS GROWN IN OREGON AND WASHINGTON

1. The authority citation for 7 CFR part 927 continues to read as follows:

Authority: 7 U.S.C. 601–674.

* * * * *

2. Revise § 927.5 to read as follows:

§ 927.5 Size

Size means the number of pears which can be packed in a standard pear box when packed in accordance with the packing requirements of the U.S. Standards for Pears (part 51 of this title), or as such regulations hereafter may be modified or as ''size'' may be more specifically defined in a regulation issued under this part.

3. Add new §§ 927.14 and 927.15 under the undesignated center heading ''Definitions'' to read as follows:

§ 927.14 Pack.

Pack means the specific arrangement, size, weight, count, or grade of a quantity of pears in a particular type and size of container, or any combination thereof.

§ 927.15 Container.

Container means a box, bag, crate, lug, basket, carton, package, or any other type of receptacle used in the packaging or handling of pears.

5. Revise § 927.28 to read as follows:

§ 927.28 Alternates for members of the Control Committee.

The first alternate for a member shall act in the place and stead of the member for whom he or she is an alternate during such member's absence. In the event of the death, removal, resignation, or disqualification of a member, his or her first alternate shall act as a member until a successor for the member is selected and has qualified. The second alternate for a member shall serve in the place and stead of the member for whom he or she is an alternate whenever both the member and his or her first alternate are unable to serve. In the event that both a member of the Control Committee and that member's alternates are unable to attend a Control Committee meeting, the member may designate any other alternate member from the same group (handler or grower) to serve in that member's place and stead.

4. Amend § 927.51 by revising paragraph (a) to read as follows:

§ 927.51 Issuance of regulations; and modification suspension, or termination thereof.

(a) Whenever the Secretary finds, from the recommendations and information submitted by the Control Committee, or from other available information, that regulation, in the manner specified in the section, of the shipment of pears would tend to effectuate the declared policy of the act, he or she shall so limit the shipment of pears during a specified period or periods. Such regulation:

(1) May limit the total quantity of any grade, size, quality, maturity, or combination thereof, of any variety of pears grown in any district and may prescribe different requirements applicable to shipments to different export markets; or

(2) May prescribe minimum standards of quality for any variety of pears and limit the shipment thereof to those meeting such minimum standards; or

(3) Fix the size, capacity, weight, dimensions, markings, or pack of the container, or containers, which may be used in packaging or handling of pears.

Dated: March 27, 2002.

A.J. Yates,

Administrator, Agricultural Marketing Service.

[FR Doc. 02–7918 Filed 4–2–02; 8:45 am]

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DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Part 286

[INS No. 2180–01]

RIN 1115–AG47

Establishment of a $3 Immigration User Fee for Certain Commercial Vessel Passengers Previously Exempt

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Proposed rule.

SUMMARY: This rule proposes to amend the Immigration and Naturalization Service (Service) regulations in accordance with section 109 of the Department of Justice Appropriations Act, 2002 (Title I of Public Law 107–77), signed November 28, 2001. This law authorizes the collection of a $3 fee for certain commercial vessel passengers previously exempt under section 286(e)(1) of the Immigration and Nationality Act (Act). This proposed rule would amend the Service regulations to require certain commercial vessel operators and/or their ticketing agents to charge and collect a $3 user fee from every commercial vessel passenger whose journey originated in the U.S., Canada, Mexico, a territory or possession of the United States, or an adjacent island