

**DEPARTMENT OF AGRICULTURE****Agricultural Marketing Service****7 CFR Part 927**

[Docket No. AO-F&V-927-A1; FV04-927-1 PR]

**Winter Pears Grown in Oregon and Washington; Recommended Decision and Opportunity To File Written Exceptions to Proposed Amendments to 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 (order) for winter pears grown in Oregon and Washington. The amendments are jointly proposed by the Winter Pear Control Committee and the Northwest Fresh Bartlett Marketing Committee, which are responsible for local administration of orders 927 and 931, respectively. Marketing Agreement and Order No. 931 regulates the handling of fresh Bartlett pears grown in Oregon and Washington. The amendments would combine the winter pear and fresh Bartlett orders into a single program under marketing order 927, and would add authority to assess pears for processing. All of the proposals are intended to streamline industry organization and improve the administration, operation, and functioning of the program.

**DATES:** Written exceptions must be filed by February 14, 2005.

**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 or [www.regulations.gov](http://www.regulations.gov). All comments should reference the docket number and the date and page number of this issue of the **Federal Register**. Comments 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 Order Administration Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, USDA, Post Office Box 1035, Moab, UT 84532, telephone: (435) 259-7988, fax: (435) 259-4945.

Small businesses may request information on this proceeding by

contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue SW., Stop 0237, Washington, DC 20250-0237; telephone: (202) 720-2491, fax: (202) 720-8938.

**SUPPLEMENTARY INFORMATION:** Prior documents in this proceeding: Notice of Hearing issued on March 24, 2004, and published in the March 30, 2004, issue of the **Federal Register** (69 FR 16501).

This action is governed by the provisions of sections 556 and 557 of title 5 of the United States Code and is therefore 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 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 recommended decision 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 are based on the record of a public hearing held on April 13 and 14, 2004, in Yakima, Washington and on April 16, 2004, in Portland, Oregon. Notice of this hearing was published in the **Federal Register** on March 30, 2004 (69 FR 16501). The notice of hearing contained order changes proposed by both the Winter Pear Control Committee and the Northwest Fresh Bartlett Marketing Committee, which are responsible for local administration of orders 927 and 931, respectively. Marketing order 927 regulates the handling of winter pears grown in Oregon and Washington. Marketing order 931 regulates the handling of Bartlett pears in the same production area.

At a joint meeting of the Winter Pear Control Committee and the Northwest Fresh Bartlett Pear Marketing Committee on November 13, 2003, both Committees voted unanimously to recommend amendments to Marketing Order 927. The amendments are intended to streamline industry and program organization by placing both Marketing Order 927, regulating the handling of winter pears, and Marketing Order 931, regulating the handling of

Bartlett pears, under one program: Marketing Order 927. If this proposal were implemented, Marketing Order 931 would be terminated. The amendments would also add pears for processing to the order, and would update various provisions of the order.

The Committees proposed amendments to marketing order 927 include:

1. Expanding the definition of pears to include all varieties of pears classified as summer/fall pears in addition to winter pears; adding Concorde, Packham, and Taylor s Gold pears to the current list of winter pear varieties; and adding a third category of pears which would include varieties not classified as summer/fall or winter pears. This amendment would extend program coverage to all pears grown in Oregon and Washington.

2. Revising the definition of size to include language currently used within the industry.

3. Extending the order's coverage to pears for processing by revising the definition of handle, and adding definitions of processor and process.

4. Establishing districts for pears for processing. This amendment would divide the order's production area into two districts for pears for processing: one being the State of Oregon and the other being the State of Washington.

5. Dissolving the current Winter Pear Control Committee and establishing two new administrative committees: the Fresh Pear Committee and the Processed Pear Committee (Committees). This proposal would add a public member and public alternate member seat to both of the newly established Committees and would remove Section 927.36, Public advisors. The Committees would coordinate administration of Marketing Order 927, with each Committee setting assessments and administering program functions specific to their commodity. Coordinated administration would allow each Committee to make decisions on behalf of the commodity they represent, yet combine administrative functions, when applicable, to maximize efficiencies and minimize program costs.

Additionally, related changes would be made to order provisions governing nomination and selection of members and their alternates, terms of office, eligibility for membership, and quorum and voting requirements, to reflect the proposed dual committee structure.

6. Authorizing changes in the number of Committee members and alternates, and allowing reapportionment of committee membership among districts and groups (*i.e.*, growers, handlers, and

processors). Such changes would require a Committee recommendation and approval by the Department.

7. Adding authority to establish assessment rates for each category of pears, including: Summer/fall pears, winter pears, and all other pears. In addition, rates of assessment could be different for fresh pears and pears for processing in each category, and could include supplemental rates on individual varieties.

8. Adding authority for container marking requirements for fresh pears.

9. Removing the order provision allowing grower exemptions from regulation. This is a tool no longer used by the industry and, thus, is considered obsolete.

10. Amending § 927.70, Reports, to update order language regarding confidentiality requirements to conform to language under the Act.

11. Clarifying inspection requirements and adding authority to eliminate those requirements if an alternative, adequate method of ensuring compliance with quality and size standards in effect under the order can be developed.

12. Eliminating the current exemptions for pears for processing and for pears shipped to storage warehouses.

13. Providing that separate continuance referenda be held every 6 years for fresh pears and processing pears.

14. Adding the authority for the Committees to conduct post-harvest research, in addition to production research and promotion (including paid advertising).

15. Updating several order provisions to make them more current.

16. Revising order provisions to reflect the two-committee structure being recommended for administration of the program.

Twenty-one industry witnesses testified at the hearing. These witnesses represented fresh winter and summer/fall pear producers and handlers, and processors of summer/fall pears in the production area. All witnesses supported the Committees recommended changes; no opposition was present at the hearing.

Witnesses addressed the need to simplify the operations of the Northwest pear industry by combining the activities of the fresh winter pear, the fresh summer/fall pear and the processed pear industries under a single federal marketing order. Witnesses stated that the proposed amendments would streamline pear industry activities, including assessment collection, administration, regulation, promotion, and research. The three industries are currently regulated under

two Federal marketing orders and two State commissions. If this proposal were implemented, the two federal programs would be combined under one federal program that would also assume functions similar to those under the current state programs. Witnesses stated that the state programs would likely be dissolved if this proposal were implemented.

Witnesses explained that the proposal would require expanding the definition of pears under 927 to include all varieties of pears grown in the production area. The proposed amendments would also include revising the definition of handle, and adding definitions for process and processor.

Witnesses stated that expanding the scope of the order to include pears for processing would require a restructuring of the order's administrative committee. The new committee structure would include one committee with oversight for all fresh pear activities, and a second committee with oversight for all activities related to pears for processing. Additionally, witnesses spoke in favor of amending order provisions governing nomination and selection of members and their alternates, terms of office, eligibility for membership, and quorum and voting requirements to reflect the proposed dual committee structure.

The order's production area, the States of Oregon and Washington, would remain the same under the proposed amendments. However, the subdivision of the production area into districts would be different for pears for processing than for fresh pears. While four districts would be established for fresh pears, pears for processing would only have two districts: the State of Oregon and the State of Washington.

Witnesses also proposed adding a public member and public alternate member seat to both of the newly established committees. The public member and his or her alternate would be residents of the production area, and would have no financial ties to the production, handling or processing of pears. Witnesses stated that this proposal would also result in the removal of § 927.36, Public advisors, as unnecessary, since the public advisors would be replaced by public members of the committees.

Witnesses favored adding authority to the order to allow the committees, each independently, to recommend changes in the number of committee members and alternates of each committee, as well as recommend reapportionment of committee membership among districts and groups (*i.e.*, growers, handlers, and processors). Witnesses stated that this

authority would allow the committees more flexibility in responding to industry changes over time that may merit adjustments in committee structure. These recommendations would be based on an assessment of several industry indicators and would require approval by the Department.

Witnesses stated that the order's assessment structure should also be revised. Specifically, witnesses advocated adding authority to establish assessment rates for each category of pears, including: Summer/fall pears, winter pears, and all other pears. In addition, rates of assessment could be different for fresh pears and pears for processing in each category, and could include supplemental rates on individual varieties. The Fresh Pear Committee would recommend assessment rates for fresh pears and the Processed Pear Committee would recommend assessment rates for pears for processing.

Proponents of this amendment stated that authority to establish assessment rates by category would allow the committees to maintain different assessment levels for each category of Northwest pears (based on different budget needs), as well as providing the committees with additional flexibility through the ability to apply supplemental rates of assessments for individual varieties within each category. Supplemental rates would be used to fund specific research or promotional efforts for individual varieties, whereas categorical assessment rates would be used to fund activities for an entire category of pears.

Witnesses explained that authority for production research and promotion, including paid advertising, currently exists under marketing order 927. Expanding the order's definition of pears to include summer/fall varieties and pears for processing would extend those authorities to all Northwest pears.

In addition, witnesses stated their support for adding the authority to conduct post-harvest research. Post-harvest research could include activities such as storage and treatment of pears between the field and the marketplace. Proponents stated that the authority for production and post-harvest research, and promotion activities including paid advertising, would enhance the order's ability to support Northwest pear growers, handlers and processors.

In discussing the order's authority to regulate fresh pears, witnesses supported adding authority to establish container marking regulations. Witnesses stated that this authority, which could include the use of generic industry logos, would provide the

industry with a marketing tool to enhance the presentation of fresh Northwest pears in the marketplace.

Witnesses also advocated adding authority to recommend modification or elimination of inspection requirements provided that an alternative method of ensuring compliance with quality and size standards were developed. Any alternative system would have to be approved by the Department through the rulemaking process.

Witnesses stated their approval of the Committees' recommendations to: Eliminate the current exemption for pears for processing and for pears shipped to storage warehouses as this provision is considered obsolete; remove the order provision allowing grower exemptions from regulation as this tool is also no longer used by the industry; and, amend § 927.70, Reports, to add confidentiality provisions of the order concerning the handling of information provided to the Committees and to specify in the order provisions that handlers maintain records for at least two years.

Finally, witnesses supported requiring continuance referenda as a means of determining grower sentiment on the order's operations. As proposed, separate continuance referenda would be held every 6 years for the fresh pear and processing pear provisions of the order (each independently).

At the conclusion of the hearing, the Administrative Law Judge stated that 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 would be June 1, 2004. The deadline was subsequently extended to June 16, 2004. One brief on behalf of the joint Winter Pear Control Committee and the Northwest Fresh Bartlett Marketing Committee was filed. The brief contained an overview of the industry's proposals and reiterated support for amending the order.

#### Material Issues

The material issues presented on the record of hearing are as follows:

(1) Whether to amend the definition of "pears" to include all varieties of pears grown in the production area;

(2) Whether to revise the definition of "size" to reflect current industry usage of the term;

(3) Whether to add authority to regulate pears for processing, by revising the definition of "handle", and adding definitions of "processor" and "process";

(4) Whether to establish districts for pears for processing;

(5) Whether to terminate the current Winter Pear Control Committee, to establish two new administrative committees (the Fresh Pear Committee and the Processed Pear Committee), to add a public member and public alternate member seat to both of the newly established committees, to remove § 927.36, Public advisors, and to make related changes to order provisions governing nomination and selection of members and their alternates, terms of office, eligibility for membership, and quorum and voting requirements;

(6) Whether to add authority for the proposed committees to recommend changes in the number of committee members and alternates, and the allocation of membership among groups and districts;

(7) Whether to add authority for the committees to recommend rates of assessment for pears by category (summer/fall pears, winter pears, and all other pears) and supplemental rates of assessment by variety;

(8) Whether to add authority for container marking requirements for fresh pears;

(9) Whether to remove § 927.54, Exemption Certificates, which allows grower exemptions from regulations;

(10) Whether to amend § 927.70, Reports, to add confidentiality provisions concerning the handling of information provided to the Committees and to specify in the order provisions that handlers maintain records for at least two years;

(11) Whether to add authority to recommend modification or elimination of inspection requirements, provided that an alternative, USDA approved method of ensuring compliance with order quality and size standards could be used;

(12) Whether to eliminate current exemptions for pears for processing and for pears shipped to storage warehouses;

(13) Whether to provide that separate continuance referenda be held every 6 years for fresh pears and processing pears;

(14) Whether to add authority for the proposed committees to conduct post-harvest research, in addition to production research and promotion (including paid advertising); and

(15) Whether to update several order provisions to make them more current.

#### 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—Revision of the Definition of Pears

Section 927.4 of the order should be amended to include all varieties of pears grown in the States of Oregon and Washington. This amendment would entail adding a category for all pear varieties characterized as summer/fall varieties, and would add the Concorde, Packham and Taylor's Gold varieties to the current list of pear varieties characterized as winter pear varieties. In addition, a third category of pears should be added that would include all varieties not classified as summer/fall or winter pears, that are grown within the production area.

The winter pear order currently defines pears as any and all of the Beurre D'Anjou, Beurre Bosc, Winter Nelis, Doyenne du Comice, Forelle, and Seckel varieties of pears. It also includes any other varieties or subvarieties characterized as winter pears that are grown in the production area and are recognized by the committee and approved by the Department.

The proposed amendment would broaden the scope of Federal marketing order 927 to cover all pears produced within the production area. Witnesses stated that without this proposed change in the definition of pears covered by marketing order 927, all other proposed amendments would not be possible as they entail bringing the fresh winter and summer/fall pear industries and the processed pear industry under one Federal regulatory program.

According to the record, there are eight principal varieties of pears grown in the States of Washington and Oregon. These pear varieties are split into categories of summer/fall and winter pears. These references stem from the differences in the crop harvest and marketing cycles of the different varieties.

Winter pears, such as the red and green Anjou, Bosc, Comice, Seckel, Forelle, Concorde, Packham and Taylor's Gold varieties, are typically harvested in early September. Winter pear varieties are generally able to be stored longer than summer/fall varieties, and thus can be sold throughout the winter, spring and summer. The marketing season for Comice, Seckel, and Forelle generally runs through April. The marketing season for Bosc pears extends into May, and Anjou pears can be available into July or later.

Summer/fall varieties include the Bartlett and Starkrimson pear varieties. Summer/fall pears are harvested in late summer and are marketed throughout the fall, sometimes into January. Bartlett

pears can either be red or green, with the green Bartlett being more prevalent in the marketplace. Bartlett pears are also the variety of pear that is most commonly used for processing. The Starkrimson variety is a summer/fall variety that has recently become more important in the overall volume of pear production in Oregon and Washington.

Witnesses also indicated that establishing an "other" category would be prudent in the event that future varieties of pears were developed that do not fall into the other established categories. The industry would gain flexibility in responding to new developments in the Oregon and Washington pear industry by providing for the structure to classify such pears appropriately for program purposes. This would allow the industry to avoid having to pursue amendment of the marketing order in the future, if new varieties of pears are developed that are not considered winter or summer/fall pears.

USDA is also recommending that § 927.4, the definition of pears proposed by industry, be revised to include language stating that all pears with the genus name "Pyrus" produced within the production area would be included under the order. This language was also included in the brief filed by the joint Winter Pear Control Committee and the Northwest Fresh Bartlett Marketing Committee in support of the proposed amendments to marketing order 927. Accordingly, USDA recommends revising § 927.4, Pears, to include the genus name "Pyrus" in the definition.

Witnesses stated that this proposed amendment would provide the basis for many of the other proposed amendments discussed later in this document. The industry intends to expand the scope of Federal marketing order 927 to include all varieties of pears grown in Oregon and Washington, to regulate both fresh pears and pears for processing, as well as to establish two administrative committees for local oversight and administration of the order. In order to effectuate these changes, the definition of pears needs to be amended to provide authority to regulate all pears under one order. This would be accomplished by amending the order's definition of pears.

Witnesses explained that the winter, summer/fall, fresh and processed pear industries are closely inter-related. Growing, harvesting, packing, processing and marketing activities of all of these industries impact each other to the extent that regulating them under one Federal marketing order would be logistically beneficial for the Oregon and Washington pear industry.

Proponents of this amendment stated that this amendment, in conjunction with the proposed amendments discussed in later material issues, would help to improve the orderly marketing of product within the industry.

To illustrate the interaction of the different pear industries, witnesses used the example of a large crop of Bartlett pears. In this example, communication between the fresh and processing sides of the pear industry would be helpful in assuring timely movement of a perishable product and maximizing returns for that product. Crop estimates and harvest information, for example, could be shared between the fresh and processed committees to anticipate market distribution strategies for the large crop. The committees would facilitate information sharing at the administrative, grower and handler levels to enhance coordination of fresh and processed industry activities. For example, potential overflow from the fresh market needs to be able to move efficiently to the processed industry in order to prevent loss of product. Timely movement of a perishable product is essential to securing the highest grower return for that product.

Similarly, witnesses stated that regulating all varieties of pears (winter and summer/fall) under one marketing order would synchronize activities and facilitate inter-industry discussions and decision-making.

There was no opposition testimony on this issue. For the above reasons, it is recommended that section 927.4 be amended to include all pears characterized as winter and summer/fall varieties and subvarieties grown within the production area. A category for all pears not classified as either winter or summer/fall pears should also be established. USDA recommends including a reference to the genus name "Pyrus" as part of this definition.

A conforming change is needed in the title of 7 CFR Part 927. It is proposed to be revised to "Pears Grown in Oregon and Washington" to reflect the fact that the program no longer would cover only winter pears.

#### *Material Issue Number 2—Revision of the Definition of Size*

Section 927.5, Size, should be revised to reflect contemporary definition of the term as used by the industry today.

Witnesses explained that the current definition of "size" in the order is outdated as it defines size according to the number of pears that can be packed in a standard western pear box. A standard western pear box is described as a box that is 18 inches long, 11½ inches wide and 8½ inches deep. At the time

marketing order 927 was established, the standard western pear box was the common receptacle used for packing fresh pears. Over time, different forms of packing containers with different dimensions have evolved. Thus, this definition no longer accurately reflects the variety of containers used within the industry.

Alternatively, witnesses proposed that the definition be revised to include language describing a 44-pound net weight standard box or container equivalent. According to the record, industry currently describes a 44-pound box as a standard container, and uses this definition to measure crop size and changes in crop volumes from year to year.

Witnesses also explained that, given the proposal to add authority to regulate pears for processing to the order, a size definition solely based on a fresh pear packing box would not be appropriate. Witnesses proposed a size definition that would also include a physical measurement: The greatest transverse diameter of the pear taken at right angles to a line running from the stem end. Proponents of the revised definition stated that a diameter-based definition would accurately describe pear sizes in both the fresh and processed pear industries, and would more accurately reflect current sizing procedures and technology. As one witness stated, the physical description for measuring pears provides the basis for determining what size actually goes into a box. Representatives from the pear processing industry also explained that processors require a minimum-diameter size of 2¼ inches for pears for processing. Thus, the revised definition of size would better reflect current practices of both industries.

There was no opposition testimony on this issue. For the above reasons, it is recommended that § 927.5, Size, be revised to more accurately reflect the contemporary definition used within the industry.

#### *Material Issue Number 3—Adding Authority to Regulate Pears for Processing*

Federal marketing order 927 should be amended to include authority to regulate pears for processing by revising § 927.7, Handler, and § 927.8, Ship or handle. These terms should be amended to include persons receiving pears for processing. In addition, definitions of "processor" and "process" should be added to the order to further clarify the amended terms "handler" and "ship or handle."

The order currently does not include authority to regulate pears for

processing. However, the regulation of pears for processing is authorized under the Act and, therefore, can be added as a provision of marketing order 927. Given the proposal described in Material Issue 1, revising the definition of "pears," the authority to regulate pears for processing would apply to all pear varieties grown in the states of Oregon and Washington.

There are five processing plants in the production area, with one in Oregon and four in Washington. Seventy five percent of the processing tonnage produced within the production area originates from the State of Washington, with 73 percent of the total located in the Yakima area. Processed pear production totaled 842.2 million pounds in the 2001/2002 crop year, compared to 1086.3 million pounds of fresh pear production in the same year.

According to the hearing record, adding authority to regulate pears for processing would complement the Oregon and Washington pear industries' desire to coordinate and streamline industry-wide research, promotion, and administrative activities. To accomplish this, the definition of "handle" should be expanded to include receiving pears for processing. Processing would be defined as canning, reducing to concentrate, freezing, dehydrating, pressing or pureeing pears, or in any other way converting pears commercially into a processed product. A processor would be any person who commercially processes pears.

Most pear producers within the production area produce both winter and summer/fall pear varieties for both the fresh and processed product markets. Record evidence indicates that the fresh and processed product markets compliment each other, as the latter provides a market for product that cannot be profitably distributed in the fresh market. Combining the activities of the fresh and the processed pear industries under a single Federal marketing order would facilitate communication among industry participants and would allow for more efficient marketing and research.

Representatives of the processed pear industry testifying at the hearing stated their support for adding authority to regulate pears for processing under the order. Witnesses stated that a Federal marketing order would provide a stable, unified, and constant vehicle to accomplish industry production and marketing objectives, mainly promoting consumption of fresh and processed Northwest pears, and increasing grower returns. Witnesses expanded on the many benefits they believed would result from collective industry action,

and stated that coordination of marketing and research efforts is essential to maintaining market share in an increasingly competitive marketplace. Moreover, witnesses explained that combining fresh and processed pear activities under one program would represent a natural progression of the long-existing cooperation between the two industries.

According to the record, pear growers in Oregon and Washington have a 50-year history of dedicated funding to promote canned pears to consumers and foodservice users. Formal support of the processed pear industry began in 1954 with the establishment of the Pacific Northwest Canned Pear Service (PNCPS), a non-profit marketing organization funded through voluntary grower assessments.

The PNCPS continues to operate under the direction of growers from Washington and Oregon through two State grower organizations: the Washington State Fruit Commission and the Oregon Bartlett Pear Commission. The two State organizations annually approve a budget based on a per-ton assessment on pears delivered to processors. This mandatory assessment is collected from shippers and processors by both organizations, and provides the funds for the PNCPS to operate through an annually approved contract.

Due to the mandatory collection of marketing dollars from Washington and Oregon Bartlett pear growers who sell their tonnage for processing, all of those growers are members of the PNCPS. Each of the two State grower organizations appoints board members to the PNCPS board of directors.

In addition, processor members pay an annual associate membership fee and pay assessments on pears transported to the Northwest for processing from California, Idaho, or Canada. Associate processor members include all five pear processors operating in the production area.

Witnesses testified, if implemented, the proposal to include regulatory authority for pears for processing could lead to the dissolution of the two State commissions. Collection of assessments and administration of the marketing order program would become the responsibility of the proposed Processed Pear Committee, described and discussed under Material Issue 5.

Witnesses did not expect the proposed change in the structure of processed pear organizations to result in a change to the combined federal and state assessments that handlers are currently paying. The proposed amendment is expected to result in a

reorganization of entities representing processed pear interests, reducing the number of regulatory entities from two to one. Assessment collection would be simplified, but the level of assessment is not expected to increase or decrease significantly. According to the hearing record, current assessments equal roughly \$5 per ton of pears received for processing.

Handler assessments would be levied on the first individual receiving pears from the producer for packing or processing. For example, if a producer were to transport pears directly to a processor, that processor would be considered the first handler and would be responsible for submitting the appropriate assessment to the administrative committee. If a producer delivers pears to a packinghouse, where pre-sizing or grading for fresh market may take place prior to selecting tonnage to be directed to the processor, then the packinghouse would be considered the first handler and would be responsible for the assessment amount due. If a producer were to deliver pears to a packinghouse or processing facility outside of the production area, then the producer would be considered the first handler. The definition of handler would exclude any person receiving pears solely for the purpose of transporting them to a packinghouse or processor, such as a contract carrier.

Subject to approval by the Department, Federal processed pear assessments could be allocated to a promotional organization to conduct promotional activities on a contract basis, much like the current contractual arrangement between the PNCPS and the State commissions. Record evidence demonstrated that promotional activities, such as consumer education campaigns, distributor rebate programs, and other marketing, such as recipe development, have helped to sustain a stable market share for processed pears. In spite of increasing competition from imported pears and a growing preference among consumers for take-out or fast food meal service, demand for processed pear products has remained relatively stable over the past three decades.

The record evidence shows that over the last three years, imported canned pears have become an increasingly competitive challenge to the Northwest canned pear industry. Witnesses cited imports from China, South Africa and Australia as the industry's top three foreign competitors, with imported product accounting for nearly 10 percent of domestic canned pear sales. Promotional activities geared towards

large-volume end users, including school foodservice, health care, and other on-site foodservice operators and distributors, have helped the Northwest processed pear industry to maintain a stable share of these market sectors. Witnesses stated that incorporating processed pears under the Federal marketing order for Oregon and Washington pears would assist the industry and assure that promotional activities continue to receive coordinated industry support.

Information presented at the hearing suggests that over the past century a number of factors have converged to change consumer food consumption patterns and encourage the emerging dominance of food service over the retail sector. In an increasingly demanding work-life environment, many consumers are becoming increasingly dependent on dining out or purchasing prepared foods. With consumers turning to foodservice with their food dollars, canned pear consumption has moved away from the home and into foodservice operations.

As a result, representatives from the PNCPS explained that current promotional activities related to this sector are largely oriented towards consumer education and public relations efforts via food editors and nutrition professionals, and consumer retail promotion. According to the record, consumer promotion efforts, including lifestyle brochures, newspaper recipe releases and consumer newsletters, have helped to stabilize home consumption.

While witnesses stated that promotional activities are essential to the continued vitality of the processed pear industry, they also expressed their view that grade and size regulatory authority for processed pears should not be included under the order. In other words, supporters of this proposal only favored regulatory oversight of the collection of assessments on pears for processing for the use of funding research and promotion. This amendment would not include authority to establish grade and size regulations for pears for processing.

Representatives from the processed pear industry stated that during the drafting of the proposal to amend marketing order 927 to include pears for processing, processors were polled by members of the Winter Pear Control Committee regarding support for grade and size regulatory authority. Given that the processed pear industry currently operates under established USDA grades and standards, processors opted against including this authority in the proposed amendment. When asked at the hearing

if such authority might be desirable at some point in the future, processors responded that they would be prepared to pursue amendment of the order at such time. Thus, authority for grade and size regulation is not included as part of this proposal.

Based on the record testimony and the reasons outlined above, § 927.7, Handler, and § 927.8, Ship or handle, should be amended to include the activity of receiving pears for processing. In addition, two new definitions should be added to the order: § 927.14, Processor, and § 927.15, Process. No opposition to these proposed amendments was presented at the hearing.

#### *Material Issue Number 4—Districts*

Section 927.11, Districts, should be amended to include two sets of representative districts: one for fresh pear production and one for processed pear production. This section of the order needs to be revised to reflect the proposed establishment of two administrative committees: the Fresh Pear Committee and the Processed Pear Committee, discussed in Material Issue 5. The geographic boundaries of the total production area under Marketing Order 927, which includes the states of Oregon and Washington, would not change.

Marketing order 927 currently defines four districts for fresh winter pear production. Given the proposal to expand marketing order coverage to all varieties of pears produced and handled in the fresh and processed pear industries of Oregon and Washington, these representative districts need to be adjusted. The proposed amendment would retain a four-district division of the production area for fresh pear production, but would slightly modify the current district boundaries to reflect the addition of summer/fall pear varieties. In addition, two districts for processed pears would be established. These would be defined along State boundary lines, with Oregon as one district and Washington as the other.

The current Winter Pear Control Committee consists of 12 members allocated among 4 geographic districts: Medford, Yakima, Mid-Columbia and Wenatchee. The Medford and Yakima Districts each have one grower and one handler member, and the Mid-Columbia and Wenatchee Districts each have two grower and two handler members. There is also a non-voting public advisor.

The current Northwest Fresh Bartlett Marketing Committee, which represents Oregon and Washington summer/fall fresh production, has 14 members allocated among 4 districts: Medford,

Yakima, Mid-Columbia and Wenatchee. The Medford and Yakima Districts each have two grower and two handler members, and the Mid-Columbia and Wenatchee Districts each have two grower and one handler members. There is also one non-voting public advisor.

Geographically, these districts are nearly identical to the winter pear districts, with the exception of the division of production along the Columbia River Gorge and southern Oregon. The differences in district committee representation reflect the regional differences in summer/fall pear production and winter pear production.

According to the record, the proposed Fresh Pear Committee districts are based on the existing structure of the Winter Pear Control Committee, which has been updated several times and which accurately represents the interests of the fresh summer/fall pear industry. The proposed fresh district structure also borrows from the Northwest Fresh Bartlett Marketing Committee in that it divides the State of Washington along a more logical division of County lines.

The proposed districts for the Fresh Pear Committee are as follows: The Medford District would include all of the Counties in the State of Oregon except for Hood River and Wasco Counties; the Mid-Columbia District would include Hood River and Wasco Counties in the State of Oregon and the Counties of Skamania and Klickitat in the State of Washington; the Wenatchee District would include the Counties of King, Chelan, Okanogan, Douglas, Grant, Lincoln, and Spokane in the State of Washington, and all other Counties in Washington lying north thereof; and, the Yakima District would include all of the State of Washington not included in the Wenatchee District or in the Mid-Columbia District.

Record evidence indicates that the most significant change in the proposed fresh pear district structure occurs in Oregon, with fresh pear representation being shifted from the Mid-Columbia District to the Medford District. Witnesses explained that growers from this area specifically asked to be included in Medford instead of Mid-Columbia to better reflect the distribution of fresh production in Oregon. The shift in district boundaries would also result in more opportunities for industry members from this region to participate as members of the committee.

According to the record, there are roughly 350 fresh pear producers in Hood River County, Oregon, and less than 40 fresh pear producers in Medford County, Oregon. The area subject to the proposed shift in district boundaries is

known as the Willamette Valley region and has less than 40 fresh pear producers. Given the distribution of fresh pear producers in Oregon, the proposal to merge Willamette Valley producers into the Medford District would improve representation of that area on the committee. The Medford Districts average annual production of winter pears has decreased over the past five years by approximately 10.8 percent, or from 1.127 million boxes (10 year average) to 1 million boxes (five year average). Average annual production of summer/fall pear varieties over the same time period has fallen 13 percent, from 269 thousand boxes (10 year average) to 234 thousand boxes (five year average). At the time, average annual production of summer/fall varieties in the Mid-Columbia District have increased by nearly 10 percent, growing from 868 thousand boxes (10 year average) to 951 thousand boxes (5 year average). Mid-Columbia average annual production of winter pears has remained fairly stable over this period, decreasing by only one half of a percent. Thus, expanding the Medford District would allocate a portion of the current Mid-Columbia District production to that district, and would expand the pool of Medford District industry representatives eligible to serve on the committee.

The proposal to redefine Wenatchee District to include King, Grant and Lincoln Counties, and all other Counties in Washington lying north thereof, is also the result of a shift in boundary lines. The total amount of commercial fresh production represented in this district would not significantly change. However, the re-designation would allow for a better division of production between districts in Washington if production in the northern part of the State were to grow in the future. Witnesses stated that under the proposed district boundaries the State of Washington would be divided geographically into two districts.

The proposed fresh pear district boundaries and corresponding allocation of committee member representation, discussed in Material Issue 5, are also validated by seasonal production summaries. A review of production statistics by district covering 10 years presented at the hearing indicate that the Wenatchee and Mid-Columbia Districts are the largest producers of both fresh winter and summer/fall varieties, and therefore merit a larger committee representation than the Medford and Yakima Districts. The proposed district boundaries offer a more accurate geographical representation of fresh pear production

in the States of Oregon and Washington and more fairly gauge regional production differences.

According to the record, processed pear production has historically been identified by Oregon and Washington State boundaries. Representation of processed pear industry interests and collection of mandatory State assessments have been conducted by respective State commissions: the Oregon Bartlett Pear Commission in Oregon and the Washington Stone Fruit Commission in Washington.

The proposed Processed Pear Committee, further discussed under Material Issue 5, would initially be made up of 10 members allocated between 2 districts. One district would encompass the entire State of Washington. Because processed pear production in this district would represent 75 percent of total processed pear production in the production area, committee member representation would include two grower members, two handler members and two processor members.

The other district would encompass the State of Oregon and would be allocated committee representation of one grower member, one handler member, and one processor member. (The public member would represent the production area at-large.) This proposed structure meets the existing language in the Act, which requires representation of processors and producers to be equal.

Growers and processors testifying at the hearing stated their support for the proposed processed pear districts and indicated that representation by State offered an equitable division of production interests on the proposed administrative committee. While Oregon only represents 25 percent of total production area production, witnesses agreed that the entire State should be included in the same district to provide the Oregon processed pear industry a separate district.

Given the record evidence and the reasons outlined above, USDA recommends that § 927.11, Districts, be amended as proposed. This amendment would create two sets of representative districts under the order: one for fresh pears and one for processed pears. The proposed amendment reflects current industry operations and ensures equitable representation of producers, handlers and processors of pears in the States of Oregon and Washington. No opposition to this proposal was given at the hearing.

*Material Issue Number 5—Termination of the Winter Pear Control Committee and Establishment of the Fresh Pear Committee and the Processed Pear Committee*

The marketing order should be amended to create two administrative committees: the Fresh Pear Committee and the Processed Pear Committee. Conforming changes should be made for all sections related to committee establishment, nomination, selection, voting, eligibility and tenure. These changes should all reflect a two-committee structure, where each committee has authority to act independently.

The order is currently structured around the Oregon and Washington fresh winter pear industry, with the Winter Pear Control Committee responsible for local administration of the program. The proposal to expand order coverage to all pear varieties produced within the production area, and to both the fresh and processed product industries, necessitates modification of this structure.

All witnesses at the hearing supported including both winter and summer/fall pears, in addition to all pear varieties not classified as either, under marketing order 927. Witnesses explained that consolidation would eliminate a confusing and inefficient system currently comprised of two Federal marketing orders and two State commissions. These four programs would be replaced with an updated single marketing program, which would benefit producers, handlers, and processors.

Witnesses also advocated the establishment of two administrative bodies: One for the fresh industry and one for the processed industry. Witnesses explained that while the two industries were both dependent on the same production of pears, the administrative needs of the two industries were different. Managing the two sides of the pear industry, fresh and processed, would require two differing approaches. From promotional activities to customers, trade factors to shelf life, and consumer trends to cultural practices in the orchards, pears for the fresh market differ from pears for processing.

According to the record, the ability for the fresh and processed industries to recommend assessment levels, maintain separate financial records, and establish reserves independently based on specific promotional objectives, is very important. However, the two committees would have the ability to work together in many areas, such as

funding of research that benefits all pears, and compiling statistical reports. Witnesses stated that the proposed amendments to the marketing order would provide a unified program for all pears under one marketing order, yet recognizes the differences in the objectives of the two industries. For these reasons, § 927.20, Establishment and membership, should be amended to create a Fresh Pear Committee and a Processed Pear Committee.

The proposed Fresh Pear Committee should consist of 13 members of whom 6 should be growers, 6 should be handlers and 1 should be a public member. For each member there should be two alternates, designated as the "first alternate" and the "second alternate," respectively. Each fresh pear district, described in Material Issue 4, should be represented by one grower member and one handler member, except that the Mid-Columbia District and the Wenatchee District, which should be represented by two grower members and two handler members. The committee should recommend a public member to the Department once the industry representatives are nominated and appointed by the Department.

The proposed Processed Pear Committee should consist of 10 members of whom 3 should be growers, 3 should be handlers, 3 members shall be processors, and 1 should be a public member. For each member there should be two alternates, designated as the "first alternate" and the "second alternate," respectively. District 1, the State of Washington, should be represented by two grower members, two handler members and two processor members. District 2, the State of Oregon, should be represented by one grower member, one handler member and one processor member. The committee should recommend a public member to the Department once the industry representatives are nominated and appointed by the Department.

The proposal to add a voting public member to each administrative committee is new to the order. Prior to the proposed amendments, the Winter Pear Control Committee did have the authority to appoint a public advisor. However, the public advisor did not have voting rights. Witnesses supported the addition of a voting public member as they anticipated that a non-industry perspective would contribute the committee discussions and decision-making. Under the proposed amendments, the public member would not be allowed to have financial interests in the pear industry. Thus, the

public member would be better able to represent consumer interests.

Sections 927.21 and 927.22, which outline provisions for the nomination and selection of committee members, should be amended to include language specific to the two proposed administrative committees. Nomination and selection of Fresh and Processed Pear Committee members and their respective alternates would operate similarly to the current nomination and selection system for the Winter Pear Control Committee. Committee members would be elected for nomination at a meeting of their peers. This means that growers would be elected at growers' meetings, handlers would be elected at meetings of handlers, and processors would be elected at meetings attended by processors.

Advance notices of these meetings would be placed in the local media, and all eligible members of that peer group could be nominated for selection to the committees. After an individual is nominated, and accepts that nomination, a statement containing background information and acknowledgement of their willingness to serve would be submitted to the USDA. Ultimately, committee member nominees would be selected and appointed as committee members by USDA.

Sections 927.23 and 927.24 govern voting and eligibility requirements for committee members. Again, these sections are based on the language currently in place for the Winter Pear Control Committee. These sections should be revised to reflect the proposed dual committee structure. Voting guidelines stipulate that only growers, handlers or processors, respectively, should vote for their peers.

Moreover, an individual should participate only in the election held in the district in which he or she produces, handles or processes pears. Individuals would be entitled to cast only one vote on behalf of his or her self, his or her agents, partners, affiliates, subsidiaries, and representatives. While each person may vote as a grower, handler or processor, they would not be able to vote as a combination thereof. Thus, if a person were a pear producer, handler and processor, he or she would have to choose whether to participate in the producer, handler or processor member nominations. Likewise, a producer who grows pears in more than one district would have to choose the district in which he or she wishes to participate.

In order to be eligible to serve as a committee member, a grower, handler or processor must conduct their respective

business in the district that they represent. Officers or employees of a corporate or limited liability corporation should be eligible to serve as representatives of their employer.

Section 927.27, Term of office, should be amended to replace all references to the Winter Pear Control Committee with the Fresh Pear and Processed Pear Committee. The terms of office of members and alternates should be for 2 years beginning on July 1. About one-half of committee membership of each committee ends each June 30. This provision would allow for staggered terms of office and would ensure that only one-half of each committee rotates tenure each year, thus providing for a continuation of experience among committee members.

Tenure limitations should be the same under the revised order as they currently are for the winter pear committee members. This section states that no member should serve more than three consecutive 2-year terms unless specifically exempted by the Department. Members and alternate members should continue to serve until their respective successors are qualified to serve on the committee and are selected.

Section 927.33, Procedure, describes quorum and voting requirements for committee action at meetings. The language in this section should be revised to reflect the proposed Fresh and Processed Pear Committees and should provide for a 75-percent attendance rate for a quorum for each committee. All decision-making at committee meetings should require the concurring vote of at least 75 percent of those members present, including alternates serving in the place of any members.

When asked how procedural aspects of the order would be impacted given a change in a committee size, witnesses stated that administration of the order should continue to be conducted as currently outlined. If a committee size were to change in terms of total number of members, witnesses felt that the 75 percent requirement for both quorum and committee action should be maintained.

According to the hearing record, witnesses supported the use of current marketing order 927 language as a model for the administrative functioning of the proposed Fresh and Processed Pear Committees. Witnesses noted that marketing order 927 has a long history of effectively meeting the needs of the Oregon and Washington fresh winter pear industry. Therefore, few changes to the provisions of the



above-described sections were proposed.

Record evidence supports the proposed changes in §§ 927.20 to 927.24, 927.27, and 927.33 described above. No opposition to these amendments was offered at the hearing.

Numerous conforming changes are needed to reflect the proposed dual committee structure. These proposed revisions would, for the most part, replace all references to the "Winter Pear Control Committee" or "Control Committee" with references to the "Fresh Pear Committee," the "Processed Pear Committee," or both. Another change needed in several sections is adding reference to processor committee members in addition to producer and handler members. Such conforming changes are needed in §§ 927.9 Fiscal period; 927.26 Qualifications; 927.28 Alternates for members; 927.29 Vacancies; 927.30 Compensation and expenses; 927.31 Powers; 927.32 Duties; 927.34 Right of the Secretary; 927.35 Funds and other property; 927.40 Expenses; 927.43 Use of funds; 927.45 Contributions; 927.50 Marketing policy; 927.52 Prerequisites to recommendations; 927.53 Notification; 927.75 Liability; 927.79 Proceedings after termination; and 927.80 Amendments. Additionally one heading should be changed from "Control Committee" to "Administrative Bodies."

*Material Issue Number 6—Adding Authority for Changes in Committee Size and Membership Allocation*

Section 927.20 of the order should be revised to add authority for the committees, each individually, to recommend changes in committee size and structure. The intent of this proposal is to provide the committees with a tool to more efficiently respond to the changing character of the Oregon and Washington State pear industry. In recommending any such changes, the following would be considered: (1) Shifts in acreage within districts and within the production area during recent years; (2) the importance of new production in its relation to existing districts; (3) equitable relationship between Committee membership and the various districts; (4) economies to result from more efficient administration due to redistricting or reapportionment of members within districts; and (5) other relevant factors.

Testimony indicates that significant changes have occurred in both the production base and industry demographics of the pear industry since the order was implemented. These changes suggest that flexibility in

adapting to the changing character of the Oregon and Washington pear industry is important to the administration of the order. Witnesses stated that, ultimately, the order's ability to remain effective over time would be reliant on its ability to change with the needs of the industry. In this regard, witnesses proposed adding authority to the order that would allow for committee size and structure to be considered, and recommendations for change to be made.

Witnesses testified that careful industry analysis would lead to sound recommendations to USDA regarding any change in committee size or structure. If the authority to change the size of the committees were added to the order, the committees could, at regular meetings, review the current structure of the committees using the points of consideration mentioned above. Upon completing this analysis, the committees could make a recommendation to USDA for a change in the size of the committee. Recommendations would be made by each committee individually for the segment of the industry that they represent. Implementation of this authority would allow such changes to be pursued through the informal rulemaking process.

Given the changes that the Oregon and Washington pear industry has seen over time, flexibility to change the size of the committees in step with the evolving needs of the industry would be an important tool. It would allow the committees to focus on the increasing competitiveness in the market while minimizing costs and maximizing efficiency.

Record evidence supports amending the order to add authority to change committee size and structure. This amendment would allow each committee, given due analysis and consideration of key factors and USDA approval, to more quickly adapt to changes within the industry. There was no opposition to the above proposal. Accordingly, USDA is proposing that § 927.20 be amended.

*Material Issue Number 7—Assessment and Supplemental Assessment Rates*

Section 927.41, Assessments, should be amended to allow the Fresh Pear and Processed Pear Committees to recommend rates of assessment for each category of pears, including summer/fall pears, winter pears, and all other pears. In addition, rates of assessment could be different for fresh pears and pears for processing in each category, and could include supplemental rates on individual varieties.

Currently, the order provides for an assessment rate for winter pears, and supplemental assessment rates for individual varieties and subvarieties of winter pears, to be established. Rates of assessment are recommended to the Department for approval. If authority to establish rates of assessment for summer/fall and other pear varieties, as well as supplemental rates of assessment, were incorporated under the order, they, too, would be subject to approval by USDA. Assessments are used to fund the administrative functions of the committee, in addition to any research and promotional activities authorized under the order. According to the record, supplemental rates of assessment would be used for expenses specific to an individual variety or subvariety of pear.

Witnesses stated that three different base assessments would best serve the industry. Historically, fresh winter pear varieties have paid higher assessments than fresh summer/fall pears. Pears for processing have been assessed at yet a different level, and could feasibly have differential assessments for winter, summer/fall or other varieties over time.

Moreover, while the proposed amendments would result in unifying the programs for winter pears and summer/fall pears varieties under one marketing order, (and one, combined fiscal year) separate base assessment rates would allow for differences in the budget requirements for each category. Winter pears have a distinct season from summer/fall pears, and thus present distinct, identifiable costs. The operational differences of each category reflect the need for maintaining differences in base assessment rates in order to generate adequate funds cover category-specific costs.

According to the record, the base assessment for pears classified as "other" is intended for the future needs of the industry as new varieties or subvarieties of the genus *Pyrus* are developed that do not fit under either "winter pear" or "summer/fall pear."

Besides the differences between fresh and processed pears, witnesses stated that it would be important to provide each committee with the authority to establish varying rates of assessment on a variety-specific basis. This authority would provide the committees with flexibility to ensure that variety-specific projects could be undertaken as special promotional or research needs develop. Having the ability to add a supplemental rate of assessment to a specific variety, without raising assessments for all other pears, would allow the committee to address those needs without requiring funding by

entities not involved with the production or handling of that variety.

According to the record, a supplemental rate of assessment for Anjou pears currently exists under marketing order 927. Funds generated by this supplemental assessment are used to address research and production issues specific to ethoxyquin use to stop scald, a defect found almost exclusively in Anjou pears. Anjou growers testifying at the hearing indicated their support of this supplemental assessment and stated that without the resulting extra revenue, research and registration of ethoxyquin chemicals essential to the industry would be unavailable. Without the flexibility of a supplemental assessment, witnesses stated that the lack of funding and loss in investments of Anjou production could have resulted in an industry crisis.

Record evidence supports amending the marketing order to authorize establishment of rates of assessment for each category of pears, including summer/fall pears, winter pears, and all other pears. In addition, rates of assessment could be different for fresh pears and pears for processing in each category, and could include supplemental rates on individual varieties or subvarieties. There was no opposition to the above proposal. Accordingly, the Department is proposing that § 927.41 be amended.

#### *Material Issue Number 8—Adding Authority for Container Marking Requirements*

Section 927.51, Issuance of regulations and modification, suspension, or termination thereof, should be amended to provide authority for container marking regulations for fresh pears. This authority would allow the Fresh Pear Committee to recommend mandatory marking or labeling requirements on containers used in the packing or handling of fresh pears grown in Oregon and Washington. Any committee recommendation would be subject to review and approval of the Secretary.

The order currently authorizes the establishment of grade, size and quality regulations, but does not include container-marking authority. Witnesses stated that this authority, which would include the use of generic industry logos, would provide the industry with a marketing tool to enhance the presentation of fresh Northwest pears in the marketplace.

According to the record, the industry's ability to deliver a consistently graded, sized, weighed, and marked product has become steadily more important. The growing presence

of imported pears and other like products have caused increased competition for the consumer's attention in the marketplace. Pear supply and utilization figures from the USDA's Economic Research Service show that imports have accounted for between 20 and 23 percent of U.S. domestic fresh pear consumption in recent years. Imports from Argentina and Chile are the most prevalent. Use of a generic pear logo, by the Northwest Pear Bureau, the promotional organization representing Oregon and Washington fresh pears, has been helpful in promoting pears to consumers. If the proposed container marking authority were implemented, the Fresh Pear Committee could expand the use of this logo or develop similar promotional marking requirements.

Witnesses also explained that handlers, in packing to the varying demands of their customers, are using an increasing number of different types of containers. Pear sizes have traditionally been associated with the number of pears that fit into a western standard box (see Material Issue 2). However, since the western standard box is no longer "standard", determining the size of pear packed cannot be simply calculated by counting the number of pears in the container. For this reason, handlers testifying at the hearing stated that container marking would be helpful in reducing confusion in the marketplace. If pear size were required to be marked on all containers packed, regardless of the container size or shape, this information would be more readily available to consumers. This information would also allow for easier price comparisons between differing containers holding the same size pear.

Witnesses offered the following example of regulating 180-size pears to describe how container-marking authority could be beneficial to the fresh pear industry:

If the Fresh Pear Committee were to determine that, for example, size 180 pears are not profitable to the grower, a regulation eliminating that size from the marketplace could be implemented. The committee could also implement a container-marking requirement mandating the marking of product size on all fresh pear containers. In this case, container marking would facilitate better identification of the size of pears in containers and better communication of size of product to customers.

Testimony indicated that fresh packing facilities are already configured for labeling and container marking. Witnesses noted that there would be little, if any, need for equipment

changes or additions. Thus, the proposed change is not expected to negatively affect the costs associated with handling fresh pears. The proposed amendment would only authorize container marking specifications; it would not impose any new regulatory requirements on Oregon or Washington fresh pear handlers. Authority to regulate container pack or size is also not included as part of this proposal. Any specific recommendation by the Committee to implement this authority would be subject to analysis through the informal rulemaking process.

Record evidence supports amending the order to include container marking authority. This amendment would allow the Fresh Pear Committee to recommend, and USDA to implement, container marking requirements through the informal rulemaking procedure. No opposition to the above proposal was voiced at the hearing. Accordingly, USDA proposes that § 927.51 be amended.

#### *Material Issue Number 9—Removal of Grower Exemption Certificates*

Section 927.54, Exemption certificates, should be removed from the order as it is obsolete and no longer used by the industry. This section provides authority for the issuance of exemption certificates to growers who would be prevented from shipping product under a grade or size regulation implemented under the order. A grower receiving such an exemption certificate would be allowed to ship a quantity of the variety being regulated equal to the average shipping quantity of that variety for the district in which he or she produces.

According to the record, grade and size regulations for pears other than the Anjou pear variety have only been implemented once in the history of marketing order 927, in 1977. Witnesses stated that the practical use of this exemption clause at that time was deemed ineffective. Consequently, it was recommended by the committee that this authority be eliminated.

For the above reasons, the Department agrees that § 927.54 should be removed from the order.

#### *Material Issue Number 10—Confidentiality and Record Retention Requirements*

The Fresh Pear Committee and the Processed Pear Committee should, each independently, have authority to establish handler reporting requirements, subject to USDA approval. Section 927.70, Reports, should be further revised to include language spelling out confidential

treatment of handler information submitted to the committees under the mandatory reporting requirements of this section.

Confidentiality would help protect handlers against any disclosure of information that might adversely affect or reveal a handler's competitive position. The proposed amendment would also add language providing that handlers must retain shipping and disposition records of pears handled for two years. The record retention requirement would allow the committees access to information in the event that handler reports need to be verified.

According to the record, Oregon and Washington winter and summer/fall pear handlers currently submit reports under marketing orders 927 and 931. Information submitted in accordance with reporting requirements provides the data necessary for such things as annual production by variety, shipment volumes during the season, and historic comparisons. In turn, the committees use industry reports to determine promotion, sales and marketing activities. Information gathered from these reports is also used to calculate assessments and conduct compliance audits.

Witnesses stated that adding the requirement for record retention for two years would formalize current industry practices and would update order language to conform to the Act.

For the reasons described above, § 927.70, Reports, should be amended to include confidentiality and record retention requirements. No opposition to this proposal was voiced at the hearing.

#### *Material Issue Number 11—Inspection Requirements*

Section 927.60, Inspection and certification, should be amended to clarify current inspection requirements and add authority for the Fresh Pear Committee to recommend elimination of those requirements under certain circumstances.

Section 927.51 of the order authorizes the establishment of grade, size and quality requirements for fresh shipments of pears. Section 927.60 requires that each shipment of fresh pears be inspected and certified by the Federal-State Inspection Service. The primary purpose of the inspection and certification requirement is to ensure compliance with any regulations in effect under the authority of § 927.51.

Traditionally, the pear industry has used end-line inspection procedures. Under this scenario, samples of packed pears are examined at the end of the

production process, and the results are certified by Federally licensed inspectors. The record shows that in recent years, the Federal-State Inspection Service has developed effective, less costly alternatives to the end-line inspection program. One alternative is the "Partners in Quality" program, a documented quality assurance system. Under this program, individual packing houses must demonstrate and document their ability to pack product that meets all relevant quality requirements. Effectiveness of the program is verified through periodic, unannounced audits of each packer's system by USDA-approved auditors.

Another program recently developed is the Customer Assisted Inspection Program (CAIP). Under CAIP, USDA inspectors oversee the in-line sampling and inspection process performed by trained company staff. USDA oversight ranges from periodic visits throughout the day to a continuous on-site presence.

Witnesses at the hearing testified that the fresh pear industry should be able to utilize any method of inspection acceptable to the Federal-State Inspection Service. These alternative methods have been developed by USDA as a means of reducing costs to industry. Individual pear handlers could choose the method of inspection best suited to their operations. The language of § 927.60 is proposed to be revised to make this clarification.

Witnesses also testified that the Committee should be authorized to recommend modification or elimination of the inspection requirement if it is able to devise an alternative means of ensuring compliance with any quality and size standards in effect under the order. Any alternative system would have to be approved by the Department through the informal rulemaking process. Additionally, it would have to provide adequate assurance that handlers under the program were in compliance with program requirements.

The Agricultural Marketing Service is responsible for ensuring that all handlers regulated under a marketing order program are in compliance with any regulations that are in effect. Marketing order administrative committees have the responsibility of locally administering marketing order programs, which includes monitoring industry's compliance with order requirements, and reporting any violations to the Department for enforcement measures.

While the Department supports and encourages innovation and development of cost-saving procedures, it is

important that the program maintain its integrity and that any quality or size regulation in effect are not compromised.

Witnesses at the hearing did not provide specific examples of any alternatives. However, they supported maximum flexibility in the order to allow the industry to take advantage of any innovative procedures that may be available in the future. As previously discussed, such procedures would require USDA approval.

According to the hearing record, the integrity of the industry's commitment to comply with grade and size regulations would not be compromised. The authority to recommend alternatives to mandatory inspection would be a practical tool for the industry. It would allow grade and size standards to be maintained, yet could allow for time and cost-saving opportunities.

One witness offered the example of current quality regulations in effect for Anjou pears. All Anjou pears shipped domestically prior to November 1st must have a pressure reading of 14 pounds or below and have been cooled to at least 35 degrees. This regulation requires that the fruit be inspected. Handlers currently pay 12½ cents per hundredweight for this inspection. At times, they lose time due to delays in the inspection process. Handler witnesses also indicated that delays could be longer for smaller shippers that do not have inspectors stationed at their warehouses. Witnesses explained that if alternative forms of inspection were allowed, grade and size regulation could be more economically implemented.

Record evidence supports amending § 927.60 to clarify that any inspection program developed by the Federal-State Inspection Service may be utilized by fresh pear handlers under the order. Additionally, that section should be amended to add authority for the Fresh Pear Committee to recommend modification or elimination of the inspection requirement provided that an adequate method of ensuring compliance with quality and size requirements can be developed. This amendment would allow the Fresh Pear Committee to recommend, and USDA to implement, time and cost-saving mechanisms for handlers without compromising product quality in the marketplace.

The proposed language of 927.60, Inspection and certification, has been revised somewhat from what appeared in the Notice of Hearing to clarify the intent of the pear industry, as testified at the hearing.

### *Material Issue Number 12—Elimination of Obsolete Exemption Provisions*

Section 927.65, Exemption from regulation, allows pears shipped for certain purposes to be exempt from handling regulations in effect under the order as well as from assessments. This section should be amended by deleting obsolete provisions.

Currently pears shipped for consumption by charitable institutions, distribution by relief agencies, or conversion into by-products are exempt from regulation. Since this decision recommends extending program coverage to pears for processing, the third purpose listed needs to be deleted.

Additionally, paragraph (c) of § 927.65 provides authority for the committee, with the approval of USDA, to designate storage warehouses within the production area. Pears shipped to those storage warehouses would be exempt from any regulatory provisions in effect under the order. This authority has never been used. As such, the record supports deleting this provision as unnecessary. The administrative committees would retain the authority (provided in § 927.65(b)) to designate types of shipments that should be exempt from regulations (including payment of assessments). Such exemptions could only be implemented with USDA approval through informal rulemaking.

This proposal also recommends revising the language in § 927.64 paragraphs (a) and (b), to reflect the dual committee structure described in Material Issue 5. The amended language would replace all references to the "Winter Pear Control Committee" in this section with "the Fresh Pear Committee or the Processed Pear Committee."

Given the above-described reasons, the Department agrees that § 927.64 should be amended by removing paragraph (c) from the order and updating language in paragraphs (a) and (b) to reflect to the proposed dual committee structure. No opposition to this proposal was presented at the hearing.

### *Material Issue Number 13—Continuance Referenda*

Section 927.78, Termination, should be amended to provide for separate continuance referenda for fresh pears and pears for processing every 6 years. A vote to discontinue the program with respect to fresh pears would not result in discontinuance of the order with respect to pears for processing, and vice versa.

Marketing order 927 currently requires that continuance referenda be

held every 6 years. Witnesses supported the need for maintaining the referendum process and stated that this practice should be extended to both fresh and processed pears.

The record shows that producers should have an opportunity to periodically vote on whether a marketing order should continue. Continuance referenda provide an industry with a means to measure producer support for the program. Experience has shown that programs need significant industry support to operate effectively. Continuance would require a favorable vote of at least two-thirds of those voting, or at least two-thirds of the volume represented in the referendum. This is the same as that for issuance and amendment of an order.

The USDA believes that producers should have an opportunity to periodically vote on whether the marketing order should continue, and that the costs in time and money are well worth the periodic producer feedback afforded by such referenda. Accordingly, the record evidence supports the requirement that such referenda be conducted.

Record evidence supports the amendment of §§ 927.78 to require separate continuance referenda for fresh and processed pears. No opposition to this proposal was received at the hearing.

### *Material Issue Number 14—Adding Authority for Post-Harvest Research*

Section 927.47, Research and development, should be amended to include authority for post-harvest research. In addition, the language in this section should be revised to reflect the proposed dual committee structure. All references to the Winter Pear Control Committee should be revised to reference the proposed Fresh and Processed Pear Committees.

The order currently contains authority for production research and marketing research, but does not contain specific authority for post-harvest research. Examples of post-harvest research include developing improved storage, handling and packaging technologies. Witnesses supported the need for research in this area and discussed the benefits currently brought to the industry through production and market research.

Witnesses stated that research and promotion have been beneficial in assisting the pear industry to improve crop yields and enhance marketability and market distribution of their product. As a result, pears have been able to retain a viable role in an increasingly competitive market. Post-harvest

research would complement the already existing authorities, as it would focus on a section of the pear crop to market flow that, until now, has not benefited from research activities. For example, improved storage techniques could benefit the pear industry by decreasing the loss of product due to storage, or by increasing the storability of product to help prolong the marketing season. Funding for these activities would come from assessments and would be subject to approval by the Department.

Authority for promotion, including paid advertising, also currently exists under the order. Given the proposal to add summer/fall pear varieties to the scope of the order, the already existing authority for paid advertising would be applied to these varieties if the proposed amendments were implemented. Witnesses stated that these promotional activities, including paid generic advertising, have historically been beneficial in boosting sales and maintaining market share.

Witnesses also expressed that research and promotion activities were likely to be more effective and cost-efficient under the proposed dual-committee structure as the industry would be able to better coordinate needs and resources. Promotional authority for both commodities, fresh and processed pears, should include market research and development projects, as well as marketing promotion, including paid advertising. In the absence of this proposed change, the effectiveness of the total pear marketing program would be limited by the inability to use all available tools when promoting pears grown in the Northwest.

Record evidence indicates that, in the past, pear-related research has been supported by a number of industry organizations, State commissions, and Federal marketing orders. With the proposed consolidation of all pears under one marketing order, it is essential that both committees have the authority to collect and allocate research assessment dollars to ensure that the necessary funding continues to be available for specific projects supported by the industry. To this end, witnesses stated that research benefits everyone. As an example, research that leads to improved pack-outs or improved storability would likely increase grower returns and provide a better product on store shelves, to the benefit of the consumer.

Given the reasons outlined above, § 927.47, Research and promotion, should be amended to include authority for post-harvest research. In addition, changes should be made in the language of this section to reflect the proposed

dual-committee structure representing both fresh and processed pears. No opposition to this proposal was voiced at the hearing.

*Material Issue Number 15—Updating of Order Provisions*

Marketing order 927 contains several sections that should be amended to better reflect current industry operations. These amendments are largely considered housekeeping changes, as they are intended to simply update language rather than alter the meaning of order provisions in any way.

Section 927.1, Secretary, should be revised to include the modern definition of this term. The revised definition recognizes officers or employees of the Department of Agriculture as delegates of the Secretary of Agriculture.

Section 927.3, Person, should be revised to make this definition consistent with that in the Act.

Section 927.6, Grower, should be revised to recognize the term “producer” as a synonymous term.

Section 927.44, Collection of assessments, should be removed as being obsolete and inconsistent with USDA policy.

Section 927.77, Effective time, should be revised by removing the date “August 26, 1939” as obsolete.

No opposition to these amendments was voiced at the hearing. Accordingly, USDA proposes that the above-described sections be amended.

**Small Business Consideration**

Pursuant to the 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 and amendments thereto are unique in that they are normally brought about through group action of essentially small entities for their own benefit. Thus, both the RFA and the Act are compatible with respect to small entities.

Small agricultural producers have been defined by the Small Business Administration (SBA)(13 CFR 121.201) as those having annual receipts of less than \$750,000. Small agricultural service firms, which include handlers regulated under the order, are defined as those with annual receipts of less than \$5,000,000.

Interested persons were invited to present evidence at the hearing on the probable regulatory and informational impact of the proposed amendments to the order on small businesses. The record evidence is that most of the proposed amendments are designed to enhance industry efficiencies and reduce costs, thereby improving grower returns.

The record indicates that there are approximately 1,850 pear growers in Oregon and Washington. Of that total, 1,345 growers report Bartlett or other summer/fall pear production, and 1,753 growers report winter pear production. Two-year average NASS figures (the 2002 crop year and preliminary figures for 2003) provides the following production profile for Washington and Oregon, respectively: bearing acres, 24,800 and 17,600; yield per acre, 16.8 tons and 11.8 tons; annual production, 417,500 tons and 207,500 tons. Total acres planted in pears for Washington and Oregon (including non-bearing acres) in 2002 were 26,586 and 22,822, respectively. Average Washington and Oregon pear pack-out for the 10-year period from 1993/94 to 2002/03 was 14,639,225 standard boxes, compared to 13,476,829 standard boxes for 1989/90–1998/99.

Summing average Washington and Oregon pear acreage for 2002 and 2003, and dividing by the number of growers (1,850), the estimated average acreage per grower in the two-state area is 26.7 total acres and 22.9 bearing acres. According to the 1997 Agricultural Census, the average Oregon and Washington pear grower had approximately 23 and 15 total acres, respectively. The sum of average Washington and Oregon pear production for 2002 and 2003, divided by the number of growers, yields an estimated average production per grower in the two-state area of 338 tons (676,000 pounds).

The average fresh market grower return for the two States has been between 20 and 22 cents per pound in recent years, and between 10 and 12 cents per pound for processing. Estimated 2-year average pear sales revenue per grower in the production area is approximately \$101,000, which is between 1/7 and 1/8 of the revenue that would qualify a grower to be a large grower according to the SBA definition (if based on pear sales alone). According to the hearing record, roughly 75 percent of the fresh pear producers in the States of Oregon and Washington qualify as small producers. One witness stated that a 1,000-acre farm represents the threshold between a small and a

large producer (a substantially different definition from what the SBA uses).

There are 55 handlers that handle fresh pears produced in Oregon and Washington; 73 percent of these fall into the SBA definition of “small business. There are five processing plants in the production area, with one in Oregon and four in Washington. All five processors are larger than the SBA’s definition of small business. According to information presented by processors testifying at the hearing, roughly 90 percent of pears received for processing come from small grower entities.

The proposals put forth at the hearing would streamline industry organization, but would not result in a significant change in industry production, harvest or distribution activities. In discussing the impacts of the proposed amendments on small growers and handlers, witnesses indicated that the changes are expected to result in lower costs.

If implemented, the amendments would result in the consolidation of marketing orders 927 and 931, regulating fresh winter pears and summer/fall pears, respectively. Program coverage would also be extended to pears for processing. The combined programs would be administered by two new administrative committees, one for fresh pears and one for pears for processing. Cost savings could occur as a result of more efficient coordination of administrative activities between the two proposed committees.

Record evidence indicates the proposal to revise the order’s inspection provisions may result in cost savings for handlers. Handlers within the production area typically have about 75 percent of their product inspected on a voluntary basis. The remaining 25 percent represents the amount of additional product that would be required to be inspected if regulations were in effect.

Handler witnesses also reported that inspection costs average 12½ cents per hundredweight, with a \$9.00 minimum fee. In addition to paying the inspection fee, handlers may also experience delays in shipments while waiting for inspection to be completed. Handlers indicated that such delays could be longer for smaller shippers that do not have inspectors regularly stationed at their warehouses. This proposal seeks to reduce these costs by allowing alternatives to mandatory inspection.

Traditionally, the pear industry has used end-line inspection procedures. Under this scenario, samples of packed pears are examined at the end of the production process, and the results are certified by Federally licensed

inspectors. The record shows that in recent years, the Federal-State Inspection Service has developed effective, less costly alternatives to the end-line inspection program. One alternative is the Partners in Quality program, a documented quality assurance system. Under this program, individual packing houses must demonstrate and document their ability to pack product that meets all relevant quality requirements. Effectiveness of the program is verified through periodic, unannounced audits of each packer's system by USDA-approved auditors.

Another program recently developed is the Customer Assisted Inspection Program (CAIP). Under CAIP, USDA inspectors oversee the in-line sampling and inspection process performed by trained company staff. USDA oversight ranges from periodic visits throughout the day to a continuous on-site presence. Witnesses at the hearing testified that the fresh pear industry should be able to utilize any method of inspection acceptable to the Federal-State Inspection Service. These alternative methods have been developed by USDA as a means of reducing costs to industry. If this amendment were implemented, individual pear handlers could choose the method of inspection best suited to their operations, thereby possibly reducing costs associated with inspection.

Additionally, the authority to eliminate inspection requirements could have handler cost implications. However, any increase or decrease in costs could not be determined until specific alternative methods are developed to assure compliance with any quality and size standards in effect.

The proposal to authorize container marking requirements is not expected to result in significant cost increases for fresh pear handlers. Testimony indicated that packing facilities are already configured for labeling and container marking. Witnesses noted that there would be little, if any, need for equipment changes or additions. Thus, the proposed change is not expected to have any adverse financial impact related to handling fresh pears. It should be noted that the proposed amendment would only grant the committees authority to recommend container markings; implementation of this authority could be done through informal rulemaking in the future. The amendment itself would therefore not impose any new regulatory requirements on Oregon or Washington fresh pear handlers.

Witnesses explained that the winter, summer/fall, fresh and processed pear industries are closely inter-related. Growing, harvesting, packing, processing and marketing activities of these industries all impact each other. Thus, bringing all industry segments together under a single marketing program would be beneficial for the Oregon and Washington pear industry. Proponent witnesses stated that the combined amendments, if implemented, would help to improve the orderly marketing of product within the industry.

Similarly, coordinated marketing and distribution efforts for fresh varieties that appear in the marketplace simultaneously would assist in maximizing grower returns from each variety. While the industries currently undertake coordinated marketing and promotional activities, witnesses stated that combining these industries would further synchronize activities and facilitate industry discussions and decision-making.

The amendments would add authority to assess summer/fall pear handlers and undertake promotional activities on their behalf in a manner similar to that done currently for winter pears. When asked if assuming this authority would be acceptable to the summer/fall pear industry, witnesses supported promotional activities, including paid generic advertising, as a way to boost sales and maintain market share.

Post-harvest research would also benefit the pear industries by focusing on a section of the pear crop-to-market flow that, until now, has not benefited from research activities. Improved storage techniques resulting from industry-funded post-harvest research could benefit the pear industry by decreasing the loss of product due to storage, or by increasing the storability of product to help prolong the marketing season.

A significant market-facilitating function carried out by the current marketing order committees is the collection of statistical data. That function would continue under the amended marketing order and the authority to collect information would extend to additional varieties that are currently produced. Flexibility is provided for including other varieties in the future. Witnesses emphasized the importance and value of collecting and disseminating accurate statistical information to enable industry participants to make economic and marketing decisions.

The proposal to establish two administrative committees also includes the addition of a public member to each

of those committees. The benefit of adding a non-industry, consumer perspective to committee deliberations and decision-making could prove very beneficial. Witnesses stated that this additional perspective would improve the committees understanding of the consumer in the marketplace and could enhance committee activities aimed at increasing consumer demand for Oregon and Washington pears.

The addition of a public member to each committee is not expected to result in any substantial cost increases. While these members would be entitled to reimbursement for certain expenses allowed for under the order, this expense is neither different nor any more burdensome than the current reimbursement arrangement for committee members.

Interested persons were invited to present evidence at the hearing on the probable regulatory and informational impact of the proposed amendments to the order on small entities. The record evidence is that most of the amendments are designed to reduce costs. While some of the proposals could impose some minimal costs, those costs would be outweighed by the benefits expected to accrue to the Oregon and Washington pear industry.

Current information collection requirements for Part 927 are approved by OMB under OMB number 0581-0089. Any changes in those requirements as a result of this proceeding would be submitted to OMB for approval. Witnesses stated that existing forms could be adequately modified to serve the needs of the proposed fresh and processed pear committees. While conforming changes to the forms would need to be made (such as changing the name of the committee), the functionality of the forms would remain the same.

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.

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

Committee meetings regarding these proposals as well as the hearing dates were widely publicized throughout the Oregon and Washington fresh and processed pear industries, and all interested persons were invited to attend the meetings and the hearing and participate in deliberations on all issues.

All committee meetings (both of the Winter Pear Committee and the Northwest Bartlett Pear Committee) and the hearing were public forums and all entities, both large and small, were able to express views on these issues. Finally, interested persons are invited to submit information on the regulatory and informational impacts of this action on small businesses.

A 30-day comment period is provided to allow interested persons to respond to this proposal. Thirty days is deemed appropriate so that this rulemaking may be completed prior to the beginning of the 2005 crop year, beginning July 1, 2005. All written exceptions timely received will be considered and a grower referendum will be conducted before these proposals are implemented.

#### Civil Justice Reform

The amendments to Marketing Agreement and Order 927 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 would not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this proposal.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

#### Rulings on Briefs of Interested Persons

Briefs, proposed findings and conclusions, and the evidence in the record were considered in making the findings and conclusions set forth in this recommended decision. To the extent that the suggested findings and conclusions filed by interested persons are inconsistent with the findings and conclusions of this recommended decision, the requests to make such findings or to reach such conclusions are denied.

#### 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 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 pears grown in the production area; and

(5) All handling of 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.

A 30-day comment period is provided to allow interested persons to respond to this proposal. Thirty days is deemed appropriate so that this rulemaking may be completed prior to the 2005–2006 season. All written exceptions timely received will be considered and a grower referendum will be conducted before these proposals are implemented.

#### List of Subjects in 7 CFR Part 927

Marketing agreements, Winter pears, Reporting and recordkeeping requirements.

#### Recommended Further 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—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 the heading of part 927 to read as set forth above.

3. Revise § 927.1 to read as follows:

##### § 927.1 Secretary.

*Secretary* means the Secretary of Agriculture of the United States, or any officer or employee of the Department of Agriculture who has been delegated, or to whom authority may hereafter be delegated, the authority to act for the Secretary.

4. Revise § 927.3 to read as follows:

##### § 927.3 Person.

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

5. Revise § 927.4 to read as follows:

##### § 927.4 Pears.

(a) *Pears* means and includes any and all varieties or subvarieties of pears with the genus *Pyrus* that are produced in the production area and are classified as:

(1) Summer/fall pears including Bartlett and Starkrimson pears;

(2) Winter pears including Beurre D, Anjou, Beurre Bosc, Doyenne du Comice, Concorde, Forelle, Winter Nelis, Packham, Seckel, and Taylor's Gold pears; and

(3) Other pears including any or all other varieties or subvarieties of pears not classified as summer/fall or winter pears.

(b) The Fresh Pear Committee and/or the Processed Pear Committee, with the approval of the Secretary, may recognize new or delete obsolete varieties or subvarieties for each category.

6. Revise § 927.5 to read as follows:

##### § 927.5 Size.

*Size* means the number of pears which can be packed in a 44-pound net weight standard box or container equivalent, or as "size" means the greatest transverse diameter of the pear taken at right angles to a line running from the stem to the blossom end, or such other specifications more specifically defined in a regulation issued under this part.

7. Revise § 927.6 to read as follows:

**§ 927.6 Grower.**

*Grower* is synonymous with producer and means any person engaged in the production of pears, either as owner or as tenant.

8. Revise § 927.7 to read as follows:

**§ 927.7 Handler.**

*Handler* is synonymous with shipper and means any person (except a common or contract carrier transporting pears owned by another person) who, as owner, agent, broker, or otherwise, ships or handles pears, or causes pears to be shipped or handled by rail, truck, boat, or any other means whatsoever.

9. Revise § 927.8 to read as follows:

**§ 927.8 Ship or handle.**

*Ship or handle* means to sell, deliver, consign, transport or ship pears within the production area or between the production area and any point outside thereof, including receiving pears for processing: *Provided*, That the term "handle" shall not include the transportation of pear shipments within the production area from the orchard where grown to a packing facility located within the production area for preparation for market or delivery for processing.

10. Revise § 927.9 to read as follows:

**§ 927.9 Fiscal period.**

*Fiscal period* means the period beginning July 1 of any year and ending June 30 of the following year or such may be approved by the Secretary pursuant to a joint recommendation by the Fresh Pear Committee and the Processed Pear Committee.

11. Revise § 927.11 to read as follows:

**§ 927.11 District.**

*District* means the applicable one of the following—described subdivisions of the production area covered by the provisions of this subpart:

(a) For the purpose of committee representation, administration and application of provisions of this subpart as applicable to pears for the fresh market, districts shall be defined as follows:

(1) *Medford District* shall include all the counties in the State of Oregon except for Hood River and Wasco counties.

(2) *Mid-Columbia District* shall include Hood River and Wasco counties in the State of Oregon, and the counties of Skamania and Klickitat in the State of Washington.

(3) *Wenatchee District* shall include the counties of King, Chelan, Okanogan, Douglas, Grant, Lincoln, and Spokane in the State of Washington, and all other counties in Washington lying north thereof.

(4) *Yakima District* shall include all of the State of Washington, not included in the Wenatchee District or in the Mid-Columbia District.

(b) For the purpose of committee representation, administration and application of provisions of this subpart as applicable to pears for processing, districts shall be defined as follows:

(1) The State of Washington.

(2) The State of Oregon.

(c) The Secretary, upon recommendation of the Fresh Pear Committee or the Processed Pear Committee, may reestablish districts within the production area.

12. Revise § 927.13 to read as follows:

**§ 927.13 Subvariety.**

*Subvariety* means and includes any mutation, sport, or other derivation of any of the varieties covered in § 927.4 which is recognized by the Fresh Pear Committee or the Processed Pear Committee and approved by the Secretary. Recognition of a subvariety shall include classification within a varietal group for the purposes of votes conducted under § 927.52.

13. Add a new § 927.14 to read as follows:

**§ 927.14 Processor.**

*Processor* means any person who as owner, agent, broker, or otherwise, commercially processes pears in the production area.

14. Add a new § 927.15 to read as follows:

**§ 927.15 Process.**

*Process* means to can, concentrate, freeze, dehydrate, press or puree pears, or in any other way convert pears commercially into a processed product.

15. Revise the undesignated center heading preceding § 927.20 to read as follows:

**Administrative Bodies**

16. Revise § 927.20 to read as follows:

**§ 927.20 Establishment and membership.**

There are hereby established two committees to administer the terms and provisions of this subpart as specifically provided in §§ 927.20 through 927.35:

(a) A Fresh Pear Committee, consisting of 13 individual persons as its members is established to administer order provisions relating to the handling of pears for the fresh market. Six members of the Fresh Pear Committee shall be growers, six members shall be handlers, and one member shall represent the public. For each member there shall be two alternates, designated as the "first alternate" and the "second alternate," respectively. Each district shall be represented by one grower

member and one handler member, except that the Mid-Columbia District and the Wenatchee District shall be represented by two grower members and two handler members.

(b) A Processed Pear Committee consisting of 10 members is established to administer order provisions relating to the handling of pears for processing. Three members of the Processed Pear Committee shall be growers, three members shall be handlers, three members shall be processors, and one member shall represent the public. For each member there shall be two alternates, designated as the "first alternate" and the "second alternate", respectively. District 1, the State of Washington, shall be represented by two grower members, two handler members and two processor members. District 2, the State of Oregon, shall be represented by one grower member, one handler member and one processor member.

(c) The Secretary, upon recommendation of the Fresh Pear Committee or the Processed Pear Committee may reapportion members among districts, may change the number of members and alternates, and may change the composition by changing the ratio of members, including their alternates. In recommending any such changes, the following shall be considered:

(1) Shifts in pear acreage within districts and within the production area during recent years;

(2) The importance of new pear production in its relation to existing districts;

(3) The equitable relationship between membership and districts;

(4) Economies to result for growers in promoting efficient administration due to redistricting or reapportionment of members within districts; and

(5) Other relevant factors.

17. Revise § 927.21 to read as follows:

**§ 927.21 Nomination and selection of members and their respective alternates.**

Grower members and their respective alternates for each district shall be selected by the Secretary from nominees elected by the growers in such district. Handler members and their respective alternates for each district shall be selected by the Secretary from nominees elected by the handlers in such district. Processor members and their respective alternates shall be selected by the Secretary from nominees elected by the processors. Public members for each committee shall be nominated by the Fresh Pear Committee and the Processed Pear Committee, each independently, and selected by the Secretary. The Fresh Pear Committee and the Processed Pear



Committee may, each independently, prescribe such additional qualifications, administrative rules and procedures for selection for each candidate as it deems necessary and as the Secretary approves.

18. Revise § 927.22 to read as follows:

**§ 927.22 Meetings for election of nominees.**

(a) Nominations for members of the Fresh Pear Committee and their alternates shall be made at meetings of growers and handlers held in each of the districts designated in § 927.11 at such times and places designated by the Fresh Pear Committee.

(b) Nominations for grower and handler members of the Processed Pear Committee and their alternates shall be made at meetings of growers and handlers held in each of the districts designated in § 927.11 at such times and places designated by the Processed Pear Committee. Nominations for processor members of the Processed Pear Committee and their alternates shall be made at a meeting of processors at such time and place designated by the Processed Pear Committee.

19. Revise § 927.23 to read as follows:

**§ 927.23 Voting.**

Only growers in attendance at meetings for election of nominees shall participate in the nomination of grower members and their alternates, and only handlers in attendance at meetings for election of nominees shall participate in the nomination of handler members and their alternates, and only processors in attendance for election of nominees shall participate in the nomination of processor members and their alternates. A grower may participate only in the election held in the district in which he or she produces pears, and a handler may participate only in the election held in the district in which he or she handles pears. Each person may vote as a grower, handler or processor, but not a combination thereof. Each grower, handler and processor shall be entitled to cast one vote, on behalf of himself, his agents, partners, affiliates, subsidiaries, and representatives, for each nominee to be elected.

20. Revise § 927.24 to read as follows:

**§ 927.24 Eligibility for membership.**

Each grower member and each of his or her alternates shall be a grower, or an officer or employee of a corporate or LLC grower, who grows pears in the district in which and for which he or she is nominated and selected. Each handler member and each of his or her alternates shall be a handler, or an officer or employee of a handler, handling pears in the district in and for

which he or she is nominated and selected. Each processor member and each of their alternates shall be a processor, or an officer or employee of a processor, who processes pears in the production area.

21. Revise § 927.26 to read as follows:

**§ 927.26 Qualifications.**

Any person prior to or within 15 days after selection as a member or as an alternate for a member of the Fresh Pear Committee or the Processed Pear Committee shall qualify by filing with the Secretary a written acceptance of the person's willingness to serve.

22. Revise § 927.27 to read as follows:

**§ 927.27 Term of office.**

The term of office of each member and alternate member of the Fresh Pear Committee and the Processed Pear Committee shall be for two years beginning July 1 and ending June 30: *Provided*, That the terms of office of one-half the initial members and alternates shall end June 30, 2006; and that beginning with the 2005–2006 fiscal period, no member shall serve more than three consecutive two-year terms unless specifically exempted by the Secretary. Members and alternate members shall serve in such capacities for the portion of the term of office for which they are selected and have qualified and until their respective successors are selected and have qualified. The terms of office of successor members and alternates shall be so determined that one-half of the total committee membership ends each June 30.

23. Revise § 927.28 to read as follows:

**§ 927.28 Alternates for members.**

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 a member of the Fresh Pear Committee or the Processed Pear Committee and both that member's alternates are unable to attend a meeting, the member may designate any other alternate member from the same group (handler, processor, or grower) to serve in that member's place and stead.

24. Revise § 927.29 to read as follows:

**§ 927.29 Vacancies.**

To fill any vacancy occasioned by the failure of any person selected as a member or as an alternate for a member of the Fresh Pear Committee or the Processed Pear Committee to qualify, or in the event of death, removal, resignation, or disqualification of any qualified member or qualified alternate for a member, a successor for his or her unexpired term shall be nominated and selected in the manner set forth in §§ 927.20 to 927.35. If nominations to fill any such vacancy are not made within 20 days after such vacancy occurs, the Secretary may fill such vacancy without regard to nominations.

25. Revise § 927.30 to read as follows:

**§ 927.30 Compensation and expenses.**

The members and alternates for members shall serve without compensation, but may be reimbursed for expenses necessarily incurred by them in the performance of their respective duties.

26. Revise § 927.31 to read as follows:

**§ 927.31 Powers.**

The Fresh Pear Committee and the Processed Pear Committee shall have the following powers to exercise each independently:

(a) To administer, as specifically provided in §§ 927.20 to 927.35, the terms and provisions of this subpart:

(b) To make administrative rules and regulations in accordance with, and to effectuate, the terms and provisions of this subpart; and

(c) To receive, investigate, and report to the Secretary complaints of violations of the provisions of this subpart.

27. Revise § 927.32 to read as follows:

**§ 927.32 Duties.**

The duties of the Fresh Pear Committee and the Processed Pear Committee, each independently, shall be as follows:

(a) To act as intermediary between the Secretary and any grower, handler or processor;

(b) To keep minutes, books, and records which will reflect clearly all of the acts and transactions. The minutes, books, and records shall be subject at any time to examination by the Secretary or by such person as may be designated by the Secretary;

(c) To investigate, from time to time, and to assemble data on the growing, harvesting, shipping, and marketing conditions relative to pears, and to furnish to the Secretary such available information as may be requested;

(d) To perform such duties as may be assigned to it from time to time by the Secretary in connection with the

administration of section 32 of the Act to amend the Agricultural Adjustment Act, and for other purposes, Public Act No. 320, 74th Congress, approved August 24, 1935 (49 Stat. 774), as amended;

(e) To cause the books to be audited by one or more competent accountants at the end of each fiscal year and at such other times as the Fresh Pear Committee or the Processed Pear Committee may deem necessary or as the Secretary may request, and to file with the Secretary copies of any and all audit reports made;

(f) To appoint such employees agents, and representatives as it may deem necessary, and to determine the compensation and define the duties of each;

(g) To give the Secretary, or the designated agent of the Secretary, the same notice of meetings as is given to the members of the Fresh Pear Committee or the Processed Pear Committee;

(h) To select a chairman of the Fresh Pear Committee or the Processed Pear Committee and, from time to time, such other officers as it may deem advisable and to define the duties of each; and

(i) To submit to the Secretary as soon as practicable after the beginning of each fiscal period, a budget for such fiscal year, including a report in explanation of the items appearing therein and a recommendation as to the rate of assessment for such period.

28. Revise § 927.33 to read as follows:

**§ 927.33 Procedure.**

(a) *Quorum and voting.* A quorum at a meeting of the Fresh Pear Committee or the Processed Pear Committee shall consist of 75 percent of the number of committee members, or alternates then serving in the place of any members, respectively. Except as otherwise provided in § 927.52, all decisions of the Fresh Pear Committee or the Processed Pear Committee at any meeting shall require the concurring vote of at least 75 percent of those members present, including alternates then serving in the place of any members.

(b) *Mail voting.* The Fresh Pear Committee or the Processed Pear Committee may provide for members voting by mail, telecopier or other electronic means, telephone, or telegraph, upon due notice to all members. Promptly after voting by telephone or telegraph, each member thus voting shall confirm in writing, the vote so cast.

29. Revise § 927.34 to read as follows:

**§ 927.34 Right of the Secretary.**

The members and alternates for members and any agent or employee appointed or employed by the Fresh Pear Committee or the Processed Pear Committee shall be subject to removal or suspension by the Secretary at any time. Each and every regulation, decision, determination, or other act shall be subject to the continuing right of the Secretary to disapprove of the same at any time, and, upon such disapproval, shall be deemed null and void, except as to acts done in reliance thereon or in compliance therewith prior to such disapproval by the Secretary.

30. Revise § 927.35 to read as follows:

**§ 927.35 Funds and other property.**

(a) All funds received pursuant to any of the provisions of this subpart shall be used solely for the purposes specified in this subpart, and the Secretary may require the Fresh Pear Committee or the Processed Pear Committee and its members to account for all receipts and disbursements.

(b) Upon the death, resignation, removal, disqualification, or expiration of the term of office of any member or employee, all books, records, funds, and other property in his or her possession belonging to the Fresh Pear Committee or the Processed Pear Committee shall be delivered to his or her successor in office or to the Fresh Pear Committee or Processed Pear Committee, and such assignments and other instruments shall be executed as may be necessary to vest in such successor or in the Fresh Pear Committee or Processed Pear Committee full title to all the books, records, funds, and other property in the possession or under the control of such member or employee pursuant to this subpart.

**§ 927.36 [Removed]**

31. Remove § 927.36, Public advisors.

32. Revise § 927.40 to read as follows:

**§ 927.40 Expenses.**

The Fresh Pear Committee and the Processed Pear Committee are authorized, each independently, to incur such expenses as the Secretary finds may be necessary to carry out their functions under this subpart. The funds to cover such expenses shall be acquired by the levying of assessments as provided in § 927.41.

33. Revise § 927.41 to read as follows:

**§ 927.41 Assessments.**

(a) Assessments will be levied only upon handlers who first handle pears. Each handler shall pay assessments on all pears handled by such handler as the pro rata share of the expenses which the

Secretary finds are reasonable and likely to be incurred by the Fresh Pear Committee or the Processed Pear Committee during a fiscal period. The payment of assessments for the maintenance and functioning of the Fresh Pear Committee or the Processed Pear Committee may be required under this part throughout the period such assessments are payable irrespective of whether particular provisions thereof are suspended or become inoperative.

(b)(1) Based upon a recommendation of the Fresh Pear Committee or other available data, the Secretary shall fix three base rates of assessment for pears that handlers shall pay on pears handled for the fresh market during each fiscal period. Such base rates shall include one rate of assessment for any or all varieties or subvarieties of pears classified as summer/fall; one rate of assessment for any or all varieties or subvarieties of pears, classified as winter; and one rate of assessment for any or all varieties or subvarieties of pears classified as other. Upon recommendation of the Fresh Pear Committee or other available data, the Secretary may also fix supplemental rates of assessment on individual varieties or subvarieties categorized within the above-defined assessment classifications to secure sufficient funds to provide for projects authorized under § 927.47. At any time during the fiscal period when it is determined on the basis of a Fresh Pear Committee recommendation or other information that different rates are necessary for fresh pears or for any varieties or subvarieties, the Secretary may modify those rates of assessment and such new rate shall apply to any or all varieties or subvarieties that are shipped during the fiscal period for fresh market.

(2) Based upon a recommendation of the Processed Pear Committee or other available data, the Secretary shall fix three base rates of assessment for pears that handlers shall pay on pears handled for processing during each fiscal period. Such base rates shall include one rate of assessment for any or all varieties or subvarieties of pears classified as summer/fall; one rate of assessment for any or all varieties or subvarieties of pears, classified as winter; and one rate of assessment for any or all varieties or subvarieties of pears classified as other. Upon recommendation of the Processed Pear Committee or other available data, the Secretary may also fix supplemental rates of assessment on individual varieties or subvarieties categorized within the above-defined assessment classifications to secure sufficient funds to provide for projects authorized under

§ 927.47. At any time during the fiscal period when it is determined on the basis of a Processed Pear Committee recommendation or other information that different rates are necessary for pears for processing or for any varieties or subvarieties, the Secretary may modify those rates of assessment and such new rate shall apply to any or all varieties or subvarieties of pears that are shipped during the fiscal period for processing.

(c) Based on the recommendation of the Fresh Pear Committee, the Processed Pear Committee or other available data, the Secretary may establish additional base rates of assessments, or change or modify the base rate classifications defined in paragraphs (a) and (b) of this section.

(d) The Fresh Pear Committee or the Processed Pear Committee may impose a late payment charge on any handler who fails to pay any assessment within the time prescribed. In the event the handler thereafter fails to pay the amount outstanding, including the late payment charge, within the prescribed time, the Fresh Pear Committee or the Processed Pear Committee may impose an additional charge in the form of interest on such outstanding amount. The Fresh Pear Committee or the Processed Pear Committee, with the approval of the Secretary, shall prescribe the amount of such late payment charge and rate of interest.

(e) In order to provide funds to carry out the functions of the Fresh Pear Committee or the Processed Pear Committee prior to commencement of shipments in any season, handlers may make advance payments of assessments, which advance payments shall be credited to such handlers and the assessments of such handlers shall be adjusted so that such assessments are based upon the quantity of each variety or subvariety of pears handled by such handlers during such season. Further, payment discounts may be authorized by the Fresh Pear Committee or the Processed Pear Committee upon the approval of the Secretary to handlers making such advance assessment payments.

34. Revise § 927.42 to read as follows:

**§ 927.42 Accounting.**

(a) If, at the end of a fiscal period, the assessments collected are in excess of expenses incurred, the Fresh Pear Committee or the Processed Pear Committee may carryover such excess into subsequent fiscal periods as a reserve: *Provided*, That funds already in the reserve do not exceed approximately one fiscal period's expenses. Such reserve may be used to cover any

expense authorized under this part and to cover necessary expenses of liquidation in the event of termination of this part. Any such excess not retained in a reserve or applied to any outstanding obligation of the person from whom it was collected shall be refunded proportionately to the persons from whom it was collected. Upon termination of this part, any funds not required to defray the necessary expenses of liquidation shall be disposed of in such manner as the Secretary may determine to be appropriate: *Provided*, That to the extent practical, such funds shall be returned pro rata to the persons from whom such funds were collected.

(b) All funds received pursuant to the provisions of this part shall be used solely for the purpose specified in this part and shall be accounted for in the manner provided in this part. The Secretary may at any time require the Fresh Pear Committee or the Processed Pear Committee and its members to account for all receipts and disbursements.

35. Revise § 927.43 to read as follows:

**§ 927.43 Use of funds.**

From the funds acquired pursuant to § 927.41 the Fresh Pear Committee and the Processed Pear Committee, each independently, shall pay the salaries of its employees, if any, and pay the expenses necessarily incurred in the performance of the duties of the Fresh Pear Committee or the Processed Pear Committee.

**§ 927.44 [Removed]**

36. Remove § 927.44, Collection of unpaid assessments.

37. Revise § 927.45 to read as follows:

**§ 927.45 Contributions.**

The Fresh Pear Committee or the Processed Pear Committee may accept voluntary contributions but these shall only be used to pay expenses incurred pursuant to § 927.47. Furthermore, such contributions shall be free from any encumbrances by the donor and the Fresh Pear Committee or the Processed Pear Committee shall retain complete control of their use.

38. Revise § 927.47 to read as follows:

**§ 927.47 Research and development.**

The Fresh Pear Committee or the Processed Pear Committee, with the approval of the Secretary, may establish or provide for the establishment of production and post-harvest research, or marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption of pears. Such

projects may provide for any form of marketing promotion, including paid advertising. The expense of such projects shall be paid from funds collected pursuant to §§ 927.41 and 927.45. Expenditures for a particular variety or subvariety of pears shall approximate the amount of assessments and voluntary contributions collected for that variety or subvariety of pears.

39. Revise § 927.50 to read as follows:

**§ 927.50 Marketing policy.**

(a) It shall be the duty of the Fresh Pear Committee to investigate, from time to time, supply and demand conditions relative to pears and each grade, size, and quality of each variety or subvariety thereof. Such investigations shall be with respect to the following:

- (1) Estimated production of each variety or subvariety of pears and of each grade, size, and quality thereof;
- (2) Prospective supplies and prices of pears and other fruits, both in fresh and processed form, which are competitive to the marketing of pears;
- (3) Prospective exports of pears and imports of pears from other producing areas;
- (4) Probable harvesting period for each variety or subvariety of pears;
- (5) The trend and level of consumer income;
- (6) General economic conditions; and
- (7) Other relevant factors.

(b) On or before August 1 of each year, the Fresh Pear Committee shall recommend regulations to the Secretary if it finds, on the basis of the foregoing investigations, that such regulation as is provided in § 927.51 will tend to effectuate the declared policy of the act.

(c) In the event the Fresh Pear Committee at any time finds that by reason of changed conditions, any regulation issued pursuant to § 927.51 should be modified, suspended, or terminated, it shall so recommend to the Secretary.

40. Revise § 927.51 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 Fresh Pear Committee, or from other available information, that regulation, in the manner specified in this section, of the shipment of fresh pears would tend to effectuate the declared policy of the act, he or she shall so limit the shipment of such pears during a specified period or periods. Such regulation may:

- (1) Limit the total quantity of any grade, size, quality, or combinations

thereof, of any variety or subvariety of pears grown in any district and may prescribe different requirements applicable to shipments to different export markets;

(2) Limit, during any period or periods, the shipment of any particular grade, size, quality, or any combination thereof, of any variety or subvariety, of pears grown in any district or districts of the production area; and

(3) Provide a method, through rules and regulation issued pursuant to this part, for fixing markings on the container or containers, which may be used in the packaging or handling of pears, including appropriate logo or other container markings to identify the contents thereof.

(b) Whenever the Secretary finds, from the recommendations and information submitted by the Fresh Pear Committee, or from other available information, that a regulation should be modified, suspended, or terminated with respect to any or all shipments of fresh pears grown in any district in order to effectuate the declared policy of the act, he or she shall so modify, suspend, or terminate such regulation. If the Secretary finds, from the recommendations and information submitted by the Fresh Pear Committee, or from other available information, that a regulation obstructs or does not tend to effectuate the declared policy of the act, he or she shall suspend or terminate such regulation. On the same basis and in like manner, the Secretary may terminate any such modification or suspension.

41. Revise § 927.52 to read as follows:

**§ 927.52 Prerequisites to recommendations.**

(a) Decisions of the Fresh Pear Committee or the Processed Pear Committee with respect to any recommendations to the Secretary pursuant to the establishment or modification of a supplemental rate of assessment for an individual variety or subvariety of pears shall be made by affirmative vote of not less than 75 percent of the applicable total number of votes, computed in the manner hereinafter described in this section, of all members. Decisions of the Fresh Pear Committee pursuant to the provisions of § 927.50 shall be made by an affirmative vote of not less than 80 percent of the applicable total number of votes, computed in the manner hereinafter prescribed in this section, of all members.

(b) With respect to a particular variety or subvariety of pears, the applicable total number of votes shall be the aggregate of the votes allotted to the

members in accordance with the following: Each member shall have one vote as an individual and, in addition, shall have a vote equal to the percentage of the vote of the district represented by such member; and such district vote shall be computed as soon as practical after the beginning of each fiscal period on either:

(1) The basis of one vote for each 25,000 boxes (except 2,500 boxes for varieties or subvarieties with less than 200,000 standard boxes or container equivalents) of the average quantity of such variety or subvariety produced in the particular district and shipped therefrom during the immediately preceding three fiscal periods; or

(2) Such other basis as the Fresh Pear Committee or the Processed Pear Committee may recommend and the Secretary may approve. The votes so allotted to a member may be cast by such member on each recommendation relative to the variety or subvariety of pears on which such votes were computed.

42. Revise § 927.53 to read as follows:

**§ 927.53 Notification.**

(a) The Fresh Pear Committee shall give prompt notice to growers and handlers of each recommendation to the Secretary pursuant to the provisions of § 927.50.

(b) The Secretary shall immediately notify the Fresh Pear Committee of the issuance of each regulation and of each modification, suspension, or termination of a regulation and the Fresh Pear Committee shall give prompt notice thereof to growers and handlers.

**§ 927.54 [Removed]**

42-a. Remove § 927.54, Exemption Certificate.

43. Amend § 927.60 by revising paragraph (a) and adding a new paragraph (c) to read as follows:

**§ 927.60 Inspection and certification.**

(a) Handlers shall ship only fresh pears inspected by the Federal-State Inspection Service or under a program developed by the Federal-State Inspection Service: except, that such inspection and certification of shipments of pears may be performed by such other inspection service as the Fresh Pear Committee, with the approval of the Secretary, may designate. Promptly after shipment of any pears, the handler shall submit, or cause to be submitted, to the Fresh Pear Committee a copy of the inspection certificate issued on such shipment.

\* \* \* \* \*

(c) The Fresh Pear Committee may, with the approval of the Secretary,

prescribe rules and regulations modifying or eliminating the requirement for mandatory inspection and certification of shipments: *Provided*, That an adequate method of ensuring compliance with quality and size requirements is developed.

44. Revise § 927.65 to read as follows:

**§ 927.65 Exemption from regulation.**

(a) Nothing contained in this subpart shall limit or authorize the limitation of shipment of pears for consumption by charitable institutions or distribution by relief agencies, nor shall any assessment be computed on pears so shipped. The Fresh Pear Committee or the Processed Pear Committee may prescribe regulations to prevent pears shipped for either of such purposes from entering commercial channels of trade contrary to the provisions of this subpart.

(b) The Fresh Pear Committee or the Processed Pear Committee may prescribe rules and regulations, to become effective upon the approval of the Secretary, whereby quantities of pears or types of pear shipments may be exempted from any or all provisions of this subpart.

45. Revise § 927.70 to read as follows:

**§ 927.70 Reports.**

(a) Upon the request of the Fresh Pear Committee or the Processed Pear Committee, and subject to the approval of the Secretary, each handler shall furnish to the aforesaid committee, respectively, in such manner and at such times as it prescribes, such information as will enable it to perform its duties under this subpart.

(b) All such reports shall be held under appropriate protective classification and custody by the Fresh Pear Committee or the Processed Pear Committee, or duly appointed employees thereof, so that the information contained therein which may adversely affect the competitive position of any handler in relation to other handlers will not be disclosed. Compilations of general reports from data submitted by handlers are authorized subject to the prohibition of disclosure of individual handlers identities or operations.

(c) Each handler shall maintain for at least two succeeding years such records of the pears received and of pears disposed of, by such handler as may be necessary to verify reports pursuant to this section.

46. Revise § 927.75 to read as follows:

**§ 927.75 Liability.**

No member or alternate for a member of the Fresh Pear Committee or the Processed Pear Committee, nor any

employee or agent thereof, shall be held personally responsible, either individually or jointly with others, in any way whatsoever, to any party under this subpart or to any other person for errors in judgment, mistakes, or other acts, either of commission or omission, as such member, alternate for a member, agent or employee, except for acts of dishonesty, willful misconduct, or gross negligence.

47. Revise § 927.76 to read as follows:

**§ 927.76 Agents.**

The Secretary may name, by designation in writing, any person, including any officer or employee of the Government or any bureau or division in the Department of Agriculture to act as his or her agent or representative in connection with any of the provisions of this subpart.

48. Revise § 927.77 to read as follows:

**§ 927.77 Effective time.**

The provisions of this subpart and of any amendment thereto shall become effective at such time as the Secretary may declare, and shall continue in force until terminated in one of the ways specified in § 927.78.

49. Amend § 927.78 by revising paragraphs (b), (c), and (d) to read as follows:

**§ 927.78 Termination.**

\* \* \* \* \*

(b) The Secretary shall terminate or suspend the operation of any or all of the provisions of this subpart whenever he or she finds that such operation obstructs or does not tend to effectuate the declared policy of the act.

(c) The Secretary shall terminate the provisions of this subpart applicable to fresh pears for market or pears for processing at the end of any fiscal period whenever the Secretary finds, by referendum or otherwise, that such termination is favored by a majority of growers of fresh pears for market or pears for processing, respectively:

*Provided*, That such majority has during such period produced more than 50 percent of the volume of fresh pears for market or pears for processing, respectively, in the production area. Such termination shall be effective only if announced on or before the last day of the then current fiscal period.

(d) The Secretary shall conduct a referendum within every six-year period beginning on the date this section becomes effective, to ascertain whether continuance of the provisions of this subpart applicable to fresh pears for market or pears for processing are favored by producers of pears for the fresh market and pears for processing, respectively. The Secretary may terminate the provisions of this subpart at the end of any fiscal period in which the Secretary has found that continuance of this subpart is not favored by producers who, during a representative period determined by the Secretary, have been engaged in the production of fresh pears for market or pears for processing in the production area: *Provided*, That termination of the order shall be effective only if announced on or before the last day of the then current fiscal period.

\* \* \* \* \*

50. Revise § 927.79 to read as follows:

**§ 927.79 Proceedings after termination.**

(a) Upon the termination of this subpart, the members of the Fresh Pear Committee or the Processed Pear Committee then functioning shall continue as joint trustees for the purpose of liquidating all funds and property then in the possession or under the control of the Fresh Pear Committee or the Processed Pear Committee, including claims for any funds unpaid or property not delivered at the time of such termination.

(b) The joint trustees shall continue in such capacity until discharged by the Secretary; from time to time account for all receipts and disbursements; deliver

all funds and property on hand, together with all books and records of the Fresh Pear Committee or the Processed Pear Committee and of the joint trustees, to such person as the Secretary shall direct; and, upon the request of the Secretary, execute such assignments or other instruments necessary and appropriate to vest in such person full title and right to all of the funds, property, or claims vested in the Fresh Pear Committee or the Processed Pear Committee or in said joint trustees.

(c) Any funds collected pursuant to this subpart and held by such joint trustees or such person over and above the amounts necessary to meet outstanding obligations and the expenses necessarily incurred by the joint trustees or such other person in the performance of their duties under this subpart, as soon as practicable after the termination hereof, shall be returned to the handlers pro rata in proportion to their contributions thereto.

(d) Any person to whom funds, property, or claims have been transferred or delivered by the Fresh Pear Committee or the Processed Pear Committee or its members, upon direction of the Secretary, as provided in this section, shall be subject to the same obligations and duties with respect to said funds, property, or claims as are imposed upon the members or upon said joint trustees.

51. Revise § 927.80 to read as follows:

**§ 927.80 Amendments.**

Amendments to this subpart may be proposed from time to time by the Fresh Pear Committee or the Processed Pear Committee or by the Secretary.

Dated: January 5, 2005.

**Kenneth C. Clayton,**

*Associate Administrator, Agricultural Marketing Service.*

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