

# Rules and Regulations

Federal Register

Vol. 71, No. 141

Monday, July 24, 2006

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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 923

[Docket No. FV06-923-1 FIR]

#### Sweet Cherries Grown in Designated Counties in Washington; Removal of Container Regulations

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

**ACTION:** Final rule.

**SUMMARY:** The Department of Agriculture (USDA) is adopting, as a final rule, without change, an interim final rule that removed the container regulations prescribed under the Washington sweet cherry marketing order. Specifically, this rule finalizes the removal of the requirement that dark-colored sweet cherries be handled in containers having a certain net weight. The marketing order regulates the handling of fresh sweet cherries grown in designated counties in the State of Washington, and is administered locally by the Washington Cherry Marketing Committee (Committee). By eliminating the container requirements, this regulatory relaxation provides handlers with the ability to meet the rapidly changing wholesale, retail, and consumer demand for innovative product packaging. This is expected to enhance industry marketing flexibility and efficiency.

**DATES:** *Effective Date:* August 23, 2006.

**FOR FURTHER INFORMATION CONTACT:**

Robert J. Curry or Gary D. Olson, Northwest Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1220 SW Third Avenue, Suite 385, Portland, Oregon 97204-2807; Telephone: (503) 326-2724; Fax: (503) 326-7440.

Small businesses may request information on complying with this

regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250-0237; Telephone (202) 720-2491; Fax: (202) 720-8938; or E-mail: [Jay.Guerber@usda.gov](mailto:Jay.Guerber@usda.gov).

**SUPPLEMENTARY INFORMATION:** This rule is issued under Marketing Order No. 923 (7 CFR part 923) regulating the handling of sweet cherries grown in designated counties in Washington, hereinafter referred to as the "order." The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act."

USDA is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

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

This rule finalizes the removal of the requirement that dark-colored sweet cherries be handled in containers having a certain net weight. This relaxation in the regulations provides handlers with the ability to meet the rapidly changing wholesale, retail, and consumer demand for innovative product packaging, thereby enhancing

industry marketing flexibility and efficiency.

Section 923.52 of the order authorizes the issuance of regulations for grade, size, quality, maturity, pack, and container for any variety of sweet cherries grown in the production area. Section 923.52(a)(3) specifically authorizes the establishment of the container regulations found in § 923.322. Section 923.53 authorizes the modification, suspension, or termination of regulations issued pursuant to § 923.52.

Authority to regulate the size, capacity, weight, dimension, markings or pack of containers used in the handling of fresh sweet cherries was included in the order when promulgated in 1957. This authority was included in the order to facilitate container standardization and thus help establish orderly marketing conditions and increase producer returns.

The Committee meets prior to each season to consider recommendations for modification, suspension, or termination of any regulatory requirements for Washington sweet cherries that are issued on a continuing basis. Committee meetings are open to the public and interested persons may express their views at these meetings. The USDA reviews the Committee recommendations along with any supportive information submitted by the Committee, as well as information from other available resources, and determines whether modification, suspension, or termination of the regulatory requirements would tend to effectuate the declared policy of the Act.

At its February 28, 2006, meeting, the Committee recommended that the container regulations be entirely removed from the handling regulations. The Committee recommended that this rule be effective as early as May 1, 2006, to ensure that the earliest shipments of sweet cherries benefit from the relaxed regulations, and that container manufacturers have adequate time prior to the beginning of the shipping season to retool if new containers are ordered by the industry.

The container requirements provide the Washington cherry industry with container standardization to help ensure orderly marketing conditions and increased producer returns. Section 923.322(d) provided that: "No handler shall handle any lot of cherries, except

cherries of the Rainier, Royal Anne, and similar varieties commonly referred to as "light sweet cherries", unless such cherries are in containers which meet each of the following applicable requirements:

(1) The net weight of loose packed (jumble-filled) cherries in any container shall be 12 pounds or less, or 20 pounds or more. The net weight of face packed cherries in any container shall be 15 pounds, or 12 pounds or less: *Provided*, That containers with a net weight of 12 pounds or less may be packed together with like containers in a master shipping container.

(2) Subject to the provisions of paragraphs (b)(2)(i) and (ii) of this section, shipments of cherries may be handled in such experimental containers as have been approved by the Washington Cherry Marketing Committee."

Paragraph (2) above refers to the provisions of § 923.322(b)(2)(i) and (ii), which specified that: "(i) All shipments handled in such containers shall be under the supervision of the committee; and (ii) at least 90 percent, by count, of the cherries in any lot of such containers shall measure not less than 54/64 inch in diameter, and not more than 5 percent, by count, may be less than 52/64 inch in diameter." Since the provisions of (b)(2)(i) and (ii) referred to experimental containers exempt under 923.322(d)(2), this rule also finalizes the removal of both paragraphs from the handling regulations.

Comments made at the public meeting indicate that container standardization has contributed to orderly marketing in the past. Due to the changing dynamics in the fresh produce industry, however, buyers—at the wholesale, retail and consumer level—are seeking many more packaging options than have been available in the past. Handlers report that buyers are increasingly interested in non-traditional packaging options designed for better handling and greater consumer acceptance. Handlers also desire greater latitude in choosing the optimum weight for a particular type of pack. Of specific concern to this industry is the ability to pack cherries in containers with net weights of between 12 and 20 pounds—a weight range specifically barred under the removed container regulation.

Although § 923.322(d)(2) provided for experimental container exemptions, those handlers who have utilized this exemption in the past felt that the process was too cumbersome and time-consuming, thus failing to provide the optimal flexibility they need under current marketing conditions.

Regardless of the size, capacity, or type containers the industry may eventually use, the Committee believes that the Washington cherry industry desires flexibility in packaging dark-colored sweet cherries. This action provides the industry with needed flexibility.

This rule not only finalizes the removal of the container regulations (§ 923.322(d)), but also finalizes necessary conforming changes through the removal of § 923.322(b)(2)(i) and (ii), as well as references to container requirements in § 923.322(f)(1)(ii) and § 923.322(g).

#### Final Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Agricultural Marketing Service (AMS) has considered the economic impact of this rule on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 1,500 cherry producers within the regulated production area and approximately 53 regulated handlers. Small agricultural producers are defined by the Small Business Administration (13 CFR 121.201) as those having annual receipts of less than \$750,000, and small agricultural service firms are defined as those whose annual receipts are less than \$6,500,000.

For the 2005 shipping season, the Washington Agricultural Statistics Service prepared a preliminary report showing that the total 113,000 ton fresh market sweet cherry utilization sold for an average of \$2,830 per ton. Based on the number of producers in the production area, the average producer revenue from the sale of sweet cherries in 2005 is estimated at approximately \$213,200 per year. In addition, the Committee reports that most of the industry's 53 handlers would have each averaged gross receipts of less than \$6,500,000 from the sale of fresh sweet cherries last season. Thus, the majority of producers and handlers of Washington sweet cherries may be classified as small entities.

At its February 28, 2006, meeting the Committee recommended that the

container regulations in § 923.322(d) be removed from the order's rules and regulations. Section 923.52(a)(3) of the order specifically authorizes the establishment of container regulations. Further, § 923.53 authorizes the modification, suspension, or termination of regulations issued pursuant to § 923.52. This relaxation in the regulations provides handlers with the ability to meet the rapidly changing wholesale, retail, and consumer demand for innovative product packaging, thus enhancing industry marketing flexibility and efficiency.

The Committee anticipates that this rule will not negatively impact small businesses. This rule finalizes the removal of the container requirements found under § 923.322(d) of the order's rules and regulations, and, thus, should provide the industry with greater marketing opportunities. The Committee believes that any additional costs this action may have on the industry would be associated with the development and use of new containers. Such costs would likely be offset by new marketing opportunities.

The Committee discussed alternatives to its recommendation to remove the container regulations. The Committee explored the option of leaving the container regulations intact without change. This option was rejected as being an inadequate response to the demand for greater flexibility in the packaging of fresh cherries. Temporary suspension of the regulations was considered, and then discarded, as also being inadequate for the current marketing situation.

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

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

AMS is committed to compliance with the Government Paperwork Elimination Act (GPEA), which requires Government agencies in general to provide the public the option of submitting information or transacting business electronically to the maximum extent possible.

The Committee's meeting was widely publicized throughout the Washington cherry industry and all interested persons were invited to attend the meeting and participate in Committee deliberations. Like all Committee

meetings, the February 28, 2006, meeting was a public meeting and all entities, both large and small, were able to express their views on this issue.

An interim final rule regarding this action was published in the **Federal Register** on April 10, 2006. Committee staff ensured that copies of the rule were made available to Committee members and Washington sweet cherry industry members. In addition, the rule was made available through the Internet by USDA and the Office of the Federal Register. The interim final rule provided for a 60-day comment period that ended June 9, 2006. No comments were received.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: <http://www.ams.usda.gov/fv/moab.html>. Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant material presented, including the Committee's recommendation, and other information, it is found that finalization of the interim final rule, without change, as published in the **Federal Register** (71 FR 17982, April 10, 2006) will tend to effectuate the declared policy of the Act.

#### List of Subjects in 7 CFR Part 923

Cherries, Marketing agreements, Reporting and recordkeeping requirements.

#### PART 923—SWEET CHERRIES GROWN IN DESIGNATED COUNTIES IN WASHINGTON

■ Accordingly, the interim final rule amending 7 CFR part 923 which was published at 71 FR 17982 on April 10, 2006, is adopted as a final rule without change.

Dated: July 18, 2006.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

[FR Doc. E6-11736 Filed 7-21-06; 8:45 am]

BILLING CODE 3410-02-P

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 1250

[Docket No. PY-06-001]

#### Amendment to Egg Research and Promotion Rules and Regulations

AGENCY: Agricultural Marketing Service.

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

**SUMMARY:** This action will amend the Egg Research and Promotion Rules and Regulations by changing the State composition of the six geographic areas on the American Egg Board. The Board approved this change and requested that the Secretary amend the Rules and Regulations accordingly. This adjustment is based on changing geographic trends in egg production and would become effective beginning with the 2007-08 membership term.

**DATES:** Effective July 25, 2006. Comments must be received by August 23, 2006.

**ADDRESSES:** Written comments are to be mailed to Angela C. Snyder, Chief, Research and Promotion, Poultry Programs, AMS, USDA, Stop 0256, 1400 Independence Avenue, SW., Washington, DC 20090-6456; or by fax to (202) 720-5631. Alternatively, comments may be submitted electronically to:

[angie.snyder@usda.gov](mailto:angie.snyder@usda.gov). Comments may also be submitted electronically to: [AMSPYDockets@usda.gov](mailto:AMSPYDockets@usda.gov) or <http://www.regulations.gov>. State that your comments refer to Docket No. PY-06-001. Comments should be submitted in duplicate. Comments received may be inspected at this location between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays. Comments received also will be made available over the Internet in the rulemaking section of the AMS Web site <http://www.ams.usda.gov/rulemaking>. A copy of this interim final rule may be found at: <http://www.ams.usda.gov/poultry/regulations/rulemaking/index.htm>.

**FOR FURTHER INFORMATION CONTACT:**

Angela C. Snyder, (202) 720-5131.

**SUPPLEMENTARY INFORMATION:** The Egg Research and Promotion Order (Order) is issued under the Egg Research and Consumer Information Act (Act), as amended [7 U.S.C. 2701 *et seq.*].

#### Executive Order 12866

The Office of Management and Budget has waived the review process required by Executive Order 12866 for this action.

#### Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have a retroactive effect. This rule would not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before

parties may file suit in court. Under section 14 of the Act, a person subject to an order may file provisions of such Order or any obligations imposed in connection with such Order are not in accordance with law; and requesting a modification of the Order or an exemption there from. Such person is afforded the opportunity for a hearing on the petition. After a hearing, the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which such person is an inhabitant, or has his principal place of business, has jurisdiction to review the Secretary's ruling on the petition, if a complaint is filed within 20 days after date of the entry of the ruling.

#### Regulatory Flexibility Act

The Agricultural Marketing Service has determined that this rule will not have a significant economic impact on a substantial number of small entities, as defined by the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The rule imposes no new burden on the industry but merely adjusts area distribution to reflect geographic shifts in production since the last review. In accordance with the provisions of the Act and section 1250.328 of the Order, the area grouping of the 48 contiguous States are to be reviewed by the Board at least every 5 years. Based on the latest review, the Board has recommended adjustment of area distribution to reflect sustained geographic shifts in egg production. Total United States table egg production was 76.98 billion in 2005, representing a 9% increase in exports and continued increases in domestic per capita consumption.

There are approximately 260 egg producers required to pay assessments to the Board under the Act. The Act exempts producers owning less than 75,000 laying hens from paying assessments; therefore, the nation's smallest producers are exempt from the program. The Small Business Administration (SBA) [13 CFR 121.201] defines small agricultural producers as those having receipts of \$750,000 or less annually and small agricultural service firms as those having receipts of \$6.5 million or less annually. None of the 260 producers subject to the Act are believed to be categorized by the SBA as small agricultural producers.

#### Paperwork Reduction Act

Information collection requirements and recordkeeping provisions contained in 7 CFR part 1250 have been previously approved by the Office of Management and Budget and assigned OMB Control