DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 930

[Doc. No. AMS–SC–18–0083; SC19–930–1 FR]

Tart Cherries Grown in the States of Michigan, et al.; Free and Restricted Percentages for the 2018–19 Crop Year and Revision of Grower Diversion Requirements for Tart Cherries

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule implements a recommendation from the Cherry Industry Administrative Board (Board) to establish free and restricted percentages for the 2018–19 crop year under the Marketing Order for tart cherries grown in the states of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin. This action establishes the proportion of tart cherries from the 2018–19 crop which may be handled in commercial outlets. This action also revises the regulations regarding grower diversion. This action should stabilize marketing conditions by adjusting supply to meet market demand and help improve grower returns.

DATES: Effective November 4, 2019.

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Small businesses may request information on complying with this regulation by contacting Richard Lower, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, Fax: (202) 720–8938, or Email: *Richard.Lower@usda.gov*.

SUPPLEMENTARY INFORMATION: This final rule, pursuant to 5 U.S.C. 553, amends regulations issued to carry out a marketing order as defined in 7 CFR 900.2(j). This final rule is issued under Marketing Agreement and Order No. 930, both as amended (7 CFR part 930), regulating the handling of tart cherries produced in the states of Michigan, New York, Pennsylvania, Oregon, Utah, Washington and Wisconsin. Part 930 (referred to as the ''Order'') is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.'' The Board locally administers the Order and is comprised of producers and handlers of tart cherries operating within the production area, and a public member.

The Department of Agriculture (USDA) is issuing this final rule in conformance with Executive Orders 13563 and 13175. This final rule falls within a category of regulatory action that the Office of Management and Budget (OMB) exempted from Executive Order 12866 review. Additionally, because this rule does not meet the definition of a significant regulatory action, it does not trigger the requirements contained in Executive Order 13771. See OMB's Memorandum titled ''Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, titled 'Reducing Regulation and Controlling Regulatory Costs' '' (February 2, 2017).

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the Order provisions now in effect, free and restricted percentages may be established for tart cherries handled during the crop year. This rule establishes free and restricted percentages for tart cherries for the 2018–19 crop year, beginning July 1, 2018, through June 30, 2019.

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

This final rule establishes the proportion of tart cherries from the 2018–19 crop which may be handled in commercial outlets at 73 percent free and 27 percent restricted. This action also revises the regulations regarding grower diversion to codify the Board's definition of marketable fruit. The Secretary of Agriculture (Secretary) has determined that designating free and restricted percentages of tart cherries for the 2018–2019 crop year effectuates the declared policy of the Act to stabilize marketing conditions by adjusting supply to meet market demand and help improve grower returns. These recommendations were made by the Board at meetings on September 13, 2018, and October 23, 2018.

Section 930.51(a) provides the Secretary authority to regulate volume by designating free and restricted percentages for any tart cherries acquired by handlers in a given crop year. Section 930.50 prescribes procedures for computing an optimum supply based on sales history and for calculating these free and restricted percentages. Free percentage volume may be shipped to any market, while restricted percentage volume must be held by handlers in a primary or secondary reserve, or be diverted or used for exempt purposes as prescribed in §§ 930.159 and 930.162. Exempt purposes include, in part, the development of new products, sales into new markets, the development of export markets, and charitable contributions. Sections 930.55 through 930.57 prescribe procedures for inventory reserve. For cherries held in reserve, handlers would be responsible for storage and would retain title of the tart cherries.

Under § 930.52, only districts with an annual average production over the prior three years of at least six million pounds are subject to regulation, and any district producing a crop that is less than 50 percent of its annual average of the previous five years is exempt. The regulated districts for the 2018–19 crop year are: District 1—Northern Michigan; District 2—Central Michigan; District 3—Southern Michigan; District 4—New York; District 7—Utah; District 8—Washington; and District 9—Wisconsin. Districts 5 and 6 (Oregon and Pennsylvania, respectively) will not be regulated for the 2018–19 season.

Section 930.58 provides authority for voluntary grower diversion. When volume regulation is in effect, growers can divert all or a portion of their cherries which otherwise, upon delivery to a handler, would be subject to regulation. This section also authorizes the Board, with the approval of the Secretary, to establish terms and conditions for grower diversion. Section 930.158 prescribes the rules and regulations for grower diversion, including a requirement that diverted cherries be marketable.

Demand for tart cherries and tart cherry products tends to be relatively stable from year to year. Conversely, annual tart cherry production can vary greatly. In addition, tart cherries are processed and can be stored and carried over from crop year to crop year, further impacting supply. As a result, supply and demand for tart cherries are rarely in balance.

Because demand for tart cherries is inelastic, total sales volume is not very responsive to changes in price. However, prices are very sensitive to changes in supply. As such, an oversupply of cherries would have a sharp negative effect on prices, driving down grower returns. Aware of this economic relationship, the Board focuses on using the volume control provisions in the marketing order to balance supply and demand to stabilize industry returns.

Pursuant to § 930.50, the Board meets on or about July 1 to review sales data, inventory data, current crop forecasts, and market conditions for the upcoming season and, if necessary, to recommend preliminary free and restricted percentages if anticipated supply would exceed demand. After harvest is complete, but no later than September 15, the Board meets again to update its calculations using actual production data, consider any necessary adjustments to the preliminary percentages, and determine if final free and restricted percentages should be recommended to the Secretary.

The Board uses sales history, inventory, and production data to determine whether there is a surplus and, if so, how much volume should be restricted to maintain optimum supply. The optimum supply represents the desirable volume of tart cherries that should be available for sale in the coming crop year. Optimum supply is defined as the average free sales of the prior three years plus desirable carry-out inventory. Desirable carry-out is the amount of fruit needed by the industry to be carried into the succeeding crop year to meet market demand until the new crop is available. Desirable carry-out is set by the Board after considering market circumstances and needs. Section 930.151(b) specifies that desirable carry-out can range from zero to a maximum of 100 million pounds.

In addition, USDA's ''Guidelines for Fruit, Vegetable, and Specialty Crop Marketing Orders'' (*http://www.ams.usda.gov/publications/content/1982-guidelines-fruit-vegetable-marketing-orders*) specify that 110 percent of recent years' sales should be made available to primary markets each season before recommendations for volume regulation are approved. This requirement is codified in § 930.50(g), which specifies that in years when restricted percentages are established, the Board shall make available tonnage equivalent to an additional 10 percent of the average sales of the prior three years for market expansion (market growth factor).

After the Board determines optimum supply, desirable carry-out, and market growth factor, it must examine the current year's available volume to determine whether there is an oversupply situation. Available volume includes carry-in inventory (any inventory available at the beginning of the season) along with that season's production. If production is greater than the optimum supply minus carry-in, the difference is considered surplus. This surplus tonnage is divided by the sum of production in the regulated districts to reach a restricted percentage. This percentage must be held in reserve or used for approved diversion activities, such as exports.

The Board met on July 6, 2018, and computed an optimum supply of 303 million pounds for the 2018–19 crop year using the average of free sales for the three previous seasons and desirable carry-out. To determine the carry-out figure, the Board discussed and considered a range of alternatives. One member suggested a carry-out value of 100 million pounds to maximize the amount of fruit on the market and to compete with imports. Another member indicated both free and restricted product could be used to compete with imports and proposed a 50 million pound carry-out. Another attendee noted excessive carryout puts downward pressure on prices. After the consideration of the alternatives, the Board determined a carry-out of 80 million pounds would supply the industry's needs at the beginning of the next season.

The Board subtracted the estimated carry-in of 125.1 million pounds from the optimum supply to calculate the production quantity needed from the 2018–19 crop to meet optimum supply. This number, 177.9 million pounds, was subtracted from the Board's estimated 2018–19 total production (from regulated and unregulated districts) of 344.5 million pounds to calculate a surplus of 166.6 million pounds of tart cherries. The Board also complied with the market growth factor requirement by removing 22.3 million pounds (average sales for prior three years of 223 million times 10 percent) from the surplus. The adjusted surplus of 144.3 million pounds was then divided by the expected production in the regulated districts (338.5 million pounds) to reach a preliminary restricted percentage of 43 percent for the 2018–19 crop year.

The Board then discussed whether this calculation would provide sufficient supply to grow sales and fulfil orders that have not yet shipped. Some members and attendees expressed concern that some existing inventory is old enough that it is difficult to sell and thus more of the current season's fruit should be made available. Some also reported there may be poor fruit yield in Michigan, which would require more tonnage to supply the same amount of product. Others added the Board's demand calculations were not considering growth in the juice and dried fruit markets that are being served by imported product. As a result, the Board recommended an additional economic adjustment of 48 million pounds (18 million due to fruit quality concerns and 30 million for expected deliveries). With this adjustment, and anticipated orchard diversion (25 million pounds) the Board's preliminary restricted percentage was 31 percent (96 million pounds divided by 313.5 million pounds).

The Board met again on September 13, 2018, to consider final volume regulation percentages for the 2018–19 season. The final percentages are based on the Board's reported production figures and the supply and demand information available in September.

The total production for the 2018–19 season was 299.2 million pounds, 45.3 million pounds below the Board's July estimate. In addition, growers diverted 12.4 million pounds in the orchard, about half of what had been anticipated. As a result 286.8 million pounds would be available to market, 282.3 million pounds of which are in the restricted districts. Using the actual production numbers, and accounting for the recommended desirable carry-out and economic adjustment, as well as the market growth factor, the restricted percentage was recalculated.

The Board subtracted the carry-in figure used in July of 125.1 million pounds, from the optimum supply of 303 million pounds to determine 177.9 million pounds of 2018–19 production would be necessary to reach optimum supply. The Board subtracted the 177.9 million pounds from the actual production of 299.2 million pounds, resulting in a surplus of 121.3 million pounds of tart cherries.

The Board also revisited its earlier decision regarding an economic adjustment. Many in attendance expressed that the previously recommended economic adjustment should be revisited to avoid placing excess fruit on the market. One member indicated the fruit quality in Michigan was better than anticipated in July. Other attendees indicated the adjustment for additional sales had been overstated. As a result, the Board recommended lowering the economic adjustment to 24 million pounds.

The recalculated surplus was reduced by subtracting the revised economic adjustment of 24 million pounds and the market growth factor of 22.3 million pounds, resulting in an adjusted surplus of 75 million pounds. The Board then divided this final surplus by the available production of 282.3 million pounds in the regulated districts (294.7 million pounds minus 12.4 million pounds of in-orchard diversion) to calculate a restricted percentage of 27 percent with a corresponding free percentage of 73 percent for the 2018–19 crop year, as outlined in the following table:

	Millions of pounds
Final Calculations:	
(1) Average sales of the prior three years	223
(2) Plus desirable carry-out	80
(3) Optimum supply calculated by the Board	303
(4) Carry-in as of July 1, 2018	125.1
(5) Adjusted optimum supply (item 3 minus item 4)	177.9
(6) Board reported production	299.2
(7) Surplus (item 6 minus item 5)	121.3
(8) Total economic adjustments	24
(9) Market growth factor	22.3
(10) Adjusted Surplus (item 7 minus items 8 and 9)	75
(11) Supply in regulated districts	294.7
(12) In-Orchard Diversion	12.4
(13) Production minus in orchard diversion	282.3
Final Percentages:	Percent
Restricted (item 10 divided by item 13 × 100)	27
Free (100 minus restricted percentage)	73

The final restriction of 27 percent is lower than the preliminary restriction percentage of 31 percent. The largest factor affecting this change was the final production numbers that came in below the Board's July estimate. Additionally, less fruit was diverted in orchard than anticipated and the Board revised its economic adjustment to 24 million pounds. The desired carry-out remained the same at 80 million pounds.

In discussing the calculation, several members indicated they believed the recommendation was too restrictive. They supported maintaining the economic adjustment at the original level, which would have resulted in a lower calculated restriction. Other members stated that reducing the economic adjustment was reflective of industry conditions and expressed concern about putting too much fruit into the market.

Establishing free and restricted percentages is an attempt to bring supply and demand into balance. If the primary market is oversupplied with cherries, grower prices decline substantially. Restricted percentages have benefited grower returns and helped stabilize the market as compared to those seasons prior to the implementation of the marketing order. The Board, based on its discussion of this issue and the result of the above calculations, believes the available information indicates a restricted percentage should be established for the 2018–19 crop year to avoid oversupplying the market with tart cherries.

Consequently, the Board recommended final percentages of 73 percent free and 27 percent restricted by a vote of 13 in favor, 4 opposed, and 1 abstention. The Board could meet and recommend the release of additional volume during the crop year if conditions so warranted. The Secretary finds, from the recommendation and supporting information supplied by the Board, that designating final percentages of 73 percent free and 27 percent restricted tends to effectuate the declared policy of the Act, and so designates these percentages.

Additionally, the Board reviewed its rules regarding grower diversion, as this diversion option has become more of a common practice over the past few seasons. To receive grower diversion credit, the marketing order requires that the fruit left in the orchard must be marketable. With no definition of marketable in the marketing order, the Board had defined fruit as unmarketable if insects were found in any of the fruit sampled from the acreage marked for diversion.

In 2016, the Board formed a committee to investigate updating this policy based on recent infestations of Spotted Wing Drosophila. The industry was concerned growers would not qualify for diversion if a zero-tolerance policy remained in effect, but also wanted to ensure orchards were properly maintained to prevent the spread of infestation. The Board modified its working definition of marketable to reflect aspects of the tolerances in an FDA Compliance Policy Guide (CPG Sec. 550.225 Cherries—Brined, Fresh, Canned and Frozen—Adulteration Involving Rot and Insect). Specifically, the Board recommended using a 5 percent tolerance for insects and a 7 percent tolerance for rot when sampling cherries for diversion. After applying the two tolerances for insects and rot over two harvests, the Board found these levels were effective. The Board discussed this issue at its meetings on September 13, 2018, and October 23, 2018, and unanimously recommended incorporating this change into the Order's rules and regulations.

Final Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), the Agricultural Marketing Service (AMS) has considered the economic impact of this final 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 businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 600 producers of tart cherries in the regulated area and approximately 40 handlers of tart cherries who are subject to regulation under the Order. Small agricultural producers are defined by the Small Business Administration (SBA) as those having annual receipts of less than $750,000, and small agricultural service firms have been defined as those whose annual receipts are less than $7,500,000 (13 CFR 121.201).

According to the National Agricultural Statistics Service (NASS) and Board data, the average annual grower price for tart cherries utilized for processing during the 2017–18 season was approximately $0.224 per pound. With total utilization at approximately 254 million pounds for the 2017–18 season, the total 2017–18 value of the crop utilized for processing is estimated at $56.9 million. Dividing the crop value by the estimated number of producers (600) yields an estimated average receipt per producer of $94,833. This is well below the SBA threshold for small producers.

A free on board (FOB) price of $0.82 per pound for frozen tart cherries was reported by the Food Institute during the 2017–2018 season. Based on utilization, this price represents a good estimate of the price for processed cherries. Multiplying this FOB price by total utilization of 254.1 million pounds results in an estimated handler-level tart cherry value of $208 million. Dividing this figure by the number of handlers (40) yields estimated average annual handler receipts of $5.2 million, which is below the SBA threshold for small agricultural service firms. Assuming a normal distribution, the majority of producers and handlers of tart cherries may be classified as small entities.

The tart cherry industry in the United States is characterized by wide annual fluctuations in production. According to NASS, the pounds of tart cherry production for the years 2012 through 2017 were 85 million, 294 million, 304 million, 253 million, 329 million, and 260 million, respectively. Because of these fluctuations, supply and demand for tart cherries are rarely in balance.

Demand for tart cherries is inelastic, meaning changes in price have a minimal effect on total sales volume. However, prices are very sensitive to changes in supply, and grower prices vary widely in response to the large swings in annual supply. Grower prices per pound for processed utilization have ranged from a low of $0.073 in 1987 to a high of $0.588 per pound in 2012.

Because of this relationship between supply and price, oversupplying the market with tart cherries would have a sharp negative effect on prices, driving down grower returns. Aware of this economic relationship, the Board focuses on using the volume control authority in the Order to align supply with demand and stabilize industry returns. This authority allows the industry to set free and restricted percentages as a way to bring supply and demand into balance. Free percentage cherries can be marketed by handlers to any outlet, while restricted percentage volume must be held by handlers in reserve, diverted, or used for exempted purposes.

This rule controls the supply of tart cherries by establishing percentages of 73 percent free and 27 percent restricted for the 2018–19 crop year. These percentages should stabilize marketing conditions by adjusting supply to meet market demand and help improve grower returns. This action regulates tart cherries growing in Michigan, New York, Utah, Washington, and Wisconsin. This action also revises the regulations regarding grower diversion to codify the Board's definition of marketable fruit. The authority for this action is provided in §§ 930.50, 930.51(a), 930.52, and 930.58. The Board recommended this action at meetings on September 13, 2018, and October 23, 2018.

This rule will result in some fruit being diverted from the primary domestic markets. However, as mentioned earlier, the USDA's ''Guidelines for Fruit, Vegetable, and Specialty Crop Marketing Orders'' (*http://www.ams.usda.gov/publications/content/1982-guidelines-fruit-vegetable-marketing-orders*) specify that 110 percent of recent years' sales should be made available to primary markets each season before recommendations for volume regulation are approved. The quantity that is available under this regulation is more than 150 percent of the average sales for the last three years.

In addition, there are secondary uses available for restricted fruit, including the development of new products, sales into new markets, the development of export markets, and being placed in reserve. While these alternatives may provide different levels of return than the sales to primary markets, they play an important role for the industry. The areas of new products, new markets, and the development of export markets utilize restricted fruit to develop and expand the markets for tart cherries. In 2017–18, these activities accounted for over 82 million pounds in sales, 27 million of which were exports. These numbers represent increases of 45 million pounds and 11.4 million pounds respectively.

Placing tart cherries into reserves is also a key part of balancing supply and demand. Although handlers bear the handling and storage costs for fruit in reserve, reserves stored in large crop years are used to supplement supplies in short crop years. The reserves help the industry to mitigate the impact of oversupply in large crop years, while allowing the industry to supply markets in years when production falls below demand. Further, storage and handling costs are more than offset by the increase in price when moving from a large crop to a short crop year.

The Board recommended a carry-out of 80 million pounds and made a demand adjustment of 24 million pounds in order to make the regulation less restrictive. With 125.1 million pounds of carry-in, 4.5 million pounds of production in the unregulated districts, and 207.3 million pounds of free tonnage from the regulated districts, 336.9 million pounds of fruit will be available for the domestic market. This is nearly 50 million pounds greater than the tonnage made available in the previous season. Even with the recommended restriction, the domestic market will have an ample supply of tart cherries. Further, should marketing conditions change, and market demand exceed existing supplies, the Board could meet and recommend the release of an additional volume of cherries. Consequently, it is not anticipated that this regulation will unduly burden growers or handlers.

While this action could result in some additional costs to the industry, these costs are outweighed by the benefits. The purpose of setting restricted percentages is to attempt to bring supply and demand into balance. If the primary market (domestic) is oversupplied with cherries, grower prices decline substantially. Without volume control, the primary market would likely be oversupplied, resulting in lower grower prices. In addition, the industry could start to build large amounts of unwanted inventories, which would also have a depressing effect on grower returns.

An econometric model has been developed to assess the impact volume control has on the price growers receive for their product. Based on the model, the use of volume control would have a positive impact on grower returns for this crop year. With volume control, grower prices are estimated to be approximately $0.04 per pound higher than without restrictions. In addition, absent volume control, the industry could start to build large amounts of unwanted inventories. These inventories would have a depressing effect on grower prices.

Retail demand is assumed to be highly inelastic, which indicates changes in price do not result in significant changes in the quantity demanded. Consumer prices largely do not reflect fluctuations in cherry supplies. Therefore, this action should have little or no effect on consumer prices and should not result in a reduction in retail sales.

The incorporation of a tolerance for insects and rot in diverted fruit aligns the Order's grower diversion rules and regulations with current industry practices. The tolerances should make it possible for more growers to participate in diversion during periods of oversupply, while encouraging proper pest management. Proper pest management helps reduce costs by decreasing incidences of infestation. Further, the use of grower diversion removes excess supply from the market without incurring the costs of harvesting, processing, and storage.

The established tolerance for insects and rot for cherries diverted in the orchard will provide clear guidance for compliance with marketing order provisions, encourage proper pest management, and align the Order's rules with industry standards. Growers, regardless of size, should benefit from the addition of these tolerances.

The free and restricted percentages established by this action will provide the market with optimum supply and will apply uniformly to all regulated handlers in the industry, regardless of size. As the restriction represents a percentage of a handler's volume, the costs, when applicable, are proportionate and should not place an extra burden on small entities as compared to large entities.

The stabilizing effects of this action benefit all handlers by helping them maintain and expand markets, despite seasonal supply fluctuations. Likewise, price stability positively impacts all growers and handlers by allowing them to better anticipate the revenues their tart cherries would generate. Growers and handlers, regardless of size benefit from the stabilizing effects of the volume restriction.

The Board had extensive discussions on carry-out inventory alternatives. The alternatives included five motions that failed to pass, ranging from 50 million pounds to 100 million pounds. The Board determined that if the carry-out number was too large, it could have a negative impact on grower returns. Some attendees indicated excess carry-in over the past few seasons has had a negative effect on returns and that growers are seeking relief. After consideration of the alternatives, the Board recommended a carry-out of 80 million pounds.

The Board also weighed alternatives when discussing the economic adjustment. At its July meeting, the Board recommended a 48 million pound adjustment to account for fruit quality concerns and expected sales. One member proposed an additional 40-million-pound adjustment to counter imports of dried and frozen cherries, while other members favored a lower amount.

When the final production numbers were reviewed in September, the Board revisited the economic adjustment. Members indicated fruit quality was still an issue, but yields were better than initially anticipated. Members also stated that with tough international markets, the additional sales may have been overstated. Members from the Western states in particular were concerned that a large shift in the restriction percentage following harvest would disrupt the overall market and petitioned the Board to reconsider the adjustment. After discussion, the Board adopted an adjustment of 24 million pounds determining this amount would best meet the industry's sales needs. Thus, the alternatives were rejected.

Regarding grower diversion requirements, the Board initially proposed a broader set of requirements including spray protocols and destruction of diverted fruit in order to better control infestation. The original proposal called for annual determination of which steps would be required in each district. As research is still evolving on how best to deal with spotted wing drosophila infestations, preferred methods of dealing with the diverted fruit were also subject to change. Thus, the Board voted to codify only the tolerance for marketability.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Order's information collection requirements have been previously approved by OMB and assigned OMB No. 0581–0177, Tart Cherries Grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin. No changes to those requirements are necessary as a result of this action. Should any changes become necessary, they would be submitted to OMB for approval.

This final rule will not impose any additional reporting or recordkeeping requirements on either small or large tart cherry handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. As noted in the initial regulatory flexibility analysis, USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this final rule.

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

The Board's meetings were widely publicized throughout the tart cherry industry, and all interested persons were invited to attend the meetings and participate in Board deliberations on all issues. Like all Board meetings, the July 6, 2018, September 13, 2018, and October 23, 2018, meetings were public meetings, and all entities, both large and small, were able to express views on this issue.

A proposed rule concerning this action was published in the **Federal Register** on May 8, 2019 (84 FR 20043). Copies of the proposed rule were sent via email to all Board members and tart cherry handlers. Finally, the proposed rule was made available through the internet by USDA and the Office of the Federal Register. A 30-day comment period was provided to allow interested persons to respond to the proposal.

Two comments were received in opposition to the proposal. Both commenters were concerned by adjustments made between the Board's preliminary and final recommendations, indicating the changes reduced the amount of free volume available. The Order requires that the Board make a preliminary recommendation on or around July 1 and then make a final recommendation before September 15. The preliminary numbers are based on forecasts and are announced to give the industry an initial indication of the conditions for the upcoming season. The preliminary percentages or the numbers used in the calculation are not binding.

One commenter stated changes from the June estimates interrupt the flow of business. However, there are often changes between the two recommendations, as actual production, diversion numbers, or industry conditions do not always align with forecasts. When the Board meets in September to make a final recommendation, harvest is complete, and the fruit has moved into processing channels. The Board can discuss volume regulation using actual numbers and current information regarding market conditions. Therefore, the final recommendation to the Secretary is made in September. Further, should conditions warrant, the Order gives the Board the authority to recommend a release of reserves if it is determined there is demand for additional fruit.

One commenter objected to the reduction in the economic adjustment from the 48 million pounds used during the preliminary discussion in June to the 24 million pounds included in the final recommendation. The Board had incorporated an adjustment of 48 million pounds in its preliminary recommendation based in part on the expectations of poor fruit quality and additional sales needs. At the meeting in September, many in attendance expressed that the Board needed to revisit the economic adjustment to avoid placing excess fruit on the market. During the discussion, one member indicated the fruit quality in Michigan was better than was anticipated in July. Other attendees indicated the adjustment for additional sales had been overstated. As a result, the Board recommended lowering the economic adjustment to 24 million pounds.

The commenter expressed that the statement regarding improved fruit quality was erroneous and using this as a reason to change the economic adjustment from 48 to 24 million pounds was improper. The commenter noted that yields for 2018 fell below 2015 and 2016 levels as grounds to support the claim that the original economic adjustment should have been maintained. However, the final recommendation provided by the Board indicated yields were better than anticipated in July, but still an issue. The other major factor in this adjustment was a consideration of expected sales. As noted earlier, the Board's discussions indicated the adjustment for additional sales may have been overstated in its preliminary calculations. Therefore, the economic adjustment was not eliminated but reduced to 24 million pounds. Further, all members had an opportunity to express their opinions. The concerns regarding the change in the economic adjustment raised by these commenters were part of the Board's discussions and in the end the recommended adjustment was supported by a supermajority of the Board.

The comments also referred to old or poor quality inventory being favored by the regulation. With the exception of an age limitation on inventory held in reserve, the Order makes no distinctions among products in inventory. There are no regulations on the age or quality of fruit held as free inventory, nor is there any specific data collected regarding the age of the product in inventory. The comments also provide no specifics regarding the volume or age of the inventory they cite as problematic. Without this information, there can be no objective determination regarding how the age or quality of current inventory is impacting the market.

Both comments also mentioned concerns with the volume of imports, which were also part of the Board's preliminary and final discussions. While the Order cannot regulate imports, the Board has sought to use its available tools to remain competitive. In recent years, the Board has recommended, and USDA implemented, changes to the Order to allow processors to use restricted fruit under the market expansion provisions of the Order. This has included allowing new market diversion credits when supplying a customer formerly supplied by imports. As stated previously, these activities accounted for 55 million pounds of sales in 2017, up from 21.4 million pounds in the previous season. In 2018, the Order's rules and regulations were modified to expand the number of years products are eligible for these diversion credits from three to five years. That change allows handlers to receive credits for two additional years, making it more likely handlers will invest in these diversion activities and reestablish domestic markets using restricted fruit.

One commenter also indicated the regulation results in quality fruit being destroyed. There is no requirement under the Order to destroy fruit. Those choosing to participate in grower diversion as a means of complying with the regulation do leave fruit unharvested in order to receive diversion credits that are then sold to processors. This is just one of many options processors have in order comply with the regulation. Board data indicate only 12.5 million pounds were diverted in the orchard, half of what had been projected in July. This indicates more handlers chose to meet their restricted percentage using reserves, new product and new market diversion, and exports.

Accordingly, based on the comments received, no changes will be made to the rule as proposed.

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/rules-regulations/moa/small-businesses*. Any questions about the compliance guide should be sent to Richard Lower at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

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

List of Subjects in 7 CFR Part 930

Marketing agreements, Reporting and recordkeeping requirements, Tart cherries.

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

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

■ 1. The authority citation for 7 CFR part 930 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. Amend § 930.158 by revising paragraph (a) to read as follows:

§ 930.158 Grower diversion and grower diversion certificates.

(a) *Grower diversion certificates.* The Board may issue diversion certificates to growers in districts subject to volume regulation who have voluntarily elected to divert in the orchard all or a portion of their tart cherry production which otherwise, upon delivery to handlers, would become restricted percentage cherries. Growers may offer the diversion certificate to handlers in lieu of delivering cherries. Handlers may redeem diversion certificates with the Board through June 30 of each crop year. After June 30 of the crop year that crop year's grower diversion certificates are no longer valid. Cherries that have reached a harvestable, marketable condition will be eligible for diversion. Diversion will not be granted to growers whose fruit was destroyed before it set and/or matured on the tree, or whose fruit is unmarketable. If marketable fruit were to be damaged or destroyed by acts of nature such as storms or hail diversion credit could be granted. To be considered marketable for the purposes of this section, sampled fruit may not exceed a 5 percent tolerance for insects or a 7 percent tolerance for rot.

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■ 3. Revise § 930.256 to read as follows:

§ 930.256 Free and restricted percentages for the 2018–19 crop year.

The percentages for tart cherries handled by handlers during the crop year beginning on July 1, 2018, which shall be free and restricted, respectively, are designated as follows: Free percentage, 73 percent and restricted percentage, 27 percent.

Dated: September 26, 2019.

Bruce Summers,

Administrator, Agricultural Marketing Service.

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2019–0389; Product Identifier 2018–SW–035–AD; Amendment 39–19748; AD 2019–19–12]

RIN 2120–AA64

Airworthiness Directives; Sikorsky Aircraft Corporation Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is superseding Airworthiness Directive (AD) 2018–10–07 for Sikorsky Aircraft Corporation (Sikorsky) Model S–76C helicopters. AD 2018–10–07 required inspecting the engine collective position transducer (CPT). This new AD retains the requirements of AD 2018–10–07 and expands the applicability. This AD is prompted by the determination that an additional part-numbered engine CPT is affected by the same unsafe condition.