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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 927

[Docket No. FV04-927-2 FR]

#### Winter Pears Grown in Oregon and Washington; Decrease of a Continuing Supplemental Assessment Rate for the Beurre d'Anjou Variety of Pears Grown in Oregon and Washington

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

**ACTION:** Final rule.

**SUMMARY:** This rule decreases the continuing supplemental assessment rate established for the Winter Pear Control Committee (Committee) for the 2004-2005 and subsequent fiscal periods from \$0.03 to \$0.01 per 44-pound standard box or container equivalent of the Beurre d'Anjou variety of pears (d'Anjou pears) handled, excluding organically produced d'Anjou pears. The Committee locally administers the marketing order which regulates the handling of winter pears grown in Oregon and Washington. Authorization for a supplemental assessment rate on individual varieties or subvarieties of winter pears enables the Committee to fund authorized projects for these varieties. The fiscal period began July 1 and ends June 30. The supplemental assessment rate will remain in effect indefinitely unless modified, suspended, or terminated.

**DATES:** Effective September 29, 2004.

**FOR FURTHER INFORMATION CONTACT:** Susan M. Hiller, Northwest Marketing Field Office, Fruit and Vegetable Programs, AMS, USDA, 1220 SW. Third Avenue, suite 385, Portland, Oregon 97204-2807; telephone: (503) 326-2724, Fax: (503) 326-7440; or George Kelhart, Technical Advisor, 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.

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 Agreement No. 89 and Order No. 927, both as amended (7 CFR part 927), regulating the handling of winter pears grown in Oregon and 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."

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order now in effect, Oregon and Washington winter pear handlers are subject to assessments. Funds to administer the order are derived from such assessments. It is intended that the supplemental assessment rate will be applicable to all assessable d'Anjou pears, excluding organically produced d'Anjou pears, beginning on July 1, 2004, and continue until amended, suspended, or terminated. 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 decreases the supplemental assessment rate established for the Committee for the 2004-2005 and subsequent fiscal periods from \$0.03 to \$0.01 per 44-pound standard box or container equivalent of d'Anjou pears, excluding organically produced d'Anjou pears. The \$0.01 supplemental assessment rate on conventionally produced (pears that are not organically produced) and handled d'Anjou pears is in addition to the continuing base assessment rate of \$0.49 per 44-pound standard box or container equivalent established for the 1998-1999 and subsequent fiscal periods, which pertains to all winter pears handled under the order (63 FR 46633; September 2, 1998). The supplemental rate of \$0.03 per 44-pound standard box or container equivalent was established at 67 FR 5438; February 6, 2002.

The order provides authority for the Committee, with the approval of USDA, to formulate an annual budget of expenses and collect assessments from handlers to administer the program. The order also provides authority to fix supplemental rates of assessment on individual varieties or subvarieties to secure sufficient funds to provide for projects authorized under § 927.47. Section 927.47 provides authority for the establishment of production research, or marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption of pears. The members of the Committee are growers and handlers of Oregon and Washington winter pears. They are familiar with the Committee's needs and with the costs for goods and services in their local area and are thus in a position to formulate an appropriate budget and assessment rates. The assessment rates are formulated and discussed in a public meeting. Thus, all directly affected persons have an opportunity to participate and provide input.

The Committee met on June 4, 2004, and unanimously recommended 2004-2005 expenditures of \$7,302,905 and reconfirmed the continuing base

assessment rate of \$0.49 per 44-pound standard box or container equivalent of winter pears established for the 1998–1999 and subsequent fiscal periods. The Committee also recommended a supplemental assessment rate of \$0.01 per 44-pound standard box or container equivalent of d’Anjou pears, excluding organically produced d’Anjou pears. In comparison, last year’s budgeted expenditures were \$8,320,989.

The Committee shares management and other expenses with the Pear Bureau Northwest and the Northwest Fresh Bartlett Pear Marketing Committee (7 CFR part 931) under a management agreement. The major expenditures recommended by the Committee for the 2004–2005 fiscal period include \$339,905 for shared expenses (salaries and benefits, insurance, office rent, equipment rental and maintenance, office supplies, telephone, postage, and similar expenses); \$290,000 for production research, and market research and development; \$110,000 for Ethoxyquin data research; \$183,000 for program expenses (compliance and education, committee meetings, office equipment purchases, industry development, and computer programs); and \$6,380,000 for paid advertising. Budgeted expenses for these items in 2003–2004 were \$329,989, \$324,000, \$360,000, \$179,000, and \$7,128,000, respectively.

Under this final rule, conventionally produced and handled d’Anjou pears will be assessed at a total rate of \$0.50 per 44-pound standard box or container equivalent, while all other varieties of winter pears, including organically produced d’Anjou pears, will be assessed at the currently established rate of \$0.49 per 44-pound standard box or container equivalent. The Committee estimates that of the 14,500,000 44-pound standard boxes or container equivalents of winter pears projected for utilization during the 2004–2005 fiscal period, 11,000,000 44-pound standard boxes or container equivalents will be conventionally produced pears of the d’Anjou variety. While the income derived from the base assessment rate will continue to fund the Committee’s administrative and promotional activities, income derived from the supplemental assessment rate will be used exclusively to fund the collection of data on Ethoxyquin residue on stored d’Anjou pears. Ethoxyquin is an antioxidant that is registered for use on pears for controlling superficial scald, a physiological disease affecting the appearance of certain varieties of stored pears. The supplemental assessment rate will not be applicable to d’Anjou pears that are organically produced,

because Ethoxyquin is not used in their handling and storage.

Assessment income for the 2004–2005 fiscal period is expected to total \$7,215,000. Income from the \$0.49 base assessment rate is estimated at \$7,105,000, calculated on estimated shipments of 14,500,000 44-pound standard boxes or container equivalents. In addition, income from the \$0.01 supplemental assessment rate is estimated at \$110,000, calculated on estimated shipments of 11,000,000 44-pound standard boxes or container equivalents. The supplemental assessment rate of \$0.01 is \$0.02 lower than the rate currently in effect. The Committee recommended a decreased supplemental assessment rate due to the projected reduced cost for the final stage of the Ethoxyquin data research. Income derived from handler assessments, along with interest income and funds from the Committee’s authorized reserve will be adequate to cover budgeted expenses. Funds in the reserve (currently \$440,550) will be kept within the maximum permitted by the order of approximately one fiscal period’s expenses (§ 927.42).

The continuing base assessment rate and the decreased supplemental assessment rate of \$0.01 will continue in effect indefinitely unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other available information.

Although the supplemental assessment rate will be in effect for an indefinite period, the Committee will continue to meet prior to or during each fiscal period to recommend a budget of expenses and consider recommendations for modification of the assessment rate. The dates and times of Committee meetings are available from the Committee or USDA. Committee meetings are open to the public and interested persons may express their views at these meetings. USDA will evaluate Committee recommendations and other available information to determine whether modification of either the base assessment rate or the supplemental assessment rate is needed. Further rulemaking will be undertaken as necessary. The Committee’s 2004–2005 budget and those for subsequent fiscal periods would be reviewed and, as appropriate, approved by USDA.

#### 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 1,753 growers of winter pears in Oregon and Washington and approximately 50 handlers subject to regulation under the marketing order. Small agricultural growers 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 \$5,000,000.

According to the *Noncitrus Fruits and Nuts, 2003 Preliminary Summary* issued in January 2004 by the National Agricultural Statistics Service, the total farm gate value of winter pears in the regulated production area for 2003 was \$135,492,000. Therefore, the 2003 average gross revenue for a winter pear grower in the regulated production area was \$77,292. Further, based on Committee records and recent f.o.b. prices for winter pears, over 76 percent of the regulated handlers ship less than \$5,000,000 worth of winter pears on an annual basis. Based on this information it can be concluded that the majority of growers and handlers of winter pears in the States of Oregon and Washington may be classified as small entities.

This rule decreases the supplemental assessment rate established for the Committee and collected from handlers for the 2004–2005 and subsequent fiscal periods from \$0.03 to \$0.01 per 44-pound standard box or container equivalent of d’Anjou pears, excluding organically produced d’Anjou pears. The Committee unanimously recommended the supplemental assessment rate decrease and 2004–2005 expenditures of \$7,302,905, and reconfirmed the continuing base assessment rate of \$0.49 per 44-pound standard box or container equivalent of winter pears established for the 1998–1999 and subsequent fiscal periods.

The Committee shares management and other expenses with the Pear Bureau Northwest and the Northwest Fresh Bartlett Pear Marketing Committee (7 CFR part 931) under a management agreement. The major expenditures recommended by the

Committee for the 2004–2005 fiscal period include \$339,905 for shared expenses (salaries and benefits, insurance, office rent, equipment rental and maintenance, office supplies, telephone, postage, and similar expenses); \$290,000 for production research, and market research and development; \$110,000 for Ethoxyquin data research; \$183,000 for program expenses (compliance and education, committee meetings, office equipment purchases, industry development, and computer programs); and \$6,380,000 for paid advertising. Budgeted expenses for these items in 2003–2004 were \$329,989, \$324,000, \$360,000, \$179,000, and \$7,128,000, respectively.

Assessment income for the 2004–2005 fiscal period is expected to total \$7,215,000. Income from the \$0.49 base assessment rate is estimated at \$7,105,000, calculated on estimated shipments of 14,500,000 44-pound standard boxes or container equivalents. In addition, income from the \$0.01 supplemental assessment rate is estimated at \$110,000, calculated on estimated shipments of 11,000,000 44-pound standard boxes or container equivalents. The supplemental assessment rate of \$0.01 is \$0.02 lower than the rate in effect prior to this action. The Committee recommended a decreased supplemental assessment rate due to the projected reduced cost for the final stage of the Ethoxyquin data research. Income derived from handler assessments, along with interest income and funds from the Committee's authorized reserve will be adequate to cover budgeted expenses. Funds in the reserve (currently \$440,550) will be kept within the maximum permitted by the order of approximately one fiscal period's expenses (§ 927.42).

The Committee reviewed and unanimously recommended 2004–2005 expenditures of \$7,302,905 which includes increases in shared expenses and program expenses, and decreases in production research, and market research and development, Ethoxyquin data research, and paid advertising expenses. Prior to arriving at this budget, alternative expenditure and assessment levels were discussed by the Committee. Based upon the projected reduced cost for the final stage of the Ethoxyquin data research, the Committee recommended a reduction in the supplemental assessment rate. Ethoxyquin is not used in the handling and storage of organically produced d'Anjou pears, thus they were excluded from the Committee's supplemental assessment rate recommendation.

A review of historical information and preliminary information pertaining to

the upcoming fiscal period indicates that the grower price for the 2004–2005 fiscal period could range between \$5.80 and \$7.35 per standard box of winter pears. Therefore, the estimated assessment revenue for the 2004–2005 fiscal period, inclusive of revenue from both the base assessment rate and the supplemental assessment rate, as a percentage of total grower revenue could range between 6.8 and 8.6 percent.

This action will decrease the assessment obligation imposed on handlers. Assessments are applied uniformly on all handlers, and some of the costs may be passed on to growers. However, the decreased supplemental assessment rate should reduce the burden on handlers, and may reduce the burden on growers. In addition, the Committee's meeting was widely publicized throughout the Oregon and Washington winter pear industry and all interested persons were invited to attend the meeting and participate in Committee deliberations on all issues. Like all Committee meetings, the June 4, 2004, meeting was a public meeting and all entities, both large and small, were able to express views on this issue. Finally, interested persons were invited to submit information on the regulatory and informational impacts of this action on small businesses.

This rule will impose no additional reporting or recordkeeping requirements on either small or large Oregon and Washington winter pear 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.

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

A proposed rule concerning this action was published in the **Federal Register** on August 16, 2004 (69 FR 50334). Copies of the proposed rule were also mailed or sent via facsimile to all winter pear handlers. Finally, the proposal was made available through the Internet by the Office of Federal Register and USDA. A 20-day comment period ending September 7, 2004, was provided for interested persons to respond to the proposal. 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 information and recommendation submitted by the Committee 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.

Pursuant to 5 U.S.C. 553, it is also found and determined that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because: (1) The 2004–2005 fiscal period began on July 1, 2004, and the marketing order requires that the rates of assessment for each fiscal period apply to all assessable winter pears handled during such fiscal period; (2) this rule decreases the supplemental assessment rate for assessable d'Anjou pears beginning with the 2004–2005 fiscal period; and (3) handlers are aware of this action which was unanimously recommended by the Committee at a public meeting and is similar to other assessment rate actions issued in past years. Also, a 20-day comment period was provided for in the proposed rule and no comments were received.

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

Marketing agreements, Pears, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, 7 CFR part 927 is amended as follows:

#### PART 927—WINTER PEARS GROWN IN OREGON AND WASHINGTON

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

Authority: 7 U.S.C. 601–674.

■ 2. Section 927.236 is revised to read as follows:

##### § 927.236 Assessment rate.

On and after July 1, 2004, an assessment rate of \$0.49 per 44-pound standard box or container equivalent of conventionally and organically produced pears and, in addition, a supplemental assessment rate of \$0.01 per 44-pound standard box or container equivalent of Beurre d'Anjou variety pears, excluding organically produced Beurre d'Anjou pears, is established for the Winter Pear Control Committee.

Dated: September 22, 2004.

A. J. Yates,  
Administrator, Agricultural Marketing Service.

[FR Doc. 04–21630 Filed 9–27–04; 8:45 am]

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