

# Rules and Regulations

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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 948

[Doc. No. AMS-FV-08-0094; FV09-948-1 IFR]

#### Irish Potatoes Grown in Colorado; Modification of the Handling Regulation for Area No. 2

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

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

**SUMMARY:** This rule modifies the minimum size requirement under the Colorado potato marketing order, Area No. 2. The marketing order regulates the handling of Irish potatoes grown in Colorado, and is administered locally by the Colorado Potato Administrative Committee, Area No. 2 (Committee). Currently, Colorado Area No. 2 potatoes must be U.S. No. 2 or better grade and most varieties must be at least 2 inches in diameter or 4 ounces in weight, except that round potatoes may be of any weight. For most long potato varieties, this rule changes the minimum size requirement from 2 inches in diameter to 1 $\frac{7}{8}$  inches in diameter and removes the minimum weight requirement. This change is intended to improve the marketing of Colorado Area No. 2 potatoes and increase returns to producers as well as provide consumers with increased supplies of potatoes.

**DATES:** Effective April 17, 2009; comments received by June 15, 2009 will be considered prior to issuance of a final rule.

**ADDRESSES:** Interested persons are invited to submit written comments concerning this proposal. Comments must be sent to the Docket Clerk, Marketing Order Administration Branch, Fruit and Vegetable Programs,

AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250-0237; Fax: (202) 720-8938, or Internet: <http://www.regulations.gov>. All comments should reference the document number and the date and page number of this issue of the **Federal Register** and will be available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: <http://www.regulations.gov>. All comments submitted in response to this rule will be included in the record and will be made available to the public. Please be advised that the identity of the individuals or entities submitting the comments will be made public on the Internet at the address provided above.

**FOR FURTHER INFORMATION CONTACT:**

Teresa Hutchinson or Gary Olson, Northwest Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, Telephone: (503) 326-2724, Fax: (503) 326-7440, or e-mail: [Teresa.Hutchinson@ams.usda.gov](mailto:Teresa.Hutchinson@ams.usda.gov) or [GaryD.Olson@ams.usda.gov](mailto:GaryD.Olson@ams.usda.gov).

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@ams.usda.gov](mailto:Jay.Guerber@ams.usda.gov).

**SUPPLEMENTARY INFORMATION:** This rule is issued under Marketing Agreement No. 97 and Marketing Order No. 948, both as amended (7 CFR part 948), regulating the handling of Irish potatoes grown in Colorado, 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. 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. 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 rule modifies the minimum size requirement for most potatoes handled under the order. The exceptions to these requirements are for potatoes handled under the size designations referred to in the U.S. Standards as "Size B" and "creamers." The revisions described in this rule are made to the handling regulations for all regulated potatoes except those potatoes considered "Size B" or "creamers." The current size requirements for "Size B" and "creamers" remain unchanged. The discussion hereafter is intended to reflect the same.

Except as explained above, the minimum size requirement for Colorado Area No. 2 potatoes currently allows the handling of potatoes that are at least 2 inches in diameter or 4 ounces in weight (round potatoes may be of any weight). For long potato varieties, this rule changes the minimum size requirement from 2 inches in diameter to 1 $\frac{7}{8}$  inches in diameter and removes the minimum weight requirement. This rule was recommended by the Committee at a meeting on August 21, 2008.

Section 948.22 authorizes the issuance of grade, size, quality, maturity, pack, and container regulations for potatoes grown in the production area. Section 948.21 further authorizes the modification, suspension, or termination of requirements issued pursuant to § 948.22.

Section 948.40 provides that whenever the handling of potatoes is regulated pursuant to §§ 948.20 through

948.24, such potatoes must be inspected by the Federal-State Inspection Service, and certified as meeting the applicable requirements of such regulations.

For marketing order purposes, the State of Colorado is divided into three areas. Area No. 1, commonly known as the Western Slope, includes and consists of the counties of Routt, Eagle, Pitkin, Gunnison, Hinsdale, La Plata, and all counties west thereof. Area No. 2, commonly known as the San Luis Valley, includes and consists of the counties of Sanguache, Huerfano, Las Animas, Mineral, Archuleta, and all counties south thereof. Area No. 3 includes and consists of all the remaining counties in the State of Colorado which are not included in Area No. 1 or Area No. 2. The order currently regulates the handling of potatoes grown in Areas No. 2 and No. 3 only; regulation for Area No. 1 is currently not active.

Grade, size, and maturity regulations specific to the handling of Colorado potatoes grown in Area No. 2 are contained in § 948.386 of the order's rules and regulations.

According to the Committee, quality assurance is very important to the industry and its customers. Providing the public with acceptable quality potatoes that are appealing to the consumer on a consistent basis is necessary to maintain buyer confidence in the marketplace.

The growing season for Colorado Area No. 2 is normally very short because potatoes are grown in the San Luis Valley at an altitude of 7,600 feet. Adverse weather has a large impact on yield and potato size at high altitudes. In spring 2008, wet weather delayed planting and emergence of the crop. An early June frost, when potato plants were just emerging, further damaged the crop. Numerous hail storms, including a severe storm in mid-August, caused significant damage to nearly 20 percent of the Area No. 2 potato acreage. In all, adverse weather conditions were responsible for significantly lower crop yields in the 2008 season.

U.S. potato acreage in 2008 is estimated to be 8 percent lower than in 2007, resulting in limited supplies of potatoes nationwide. The production of alternate rotation crops, such as wheat and corn, has become more profitable than the production of potatoes, causing producers to reduce potato acreage. These conditions have resulted in the smallest supply of potatoes in nearly 20 years.

In 2007, the Committee recommended tightening the minimum size requirements from 1 $\frac{7}{8}$  inches to 2 inches in diameter or 4 ounces

minimum weight for all non-accepted varieties potatoes, except that round varieties could be handled without weight limitations. This action was based in part on the higher yield and sales of the 2006 season. This change was effective on January 31, 2008 (73 FR 5422).

Taking into account lower estimated 2008 U.S. potato acreage and poor weather conditions in Area No. 2, the Committee recommended relaxing the minimum size regulation. The Committee believes that the size relaxation should increase the volume of potatoes meeting the order's handling requirements, thus fulfilling market demands.

Twelve members voted in favor of the modification and one member voted in opposition. The dissenting member was concerned that, even though his crop would be small, the shipper who packs his potatoes would want larger potatoes. However, the majority of the Committee believes that this change will provide potato handlers with more marketing flexibility, producers with increased returns, and consumers with a greater supply of Colorado Area No. 2 potatoes.

This rule will not impact imported potatoes covered by section 608(e) of the Act.

#### Initial 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 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 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 73 handlers of Colorado Area No. 2 potatoes subject to regulation under the order and approximately 180 producers in the regulated production area. Small agricultural service firms are defined by the Small Business Administration (13 CFR 121.201) as those having annual receipts of less than \$7,000,000, and small agricultural producers are defined as those having annual receipts of less than \$750,000.

During the 2007–2008 marketing year, approximately 14,225,568 hundredweight of Colorado Area No. 2 potatoes were inspected under the order

and sold into the fresh market. Based on an estimated average f.o.b. price of \$12.05 per hundredweight, the Committee estimates that 62 Area No. 2 handlers, or about 85 percent, had annual receipts of less than \$7,000,000. In view of the foregoing, the majority of Colorado Area No. 2 potato handlers may be classified as small entities.

In addition, based on information provided by the National Agricultural Statistics Service (NASS), the average producer price for Colorado potatoes for 2007 was \$9.85 per hundredweight. The average annual fresh potato revenue for the Colorado Area No. 2 potato producers is therefore calculated to be approximately \$778,455. Consequently, on average, the majority of the Area No. 2 Colorado potato producers may not be classified as small entities.

For long potatoes that are considered neither "Size B" nor "creamer" size potatoes, this rule changes the minimum size requirement from 2 inches in diameter to 1 $\frac{7}{8}$  inches in diameter and removes the minimum weight requirement. Authority for this action is contained in §§ 948.21 and 948.22.

In 2007, handlers were unable to adequately supply the fresh market because of low yields due to poor weather conditions and because of more restrictive regulations. Adverse weather conditions have contributed to lower yields and short supplies of potatoes for the market again in the 2008–2009 season. The Committee believes that relaxing the minimum size and weight requirements on long potato varieties will allow handlers to market a larger portion of the crop in fresh market outlets, and thus better meet demand. This change is expected to foster increased consumption and have a positive impact on the Colorado potato industry.

This change is expected to improve returns to producers. This rule is a relaxation of the current size regulation and, as such, should have a positive impact on industry participants. The Committee believes that this change would not negatively impact either handlers or producers.

The Committee discussed alternatives to this rule. One alternative included making no change at all to the current regulation. The Committee did not believe this alternative would meet the needs of buyers or benefit the industry.

This rule will not impose any additional reporting or recordkeeping requirements on either small or large Colorado Area No. 2 potato 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. Furthermore, USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this 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.

In addition, the Committee's meeting was widely publicized throughout the Colorado Area No. 2 potato industry and all interested persons were invited to attend the meeting and participate in Committee deliberations on all issues. Like all Committee meetings, the August 21, 2008, meeting was a public meeting and all entities, both large and small, were able to express views on this issue. Finally, interested persons are invited to submit comments on this interim final rule, including the regulatory and informational impacts of this action on small businesses.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateN&page=MarketingOrdersSmallBusinessGuide>. Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

This rule invites comments on a modification of the handling regulation currently prescribed under the Colorado Area No. 2 potato marketing order. Any comments timely received will be considered prior to finalization of this rule.

After consideration of all relevant material presented, including the Committee's recommendation, and other information, it is found that this interim final 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 upon good cause that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice prior to putting this rule into effect and that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because: (1) This rule relaxes the minimum size and weight requirements for most long potatoes; (2) handlers are already shipping potatoes from the 2008–2009 crop; (3) the Committee recommended this change at a public

meeting and all interested parties had an opportunity to express their views and provide input; and (4) this rule provides a 60-day comment period and any comments received will be considered prior to finalization of this rule.

#### List of Subjects in 7 CFR Part 948

Marketing agreements, Potatoes, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, 7 CFR part 948 is amended as follows:

#### PART 948—IRISH POTATOES GROWN IN COLORADO

■ 1. The authority citation for 7 CFR part 948 continues to read as follows:

**Authority:** 7 U.S.C. 601–674.

■ 2. Amend § 948.386 by revising paragraph (a)(2) to read as follows:

#### § 948.386 Handling Regulation.

\* \* \* \* \*

(a) \* \* \*

(2) *All other varieties.* U.S. No. 2, or better grade, 1<sup>7</sup>/<sub>8</sub> inches minimum diameter.

\* \* \* \* \*

Dated: April 9, 2009.

**Robert C. Keeney,**

*Acting Associate Administrator, Agricultural Marketing Service.*

[FR Doc. E9–8685 Filed 4–15–09; 8:45 am]

**BILLING CODE**

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 966

[Doc. No. AMS FV–08–0090; FVO9–966–1 FIR]

#### Tomatoes Grown in Florida; Partial Exemption to the Minimum Grade Requirements

**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 providing a partial exemption to the minimum grade requirements under the marketing order for tomatoes grown in Florida (order). The order regulates the handling of tomatoes grown in Florida and is administered locally by the Florida Tomato Committee (Committee). Absent an exemption, Florida tomatoes covered by

the order must meet at least a U.S. No. 2 grade before they can be shipped and sold outside the regulated area. This rule continues in effect the action that exempted Vintage Ripes™ tomatoes (Vintage Ripes™) from the shape requirements associated with the U.S. No. 2 grade. This change increases the volume of Vintage Ripes™ that meets the order requirements, and helps increase shipments and availability of these tomatoes.

**DATES:** *Effective Date:* May 18, 2009.

**FOR FURTHER INFORMATION CONTACT:** Doris Jamieson, Marketing Specialist, or Christian Nissen, Regional Manager, Southeast Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA; Telephone: (863) 324–3375, Fax: (863) 325–8793, or e-mail: [Doris.Jamieson@usda.gov](mailto:Doris.Jamieson@usda.gov) or [Christian.Nissen@usda.gov](mailto:Christian.Nissen@usda.gov).

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. 125 and Marketing Order No. 966, both as amended (7 CFR part 966), regulating the handling of tomatoes grown in certain designated counties in Florida, hereinafter referred to as the “order.” The marketing agreement and order are 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. A handler is afforded the opportunity for a hearing