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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 966 and 980

[Docket No. FV97-966-1 FR]

Tomatoes Grown in Florida and Imported Tomatoes; Final Rule to Change Minimum Size and Size Designation Requirements

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule increases minimum diameter size requirements for Florida and imported tomatoes. For Florida tomatoes alone, the rule also changes size designations from Medium, Large, and Extra Large to numeric size designations of 6x7, 6x6, and 5x6. Also, the rule slightly increases the diameter size ranges for the designated sizes. The marketing order regulates the handling of tomatoes grown in Florida, and is administered locally by the Florida Tomato Committee (Committee). This final rule will help the Florida tomato industry and importers meet domestic market and industry demands. Also, this rule will help provide handlers more marketing flexibility and increase returns to producers, as well as provide consumers with slightly larger, more mature tomatoes. Application of the size requirement increase to imported tomatoes is required under section 8e of the Agricultural Marketing Agreement Act of 1937.

EFFECTIVE DATE: This final rule becomes effective February 4, 1998.

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George Kelhart, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, Room 2525-S, P.O. Box 96456, Washington, DC 20090-6456; telephone (202) 720-2491, Fax: (202) 205-6632. Small businesses may request information on compliance with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, Room 2525-S, P.O. Box 96456, Washington, DC 20090-6456; telephone (202) 720-2491, Fax: (202) 205-6632.

SUPPLEMENTARY INFORMATION: This final 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."

The Department of Agriculture (Department) 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 final 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 the Secretary 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, the Secretary 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 the Secretary's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

Section 8e of the Act specifies that whenever certain specified commodities, including tomatoes, are regulated under a Federal marketing order, imports of those commodities must meet the same or comparable grade, size, quality, and maturity requirements as those in effect for the domestically produced commodity. There are no administrative procedures which must be exhausted prior to any judicial challenge to the provisions of import regulations issued under section 8e of the Act.

Under the order, tomatoes produced in the production area and shipped to fresh market channels outside the regulated area are required to meet grade, size, inspection, and container requirements. These requirements are specified in § 966.323 of the handling regulations issued under the order. These requirements apply during the period October 10 through June 15 each year. The regulated area is the entire State of Florida, except the panhandle. The production area is part of the regulated area. Specialty packed red ripe tomatoes, yellow meated tomatoes, and single and double-layer place-packed tomatoes are exempt from container net weight requirements.

Under § 966.323, all tomatoes, except for pear shaped, paste, cherry, hydroponic, and greenhouse tomatoes, must be inspected as specified in the United States Standards for Grades of Fresh Tomatoes (7 CFR part 51.1855 through 51.1877; standards). Such tomatoes also must be at least 2⁸/₃₂ inches in diameter, and sized with proper equipment in one or more of the following ranges of diameters. In the proposal, the reference to the number 2⁸/₃₂ was incorrectly published in the **Federal Register** as 2⁸/₃₂ (62 FR 52047; October 6, 1997; column three; paragraph three; line eight).

| Size designation | Inches minimum diameter | Inches maximum diameter |
|-------------------|---------------------------------|---------------------------------|
| Medium | 2 ⁸ / ₃₂ | 2 ¹⁷ / ₃₂ |
| Large | 2 ¹⁶ / ₃₂ | 2 ²⁵ / ₃₂ |
| Extra Large | 2 ²⁴ / ₃₂ | |

These size designations and diameter ranges are the same as those specified in § 51.1859 of the standards. All tomatoes in the Medium size designation are required to grade at least a U.S. No. 2, while tomatoes in the larger size

designations are required to grade at least a U.S. No. 3. Section 966.52 of the order provides authority for the establishment and modification of regulations applicable to the handling of particular sizes and size designations of tomatoes.

This rule increases the minimum diameter size requirement for Florida tomatoes from $2\frac{8}{32}$ inches to $2\frac{9}{32}$ inches and makes conforming changes to container marking requirements and the regulation for special packed tomatoes. This rule also changes the size designations Medium, Large, and Extra Large to numeric size designations of 6×7 , 6×6 , and 5×6 (respectively), and increases the diameter size ranges for the designated sizes. These size ranges are different from those specified in § 51.1859 of the standards. On September 5, 1997, the Committee met and unanimously recommended these changes. At the same meeting, the Committee recommended by a vote of 10 to 2 to eliminate shipments of U.S. No. 3 grade tomatoes from the regulated area. That recommendation is being addressed in a separate rulemaking action.

Based on an analysis of markets and demands of buyers, the Committee believes that the increase in the minimum size will improve the marketing of Florida tomatoes. By increasing the minimum size, the tomatoes will be slightly larger and, thus, more mature when packed. This follows recent industry trends to ship larger and more mature tomatoes. New commercial tomato varieties also have resulted in larger sized tomatoes being shipped in response to a strong consumer demand. Because of this demand, production of larger tomatoes has been a popular method of improving returns among producers as it also increases total yields.

Also, the Committee recommended the increase in minimum size requirements to improve the uniformity and appearance of tomato packs. The slightly smaller tomatoes in the Medium packs increase the size variability of the pack, and are more likely to be immature and have less taste. The current minimum size of $2\frac{8}{32}$ inches allows these smaller tomatoes to be combined with more mature tomatoes, which lowers the overall quality and, subsequently, the price of the pack. This has resulted in complaints from buyers throughout the market.

In the mid-1980's, Dr. Jeffrey K. Brecht, at the University of Florida, did a study of smaller tomatoes. According to his findings, fully mature green tomatoes begin coloring within a few days of harvesting. Since tomatoes are

not easily identified by a surface indicator (color) of full maturity in green fruit, pickers are forced to rely on size rather than maturity when harvesting tomatoes. The result is that tomatoes at the $2\frac{8}{32}$ of an inch minimum diameter may require two weeks or more to begin ripening. Attainment of the full ripe stage requires on average a week to 10 days additional time. Hence, the full ripening process can take as long as four weeks. Tomatoes that take this long to ripen after harvest have been shown to have poor taste. Increasing the minimum size to $2\frac{9}{32}$ inches for Medium tomatoes is expected to help reduce this problem. Also, consumers are demanding a slightly larger tomato. Smaller tomatoes with a less uniform pack have poor consumer acceptance, especially in chain stores.

The increase in the minimum size from $2\frac{8}{32}$ inches to $2\frac{9}{32}$ inches is not expected to significantly affect the total number of containers shipped. During the 1996-1997 season, of the 47,879,084 containers of 25 pound-equivalent-shipments, approximately 15 percent or about 7,023,239 shipments of 25-pound-equivalents from Florida were of the Medium size designation. The Medium size currently covers a range of $2\frac{8}{32}$ to $2\frac{17}{32}$ inches or a range of about $\frac{9}{32}$ of an inch. Increasing the minimum size to $2\frac{9}{32}$ inch removes all tomatoes that would have met the $2\frac{8}{32}$ minimum size designation. The Medium size designation currently covers a range of $2\frac{8}{32}$ to $2\frac{17}{32}$ inches or a range of about $\frac{9}{32}$ of an inch. Removing $\frac{1}{32}$ inch from the $\frac{9}{32}$ size range would eliminate about 10 percent of the size range. Thus, if the size increase had been applied during the previous season, about 700,000 25-pound equivalents would have been eliminated. Thus, the size increase is expected to reduce total shipments by about 1.5 percent (700,000 25-pound equivalents divided by 47,879,084 25-pound equivalents). Any of the tomatoes failing to meet the minimum size requirements may be sold within the production area or shipped for processing. In the proposed rule, the references in this paragraph to 25-pound equivalents were incorrectly printed in the **Federal Register** as 25,000 pound equivalents (62 FR 52048; October 6, 1997; column two; paragraph two; lines six and eight).

The Committee also recommended the following new designations and tomato diameter size ranges:

| Size designation | Inches minimum diameter | Inches maximum diameter |
|--|-------------------------|-------------------------|
| 6×7 (Currently Medium) | $2\frac{9}{32}$ | $2\frac{19}{32}$ |
| 6×6 (Currently Large) | $2\frac{17}{32}$ | $2\frac{27}{32}$ |
| 5×6 (Currently Extra Large) | $2\frac{25}{32}$ | |

Prior to 1991, numeric size designations were used by Florida handlers and marketers from other growing areas, both domestic and foreign. The current standards and nomenclature size designations were implemented in 1991, and were designed to provide a uniform basis for marketing tomatoes. However, numeric size designation terminology has continued to be used by Florida handlers and sellers from other domestic and foreign growing areas in negotiating price and other terms of trade, and buyers in the marketplace still routinely refer to the size of tomatoes in a 25-pound bulk (loose pack) box by using the 6×7 , 6×6 , and 5×6 size designations, even though the box may be marked Medium, Large, or Extra Large. Florida tomato handlers have found that the difference in terminology has hindered their negotiations with buyers, and adversely affected handler and producer returns. Handlers believe that buyers tend to discount Florida tomatoes because the buyers do not have confidence that the Medium, Large, and Extra Large designations correctly correspond with the size designations of 6×7 , 6×6 , and 5×6 currently used by other tomato growing areas.

Florida handlers compete directly with tomatoes from Mexico. Mexican packers generally market their smaller sized tomatoes in 3-layer place-packs marked 6×6 or 6×7 (each box weighs about 30 pounds), and bulk (loose pack) boxes with the same numeric size designations (each box weighs about 25 pounds). The larger sizes of tomatoes from Mexico are generally marketed in 2-layer place-packs marked as 5×6 , 5×5 , 4×5 , or 4×4 , each weighing between 21 and 24 pounds.

Many buyers in the marketplace purchase tomatoes from both Florida and Mexico, depending on size availability and price, and the preferred language in discussing price and other terms of sale and delivery is numeric size or count, not nomenclature size designations. Reverting back to a previously used numeric system will allow Florida handlers to use numeric size designations that are familiar to both handlers and buyers of Florida tomatoes, facilitate buyer negotiations,

and allow Florida handlers to more effectively market their crop.

In spite of the harmonized marketing goals of 1991, each of the growing areas have continued to market their tomatoes a bit differently. The size designation change will enable the Florida tomato industry to better meet marketplace needs.

This rule also increases the minimum and maximum diameter ranges of the three size designations. The net increase for the maximum diameters for the Medium (6 × 7) and Large (6 × 6) size designations will be 1/32 inch.

This will result in a 2/3×'s overlap in the maximum diameters in these size designations to the next larger size. According to the Committee, this will provide a more even distribution of tomato shipments throughout the three size designations, which will enable handlers to make better decisions on which size of tomatoes to pack. For instance, tomatoes that measure at the very top end of the Medium (6 × 7) size can either be packed with Medium (6 × 7) size tomatoes or as a smaller tomato with Large (6 × 6) size tomatoes. The same increased flexibility will exist for Large (6 × 6) size tomatoes packed with Extra Large (5 × 6) size tomatoes. Such packing decisions could depend on specific buyer or market demands, on general crop size, and on condition of the tomatoes and prices on each day of packing.

Currently, Florida producers are growing tomato varieties which tend to size larger and tend to be oblong. The new diameter size ranges for the three size designations also are intended to accommodate the sizing of these varieties of tomatoes and foster the shipment of larger tomatoes, which the marketplace desires.

Due to strong consumer demand during the 1996-1997 season, approximately 80 percent of the Florida tomatoes sold were in the Extra Large (5 × 6) size designation. This rule will increase the minimum diameter of the Extra Large (5 × 6) size designation to 2-25/32 inches from 2²⁴/32 inches with no maximum size limit. Increasing the minimum diameter size of this designation by 1/32 inch for Extra Large (5 × 6) size packs will reduce the number of smaller sized tomatoes packed in that size designation. Hence, this is expected to decrease size variability and improve uniformity of this premium pack. Thus, improvements in this size category are expected to further enhance consumer demand, resulting in increased returns to producers.

Also, a study conducted by Dr. John J. VanSickle at the University of Florida

estimates that increases in the minimum diameters for each size category would result in an increase in the overall prices received for Florida tomatoes. The study indicates that if increasing the size minimums shifted 1 percent of the smallest Extra Large (5 × 6) size tomatoes into the smaller size categories, then prices for Extra Large (5 × 6) size would increase by .25 percent, the price of Large (6 × 6) size tomatoes by .15 percent, and the price of Medium (6 × 7) size tomatoes by .07 percent. The increase in price would occur because of the redistribution of larger sized tomatoes into the smaller size designations, which is a response to consumer demand for a more consistent pack and slightly larger tomatoes.

These changes are expected to increase returns to producers by improving size consistency, quality, and maturity; and, thus, encourage repeat purchases from consumers. The new size designations will allow handlers to respond better to market preferences, which is expected to benefit producers and handlers of Florida tomatoes.

This rule also makes conforming changes to two paragraphs in § 966.323. The first change in § 966.323 (a)(2)(iii) concerns container marking requirements. The references to the nomenclature (Medium, Large, and Extra Large) size designations are replaced with the new numeric size designations. The second change is in § 966.323 (d)(3) for special packed tomatoes. The reference to the 2-8/32 inch minimum size is replaced with the new 2-9/32 inch minimum size.

Mexico is the largest exporter of tomatoes into the United States. Small quantities are imported from the Caribbean Basin. On average, Mexico represents over 99 percent of all tomato imports during the period (October 10 through June 15) when Florida and import requirements apply.

Section 8e of the Act requires that when certain domestically produced commodities, including tomatoes, are regulated under a Federal marketing order, imports of that commodity must meet the same or comparable grade, size, quality, or maturity requirements for the domestically produced commodity. The current import regulations are specified in 7 CFR 980.212. Similar to the order, the regulations apply during the period October 10 through June 15 when the Florida handling requirements are in effect. Because this rule increases the minimum size for domestic tomato shipments, this increase will be applicable to imported tomatoes beginning with the effective date of this rule.

Florida tomatoes must be packed in accordance with three specified size designations, and tomatoes falling into different size designations may not be commingled in a single container. These pack restrictions do not apply to imported tomatoes. Because pack requirements do not apply, different sizes of imported tomatoes may be commingled in the same container.

However, the Florida handling requirements also specify that tomatoes that are designated as Medium (6 X 7) size must meet a U.S. No. 2 grade, while the larger sizes are required to meet a U.S. No. 3 grade. The more stringent grade requirements are applied to the Medium (6 X 7) size designation because of quality problems with smaller tomatoes.

Similarly, current import requirements specify that all lots with a minimum diameter of 2-17/32 inches and larger shall meet at least a U.S. No. 3 grade. All other tomatoes shall meet at least a U.S. No. 2 grade. Any lot with more than 10 percent of its tomatoes less than 2-17/32 inches in diameter is required to grade at least U.S. No. 2. This rule will change these requirements to reflect the changes to the Florida handling requirements by requiring that all lots with a minimum diameter of 2-19/32 inches and larger meet at least a U.S. No. 3 grade. All other tomatoes will need to meet at least a U.S. No. 2 grade. Any lot with more than 10 percent of its tomatoes less than 2-19/32 inches in diameter will have to grade at least U.S. No. 2.

These changes are expected to benefit the marketers of both Florida and imported tomatoes by providing consumers with better quality, higher maturity, and slightly larger tomatoes. Prior to the issuance of the proposed rule, the Department had contacted a few tomato importers concerning imports. The importers indicated that they are importing larger sizes of tomatoes. The Department believes that the increase in minimum size would not limit the quantity of imported tomatoes or place an undue burden on importers of Mexican tomatoes. The expected increase in customer satisfaction is expected to benefit all tomato importers regardless of the size of their operation or business. The size increase is the only requirement implemented for Florida which applies to imported tomatoes. The exporters and importers of foreign produced tomatoes will be able to continue marketing their tomatoes as they have in all other respects, and in meeting buyer needs.

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, the 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 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. Import regulations issued under the Act are based on those established under Federal marketing orders which regulate the handling of domestically produced products.

There are approximately 65 handlers of Florida tomatoes who are subject to regulation under the order and approximately 75 tomato producers in the regulated area. In addition, at least 170 importers of tomatoes are subject to import regulations and will be affected by this rule. Small agricultural service firms have been defined by the Small Business Administration (SBA) (13 CFR 121.601) as those having annual receipts of less than \$5,000,000, and small agricultural producers are defined as those having annual receipts of less than \$500,000.

Committee data indicates that approximately 30 percent of the Florida handlers handle over 90 percent of the total volume of Florida fresh tomatoes marketed. Based on this information, shipment information for the 1996-97 season, and the 1996-97 season average price of \$7.97 per 25-pound equivalent carton, the majority of handlers would be classified as small entities as defined by the SBA. The majority of producers of Florida tomatoes may be classified as small entities. The Department also believes that most importers may be classified as small entities. In the proposed rule, the reference to 25-pound equivalent carton referred to in this paragraph was incorrectly printed in the **Federal Register** as 25,000 pound equivalent carton (62 FR 52049; October 6, 1997; column three; paragraph two; line seven).

Under § 966.52 of the Florida tomato marketing order, the Committee has authority to recommend increases in the minimum size requirement and changes in the size designations for Florida tomatoes grown in the defined production area and handled under the order. This rule, unanimously recommended by the Committee at its September 5, 1997, meeting, will increase the minimum size, change size

designations and corresponding diameter size ranges. As provided under section 8e of the Act, the increase in the minimum size diameter requirement applies to imported tomatoes.

Based on analysis of markets and demands of buyers, the Committee recommended increasing the minimum size from 2-⁸/₃₂ inches to 2-⁹/₃₂ inches in diameter and the corresponding minimum sizes for the other two size designations. The Committee believes these size increases will improve the marketing of Florida tomatoes. By increasing the minimum sizes, the tomatoes in each size range will be slightly larger and, thus, more mature when packed. This follows recent industry trends to ship larger and more mature tomatoes. Current trends in cultural practices and new commercial tomato varieties also have resulted in larger sized tomatoes being shipped in response to consumer demand for such tomatoes. Because of this demand, production of larger tomatoes has been a popular method of improving returns among producers as it also increases total yields and total pounds. While yields increase with larger fruit, the labor costs associated with picking these tomatoes remains fairly constant because producers pick relatively the same number of fruit.

The change in the minimum size was recommended because demand for larger tomatoes has increased over the last five years. This in part is due to the fact that size continues to be a major influence on price. According to Dr. John J. VanSickle of the University of Florida, the percent of Extra Large (5×6) size tomatoes shipped from Florida has increased steadily from 43.2 percent of total shipments since 1992-93 to 50 percent of total shipments in 1996-1997 for mature green tomatoes. Mature green tomatoes are green but are fully developed and will continue to ripen fully. Meanwhile, the percent of tomatoes from Florida marketed in the Extra Large (5×6) size for vine ripe tomatoes has increased from 66.6 percent to 79.2 percent of total shipments. Vine ripe tomatoes have started to break in color from green to tannish-yellow, pink, or red.

The increase in the minimum size from 2-⁸/₃₂ inches to 2-⁹/₃₂ inches is not expected to affect significantly the total number of Florida shipments. During the 1996-1997 season, of the 47,879,084 shipments of 25-pound equivalents, approximately 15 percent or about 7,023,239 shipments of 25-pound equivalents from Florida were in the minimum size designation of Medium. The Medium size currently covers a range of 2-⁸/₃₂ to 2-¹⁷/₃₂ inches or a range

of about ⁹/₃₂ inch. Increasing the minimum size to 2-⁹/₃₂ inch removes tomatoes that would have met the 2-⁸/₃₂ inch minimum size designation. Removing ¹/₃₂ inch from the ⁹/₃₂ inch size range decreases the size range by about 10 percent. If the size increase had applied during the previous season, shipments from that range would have been reduced by about 700,000 25-pound equivalents. Thus, the size increase is expected to reduce total shipments by approximately 1.5 percent (700,000 25-pound equivalents divided by 47,879,084 25-pound equivalents). Because Florida tomatoes are sizing larger than in the past, the increase in size requirements is expected to have a minimal impact on total shipments. Also, any of these smaller tomatoes may be sold within the production area or shipped for processing. In the proposed rule, the references to 25-pound equivalents in this paragraph were incorrectly printed as 25,000 pound equivalents (62 FR 52050; October 6, 1997; column one; paragraph two; lines six and eight).

Also, this rule changes the size designations from Medium, Large, and Extra Large to numeric size designations of 6×7, 6×6, and 5×6. In addition, the rule slightly increases the diameter size ranges for these designated sizes.

The Committee stated that, absent a change in the regulations, an erosion of market confidence could occur from not meeting buyer needs. This could result in reduced shipments and reduced producer income.

Direct costs associated with this rule will be the purchase of new sizing belts. Sizing belts convey and size fruit during the packing process. Depending on the amount of use, sizing belts can last a season or may need to be replaced two to three times a season. Estimated prices associated with these purchases could range from \$450.00 for a small handler to \$19,000 for very large handlers. While there are short-term costs associated with the new sizing designations, the benefits are expected to outweigh the costs. Moreover, changing sizing belts is a routine action since they have to be regularly replaced depending on use.

A study conducted by Dr. John J. VanSickle at the University of Florida estimates that size increases in the minimum diameters for each size category would result in an increase in the overall prices received for Florida tomatoes and better returns to producers. The study indicates that increasing the size minimums would shift some of the smallest Extra Large (5×6) size tomatoes into the smaller size categories. A shift of 1 percent into the

smaller size categories would increase the prices for Extra Large (5×6) size tomatoes by .25 percent, the price of Large (6×6) size tomatoes by .15 percent, and the price of Medium (6×7) size tomatoes by .07 percent. The increase in price would occur in response to consumer demand for packs with slightly larger tomatoes. The costs to the industry associated with the minimum size and size designation changes would include purchases of new equipment and adjustments to operate under the new requirements. These costs are expected to be minimal relative to the benefits expected, and in relation to normal operating costs and procedures.

The new numeric size designations should not have a negative impact on any handler regardless of size. This is expected to help Florida handlers respond to market and consumer demand for larger sized tomatoes. The Committee believes that these designations are the only practical means available to the Florida industry for identifying its larger sized tomatoes. The standards specify dimensions for each of the nomenclature designations currently used, but they are smaller than the Committee desires. Hence, the nomenclature designations are not as useful to Florida handlers as the new size designations. The new size designations should benefit both small and large businesses in the industry by helping the Florida industry more effectively satisfy buyer needs for larger tomatoes.

This rule may impose some additional costs on handlers, and producers. However, these costs are expected to be minimal, and would be offset by the benefits of the final rule. This rule is expected to impact similarly importers of tomatoes, as far as the slight increase in minimum size is concerned. The Committee believes that these modifications will benefit consumers, producers, handlers, and importers. The benefits of this rule are not expected to be disproportionately greater or lesser for small entities than for large entities.

The Committee discussed alternatives to this recommendation, including leaving the regulations as currently issued. All Committee members agreed that some change to the size designations was necessary to improve pack appearance and compete in the present market. The amount of change became the main concern, with a portion of the Committee favoring a larger size increase and another portion favoring small incremental moves over a period of time. The Committee recommended a compromise to allow individual packing houses leeway to

implement the amount of change through a $\frac{2}{32}$ inch overlap in sizes.

The information on imports and shipments contained in the following two paragraphs is from AMS Market New Branch data.

Mexico is the largest exporter of tomatoes to the United States. Over the last 10 years, Mexican exports to the United States averaged 32,527 containers of 25,000-pound equivalents per season (October 5–July 5) and comprised about 99 percent of all imported tomatoes to the United States during that time. Total imports during that period averaged 32,752 containers of 25,000-pound equivalents (October 5–July 5). Some of the imports from Mexico may have been transhipped to Canada.

Domestic shipments for the past 10 years averaged 108,577 containers of 25,000-pound equivalents (October 5–July 5). Florida shipments averaged 52,977 containers of 25,000-pound equivalents or approximately 48 percent of the total shipments for the same period. In the proposed rule, the reference to 25,000 pound equivalents in this paragraph was incorrectly printed as 25 pound equivalents (62 FR 52050; October 6, 1997; column three; paragraph one; line nineteen).

These changes are expected to benefit the marketers of both Florida and imported tomatoes by providing consumers with better quality, higher maturity, and slightly larger tomatoes. Prior to the issuance of the proposed rule, the Department had contacted a few tomato importers concerning imports. The importers indicated that they were importing larger sizes of tomatoes. The Department believes that the size increase would not limit the quantity of imported tomatoes or place an undue burden on importers of Mexican tomatoes. The improvement in customer satisfaction is expected to benefit all tomato importers regardless of size.

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

As noted in the initial regulatory flexibility analysis, the Department has not identified any relevant Federal rules that duplicate, overlap, or conflict with this final rule.

In addition, the Committee's September 5, 1997, meeting was publicized widely throughout the Florida tomato industry and all

interested persons were invited to attend the meeting and participate in Committee deliberations on all issues. The Committee also discussed these issues in May of 1997 and buyers and sellers of Florida tomatoes were in attendance. Like all Committee meetings, the May and September 5, 1997, meetings were public meetings 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. No such comments were received.

The proposed rule regarding this action was published in the Federal Register on October 6, 1997 (62 FR 52047). Interested persons were invited to submit written comments until October 16, 1997. Copies of the proposed rule were faxed and mailed to all known interested parties. Also, the rule was made available through the Internet by the Office of the Federal Register.

A notice reopening the comment period until November 5, 1997, was published in the October 22, 1997, issue of the **Federal Register** (62 FR 54809).

A total of 24 comments were received. Of this total, two comments requested that the original comment period for the proposed rule be reopened.

Seven favorable comments were received. Two of these comments were from a voluntary agricultural cooperative association of Florida tomato producers representing about 90 percent of the total volume of tomatoes produced under the marketing order each year. Individual comments also were received from an agricultural trade organization representing growers and handlers of commercial varieties of tomatoes throughout the State; and an association representing about 220 tomato and other winter vegetable growers and agricultural suppliers in the State of Florida. Two favorable comments were submitted by the Committee. One of the two Committee comments reaffirmed the need for the proposed changes, and pointed out several typographical errors in the supplementary information section of the proposed rule that needed correction. The corrections have been made in the final rule. The second Committee comment, in addition to reaffirming the need for the proposed changes, commented on assertions made by two opponents and a comment requesting more time to comment. In its second comment, the Committee contended that the claims of the opponents and the request for more time to comment did not have merit. A

comment was received from The Commissioner of the Florida Department of Agriculture and Consumer Services which supported the proposed changes and requested that the typographical errors pointed out by the Committee be corrected.

Fifteen opposition comments were received. These comments were from a trade association representing over 100 distributors, shippers, brokers and affiliated companies which are directly involved with the receipt, handling, and sale of perishable agricultural commodities grown in Mexico; growers and shippers of Mexican tomatoes; firms involved in the distribution and shipment of Mexican tomatoes; and a customs broker. Other opposition commenters included a grower, handler, and shipper of domestic and imported tomatoes, a national confederation of Mexican vegetable growers, and a law firm representing a confederation of Mexican producers and packers (its members account for the majority of tomatoes imported into the United States from Mexico).

Most of the opposition comments expressed support for the efforts of the Florida Tomato Committee to improve quality in U.S. markets. These commenters indicated that they opposed the proposed rule unless certain modifications were made. While they were opposed to those parts of the proposal concerning size designations, they requested inclusion of a 60-day period from publication of the final rule to its effective date for the changes to the minimum size requirements.

All of the negative comments opposed the use of the proposed new numeric size designations. The commenters indicated that the new size designations are different than size designations used in the industry. Several commenters stated that Mexico generally ships its larger tomatoes in place packs and that the boxes are marked with 5×5, 5×4, 4×4, or 3×4 size designations, while the largest size designation proposed for Florida tomatoes was 5×6 with a minimum diameter of 2 ²⁵/₃₂ inch and no maximum diameter. The commenters believed this would lead to confusion in the marketplace.

A comment from a grower, handler, and shipper of domestic and imported tomatoes objected to the use of numeric size designations in shipping tomatoes in 25-pound bulk packs. The commenter believed that nomenclature designations (i.e., Medium, Large, and Extra Large), should be used for bulk packages as defined in the current standards. The commenter indicated that numeric designations were more appropriate for place-packed tomatoes.

Several of the opposing commenters explained that handlers and repackers of imported tomatoes use numeric terms like 6×7, 6×6, 5×6, 5×5, 4×5, 4×4, and 3×4 to describe the configuration (rows) of place-packed tomatoes in the boxes used. A box of 6×6 tomatoes includes 36 tomatoes in each layer, while a box of 4×'s includes 16 tomatoes in each layer. There are slight size variations to assure a tight fit.

According to two of the opposing commenters, about 62.4 percent of Mexican place-packed tomatoes shipped this past season were larger than the largest Florida proposed size diameter; i.e., larger than 2 ²⁵/₃₂ inch minimum diameter. The commenters further contended that if the proposal is implemented, Mexican growers will be forced to label their larger tomato packs with a 5 6 size designation in addition to their own designations; i.e., 3×4, 4×4, 4×5, and 5×5.

The commenters stated that such dual markings would be needed to distinguish Mexico's premium packs from Florida's proposed 5×6 pack. The commenters contended that these markings will confuse customers and will dilute the value Mexican growers receive currently for their largest sizes.

The Department has thoroughly analyzed all of these comments in the context of how tomatoes are marketed in the United States. Most tomatoes from Florida are marketed as mature greens in 25-pound bulk (loose pack) boxes. Florida handlers negotiate price and other terms of sale and delivery using both nomenclature size designations (Medium, Large, and Extra Large) and numeric size designations. Many buyers in the marketplace still routinely refer to the size in a 25-pound bulk (loose pack) box of tomatoes by using 5×6, 6×6, and 6×7 designations. Even when the boxes are marked with the Medium, Large, or Extra Large size designations, buyers frequently use the numeric size information in negotiating the purchase of tomatoes. The proposed numeric size designations will allow the Florida industry to adopt trading terminology that is in general use by handlers and buyers of Florida tomatoes.

Some mature green tomatoes are shipped out of Mexico, but most of the shipments are vine ripe tomatoes. Mexican packers generally market smaller sized tomatoes in 3-layer place-packs marked 6×6 or 6×7 in boxes weighing about 30 pounds. The larger sizes of tomatoes from Mexico generally are marketed in 2-layer place-packs marked as 5×6, 5×5, 4×5, and 4×4, weighing between 21 and 24 pounds. Some Mexican packers use the Medium, Large, and Extra Large size designations

in describing the size of the tomatoes in bulk boxes, while others use numeric size designations for both packs. Buyers in the marketplace understand these marketing practices, and use this information in making their purchase decisions.

Many buyers in the marketplace purchase tomatoes from both Florida and Mexico to meet their needs depending on size availability and price. These buyers customarily use numeric size designations in making their purchase decisions.

Thus, the Department believes that the buyers of Florida and Mexican tomatoes understand the differences in tomato size designations between shipments from Florida and Mexico, and that the proposed designations should not result in marketplace confusion or problems with market pricing.

The different tomato growing areas have been marketing their tomatoes in the way they believe helps them best market their product. These differing marketing schemes are not harmonized even within a particular growing area. The proposed numeric size designations are defined in terms of specific minimum and maximum diameter ranges and should not result in marketplace confusion. Further, the new numeric size designations do not have to be adopted by importers of Mexican tomatoes. These importers can continue to use whatever size designation markings they believe are needed to help them more effectively compete in the marketplace. Any such markings should be consistent with applicable laws or regulations including those that apply to accuracy in description of product.

Also, the proposed numeric size designations do not affect packers or repackers of imported tomatoes. Packers and repackers of imported tomatoes are free to market their tomatoes as they may believe appropriate, to segregate their larger-sized tomatoes into as many subsizes as they desire to satisfy their customers, and to differentiate their sizes from Florida packs as they do now. Again, such markings of tomatoes should be consistent with applicable laws and regulations.

Commenters also stated that, if packers in Mexico or packers in wholesale markets wished to place-pack tomatoes according to the traditional place-pack-count designations using the proposed size ranges, the tomatoes would be too large to fit into the boxes currently used. The commenters asserted that as a result, new boxes would need to be designed for place-packed tomatoes if other segments of the

industry wished to harmonize with the new Florida sizes.

This action increases the minimum diameter for each of the size designations by only $\frac{1}{32}$ of an inch and continues the 10 percent tolerance for undersize and oversize tomatoes. Given the diameter range of sizes allowable in each specific size designation (i.e., 6x7, 6x6, 5x6), packers and repackers of tomatoes should not have any problems packing tomatoes in the box sizes currently used.

Some commenters also contended that the proposed $\frac{2}{32}$ inch overlap between sizes (currently $\frac{1}{32}$ inch) will allow Florida handlers to pack smaller-sized tomatoes in the next bigger size designation in search of a better market price. The Committee recommended increases in the minimum and maximum diameters for each of the three recommended size designations. For the 6 X 7 (currently Medium) size, the minimum diameter was increased from $2 \frac{8}{32}$ to $2 \frac{9}{32}$ inches, and the maximum diameter was increased from $2 \frac{17}{32}$ to $2 \frac{19}{32}$ inches; for the 6x6 (currently Large) size, the minimum diameter was increased from $2 \frac{16}{32}$ to $2 \frac{17}{32}$ inches, and the maximum diameter was increased from $2 \frac{25}{32}$ to $2 \frac{27}{32}$ inches; and for the 5x6 (currently Extra Large) size, the minimum diameter was increased from $2 \frac{24}{32}$ to $2 \frac{25}{32}$ inches, with no maximum diameter specified. These changes and the $\frac{2}{32}$'s inch overlap are intended to facilitate the placement of slightly larger tomatoes into the next smaller-size designation, and the placement of slightly larger sizes into the next bigger-size designation.

As indicated earlier, the Committee believes that the $\frac{2}{32}$ inch overlap will provide a more even distribution of tomato shipments throughout the three size designations, and that this will enable handlers to make better decisions on which size of tomatoes to pack. For instance, tomatoes at the high end of the Medium (6x7) size can either be packed with Medium (6x7) sized tomatoes or with Large (6x6) sized tomatoes. The same increased flexibility would exist for tomatoes packed at the high end of the Large (6x6) size. Such tomatoes could be packed as Large (6x6) sized or packed as Extra Large (5x6) sized tomatoes. The end result, however, should be slightly larger tomatoes in each of the size categories.

Another commenter contended that a proposed numeric size designation means nothing when tomatoes are "loose packed;" i.e., in 25-pound bulk boxes. This is not correct. Under the proposal, minimum and maximum diameters for each numeric size

designation are specified and thus, apply to volume filled or "loose packed" tomatoes. The diameter ranges provide handlers with flexibility to meet the needs of each of their buyers.

One of the opposing commenters suggested that if Florida wished to use non-standard size designations and size dimensions (i.e., designations and dimensions different than those specified in the U.S. standards) for tomatoes, it should use other descriptive terms like Regular, Jumbo, and Colossal to replace Medium, Large, and Extra Large. While alternative size designations were considered, the Committee's best possible recommendation was to adopt the proposed numeric system. In discussing this issue, the Committee was of the view that this change to the size designations was necessary to improve pack appearance and compete in the present marketplace.

Two opposition commenters complained about the lack of time provided to the Mexican industry to examine the packing and marketing effects of the proposed size increase. They indicated that if the new sizes no longer fit in the boxes used for place packing tomatoes, Mexican growers will be forced to incur very large expenses. These expenses will be both from the loss of existing inventory of boxes and from having to invest in all new boxes. The commenters further stated that, over the past several years, the industry largely has succeeded in standardizing the size of boxes to best fit them on pallets. According to the commenters, increasing the size of the boxes would undermine this effort, resulting in lost space on every pallet and increased transportation costs for every grower. As explained earlier, Mexican packers market a vast array of pack sizes in several different boxes with different net weights. Hence, the $\frac{1}{32}$ inch increase in the minimum size requirement is not expected to require new boxes for place packing.

Although the changes to the size designations for Florida tomatoes will not apply to imported tomatoes, the following is intended to clarify how the new requirements might be used by Florida handlers. Under the proposal, each of the minimum diameters for each size designation are increased by only $\frac{1}{32}$ inch and the maximum diameters for each size designation are increased by only $\frac{2}{32}$ inch. Thus, it appears that there is enough flexibility within each size designation to avoid the need for changing boxes. For example, if a buyer desires a certain number of tomatoes in each 25-pound box, the diameter size ranges within each of the numeric sizes

are broad enough so that the handler could meet that buyer's needs. Moreover, the current tolerance of 10 percent for offsize within each size designation will continue in effect and provide handlers additional flexibility in meeting buyer needs, and in avoiding the need for new boxes.

Two commenters objected to the $\frac{1}{32}$ inch size increase because Mexican growers and handlers will have to change their sizing belts and incur an unanticipated expense for new belts. Florida growers and handlers also will incur such costs. However, the Florida industry believes that the expected improvement in quality in the marketplace will result in benefits far in excess of the costs for new sizing belts. Moreover, changing sizing belts is a routine action since they have to be replaced on a regular basis depending on the amount of usage. Obviously, the sizing belts last longer with limited use.

Only the minimum size requirement will apply to importers of Mexican tomatoes. Thus, the packers of imported tomatoes only will need to buy enough sizing belts to ensure that their tomatoes meet the minimum size and not the ranges specified in the Florida size designations. The Department understands that, in most cases, this will require only one belt per packing line to be purchased.

One commenter also requested that an additional 60 days be added to the comment period to allow the parties most affected by the rule to comment completely on the impact it will have. A total of 30 days has been provided. The Department believes that there has been sufficient time to comment, especially in view of the positions and views discussed in the comments received, whether in favor or opposed to the proposed rule.

The Committee made its recommendations for change at a meeting held on September 5, 1997. These changes were unanimously recommended. As stated earlier, the proposed size rule appeared in the **Federal Register** on October 6, 1997, with a comment period ending on October 16, 1997. Two comments were received requesting that the original comment period for the proposed rule be reopened. They were of the view that more time was needed to review and analyze the proposed changes and also raised NAFTA concerns. The Department did extend the comment period to November 5, 1997, in accordance with NAFTA and to allow more time for review and evaluation.

Many commenters also requested a 60-day delay in the effective date of the import regulation change to allow

adequate time for all foreign producers and handlers of foreign tomatoes to comply with the minimum size increase. One commenter requested that Mexican growers be given until the beginning of the 1998-99 season to comply if the minimum sizes are changed. The Department has carefully reviewed this issue.

While both Florida tomato handlers and importers will need time to order new sizing belts and adjust their equipment to meet the increased minimum size requirements, we understand that many of the Florida handlers are or will be ready to comply with the increased minimum size requirement. However, we further understand that many of the packers of Mexican tomatoes may need more time to comply with the size requirement. Most of the opposition comments requested an additional 60 days after the publication of the final rule to comply with the minimum size requirement.

The Department has decided to provide sufficient time for the Florida and import tomato industries to comply with the minimum size requirements. While a 60-day period would not be reasonable for the domestic industry especially since the Florida shipping season is already underway, a 30-day effective date from publication of the final rule is reasonable and consistent with the provisions of the Act. A 30-day period will allow both the domestic and imported tomato industries sufficient time to purchase sizing belts and also ship commodity that is already picked and packed.

The Department has contacted the three belt manufacturers to determine belt availability and delivery schedules. Based on this information, the Department has decided to postpone the effective date of this action to give Florida tomato handlers and Mexican tomato packers additional time to obtain sizing belts. The effective date is February 4, 1998.

In view of all the foregoing, the Department has concluded that the changes as proposed will advance the interests of the Florida, other domestic, and foreign tomato industries and should be implemented.

In accordance with section 8e of the Act, the United States Trade Representative has concurred with the issuance of this final rule.

After consideration of all relevant matter presented, including the information and recommendation submitted by the Committee and other

available information, the comments received, 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 Parts 966 and 980

Marketing agreements, Reporting and record keeping requirements, Tomatoes.

For the reasons set forth in the preamble, 7 CFR parts 966 and 980 are amended as follows:

PART 966—TOMATOES GROWN IN FLORIDA

1. The authority citation for 7 CFR part 966 continues to read as follows:

Authority: 7 U.S.C. 601-674.

2. Section 966.323 is amended by revising paragraphs (a)(1), (a)(2)(i) and the table immediately following it, (a)(2)(iii), and (d)(3) to read as follows:

§ 966.323 Handling regulation.

* * * * *

(a) *Grade, size, container, and inspection requirements.* (1) *Grade.* Tomatoes shall be graded and meet the requirements specified for U.S. No. 1, U.S. Combination, U.S. No. 2, or U.S. No. 3, of the U.S. Standards for Grades of Fresh Tomatoes, except that all shipments of 6 x 7 size tomatoes must grade U.S. No. 2 or better. When not more than 15 percent of the tomatoes in any lot fail to meet the requirements of U.S. No. 1 grade and not more than one-third of this 15 percent (or 5 percent) are comprised of defects causing very serious damage including not more than 1 percent of tomatoes which are soft or affected by decay, such tomatoes may be shipped and designated as at least 85 percent U.S. No. 1 grade.

(2) *Size.* (i) All tomatoes packed by a registered handler shall be at least 2⁹/₃₂ inches in diameter and shall be sized with proper equipment in one or more of the following ranges of diameters. Tomatoes shipped outside the regulated area shall also be sized with proper equipment in one or more of the following ranges of diameters. Measurements of diameters shall be in accordance with the methods prescribed in § 51.1859 of the U.S. Standards for Grades of Fresh Tomatoes.

| Size designation | Inches minimum diameter | Inches maximum diameter |
|------------------|--------------------------------|---------------------------------|
| 6 X 7 | 2 ⁹ / ₃₂ | 2 ¹⁹ / ₃₂ |

| Size designation | Inches minimum diameter | Inches maximum diameter |
|------------------|---------------------------------|---------------------------------|
| 6 X 6 | 2 ¹⁷ / ₃₂ | 2 ²⁷ / ₃₂ |
| 5 X 6 | 2 ²⁵ / ₃₂ | |

* * * * *

(iii) Only 6 x 7, 6 x 6, or 5 x 6, may be used to indicate the above listed size designations or containers of tomatoes.

* * * * *

(d) * * *

(3) *For special packed tomatoes.*

Tomatoes which met the inspection requirements of paragraph (a)(4) of this section which are resorted, regraded, and repacked by a handler who has been designated as a "Certified Tomato Repacker" by the committee are exempt from:

(i) The tomato grade classifications of paragraph (a)(1) of this section;

(ii) The size classifications of paragraph (a)(2) of this section, except that the tomatoes shall be at least 2-9/32 inches in diameter; and

(iii) The container weight requirements of paragraph (a)(3) of this section.

* * * * *

PART 980—VEGETABLES; IMPORT REGULATIONS

3. Section 980.212 is amended by revising paragraph (b)(1) to read as follows:

§ 980.212 Import regulations; tomatoes.

* * * * *

(b) * * *

(1) From October 10 through June 15 of each season, tomatoes offered for importation shall be at least 2-9/32 inches in diameter. Not more than 10 percent, by count, in any lot may be smaller than the minimum specified diameter. All lots with a minimum diameter of 2¹⁹/₃₂ inches and larger shall be at least U.S. No. 3 grade. All other tomatoes shall be at least U.S. No. 2 grade. Any lot with more than 10 percent of its tomatoes less than 2¹⁹/₃₂ inches in diameter shall grade at least U.S. No. 2.

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Dated: December 30, 1997.

Sharon Bomer Lauritsen,
Deputy Administrator, Fruit and Vegetable Programs.

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