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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 945

[Doc. No. AMS-FV-08-0062; FV08-945-1 FR]

#### Irish Potatoes Grown in Certain Designated Counties in Idaho, and Malheur County, Oregon and Imported Irish Potatoes; Relaxation of Size Requirements

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

**ACTION:** Final rule.

**SUMMARY:** This rule relaxes the size requirements for potatoes handled under the marketing order for Idaho-Eastern Oregon potatoes and for long type potatoes imported into the United States. This rule revises the size requirements to allow: Creamer size ( $\frac{3}{4}$  inch to  $1\frac{5}{8}$  inches diameter) for all varieties of potatoes to be handled if the potatoes otherwise meet U.S. No. 1 grade; and round type potatoes to be handled without regard to size so long as the size is specified on the container in connection with the grade. The changes are intended to improve the handling and marketing of Idaho-Eastern Oregon potatoes and increase returns to producers. The changes would also allow the importation of Creamer size long type potatoes under regulations as authorized by section 8e of the Agricultural Marketing Agreement Act of 1937.

**DATES:** *Effective Date:* October 5, 2009.

**FOR FURTHER INFORMATION CONTACT:**

Barry Broadbent or Gary D. Olson, Northwest Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1220 SW. Third Avenue, Suite 385, Portland, OR 97204; Telephone: (503) 326-2724, Fax: (503) 326-7440, or E-mail:

*Barry.Broadbent@ams.usda.gov* or *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@usda.gov*.

**SUPPLEMENTARY INFORMATION:** This final rule is issued under Marketing Agreement and Marketing Order No. 945, both as amended (7 CFR part 945), regulating the handling of Irish potatoes grown in certain designated counties in Idaho, and Malheur County, Oregon, 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."

This final rule is also issued under section 8e of the Act, which provides that whenever certain specified commodities, including potatoes, are regulated under a Federal marketing order, imports of these commodities into the United States are prohibited unless they meet the same or comparable grade, size, quality, or maturity requirements as those in effect for the domestically produced commodities.

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

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This action is not intended to have retroactive effect.

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.

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 terms of the marketing order, fresh market shipments of Idaho-Eastern Oregon potatoes are required to be inspected and are subject to grade, size, quality, maturity, pack, and container requirements. This final rule relaxes the current size requirements for potatoes handled under the order. As required under section 8e of the Act, the addition of the Creamer size allowance for U.S. No. 1 grade potatoes to the size requirements contained in the marketing order regulations also changes the import regulations for imported long type potatoes.

At its meeting on June 9, 2008, the Committee unanimously recommended relaxing the size requirements for all varieties of U.S. No. 1 grade potatoes. Additionally, the Committee recommended adding a provision to the current requirements that would allow handling of U.S. No. 2 or better grade round type potatoes without regard to size so long as the size is specified on the container in connection with the grade.

Sections 945.51 and 945.52 of the order provide authority for the establishment and modification of grade, size, quality, and maturity regulations applicable to the handling of potatoes.

Section 945.341 establishes minimum grade, size, and maturity requirements for potatoes handled subject to the order. Currently, the order's handling regulations specify the size requirement for round type potato varieties handled subject to the order to be  $1\frac{7}{8}$  inches minimum diameter. All other varieties of potatoes handled must be 2 inches minimum diameter, or 4 ounce minimum weight, provided that at least 40 percent of the potatoes in each lot shall be 5 ounces or heavier. Additionally, the order's handling regulations allow the handling of Size B potatoes ( $1\frac{1}{2}$  to  $2\frac{1}{4}$  inches diameter), as established in the United States Standards for Grades of Potatoes (7 CFR 51.1540-51.1566), so long as the

potatoes otherwise meet the requirements of U.S. No. 1 grade.

This final rule relaxes the size requirements of potatoes regulated under the order to allow the handling of Creamer size potatoes ( $\frac{3}{4}$  to  $1\frac{5}{8}$  inches diameter, as defined in the United States Standards for Grades of Potatoes), if those potatoes otherwise meet the requirements of U.S. No. 1 grade. In addition, this rule adds a provision to the existing size requirements to allow U.S. No. 2 grade or better round type potatoes to be handled without regard to size, so long as the size is specified on the container in connection with the grade. This change is consistent with the size requirements for U.S. No 1 and U.S. No. 2 grade potatoes as contained in the United States Standards for Grades of Potatoes.

Committee members stated that consumer demand for small potatoes has been increasing in recent years and now makes up a significant percentage of total domestic potato consumption. The trend has also increased domestic market demand for potatoes smaller than currently allowed by the size requirements prescribed in the order. This shift in consumer preference has been recognized with the inclusion of the new Creamer size classification in the most recent update of the United States Standards for Grades of Potatoes, which became effective April 21, 2008 (73 FR 15052). The market for smaller potatoes is currently being supplied by potato production areas outside the order's production area and through limited special purpose shipments authorized under § 945.341(e)(iii).

Committee members believe that it is important that the handling regulations be changed to recognize the significant increase in the demand for small size potatoes. They believe that relaxing the minimum size requirements for certain grades and packs of potatoes will enable handlers to market a larger portion of the potato crop in fresh market outlets, meet the supply needs of potato buyers, and satisfy the purchasing preferences of potato consumers.

According to the Committee, quality assurance is very important to the industry and to its customers. Providing the public with acceptable quality produce that is appealing to the consumer on a consistent basis is necessary to maintain consumer confidence in the marketplace. The Committee believes that relaxing the size requirements, while maintaining all other regulatory requirements, will preserve their commitment to quality while allowing the industry to adapt to changing consumer preferences.

The Committee reported that potato size is a significant consideration of potato buyers. Providing them the sizes desired by their customers is important to promoting potato sales. In addition, small size potatoes tend to command higher prices in the market, providing producers and handlers the opportunity to increase revenues. This change is expected to improve the marketing of Idaho-Eastern Oregon potatoes, increase the volume of potatoes handled, and enhance overall returns to producers.

Section 8e provides the authority for the regulation of certain imported commodities whenever those same commodities are regulated by a domestic marketing order. Potatoes are one of the commodities specifically covered by section 8e in the Act. In addition, section 8e provides that whenever two or more such marketing orders regulating the same agricultural commodity produced in different areas are concurrently in effect, imports must comply with the provisions of the order which regulates the commodity produced in the area with which the imported commodity is in the "most direct competition." Section 980.1(a)(2)(iii) contains the determination that imports of long type potatoes during each month of the year are in most direct competition with potatoes of the same type produced in the area covered by the order.

Minimum grade, size, quality, and maturity requirements for potatoes imported into the United States are currently in effect under § 980.1. Section 980.1(b)(3) provides that, through the entire year, the grade, size, quality, and maturity requirements of Marketing Order No. 945 applicable to potatoes of all long types shall be the respective grade, size, quality, and maturity requirements for imported potatoes of all long types. This rule relaxes the size requirements for imports of U.S. No. 1 grade, long type potatoes. Currently, the minimum size requirement for imported long type U.S. No. 1 grade potatoes is Size B ( $1\frac{1}{2}$  to  $2\frac{1}{4}$  inches). This change allows importation of Creamer size ( $\frac{3}{4}$  inch to  $1\frac{5}{8}$  inches) long type potatoes if the potatoes otherwise meet the requirements of the U.S. No. 1 grade standard.

#### Final Regulatory Flexibility Analysis

Pursuant to the 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 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.

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 46 handlers of Idaho-Eastern Oregon potatoes who are subject to regulation under the order and about 900 potato producers in the regulated area. In addition, there are approximately 255 importers of all types of potatoes, many of which import long types, who are subject to regulation under the Act. Small agricultural service firms, which include potato handlers and importers, 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 whose annual receipts are less than \$750,000.

Based on a 2005–2007 average fresh potato production of 32,242,467 hundredweight as calculated from Committee records, a three-year average of producer prices of \$6.95 per hundredweight reported by the National Agricultural Statistics Service (NASS), and 900 Idaho-Eastern Oregon potato producers, the average annual producer revenue is approximately \$248,984. It can be concluded, therefore, that a majority of these producers would be classified as small entities.

In addition, based on Committee records and 2005–2007 f.o.b. shipping point prices predominantly ranging from \$5.00 to \$26.00 per hundredweight reported by USDA's Market News Service (Market News), many of the Idaho-Eastern Oregon potato handlers do not ship over \$7,000,000 worth of potatoes. In view of the foregoing, it can be concluded that a majority of the handlers would be classified as small entities as defined by the SBA. The majority of potato importers may be classified as small entities as well.

This final rule relaxes the size requirements of potatoes regulated under the order to allow the handling of Creamer size potatoes, if those potatoes otherwise meet the requirements of U.S. No. 1 grade. Additionally, this final rule adds a provision to the existing size requirements that allows round type potatoes to be handled without regard to

size, so long as the size is specified on the container in connection with the grade.

Pursuant to section 8(e), this final rule also relaxes the size requirements of the import regulations to allow importation of Creamer size, long type potatoes if the potatoes otherwise meet the requirements of U.S. No. 1 grade. This final rule will not affect the current import requirements for red-skinned, round type or all other round type potatoes and will not require any language changes to § 980.1 of the vegetable import regulations.

Committee members believe it is important to modify the handling regulations to recognize the significant increase in the demand for smaller size potatoes. They believe that relaxing the minimum size requirements will enable handlers to market a larger portion of the crop in fresh market outlets and to meet the needs of consumers and produce buyers. Market mechanisms have indicated that smaller minimum diameter potatoes are desirable, as evidenced by the increasing demand for such potatoes, and consistently command higher prices in relation to larger diameter potatoes. This action will better ensure that the growing market for smaller sized potatoes continues to be adequately supplied. This change is expected to improve the marketing of Idaho-Eastern Oregon potatoes and increase returns to producers.

Authority for this proposed rule is provided in §§ 945.51 and 945.52 of the order. Section 945.341(a)(2) of the order's handling regulations prescribes the size requirements. Relevant import regulations are contained in §§ 980.1 and 980.501.

At the June 9, 2008, meeting, the Committee discussed the impact of this change on handlers and producers. The proposal is a relaxation of current regulation and, as such, should either generate a positive impact or no impact on industry participants. The Committee did not foresee a situation in which this proposed change would negatively impact either handlers or producers.

Neither the Committee nor NASS compile statistics exclusively relating to the production of small size potatoes. The Committee has relied on the opinions of the producers and the handlers familiar with that market to draw its conclusions. Information presented in the June 9 meeting suggests that there is increasing domestic consumer demand for small size potatoes. There also appears to be a trend in domestic consumer preference toward increasingly smaller diameter

potatoes. This is in contrast to the demand for larger size potatoes, which has been essentially static for several years.

The addition of the Creamer size designation to the United States Standards for Grades of Potatoes by the USDA Fresh Products Branch (Fresh Products) supports the Committee's position that market demand for small size potatoes is increasing. Prior to the recent changes made in the United States Standards for Grades of Potatoes, the smallest potato size designation was Size B, with a minimum diameter of 1½ inches. Fresh Products determined that a smaller potato size designation was necessary to accommodate emerging marketing trends in the potato industry. The addition of the Creamer size designation reduced the minimum potato size, as determined in the United States Standards for Grades of Potatoes, to ¾ inches diameter.

The Committee reported that smaller size potatoes of good quality receive premium prices. While USDA Market News does not report on round type potatoes or on small size, long type potatoes in the Idaho-E. Oregon area, but does report on activity in other regions producing both round types and smaller sizes of potatoes, reports from other areas do show that the higher grade, small size round type potatoes consistently command higher prices than larger potatoes. It would be reasonable to expect price trends between production areas to move together, given that the regions would compete with each other for sales in the domestic market.

Relaxing the size requirement will allow producers and handlers of potatoes under the order to ship a greater percentage of their crop to the fresh market. In addition, shipments of the smaller size potatoes that are allowed as a result of this rule change are expected to command higher prices, which should increase total net returns for those firms who chose to ship. The benefits derived from this rule change are not expected to be disproportionately more or less for small handlers or producers than for larger entities.

Additionally, this rule will allow potato importers to respond to the changing demand of the domestic consumers. The market's increasing preference for small size potatoes applies to imported potatoes as well as domestic potatoes. Thus, importers will benefit by increasing sales to this emerging domestic market segment.

The Committee discussed alternatives to this proposed change. One alternative included making no change at all to the

current regulation. The Committee did not believe that maintaining the current requirements would serve to meet the needs of consumers or buyers, and would not ultimately be of any benefit to the industry. Another alternative discussed was to allow smaller size potatoes to continue to be handled exempt from regulation under the special purpose shipment provisions provided within the order. This option was also rejected because it could potentially allow lower quality potatoes to be shipped into the fresh market. Lastly, the Committee considered further relaxing the size requirement for potatoes beyond what is proposed in this rule. The discussion centered on whether to extend the relaxation to U.S. No. 2 grade potatoes as well. The Committee believed that the proposed relaxation is sufficient to adequately supply the growing market demand for smaller size potatoes while still maintaining high quality standards for such potatoes. After consideration of all the alternatives, the Committee believes that the proposed changes contained herein would provide the greatest amount of benefit to the industry with the least amount of cost.

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.

This action will not impose any additional reporting or recordkeeping requirements on either small or large potato handlers and importers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. In addition, USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this final rule.

Further, the Committee's meeting was widely publicized throughout the potato industry, and all interested persons were invited to attend the meeting and participate in Committee deliberations. Like all Committee meetings, the June 9, 2008, meeting was a public meeting and all entities, both large and small, were able to express their views on this issue.

A proposed rule concerning this action was published in the **Federal Register** on May 22, 2009 (74 FR 23958). Copies of the rule were mailed or sent via facsimile to all Committee members and potato handlers and importers. Finally, the rule was made available through the Internet by USDA and the Office of the Federal Register. A 60-day comment period ending July 21, 2009,

was provided to allow interested persons to respond to the proposal.

One comment was received. The commenter, representing a Canadian association of producers and handlers, fully supported the proposal to relax the size requirements.

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

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, it is hereby found that this rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

**List of Subjects in 7 CFR Part 945**

Marketing agreements, Potatoes, Reporting and recordkeeping requirements.

■ For the reasons set forth above, 7 CFR part 945 is amended as follows:

**PART 945—IRISH POTATOES GROWN IN CERTAIN DESIGNATED COUNTIES IN IDAHO, AND MALHEUR COUNTY, OREGON**

■ 1. The authority citation for 7 CFR part 945 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. In § 945.341, paragraphs (a)(2)(i) and (a)(2)(iii) are revised to read as follows:

**§ 945.341 Handling regulation.**

\* \* \* \* \*

- (a) \* \* \*
- (2) \* \* \*

(i) *Round varieties*. 1<sup>7</sup>/<sub>8</sub> inches minimum diameter, unless otherwise specified on the container in connection with the grade.

\* \* \* \* \*

(iii) *All varieties, U.S. No. 1 grade or better*. (A) Size B (1<sup>1</sup>/<sub>2</sub> to 2<sup>1</sup>/<sub>4</sub> inches diameter).

(B) Creamer (3<sup>4</sup>/<sub>4</sub> to 1<sup>5</sup>/<sub>8</sub> inches diameter).

\* \* \* \* \*

Dated: August 31, 2009.

**Rayne Pegg,**

*Administrator, Agricultural Marketing Service.*

[FR Doc. E9–21354 Filed 9–3–09; 8:45 am]

**BILLING CODE 3410–02–P**

**DEPARTMENT OF AGRICULTURE**

**Agricultural Marketing Service**

**7 CFR Part 980**

**[Doc. No. AMS FV–08–0097; FV09–980–1 FR]**

**Vegetables, Import Regulations; Partial Exemption to the Minimum Grade Requirements for Fresh Tomatoes**

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

**ACTION:** Final rule.

**SUMMARY:** This rule provides a partial exemption to the minimum grade requirements under the tomato import regulation. The Florida Tomato Committee (Committee), which locally administers the marketing order for tomatoes grown in Florida (order), recommended the change for Florida tomatoes. The order’s administrative rules and regulations were recently revised to exempt Vintage Ripes™ tomatoes (Vintage Ripes™) from the shape requirements associated with the U.S. No. 2 grade. A corresponding change to the import regulation is required under section 8e of the Agricultural Marketing Agreement Act of 1937. This rule provides the same partial exemption for Vintage Ripes™ under the import regulation so it conforms to the regulations under the order.

**DATES:** *Effective Date:* October 5, 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@ams.usda.gov](mailto:Doris.Jamieson@ams.usda.gov) or [Christian.Nissen@ams.usda.gov](mailto:Christian.Nissen@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 final rule is issued under section 8e of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the “Act,” which provides that whenever certain specified commodities, including tomatoes, are regulated under a Federal marketing order, imports of these commodities into the United States are prohibited unless they meet the same or comparable grade, size, quality, or maturity requirements as those in effect for the domestically produced commodity.

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

This final 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.

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.

This final rule provides a partial exemption to the minimum grade requirements for Vintage Ripes™ imported into the United States. Absent an exemption, the import requirements specify that tomatoes must meet at least a U.S. No. 2 grade before they can be shipped and sold into the fresh market. A final rule amending the rules and regulations under the order exempting Vintage Ripes™ from the shape requirements associated with the U.S. No. 2 grade was issued separately by USDA (74 FR 17591, April 16, 2009). This rule provides the same partial exemption under the import regulation so it conforms to the regulations under the order.

Section 966.52 of the order provides the authority to establish grade requirements for Florida tomatoes. Section 966.323 of the order specifies, in part, the minimum grade requirements for tomatoes grown in Florida. Section 980.212 specifies the corresponding import requirements. Form and shape represent part of the elements of grade. The current minimum grade requirement for Florida tomatoes and for imported tomatoes is a U.S. No. 2. The specifics of this grade requirement are listed under the U.S. Standards for Grades of Fresh Tomatoes (7 CFR 51.1855–51.1877).

The U.S. Standards for Grades of Fresh Tomatoes (Standards) specify the criteria tomatoes must meet to grade a U.S. No. 2, including that they must be