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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 946

[Docket No. AMS-FV-08-0036; FV08-946-1 IFR]

#### Irish Potatoes Grown in Washington; Relaxation of Handling and Import Regulations

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

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

**SUMMARY:** This rule relaxes the size requirement prescribed under the Washington potato marketing order. The marketing order regulates the handling of Irish potatoes grown in Washington, and is administered locally by the State of Washington Potato Committee (Committee). This rule decreases the minimum size required for all fresh market red, yellow fleshed, and white types of potatoes from 1 inch (25.4 mm) to ¾ inch (19.1 mm) in diameter, if the potatoes otherwise meet the requirements of U.S. No. 1 grade. This rule will also decrease the minimum size requirement from July 1 through September 30 of each year for imported red-skinned, round type potatoes under the import regulations as required by section 8e of the Agricultural Marketing Agreement Act of 1937. The Committee recommended this change in response to the recently revised U.S. Standards for Grades of Potatoes which added a definition for Creamer potatoes. This change is intended to provide potato handlers with greater marketing flexibility, growers with increased returns, consumers with a greater supply of small potatoes, and to bring the section 8e potato import regulation into conformity with the marketing order.

**DATES:** Effective September 11, 2008; comments received by November 10, 2008 will be considered prior to issuance of a final rule.

**ADDRESSES:** Interested persons are invited to submit written comments concerning this rule. 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 docket number and the date and page number of this issue of the **Federal Register** and will be made available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: <http://www.regulations.gov>.

**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@usda.gov](mailto:Teresa.Hutchinson@usda.gov) or [GaryD.Olson@usda.gov](mailto:GaryD.Olson@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 Order No. 946, as amended (7 CFR part 946), regulating the handling of Irish potatoes grown in Washington, hereinafter referred to as the "order." The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act."

This interim 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. Section 8e also provides

that whenever two or more marketing orders regulating the same commodity produced in different areas of the United States are concurrently in effect, a determination must be made as to which of the areas produces the commodity in most direct competition with the imported commodity. Imports must meet the same or comparable requirements established for that particular area. The requirements for red-skinned, round type potatoes imported from July 1 through September 30 are based on the Washington potato marketing order requirements.

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.

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 rule decreases the size required for all fresh market red, yellow fleshed, and white types of potatoes produced in Washington State from 1 inch (25.4 mm) to ¾ inch (19.1 mm) minimum, if the potatoes otherwise meet the requirements of U.S. No. 1 grade. This change is intended to provide potato

handlers with greater marketing flexibility, growers with increased returns, and consumers with a greater supply of small potatoes. As provided under section 8e of the Act, the size modification will also apply to all red-skinned, round type potatoes imported from July 1 through September 30. This rule will not affect the current import requirements for all other round type or long type potatoes.

Section 946.52 of the order authorizes the establishment of grade, size, quality, or maturity regulations for any variety or varieties of potatoes grown in the production area. Section 946.52 also authorizes the regulation of the size, capacity, weight, dimensions, pack, and marking or labeling of the container, or containers, which may be used in the packing or handling of potatoes, or both. Section 946.51 further authorizes the modification, suspension, or termination of regulations issued under § 946.52. Section 946.60 provides that whenever potatoes are regulated pursuant to § 946.52 such potatoes must be inspected by the Federal or Federal-State Inspection Service, and certified as meeting the applicable requirements of such regulations.

Section 946.336 of the order's administrative rules and regulations prescribes the quality, size, maturity, cleanness, pack, and inspection requirements for fresh market Washington potatoes. Section 946.336(a)(2) prescribes the size requirements. Relevant import regulations are contained in § 980.1 and § 980.501 of the vegetable import regulations.

During a video conference meeting held on April 16, 2008, with a follow-up mail vote, the Committee unanimously recommended changing the minimum size requirement for all U.S. No. 1 grade fresh market red, yellow fleshed, and white types of potatoes produced under the order from 1 inch to  $\frac{3}{4}$  inch in diameter.

The Committee recommended this change in response to the recently revised U.S. Standards for Grades of Potatoes (Standards) which became effective on April 21, 2008 (73 FR 15051, March 21, 2008). The revised Standards added a definition for Creamer potatoes. The revised Standards define the Creamer size designation as  $\frac{3}{4}$  inch minimum diameter and  $1\frac{5}{8}$  inch maximum diameter with no minimum or maximum weight.

Before the Standards were revised to include a Creamer size designation, various states developed their own standards for Creamer potatoes in an attempt to meet the increasing consumer

demand for small potatoes. The Washington potato industry had previously considered Creamer potatoes to have a 1 inch minimum diameter. The Committee recommended reducing the minimum diameter to  $\frac{3}{4}$  inch so that the handling regulation would correspond with the revised Standards and to ensure that the industry was being responsive to the desires of consumers. The Committee also believes that inconsistency between what was marketed in Washington as Creamer potatoes and the Standards would have caused confusion in the marketplace.

Within the past several years, consumer demand has increased for small potatoes which often command premium prices. Decreasing the minimum size requirement from 1 inch to  $\frac{3}{4}$  inch will help handlers in Washington meet the needs of their customers.

Committee statistics show that approximately 25 percent (2,483,219 hundredweight) of fresh market Washington potatoes (9,932,874 hundredweight) are red, yellow fleshed and white types of potatoes. The decrease in the size requirement is expected to increase the volume of red, yellow fleshed, and white types of potatoes that meet minimum size requirements. Shipping a larger portion of the crop to market would help meet consumer demand and is expected to increase returns to growers.

As mentioned earlier, section 8e of the Act provides that when certain domestically produced commodities, including potatoes, are regulated under a Federal marketing order, imports of that commodity must meet the same or comparable grade, size, quality, and maturity requirements. Section 8e also provides that whenever two or more marketing orders regulating the same commodity produced in different areas of the United States are concurrently in effect, a determination must be made as to which of the areas produces the commodity in most direct competition with the imported commodity. Imports must meet the requirements established for that particular area.

Grade, size, quality, and maturity regulations have been issued regularly under marketing orders No. 945 (Idaho-Eastern Oregon potatoes), No. 948 (Colorado potatoes, Area No. 2 and Area No. 3), No. 946 (Washington potatoes), and No. 953 (Southeastern potatoes) since the marketing orders were established. Section 980.1 of the vegetable import regulations specifies that import requirements for potatoes are to be based on the seasonal categories of potatoes produced in all marketing order areas. In that regard,

imported red-skinned, round type potatoes must meet the requirements of the Washington potato marketing order during the months of July through September and the Area No. 2 Colorado potato marketing order during the months of October through the following June. This rule will not affect the current import requirements for all other round type or long type potatoes.

#### Initial Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), the Agricultural Marketing Service (AMS) has considered the economic impact of this 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.

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

Currently, there are approximately 45 handlers of Washington potatoes who are subject to regulation under the marketing order and approximately 267 potato producers in the regulated area. Small agricultural service firms are defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of less than \$6,500,000, and small agricultural producers are defined as those having annual receipts of less than \$750,000.

During the 2006–2007 marketing year, 9,932,874 hundredweight of Washington potatoes were inspected under the order and sold into the fresh market by 43 handlers, according to Committee data. The Committee reports that an industry consensus estimate of an average fresh potato f.o.b. price is \$8.45 per hundredweight. Multiplying the 2006–2007 fresh shipments of 9,932,874 hundredweight by the average f.o.b. price of \$8.45 yields a handler-level fresh market crop value of \$83.933 million. Dividing \$83.933 million by 43 handlers gives an average annual sales value per handler estimate of about \$1.952 million. The Committee estimates that 41, or about 95 percent of these 43 handlers, had annual receipts of less than \$6,500,000.

A comparable computation can be made to estimate annual average revenue per producer. Based on information provided by the National Agricultural Statistics Service, the 2006 season average producer price for Washington potatoes was \$6.25 per hundredweight. Multiplying the 2006–2007 fresh shipments of 9,932,874 hundredweight by the average producer price of \$6.25 provides a producer-level fresh market crop value of \$62.08 million. Dividing \$62.08 million by 267 Washington potato producers yields an average annual fresh market sales value per producer of approximately \$232,500.

In view of the foregoing, it can be concluded that the majority of the Washington potato producers and handlers may be classified as small entities. Although it is not known how many importers of potatoes may be classified as small entities, we believe that many of the importers of potatoes can be classified as such.

This rule decreases the minimum size required for all fresh market red, yellow fleshed, and white types of potatoes produced under the order from 1 inch to  $\frac{3}{4}$  inch in diameter, if they otherwise meet the requirements of U.S. No. 1 grade. This change enables handlers with the ability to respond to the consumer demand for small potatoes. As provided under section 8e of the Act, this change will also apply to all imported red-skinned, round type potatoes between July 1 through September 30 of each year. While no change will be required in the language of § 980.1, all imported red-skinned, round type potatoes from July 1 through September 30 will be required to meet the minimum size requirement of  $\frac{3}{4}$  inch in diameter.

The authority for the grade and size requirements is provided in § 946.52 of the order. Section 946.336(a)(2) of the order's administrative rules and regulations prescribes the size requirement. Relevant import regulations are contained in § 980.1 and § 980.501 of the vegetable import regulations.

Regarding the impact of this rule on affected entities, decreasing the size requirement for these potatoes is expected to benefit handlers, importers and growers. There should be no extra cost to producers or handlers because current harvesting and handling methods can accommodate the sorting of these smaller potatoes. By decreasing the minimum size requirement for these potatoes, a greater quantity of potatoes will meet the order's handling regulations and the import regulations. This could translate into an increased

market for small potatoes and greater returns for handlers, importers, and growers.

As small potatoes have grown in popularity with consumers, the market demand has outpaced the quantity of small, high quality potatoes available from Washington. The Committee believes that a decrease in the size requirement will increase the available supply of small potatoes. The small potato market is a minor segment of the Washington potato market. As such, the Committee believes that these small potatoes do not compete directly with most of the fresh market potatoes and that this action will not adversely affect the overall Washington potato market.

By providing Washington handlers the flexibility to pack the smaller red, yellow fleshed, and white types of potatoes, the Committee believes the industry will remain competitive in the marketplace. The Creamer potato market is a premium market and this action is expected to further increase sales of Washington Creamer potatoes to benefit the Washington potato industry. The benefits of this rule are not expected to be disproportionately greater or lesser for small entities than large entities.

The Committee discussed several alternatives to this recommendation, including not changing the minimum size requirement. However, the Committee believes that it is important that the Washington potato handling regulations be consistent with the revised Standards to reduce confusion during the inspection and marketing of these types of potatoes. The Committee also determined that decreasing the minimum size requirement for these potatoes will provide the greatest benefit to the industry by augmenting the developing market for small potatoes and increasing grower returns.

This rule will not impose any additional reporting or recordkeeping requirements on either small or large 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. In addition, 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.

Further, the Committee's meeting was widely publicized throughout the Washington potato industry and all

interested persons were invited to participate in Committee deliberations. Like all Committee meetings, the April 16, 2008, meeting was a public meeting and all entities, both large and small, were able to express views on this issue. In addition, the World Trade Organization and known importers of potatoes will be notified of this action. 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=MarketingOrders> *SmallBusinessGuide*. 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 relaxation of the size requirement prescribed under the Washington potato marketing order and the potato import regulations. Any comments received will be considered prior to finalization of this rule.

In accordance with section 8e of the Act, the United States Trade Representative has concurred with the issuance 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) Any changes resulting from this rule should be effective as soon as practicable because the Washington potato shipping season begins in July; (2) the Committee unanimously recommended these changes at a public meeting and all interested parties had an opportunity to provide input; (3) handlers are aware of this action and want to take advantage of this relaxation as soon as possible; 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 946**

Marketing agreements, Potatoes, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, 7 CFR part 946 is amended as follows:

**PART 946—IRISH POTATOES GROWN IN WASHINGTON**

■ 1. The authority citation for 7 CFR part 946 continues to read as follows:

**Authority:** 7 U.S.C. 601–674.

■ 2. In § 946.336, paragraph (a)(2)(i) is revised to read as follows:

**§ 946.336 Handling regulation.**

\* \* \* \* \*

(a) \* \* \*

(2) *Size:* (i) At least 1<sup>7</sup>/<sub>8</sub> inches in diameter, except that all red, yellow fleshed, and white types may be <sup>3</sup>/<sub>4</sub> inch (19.1 mm) minimum diameter, if they otherwise meet the requirements of U.S. No. 1.

\* \* \* \* \*

Dated: September 5, 2008.

**Lloyd C. Day,**

*Administrator, Agricultural Marketing Service.*

[FR Doc. E8–20999 Filed 9–5–08; 4:15 pm]

**BILLING CODE 3410–02–P**

**DEPARTMENT OF THE TREASURY****Office of the Comptroller of the Currency****12 CFR Part 8**

[Docket No. OCC–2008–0013]

RIN 1557–AD06

**Assessment of Fees**

**AGENCY:** Office of the Comptroller of the Currency, Treasury.

**ACTION:** Final rule.

**SUMMARY:** The Office of the Comptroller of the Currency (OCC) is adopting as final and without change the interim final assessments rule issued on February 19, 2008. The interim final rule added two new asset-size categories to the table in 12 CFR 8.2(a) used to calculate each national bank's semiannual assessment. The addition of these categories is warranted to take account of significant structural changes in the national banking system since 1992, when the table was last revised, and has enabled the OCC to realign assessments to better reflect industry structure and OCC's corresponding expenses of operations. No comments

were received in response to the request for comment on the interim final rule.

**DATES:** *Effective Date:* Effective September 10, 2008 the rule published on February 19, 2008 (73 FR 9012) and corrected at 73 FR 9625, Feb. 21, 2008 is adopted as final without change.

**FOR FURTHER INFORMATION CONTACT:** MaryAnn Nash, Counsel, Legislative and Regulatory Activities Division, (202) 874–5090; Stuart Feldstein, Assistant Director, Legislative and Regulatory Activities Division, (202) 874–5090; or Colette Baylson, Accounting Operations Manager, Financial Management, (202) 874–4403, Office of the Comptroller of the Currency, 250 E Street, SW., Washington, DC 20219.

**SUPPLEMENTARY INFORMATION:****Background**

The National Bank Act authorizes the OCC to fund the expenses of its operations through assessments on national banks.<sup>1</sup> Under this authority, the OCC collects semiannual assessments from national banks in accordance with part 8 of our regulations and with the OCC's Notice of the Comptroller of the Currency Fees (Notice of Fees).<sup>2</sup>

Part 8 establishes categories, or brackets, each of which comprises a range of size values for a national bank's total assets. Each national bank's assessment is the sum of a base amount, which is the same for every national bank in that asset-size bracket, plus a marginal amount, which is computed by applying a marginal assessment rate to the amount of total assets in excess of the lower boundary of the asset-size bracket.<sup>3</sup> The marginal assessment rate declines as asset size increases, reflecting economies of scale in bank examination and supervision, which factor into the OCC's overall cost of operations. Both the base amounts and the marginal rates applicable to each asset-size bracket are published at least once a year in the OCC's Notice of Fees.<sup>4</sup>

Prior to the issuance of the interim final rule, the national bank assessments

were based on asset-size brackets that had been last updated in 1992<sup>5</sup> and no longer reflected the structure and distribution of assets in the national banking system as a whole. For example, since 1992, there has been a significant increase not only in the amount of assets held by the largest banks, but also in the assets held by national banks in other asset-size brackets, resulting in a general upward shift in the distribution of the population of national banks on the asset-size bracket table in 12 CFR 8.2(a). The growth in the average assets held by national banks reflects the consolidation in the banking industry that has occurred since 1992.

Given these developments, the OCC has determined that it is appropriate to update the existing asset-size brackets to reflect the current structure of the national banking system. The interim final rule has enabled the OCC to adjust the assessment framework to better reflect industry structure and the OCC's corresponding expenses of operations.

**Interim Final Rule and Comments**

On February 19, 2008, the OCC published and requested comment on an interim final rule that expanded the number of asset-size assessment brackets in the table at 12 CFR 8.2(a) by revising the current top bracket, presently \$40 billion and above, to cover banks with assets between \$40 billion and \$250 billion.<sup>6</sup> In addition, the interim final rule created a new top bracket that applies to banks with assets in excess of \$250 billion.

The OCC also made a conforming change to delete the word “ten” from the description of the asset-size brackets in § 8.2(a)(1) of the assessment rules since it no longer accurately described the number of brackets.

The OCC received no comments in response to the interim final rule and has determined that it is appropriate to adopt as final the interim final rule as originally published on February 19, 2008.

**Regulatory Flexibility Act Analysis**

The Regulatory Flexibility Act (Pub. L. 96–354, Sept. 19, 1980) (RFA) applies only to rules for which an agency publishes a general notice of proposed rulemaking pursuant to 5 U.S.C. 553(b).<sup>7</sup> Pursuant to the Administrative Procedure Act (APA), at 5 U.S.C. 553(b)(B), notice and an opportunity for public comment are not required prior to the issuance of a final rule if an

<sup>1</sup> 12 U.S.C. 482.

<sup>2</sup> Under part 8, the OCC also collects assessments from Federal branches and Federal agencies. The changes provided for in this final rule will also apply to assessments of Federal branches and Federal agencies.

<sup>3</sup> See 12 CFR 8.2(a) (listing the asset-size brackets).

<sup>4</sup> See, e.g., OCC Bulletin 2007–46, “Notice of the Comptroller of the Currency Fees for Year 2008” (December 1, 2007). The OCC's regulations provide for the annual publication of the Notice of Fees and also authorize the publication of interim, or amended, notices of fees “from time to time throughout the year as necessary.” 12 CFR 8.8.

<sup>5</sup> 57 FR 22413 (May 28, 1992).

<sup>6</sup> 73 FR 9012 (February 19, 2008).

<sup>7</sup> 5 U.S.C. 601(2).