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## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

#### 7 CFR Parts 300 and 319

[Docket No. 97-016-2]

RIN 0579-AA88

#### Importation of Tomatoes From France, Morocco and Western Sahara, Chile, and Spain

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** We are amending the regulations governing the importation of fruits and vegetables to allow tomatoes from France, Morocco and Western Sahara, and Chile to be imported into the United States subject to certain conditions. This action provides importers and consumers in the United States with additional sources of tomatoes, while continuing to provide protection against the introduction and dissemination of injurious plant pests. We are also amending the regulations pertaining to importation of tomatoes from Spain by requiring containers of pink or red tomatoes to be sealed before shipment if the containers will transit any other fruit fly supporting areas while en route to the United States, and by requiring records to be kept by Spain's plant protection service regarding trapping practices and fruit fly captures. These actions are necessary to prevent the introduction of exotic fruit flies into the United States.

**DATES:** This final rule is effective July 22, 1998. The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of July 22, 1998.

**FOR FURTHER INFORMATION CONTACT:** Mr. Ronald C. Campbell, Import Specialist,

Phytosanitary Issues Management Team, PPQ, APHIS, 4700 River Road Unit 140, Riverdale, MD 20737-1236, (301) 734-6799; fax (301) 734-5786; e-mail: rcampbell@aphis.usda.gov.

#### SUPPLEMENTARY INFORMATION:

##### Background

The regulations in 7 CFR 319.56 through 319.56-8 (referred to below as "the regulations") prohibit or restrict the importation of fruits and vegetables into the United States from certain parts of the world to prevent the introduction and dissemination of plant pests, including fruit flies, that are new to or not widely distributed within the United States.

On October 16, 1997, we published in the **Federal Register** (62 FR 53761-53769, Docket No. 97-016-1) a proposal to amend the regulations by allowing fresh tomatoes (*Lycopersicon esculentum*) to be imported into the United States from France, Morocco and Western Sahara, and Chile under specific conditions. We proposed to allow these importations at the request of various importers and foreign ministries of agriculture, and after conducting pest risk analyses<sup>1</sup> that indicated the tomatoes could be imported under these conditions without presenting any significant risk of introducing fruit flies or other injurious plant pests into the United States. We also proposed to amend the regulations concerning the importation of tomatoes from Spain by requiring containers of pink or red tomatoes to be sealed before shipment if the containers were to transit other fruit-fly supporting areas en route to the United States and by requiring records to be kept by Spain's plant protection service regarding trapping practices and fruit fly captures.

We solicited comments concerning our proposal for 60 days ending December 15, 1997. We received seven comments by that date. They were from representatives of State and foreign governments and producer organizations, and a university professor. One comment was favorable to the proposal. The other commenters

expressed various concerns about our proposal, all of which are discussed below.

**Comment:** The proposal to allow importation of pink tomatoes from Morocco and Western Sahara does not consider the presence of fruit flies other than the Mediterranean fruit fly (Medfly). West Africa and North Africa are home to numerous other fruit fly species. Also, two moth species, the Old World bollworm or tomato worm, *Helicoverpa armigera* (Huber), and the tomato moth, *Lacanobia oleracea* (L.), could be transported into Florida on tomatoes from these areas.

**Response:** We are making no changes to the proposed rule in response to this comment. With respect to fruit fly species other than Medfly, our pest risk assessment indicates that tomatoes are not a host to other fruit fly species found in Morocco and Western Sahara. We believe that the proposed pest mitigation measures developed for tomatoes from Morocco and Western Sahara will reduce to an insignificant level the risk of introducing Medfly and other insect pests, including moth species, into the United States. Pink tomatoes from Morocco and Western Sahara will be grown in insect-proof greenhouses where the tomatoes are protected from insects throughout the growing season. Post-harvest safeguards required by the rule, including covering of the fruit by a fruit fly-proof mesh screen or plastic tarpaulin prior to packing, and packing in fruit fly-proof containers, will continue to protect the tomatoes from insects.

Additionally, in accordance with § 319.56-6 of the regulations, all shipments of fruits and vegetables imported into the United States are inspected at the port of arrival for injurious plant pests. Both *Helicoverpa armigera* (Huber) and *Lacanobia oleracea* (L.) are visually detectable by inspection. If a shipment of tomatoes from Morocco and Western Sahara is determined to be infested with either of these pests, or any other pest of concern, that shipment will either be disinfested (e.g., cleaned or fumigated), destroyed, or reexported. If a specific pest continually appears in shipments of tomatoes from Morocco and Western Sahara, we will consider amending our regulations to require that measures be taken in Morocco and Western Sahara to mitigate the presence of that pest.

<sup>1</sup> Information on these pest risk analyses and any other pest risk analysis referred to in this document may be obtained by writing to the person listed under **FOR FURTHER INFORMATION CONTACT** or by calling the Plant Protection and Quarantine (PPQ) fax vault at 301-734-3560.

*Comment:* Green tomatoes are authorized entry into the United States because they are not subject to attacks by Medfly. Therefore, if tomatoes are loaded in Spain while "green" (green or breaker), are shipped to the United States under controlled conditions, and are lightly colored upon arrival in the United States, there is no phytosanitary justification to prohibit entry. The Animal and Plant Health Inspection Service (APHIS) should, therefore, remove the requirement that tomatoes be green upon arrival in the United States.

*Response:* Tomatoes in general are considered poor hosts for Medfly, and we agree that green tomatoes are not Medfly host material. However, breaker tomatoes (fruit in the initial stages of ripeness) are hosts, albeit poor ones. Because green tomatoes are not required to be safeguarded in any way while in transit to the United States, there is potential for ripening tomatoes that transit areas where Medfly exists to become infested. Therefore, we are requiring that green tomatoes be green upon arrival in the United States as an additional precaution against infestation. Consequently, we are making no changes to the proposed rule in response to this comment.

*Comment:* APHIS states in the preamble to the proposed rule that tomatoes will be subject to inspection and disinfection at the port of first arrival as may be required by a United States Department of Agriculture (USDA) inspector. This means that the regulations do not explicitly require inspection of imported tomatoes. In other words, tomatoes may be imported into the United States from Medfly-infested areas without being inspected by APHIS inspectors. Thus, the risk of introducing the Medfly and other injurious plant pests into the United States is much greater than APHIS suggests.

*Response:* We proposed to allow tomatoes to be imported into the United States from France, Morocco and Western Sahara, and Chile under a combination of phytosanitary measures that constitute a framework of overlapping, redundant safeguards. In the case of tomatoes from France and Morocco and Western Sahara, where the pest of concern is the Medfly, these measures include safeguards to protect the tomatoes from Medfly infestation while they are growing, as well as after harvest. In the case of tomatoes from Chile, where the primary pests of concern are the tomato fruit moth and the tomato fruit fly, the measures include treatment with methyl bromide. These measures would be applied in the

exporting country, and would, in and of themselves, be expected to reduce the risk of the tomatoes introducing plant pests, including Medfly, to a negligible level. As an additional precaution, the tomatoes would be subject to § 319.56–6 of the regulations, which provides for inspection of all imported fruits and vegetables at the port of arrival in the United States. While not every piece of imported fruit or vegetable is examined upon its arrival in the United States, a certain amount of fruits or vegetables from each shipment is inspected by USDA inspectors stationed at the ports. The amount inspected is based on the potential pest risk, including whether there have been past pest interceptions in similar shipments. In accordance with § 319.56–6, if an inspector finds evidence of a plant pest on or in any fruit or vegetable or its container, or finds that the fruit or vegetable may have been associated with other articles infested with plant pests, the owner of the produce or the owner's agent must clean or treat the produce as required by an inspector. The inspector may require additional inspection, cleaning, and treatment at any time and place. If an inspector finds that an imported fruit or vegetable is so infested that, in the judgment of the inspector, it cannot be cleaned or treated, or if it contains soil or other contaminants, or if it otherwise fails to meet conditions of the regulations for entry into the United States, the entire lot will be refused entry. It is our contention that this combination of safeguards will reduce the risk of pest introduction, including Medfly introduction, to a negligible level.

*Comment:* The pest risk assessments listed a number of pests that might accompany these shipments of tomatoes from France, Morocco and Western Sahara, and Chile. The species listed were mostly given a high rating in terms of pest potential, yet the only mitigation offered is visual inspection upon arrival. Visual inspection, when suitably and properly performed will likely find many of these pests. But, these inspections are not being performed as thoroughly and as often as necessary, and, the discovery of nymphs or other immature stages that cannot be clearly identified taxonomically usually results in nonaction.

*Response:* As explained in the response to the previous comment, every shipment of imported fruits and vegetables is inspected at the port of first arrival. While the number of individual fruits and vegetables examined in a shipment varies depending upon various factors related to pest risk (e.g., the types of pests that

we would expect to be associated with the shipment, history of past pest interceptions), we believe the inspections are adequate to detect pests if they are present in a shipment. It is not true that no action is taken if a pest cannot be clearly identified taxonomically. If the life stage of a pest, or any other factor, prevents an inspector from making an identification at the port, our policy is to require cleaning or treatment of the infested commodity, if feasible, or to refuse entry. Concurrently, unidentified pests are often sent on to USDA laboratories, and sometimes other Federal laboratories, for positive identification so that we are aware of any new potential pest risk that may be associated with similar shipments in the future.

*Comment:* Increased imports from Medfly-infested areas will increase the risk of introducing the Medfly and other devastating plant pests into the United States, which places U.S. agriculture and agricultural trade in jeopardy. Allowing this increased risk is contrary to APHIS' obligations under the Federal Plant Pest Act and the Plant Quarantine Act.

*Response:* Both the Federal Plant Pest Act and the Plant Quarantine Act prohibit the movement of articles covered by those Acts, unless the movement is made in accordance with such regulations as the Secretary of Agriculture may promulgate to prevent the dissemination of plant pests into the United States or interstate. As explained earlier in this document and in the proposed rule, we believe that this rule will effectively reduce the risk of the introduction of Medfly and other plant pests into the United States to an insignificant level. Therefore, we are making no changes to the proposal in response to this comment.

*Comment:* There appears to be no way for APHIS to ensure that pink tomatoes come only from Almeria Province in Spain, El Jadida and Safi Provinces in Morocco, or Dahkla Province, Western Sahara. Additionally, the requirement that the tomatoes to be shipped be no more than 30 to 60 percent pink or red is too subjective. Such a standard is subject to abuse.

*Response:* Our proposal provided that pink tomatoes may be imported into the United States from Morocco and Western Sahara only if they are produced in insect-proof greenhouses in El Jadida and Safi Provinces, Morocco, or Dahkla Province, Western Sahara, that are registered with and inspected by the Moroccan Ministry of Agriculture. Additionally, a phytosanitary certificate will be

required for tomatoes from Morocco and Western Sahara to ensure the tomatoes were produced in a registered greenhouse. We believe that this requirement adequately ensures that pink tomatoes from other areas of Morocco and Western Sahara will not be exported to the United States. Similar requirements are already in place for tomatoes from the Almeria Province of Spain, and there have been no problems. Additionally, the description of a pink tomato as having a surface area more than 30 percent but not more than 60 percent pink and/or red corresponds to standard industry color scales for tomato ripeness. Consequently, we do not expect any confusion about what constitutes a pink tomato eligible for importation into the United States from Spain, Morocco and Western Sahara. Therefore, we are making no changes to the proposed rule in response to this comment.

**Comment:** Tomatoes from Chile must be treated with methyl bromide in facilities regulated by the Servicio Agrícola y Ganadero (SAG). We expect the equipment and facilities to be approved and monitored by APHIS personnel.

**Response:** The commenter's expectation is correct. In our proposal, we explicitly stated that the tomatoes must be treated in Chile with methyl bromide in accordance with the PPQ Treatment Manual, and that the treatment must be conducted in facilities registered with SAG and with APHIS personnel monitoring the treatments.

**Comment:** APHIS states that if the proposed rule is adopted, it will preempt State and local laws regarding tomatoes imported under this rule because tomatoes remain in foreign commerce until sold to the ultimate consumer. The U.S. Customs Service has determined with regard to tomatoes sold in retail grocery stores that the ultimate consumer is in fact the retail grocery store and not the retail grocery store customer. Further, the Suspension Agreement entered into between the Department of Commerce and the foreign producers and shippers that send tomatoes to the United States requires that the tomatoes be sold at a reference price to importers or buyers other than consumers. Thus, it is incorrect for APHIS to conclude that this order preempts State and local laws.

**Response:** The position of the USDA is that fresh fruits and vegetables imported for immediate sale, such as tomatoes, remain in foreign commerce until sold to the ultimate consumer. The U.S. Customs Service, for the purposes

of the Tariff Act of 1930, as amended, has defined "ultimate purchaser" for imports from non-North American Free Trade Agreement countries as "generally the last person in the United States who will receive an article in the form in which it is imported" (19 CFR 134.1(d)). The Custom Service's position, while not controlling in USDA's administration of its own statutes, is not inconsistent with USDA's position. Further, the Suspension Agreement referenced by the commenter refers to an agreement between the United States and Mexican tomato growers as to the minimum prices that Mexican tomato growers can charge for tomatoes exported to the United States. The agreement arose out of an anti-dumping case and is unrelated to USDA's determination as to when foreign commerce ceases under the plant quarantine laws for tomatoes imported from France, Morocco and Western Sahara, Chile, and Spain.

**Comment:** The current provisions concerning tomatoes from the Almeria Province of Spain require Medfly trapping at a rate much higher than that proposed for Brittany, yet the risk is characterized as equivalent. Therefore, the trapping requirement should be the same. In any case, the proposal for just one trap inside and one trap outside the greenhouse in Brittany does not appear to be adequate. In addition, there is no mention as to how the two life-cycle time period will be determined. Will this be based on a specific time interval or a life-cycle model? And, treatments, where necessary, should continue for two life-cycles rather than 60 days. It appears that this will be a requirement for France, but not for Morocco.

**Response:** We disagree that the risk is equivalent between Almeria Province, Spain, and the Brittany region of France. Unlike the Almeria Province of Spain, the climate in Brittany is temperate and not suitable to support a permanent Medfly population. Medfly does, however, occur in southern France and could be temporarily introduced into Brittany during the summer months. Therefore, trapping in France is a precaution related to the summer months. Trapping inside and outside each greenhouse in Brittany is adequate due to the fact that Medfly is not known to occur in Brittany and climatic conditions prevent the establishment of a permanent population.

Furthermore, the two life-cycle model has not been proposed for either France or Morocco and Western Sahara, because export decisions will not be based on true area freedom for Medflies. Requirements that Malathion bait sprays be applied over a 60-day period when

2 Medflies are trapped within 200 meters of a registered greenhouse within a 1-month time period is an additional safeguard for tomatoes from Morocco and Western Sahara. This provision is one of several overlapping safeguards in the systems approach that has been developed to ensure that Medflies and other exotic insect pests do not enter the United States with tomatoes from Morocco and Western Sahara. It should not be confused with the two life-cycle model that has been used by APHIS in other regulations. Therefore, we are making no changes to the proposed rule in response to this comment.

**Comment:** The tomato fruit fly, *Rhagoletis tomatis*, does not occur in central Chile. Consequently, tomatoes grown between the 4th and 7th Regions should be enterable into the United States subject only to methyl bromide fumigation for the tomato fruit moth (*Scrobopalpula absoluta*). The 4th through 7th Regions of Chile should be declared a *Rhagoletis tomatis* free zone.

**Response:** Due to the absence of internal controls for transporting tomatoes between different regions of Chile, we do not believe that the 4th through 7th Regions of Chile should be declared a *Rhagoletis tomatis* free zone. Furthermore, declaration of the 4th through 7th Regions of Chile as *Rhagoletis tomatis* free would not change any of the treatment requirements for tomato shipments from Chile to the United States due to the endemic presence of the tomato fruit moth, *Scrobopalpula absoluta*. Therefore, we are making no changes to the proposed rule in response to this comment.

**Comment:** The proposed regulations would require tomatoes from Chile to be treated with methyl bromide and packed within 24 hours of harvest, then packed in fruit-fly-proof containers for transit to the airport for shipment to the United States, and all these activities would have to be conducted under the monitoring of an APHIS inspector. Because these preclearance activities will be taking place in Chile, we believe that shipments of tomatoes from Chile should not be subject to the port-of-arrival inspection requirements of § 319.56-6.

**Response:** As noted in the response to a previous comment, every shipment of fruits and vegetables, as a condition of entry into the United States, is inspected at the port of first arrival in accordance with § 319.56-6 of the regulations. Although every vegetable or piece of fruit might not be examined, a certain number of fruits or vegetables from each shipment is inspected, based on the potential pest risk. That potential

risk may be mitigated to a large degree by preclearance measures such as those required for Chilean tomatoes, but we will not grant a blanket exemption from port-of-arrival inspection to any commodity on that basis because of possible infestations en route and the necessity to spot check to verify that prescribed safeguards are followed. Therefore, we are making no changes to the proposed rule in response to this comment.

Therefore, based on the rationale set forth in the proposed rule and in this document, we are adopting the provisions of the proposal as a final rule without change.

#### Effective Date

This is a substantive rule that relieves restrictions and, pursuant to the provisions of 5 U.S.C. 553, may be made effective less than 30 days after publication in the **Federal Register**. This rule will facilitate the movement of fresh tomatoes into the United States, providing additional sources of tomatoes for U.S. importers and increasing the supply of fresh tomatoes

in the U.S. marketplace. Therefore, the Administrator of the Animal and Plant Health Inspection Service has determined that this rule should be effective upon publication in the **Federal Register**.

#### Executive Order 12866 and the Regulatory Flexibility Act

This rule has been reviewed under Executive Order 12866. The rule has been determined to be not significant for the purposes of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget.

This rule allows tomatoes from France, Morocco and Western Sahara, and Chile to be imported into the United States subject to certain conditions. This action will provide importers and consumers in the United States with additional sources of tomatoes, while continuing to provide protection against the introduction and dissemination of injurious plant pests. This rule also makes some minor changes to the provisions for importing tomatoes from Spain, but these changes are not expected to have any effect on

the volume of tomatoes imported from Spain, and, therefore, are not expected to have any economic impact. Under the Federal Plant Pest Act and the Plant Quarantine Act (7 U.S.C. 150dd, 150ee, 150ff, 151–165, and 167), the Secretary of Agriculture is authorized to regulate the importation of fruits and vegetables to prevent the introduction of injurious plant pests.

During 1995 about 12.3 million metric tons of tomatoes were supplied to the U.S. market. Domestic production accounted for about 95.4 percent of total supply. About 2.1 million metric tons (17 percent) of the total quantity of tomatoes supplied to U.S. consumers during 1995 were marketed as fresh tomatoes. Imports from Spain accounted for less than one-tenth of one percent of the total quantity of tomatoes supplied to U.S. consumers during 1995. Imports from Spain also accounted for less than one-tenth of one percent of the total quantity of fresh tomatoes supplied to U.S. consumers during 1995. Prices and sources of tomatoes supplied to the U.S. market are summarized in the following table:

Source of U.S. tomato supply	Quantity (metric tons)	Total value (\$1,000,000)	Average value per metric ton	Percent of total quantity supplied <sup>1</sup>
Domestic production:				
Fresh market .....	1,489,613	\$853.9	\$573.20	12.1
Processed market .....	10,229,601	725.1	70.88	83.3
Imports:				
Fresh market .....	559,117	406.1	725.41	4.6
Processed market .....				
Total supply .....	12,278,988	1,985.1	161.77	100.0

<sup>1</sup> Percentage column may not sum due to rounding.

Sources: Agricultural Statistics 1995–96; Table 233 (figures converted to metric tons); USDA–NASS; Washington, DC. Foreign Agriculture Trade of the United States—FY 1995 Supplement; Table 25; USDA–ERS; Washington, DC.

We estimate that the annual quantity of tomatoes supplied to the U.S. market will increase by about 13,700 metric tons under this rule. About 6,000 metric tons are expected from Chile; the remaining 7,700 metric tons will arrive from France and Morocco and Western Sahara.

Tomato imports from Morocco and Western Sahara will be restricted to arrival during winter months. Imports from Chile and France will be allowed entry throughout the year. However, Chilean tomatoes are expected to be imported primarily during the winter months due to seasonal growing differences between the northern and southern hemispheres, and shipments from France are likely to fill a special market niche for high quality fresh tomatoes.

Therefore, imported tomatoes from France, Morocco and Western Sahara, and Chile will compete primarily with existing imports and domestic tomatoes produced during the winter months. Price discrepancies between the import and domestic markets indicate that imports cannot compete with domestic supplies unless they arrive during the winter months or for specialty markets. Prices for all tomatoes supplied to the U.S. market during 1995 averaged about \$161.77 per metric ton. Prices for domestic production averaged about \$573.20 per metric ton for fresh tomatoes and \$70.88 per metric ton for processed tomatoes. By contrast, the value of imported tomatoes averaged \$725.41 per metric ton during 1995. Spanish imports, which arrive during the winter and early spring (December 1 through April 30), averaged \$1,695 per

metric ton during the same year. This price discrepancy is likely due to the relatively high quality of winter tomato imports from Spain. During winter months, there may be some U.S. producers in Florida and other States who grow field or greenhouse tomatoes at higher than average prices. However, this price differential is not reflected in the data. Additionally, published price data for imported tomatoes does not include shipping costs. If these costs were incorporated into imported tomato prices, the average price discrepancy between domestic and imported prices would likely be greater. Specific prices for imported fresh tomatoes from various countries and regions are summarized in the following table:

Source of imported tomatoes	Quantity (metric tons)	Total value (1,000,000)	Average value per metric ton
Canada .....	11,098	\$16.1	\$1,452.92
Mexico .....	534,345	366.4	685.67
Other Latin America .....	53	0.03	525.17
Netherlands .....	11,238	18.8	1,674.29
Belgium/Luxembourg .....	1,195	1.2	2,166.81
Spain .....	657	1.1	1,695.29
Other Western Europe .....	12	0.02	1,447.61
Asia .....	1,174	1.0	844.15
Africa .....	2	0.002	1,175.00
Total imports .....	559,774	406.1	725.41

**Note:** Shipping cost not included. Columns may not sum due to rounding.

Source: Foreign Agriculture Trade of the United States—FY 1995 Supplement; Table 25; USDA—ERS; Washington, DC.

Our economic analysis first estimated the potential impact of this rule on total U.S. tomato production and then estimated the potential impact on U.S. production of fresh tomatoes.

The estimated impact on total tomato production was determined by assuming that all of the increase in imports expected as a result of this rule were directly substitutable for domestic supplies. In that case, domestic producers could experience a decline in tomato prices from \$161.77 per metric ton to \$161.45 per metric ton, or \$0.32 per metric ton. This estimate assumes a perfectly inelastic supply, a demand elasticity of  $-0.5584^2$ , an initial quantity supplied of 12.3 million metric

tons, and an increase in imports of 13,700 metric tons. This price decrease would result in a total revenue decrease for U.S. producers of \$3,929,277, or about 0.2 percent of the total value of domestic tomato production. The price decrease would increase consumer welfare by \$3,931,469, resulting in a positive, albeit small, net impact to U.S. society totaling about \$2,192. Foreign producers would realize a gain of about \$2,211,865.

If the impact were restricted to the fresh market, domestic producers could experience a decline in fresh tomato prices from \$614.76 per metric ton to \$607.40 per metric ton, or \$7.36 per metric ton. This estimate assumes a

perfectly inelastic supply, a demand elasticity of  $-0.5584^2$ , an initial quantity supplied of 2.1 million metric tons, and an increase in imports of 13,700 metric tons. This price decrease would result in a total revenue decrease for U.S. fresh tomato producers of \$15,083,488, or about 1.8 percent of the total value of domestic fresh tomato production. The price decrease would increase consumer welfare by \$15,133,904, resulting in a positive net impact to U.S. society totaling about \$50,416. Foreign producers would realize a gain of about \$8,321,380. Estimated welfare impacts for both the entire and fresh U.S. tomato markets are summarized in the following table:

U.S. tomato market	U.S. consumer gain	U.S. producer revenue loss	Net gain to U.S. society	Foreign producer gain
Entire market <sup>1</sup> .....	\$3,931,469	\$3,929,277	\$2,192	\$2,207,070
Fresh market .....	15,133,904	15,083,488	50,416	8,321,380

<sup>1</sup> Includes all tomatoes consumed in both the processed and fresh markets.

In summary, this rule will provide U.S. consumers with additional sources of tomatoes during winter months and for specialty markets. Domestic producers who propagate field or greenhouse tomatoes during the winter months may be slightly affected. However, the relatively low volume of expected imports (13,700 metric tons with a maximum value of \$8.3 million) is unlikely to significantly erode the market share of domestic producers.

The Regulatory Flexibility Act requires that APHIS specifically consider the economic impact of this rule on “small” entities. The SBA has set forth size criteria by Standard Industrial Classification (SIC), which were used as a guide in determining

which economic entities meet the definition of a “small” business.

The SBA does not maintain specific size standards for domestic entities that either import or produce tomatoes. Therefore, this analysis uses the size standards established for Vegetable and Melon Producers (SIC code 0161) and Wholesale Traders of Fresh Fruits and Vegetables (SIC code 5148). The SBA’s definition of a “small” entity included in the vegetable and melon producer classification is one that generates less than \$500,000 in annual receipts.<sup>3</sup> Wholesale traders of fresh fruits and vegetables are classified as “small” if they employ fewer than 100 people.

Currently there are about 15,438 “small” fruit and vegetable producers and 5,122 “small” wholesale traders of

fresh fruits and vegetables, according to the SBA criteria. The rule could negligibly impact some “small” domestic entities. However, because the supply of tomatoes in the U.S. market will only increase by about 13,700 metric tons (less than one-tenth of one percent of total domestic supply) and domestic producers will continue to supply more than 95 percent of the tomatoes consumed in the United States each year, it does not appear that this rule will have a significant economic impact on a substantial number of small entities.

We solicited comments in our proposed rule on our Initial Regulatory Flexibility Analysis. We received several, which are discussed below.

<sup>2</sup> The demand elasticity is obtained from J.E. Epperson and L.F. Lei, “A Regional Analysis of Vegetable Production with Changing Demand for

Row Crops Using Quadratic Programming,” Southern Journal of Agricultural Economics, Volume 21, Number 1, July 1989, pp. 87–96.

<sup>3</sup> Small Business Administration; Washington, DC. SBA data was modified by tomato specific information contained in the 1992 Census of Agriculture.

*Comment:* These imports will compete directly with tomatoes produced in Florida. APHIS states that tomatoes produced in the fall and winter months are the off season, but this is not the off season for tomatoes produced in Florida. APHIS needs to specifically address potential impacts on Florida's winter tomato industry. Additionally, APHIS finds that even if tomatoes compete with domestically-produced tomatoes, the impact will be marginal due to the low volume of imports. We disagree with this conclusion as well because even a small increase in imports can have a large impact on the price of fresh tomatoes. Fresh tomatoes are extremely price-sensitive.

*Response:* We acknowledge that tomatoes imported from France, Morocco and Western Sahara, and Chile will compete with tomatoes produced during the winter in Florida and other States. We also acknowledge that fresh tomato prices are price sensitive. When potential economic impacts are restricted to the fresh tomato market, U.S. producers would likely incur a revenue loss of \$15.1 million as a result of this rule change. This accounts for about 1.8 percent of the total annual value of fresh tomatoes supplied to U.S. consumers.

Florida producers produced about 344,105 metric tons of fresh tomatoes between December 1995 and April 1996. This accounted for about 54 percent of Florida's total annual harvest and about 16.8 percent of total fresh tomatoes supplied to the U.S. market during that period. The average price for Florida winter tomatoes between December 1995 and April 1996 was about \$703.55 per metric ton. For this reason, it is likely that competition between imported and Florida grown tomatoes would be fairly limited due to the relatively large price discrepancy that exists between foreign and domestic markets. As previously mentioned, imported tomatoes are likely to fill a special market niche rather than substitute for domestic supply.

*Comment:* We question APHIS' use of SBA size standards established for melon and vegetable producers, and the conclusions reached using that data, in its Regulatory Flexibility Analysis for the proposed rule. Further, we dispute APHIS' statement that 95 percent of tomatoes marketed in the United States are produced domestically and the conclusions reached based on that figure.

*Response:* As explained above, we used size standards published by the SBA for Melon and Vegetable Producers (SIC code 0161) and Wholesale Traders

of Fresh Fruits and Vegetables (SIC code 5148)—which include producers and wholesale traders of tomatoes—because the SBA does not maintain separate size standards that are specific to tomato producers or wholesale traders of tomatoes. We are not aware of any other published size standards for domestic tomato producers or wholesale traders of tomatoes, and the commenter did not offer any such information. Similarly, the commenter did not provide any supporting information or alternative figures when disputing the proposed rule's statement that 95 percent of the U.S. tomato supply is produced domestically. As noted in the proposed rule, we obtained that 95 percent figure from data published annually in USDA'S "Agricultural Statistics" and "Foreign Agricultural Trade of the United States."

*Comment:* There are several more current elasticity estimates that could be used for the economic analysis. Spreen *et al.* used a price flexibility of roughly  $-0.28$  to estimate the impact of losing methyl bromide for the Florida vegetable industry (Spreen *et al.*, "Use of Methyl Bromide and the Economic Impact of Its Proposed Ban on the Florida Fresh Fruit and Vegetable Industry," University of Florida Ag. Exp. Sta. Bull. 898, 1995). Using that flexibility and the assumptions in the Initial Regulatory Flexibility Analysis for the proposed rule, the economic impact increases to more than \$6.1 million. While this may pale in comparison to the overall U.S. industry, these increased imports concentrated on the winter fresh tomato industry could have more significant impacts. This is especially true noting the sensitivity of this industry to increased imports because of the recent anti-dumping case resolved by the suspension agreement signed by Mexican producers with the U.S. Government. These increased imports not only jeopardize the economic health of U.S. producers, but also jeopardize the suspension agreement with Mexico that suspended the anti-dumping case taken to the U.S. Department of Commerce and U.S. International Trade Commission.

*Response:* We agree that use of a different elasticity measurement would change the estimated net economic impact. The literature includes many examples of tomato elasticities and price flexibilities that have been calculated for specific States, regions, or seasons. The demand elasticity used in this analysis was originally developed to calculate potential economic impacts on a national scale and was, therefore, appropriate for this analysis.

Furthermore, the suspension agreement referenced by the commenter refers to an agreement between the United States and Mexican tomato growers as to the minimum prices that Mexican tomato growers can charge for tomatoes exported to the United States. The agreement arose out of an anti-dumping case and is not related to tomato imports from France, Morocco and Western Sahara, and Chile.

*Comment:* APHIS stated that tomatoes from France will fill a special market for higher quality fresh tomatoes. There is no basis in the record that tomatoes from France are higher quality tomatoes. Further, there is nothing in the record that indicates consumers want an additional source of tomatoes.

*Response:* The statement referred to by the commenter appeared in the Initial Regulatory Flexibility Analysis for the proposed rule. We said that tomatoes from France will be allowed entry throughout the year and that \* \* \* "shipments from France are likely to fill a special market niche (for higher quality fresh tomatoes)." That statement was merely an explanation of how the French tomatoes may be marketed. This rulemaking is not based on either the quality of the potential imports or the demand for them. It only removes a regulatory barrier that does not appear necessary from a pest risk perspective. Other issues are beyond the scope of this rulemaking.

*Comment:* This proposed rule will harm U.S. producers who are still suffering from losses in excess of \$750 million due to increased tomato imports from Mexico. The U.S. Department of Commerce found that tomatoes from Mexico were unfairly dumped into the U.S. market.

*Response:* Our economic analysis indicates that U.S. tomato producers could experience a revenue decrease of about \$3.9 million. This accounts for about 0.2 percent of the annual value of U.S. tomato production. Specific impacts related to tomato imports from Mexico are not relevant to this rulemaking.

#### Executive Order 12988

This rule allows the importation of tomatoes from France, Morocco and Western Sahara, and Chile under certain conditions. State and local laws and regulations regarding tomatoes imported under this rule will be preempted while the fruit is in foreign commerce. Tomatoes are generally imported for immediate distribution and sale to the consuming public, and will remain in foreign commerce until sold to the ultimate consumer. The question of when foreign commerce ceases in other

cases must be addressed on a case-by-case basis. No retroactive effect will be given to this rule, and this rule will not require administrative proceedings before parties may file suit in court challenging this rule.

### National Environmental Policy Act

An environmental assessment and finding of no significant impact have been prepared for this rule. The assessment provides a basis for the conclusion that the importation of tomatoes from France, Morocco and Western Sahara, and Chile will not present a risk of introducing or disseminating plant pests and will not have a significant impact on the quality of the human environment. Based on the finding of no significant impact, the Administrator of the Animal and Plant Health Inspection Service has determined that an environmental impact statement need not be prepared.

The environmental assessment and finding of no significant impact were prepared in accordance with: (1) The National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*), (2) Regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508), (3) USDA regulations implementing NEPA (7 CFR part 1b), and (4) APHIS' NEPA Implementing Procedures (7 CFR part 372).

Copies of the environmental assessment and finding of no significant impact are available for public inspection at USDA, room 1141, South

Building, 14th Street and Independence Avenue SW., Washington, DC, between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays. Persons wishing to inspect copies are requested to call ahead on (202) 690–2817 to facilitate entry into the reading room. In addition, copies may be obtained by writing to the individual listed under **FOR FURTHER INFORMATION CONTACT.**

### Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the information collection or recordkeeping requirements included in this rule have been approved by the Office of Management and Budget (OMB) under OMB control number 0579–0131.

### List of Subjects

#### 7 CFR Part 300

Incorporation by reference, Plant diseases and pests, Quarantine.

#### 7 CFR Part 319

Bees, Coffee, Cotton, Fruits, Honey, Imports, Incorporation by reference, Nursery Stock, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Rice, and Vegetables.

Accordingly, title 7, chapter III, of the Code of Federal Regulations is amended as follows:

### PART 300—INCORPORATION BY REFERENCE

1. The authority citation for part 300 continues to read as follows:

**Authority:** 7 U.S.C. 150ee, 154, 161, 162, and 167; 7 CFR 2.22, 2.80, and 371.2(c).

2. In § 300.1, paragraph (a), introductory text, is revised to read as follows:

#### § 300.1 Materials incorporated by reference.

(a) *Plant Protection and Quarantine Treatment Manual.* The Plant Protection and Quarantine Treatment Manual, which was reprinted November 30, 1992, and includes all revisions through June 1998, has been approved for incorporation by reference in 7 CFR chapter III by the Director of the Office of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51.

\* \* \* \* \*

### PART 319—FOREIGN QUARANTINE NOTICES

3. The authority citation for part 319 continues to read as follows:

**Authority:** 7 U.S.C. 150dd, 150ee, 150ff, 151–167, 450, 2803, and 2809; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.2(c).

4. In § 319.56–2t, the table is amended by revising the entry for Spain and by adding new entries for France and Morocco and Western Sahara, in alphabetical order, to read as follows:

#### § 319.56–2t Administrative instructions: conditions governing the entry of certain fruits and vegetables.

\* \* \* \* \*

Country/locality	Common name	Botanical name	Plant part(s)
France .....	* Tomato .....	* (Lycopersicon esculentum).	* Fruit, only if it is green upon arrival in the United States (pink or red fruit may only be imported from the Region of Brittany and only in accordance with § 319.56–2dd of this subpart).
Morocco and Western Sahara.	* Tomato .....	* (Lycopersicon esculentum).	* Fruit, only if it is green upon arrival in the United States (pink fruit may only be imported from the El Jadida or Safi Province, Morocco, or Dahkla Province, Western Sahara, and only in accordance with § 319.56–2dd of this subpart).
Spain .....	* Tomato .....	* (Lycopersicon esculentum).	* Fruit, only if it is green upon arrival in the United States (pink or red fruit may only be imported from Almeria Province and only in accordance with § 319.56–2dd of this subpart).
	* .....	* .....	* .....

\* \* \* \* \*

5. Section 319.56-2dd is revised to read as follows:

**§ 319.56-2dd Administrative instructions: conditions governing the entry of tomatoes.**

(a) *Tomatoes (fruit) (Lycopersicon esculentum) from Spain.* Pink or red tomatoes may be imported into the United States from Spain only under the following conditions:<sup>1</sup>

(1) The tomatoes must be grown in the Almeria Province of Spain in greenhouses registered with, and inspected by, the Spanish Ministry of Agriculture, Fisheries, and Food (MAFF);

(2) The tomatoes may be shipped only from December 1 through April 30, inclusive;

(3) Two months prior to shipping, and continuing through April 30, MAFF must set and maintain Mediterranean fruit fly (Medfly) traps baited with trimedlure inside the greenhouses at a rate of four traps per hectare. In all areas outside the greenhouses and within 8 kilometers, including urban and residential areas, MAFF must place Medfly traps at a rate of four traps per square kilometer. All traps must be checked every 7 days;

(4) Capture of a single Medfly in a registered greenhouse will immediately result in cancellation of exports from that greenhouse until the source of infestation is determined, the Medfly infestation is eradicated, and measures are taken to preclude any future infestation. Capture of a single Medfly within 2 kilometers of a registered greenhouse will necessitate increasing trap density in order to determine whether there is a reproducing population in the area. Capture of two Medflies within 2 kilometers of a registered greenhouse and within a 1-month time period will result in cancellation of exports from all registered greenhouses within 2 kilometers of the find until the source of infestation is determined and the Medfly infestation is eradicated;

(5) MAFF must maintain records of trap placement, checking of traps, and any Medfly captures, and must make the records available to APHIS upon request;

(6) The tomatoes must be packed within 24 hours of harvest. They must be safeguarded by a fruit fly-proof mesh screen or plastic tarpaulin while in transit to the packing house and while

awaiting packing, and packed in fruit fly-proof containers for transit to the airport and subsequent shipping to the United States. Transit through other fruit fly supporting areas is prohibited unless the fruit fly-proof containers are sealed by MAFF before shipment and the official seal number is recorded on the phytosanitary certificate; and

(7) MAFF is responsible for export certification inspection and issuance of phytosanitary certificates. Each shipment of tomatoes must be accompanied by a phytosanitary certificate issued by MAFF and bearing the declaration, "These tomatoes were grown in registered greenhouses in Almeria Province in Spain."

(b) *Tomatoes (fruit) (Lycopersicon esculentum) from France.* Pink or red tomatoes may be imported into the United States from France only under the following conditions:<sup>2</sup>

(1) The tomatoes must be grown in the Brittany Region of France in greenhouses registered with, and inspected by, the Service de la Protection Vegetaux (SRPV);

(2) From June 1 through September 30, SRPV must set and maintain one Medfly trap baited with trimedlure inside and one outside each greenhouse and must check the traps every 7 days;

(3) Capture of a single Medfly inside or outside a registered greenhouse will immediately result in cancellation of exports from that greenhouse until the source of the infestation is determined, the Medfly infestation is eradicated, and measures are taken to preclude any future infestation;

(4) SRPV must maintain records of trap placement, checking of traps, and any Medfly captures, and must make them available to APHIS upon request;

(5) From June 1 through September 30, the tomatoes must be packed within 24 hours of harvest. They must be safeguarded by fruit fly-proof mesh screen or plastic tarpaulin while in transit to the packing house and while awaiting packing, and be packed in fruit fly-proof containers for transit to the airport and subsequent shipping to the United States. At all times of the year, transit through other fruit fly supporting areas is prohibited unless the fruit fly-proof containers are sealed by SRPV before shipment and the official seal number is recorded on the phytosanitary certificate; and

(6) SRPV is responsible for export certification inspection and issuance of phytosanitary certificates. Each shipment of tomatoes must be accompanied by a phytosanitary certificate issued by SRPV and bearing

the declaration, "These tomatoes were grown in registered greenhouses in the Brittany Region of France."

(c) *Tomatoes (fruit) (Lycopersicon esculentum) from Morocco and Western Sahara.* Pink tomatoes may be imported into the United States from Morocco and Western Sahara only under the following conditions:<sup>3</sup>

(1) The tomatoes must be grown in the provinces of El Jadida or Safi in Morocco or in the province of Dakhla in Western Sahara in insect-proof greenhouses registered with, and inspected by, the Moroccan Ministry of Agriculture, Division of Plant Protection, Inspection, and Enforcement (DPVCTRF);

(2) The tomatoes may be shipped from Morocco and Western Sahara only between December 1 and April 30, inclusive;

(3) Beginning 2 months prior to the start of the shipping season and continuing through the end of the shipping season, DPVCTRF must set and maintain Mediterranean fruit fly (Medfly) traps baited with trimedlure inside the greenhouses at a rate of four traps per hectare. In Morocco, traps must also be placed outside registered greenhouses within a 2 kilometer radius at a rate of four traps per square kilometer. In Western Sahara, a single trap must be placed outside in the immediate proximity of each registered greenhouse. All traps in Morocco and Western Sahara must be checked every 7 days;

(4) DPVCTRF must maintain records of trap placement, checking of traps, and any Medfly captures, and make the records available to APHIS upon request;

(5) Capture of a single Medfly in a registered greenhouse will immediately result in cancellation of exports from that greenhouse until the source of the infestation is determined, the Medfly infestation has been eradicated, and measures are taken to preclude any future infestation. Capture of a single Medfly within 200 meters of a registered greenhouse will necessitate increasing trap density in order to determine whether there is a reproducing population in the area. Six additional traps must be placed within a radius of 200 meters surrounding the trap where the Medfly was captured. Capture of 2 Medflies within 200 meters of a registered greenhouse and within a 1-month time period will necessitate Malathion bait sprays in the area every 7 to 10 days for 60 days to ensure eradication;

<sup>1</sup> The surface area of a pink tomato is more than 30 percent but not more than 60 percent pink and/or red. The surface area of a red tomato is more than 60 percent pink and/or red. Green tomatoes may be imported in accordance with § 319.56-2t of this subpart.

<sup>2</sup> See footnote 1 in paragraph (a) of this section.

<sup>3</sup> See footnote 1 in paragraph (a) of this section.



(6) The tomatoes must be packed within 24 hours of harvest. They must be safeguarded by a fruit fly-proof mesh screen or plastic tarpaulin while in transit to the packing house and while awaiting packing, and packed in fruit fly-proof containers for transit to the airport and subsequent shipping to the United States. The tomatoes must be pink at the time of packing. Transit through other fruit fly supporting areas is prohibited unless the fruit fly-proof containers are sealed by the Moroccan Ministry of Agriculture, Fresh Product Export (EACCE), before shipment and the official seal number is recorded on the phytosanitary certificate; and

(7) EACCE is responsible for export certification inspection and issuance of phytosanitary certificates. Each shipment of tomatoes must be accompanied by a phytosanitary certificate issued by EACCE and bearing the declaration, "These tomatoes were grown in registered greenhouses in El Jadida or Safi Province, Morocco, and were pink at the time of packing" or "These tomatoes were grown in registered greenhouses in Dahkla Province, Western Sahara and were pink at the time of packing."

(d) *Tomatoes from Chile.* Tomatoes (fruit) (*Lycopersicon esculentum*) from Chile, whether green or at any stage of ripeness, may be imported into the United States only under the following conditions:

(1) The tomatoes must be treated in Chile with methyl bromide in accordance with the PPQ Treatment Manual, which is incorporated by reference at § 300.1 of this chapter. The treatment must be conducted in facilities registered with the Servicio Agrícola y Ganadero (SAG) and with APHIS personnel monitoring the treatments;

(2) The tomatoes must be treated and packed within 24 hours of harvest. Once treated, the tomatoes must be safeguarded by a fruit fly-proof mesh screen or plastic tarpaulin while in transit to the packing house and while awaiting packing, and be packed in fruit fly-proof containers under APHIS monitoring for transit to the airport and subsequent shipping to the United States; and

(3) Tomatoes may be imported into the United States from Chile only if SAG has entered into a trust fund agreement with APHIS for that shipping season. This agreement requires SAG to pay in advance all costs that APHIS estimates it will incur in providing the preclearance services prescribed in this section for that shipping season. These costs will include administrative expenses incurred in conducting the

preclearance services; and all salaries (including overtime and the Federal share of employee benefits), travel expenses (including per diem expenses), and other incidental expenses incurred by the inspectors in providing these services. The agreement requires SAG to deposit a certified or cashier's check with APHIS for the amount of these costs for the entire shipping season, as estimated by APHIS based on projected shipment volumes and cost figures from previous inspections. The agreement further requires that, if the initial deposit is not sufficient to meet all costs incurred by APHIS, SAG must deposit with APHIS another certified or cashier's check for the amount of the remaining costs, as determined by APHIS, before the inspections will be completed. The agreement also requires that, in the event of unexpected end-of-season costs, SAG must deposit with APHIS a certified cashier's check sufficient to meet such costs as estimated by APHIS, before any further preclearance services will be provided. If the amount SAG deposits during a shipping season exceeds the total cost incurred by APHIS in providing preclearance services, the difference will be returned to SAG by APHIS at the end of the shipping season.

(Approved by the Office of Management and Budget under control number 0579-0131)

Done in Washington, DC, this 15th day of July, 1998.

**Charles Schwalbe,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 98-19470 Filed 7-21-98; 8:45 am]

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## DEPARTMENT OF JUSTICE

### Immigration and Naturalization Service

#### 8 CFR Part 211

[INS No. 1920-98]

RIN 1115-AE47

#### Waiver of Inadmissibility for Certain Applicants for Admission as Permanent Residents

**AGENCY:** Immigration and Naturalization Service, Justice.

**ACTION:** Final rule.

**SUMMARY:** This rule makes a technical correction to the Immigration and Naturalization Service (Service) regulations that govern the documentary requirements for immigrants and corresponding waivers. The regulations at 8 CFR 211.1(b)(3) permit District Directors, in individual cases, to waive

the inadmissibility of aliens seeking admission for permanent residence or as returning residents who fail to present the appropriate travel documents. This rule will clarify that aliens granted waivers pursuant to 8 CFR 211.1(b)(3) are not exempt from the visa requirement, and that carriers remain liable for fines imposed under section 273(a) of the Act for bringing these aliens to the United States, even if the District Director grants a waiver of inadmissibility to the alien at the time of admission into the United States as a returning resident. This change is necessary to conform the language of the regulations with the statutory authority which exists to impose a fine when an alien is transported to the United States without the proper documentation.

**DATES:** This rule is effective July 22, 1998.

**FOR FURTHER INFORMATION CONTACT:** Una Brien, Immigration and Naturalization Service, 1400 Wilson Blvd., Suite 210, Arlington, Virginia 22209, telephone (202) 305-7018.

**SUPPLEMENTARY INFORMATION:** Section 273 of the Immigration and Nationality Act (the Act) imposes a fine on any carrier who brings to the United States any alien who lacks the passport or visa required by law. Section 211(b) of the Act permits the Attorney General to waive the inadmissibility of aliens seeking admission as returning residents who lack the necessary travel documents. Under the jurisprudence developed by the Board of Immigration Appeals (BIA), whether granting a waiver of inadmissibility relieves the carrier of liability for a fine depends on how the regulation governing the exercise of this waiver authority is written. See e.g., *Matter of "Flight SR-4"*, 10 I&N Dec. 197 (BIA 1963). The BIA has treated regulations that provide for a "blanket" waiver as also relieving the carrier of fine liability. The carrier remains liable, however, if the regulations provide for waivers only in individual cases. See *Matter of Plane "CUT-604"*, 7 I&N Dec. 701, 702 (BIA 1958) citing *Matter of PAA Plane "Flight 204"*, 6 I&N Dec. 810 (BIA 1955).

On March 22, 1996, the Service published a final rule in the **Federal Register** at 61 FR 11717, which amended the regulations governing granting waivers of inadmissibility to nonimmigrants. The purpose of the amendment was to ensure that when the Service grants a waiver of inadmissibility, the carrier is not relieved from fine liability. On September 30, 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996,