

**DEPARTMENT OF AGRICULTURE****Agricultural Marketing Service****7 CFR Part 966**

[Docket No. FV00-966-1 FIR]

**Tomatoes Grown in Florida; Change in Size Designation****AGENCY:** Agricultural Marketing Service, USDA.**ACTION:** Final rule.

**SUMMARY:** The Department of Agriculture (Department) is adopting, as a final rule, without change, the provisions of an interim final rule that increased the maximum diameter of the 6x6 numeric size designation prescribed under the Florida tomato marketing order (order). The order regulates the handling of tomatoes grown in Florida and is administered locally by the Florida Tomato Committee (Committee). This rule continues in effect a maximum diameter increase of  $\frac{2}{32}$  of an inch, from  $2\frac{27}{32}$  inches to  $2\frac{29}{32}$  inches for tomatoes designated 6x6. This change allows handlers to pack slightly larger tomatoes in a 6x6 container, and provides them with greater flexibility when packing tomatoes. The increased flexibility is expected to increase the number and availability of containers of 6x6 tomatoes, which are often in short supply.

**EFFECTIVE DATE:** April 5, 2001.

**FOR FURTHER INFORMATION CONTACT:** Doris Jamieson, Southeast Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, P.O. Box 2276, Winter Haven, Florida 33883; telephone: (863) 299-4770, Fax: (863) 299-5169; or George Kelhart, Technical Advisor, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, room 2525-S, P.O. Box 96456, Washington, DC 20090-6456; telephone: (202) 720-2491, Fax: (202) 720-5698.

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, P.O. Box 96456, room 2525-S, Washington, DC 20090-6456; telephone: (202) 720-2491, Fax: (202) 720-5698, or E-mail: Jay.Guerber@usda.gov.

**SUPPLEMENTARY INFORMATION:** This rule is issued under Marketing Agreement No. 125 and Marketing Order No. 966, both as amended (7 CFR part 966), regulating the handling of tomatoes grown in certain designated counties in

Florida, hereinafter referred to as the "order." The marketing agreement and order are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act."

The Department is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review the Secretary's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

Under the order, tomatoes produced in the production area and shipped to fresh market channels outside the regulated area are required to meet grade, size, inspection, and container requirements. These requirements apply during the period October 10 through June 15 each year. Current requirements include a minimum grade of U.S. No. 2 and a minimum size of  $2\frac{29}{32}$  inches in diameter. Current pack and container requirements outline the types of information that need to appear on a container, weight restrictions, and other requirements containers must meet.

Section 966.52 of the order provides authority for the modification, suspension, and termination of regulations. It includes the authority to establish and modify size and pack requirements for tomatoes grown in the defined production area and handled under the order.

Section 966.323 of the order's rules and regulations specifies the handling regulations for Florida tomatoes. Section 966.323(a)(2)(i) currently specifies that all tomatoes packed by a registered handler must meet a minimum size

requirement of  $2\frac{29}{32}$  inches in diameter. That section also requires that all such tomatoes must be sized with proper equipment in one of three numeric size designations with specified ranges of diameter. Tomatoes designated as "6x67" must be a minimum of  $2\frac{29}{32}$  inches in diameter and a maximum of  $2\frac{19}{32}$ . These are the smallest tomatoes marketed. Tomatoes, other than producer field-packed tomatoes, designated as "6x66" must be a minimum of  $2\frac{17}{32}$  inches in diameter and, prior to the issuance of the interim final rule, a maximum of  $2\frac{27}{32}$  inches in diameter. The interim final rule changed that maximum to  $2\frac{29}{32}$ . Tomatoes designated as "5x6" must be a minimum of  $2\frac{25}{32}$  inches in diameter with no maximum size requirement. These are the largest size marketed. To allow for variation incident to proper sizing, not more than a total of 10 percent, by count, of the tomatoes in the lot may be smaller than the specified minimum diameter or larger than the maximum diameter.

This rule continues in effect the increase in the maximum diameter prescribed for size 6x66 tomatoes by  $\frac{2}{32}$  of an inch, from  $2\frac{27}{32}$  inches to  $2\frac{29}{32}$  inches. This will allow handlers the option of packing slightly larger tomatoes in a 6x66 container. This increased flexibility in packing tomatoes is expected to allow handlers to pack some of the smaller 5x6 tomatoes into 6x66 containers. This is expected to increase the number and availability of containers of 6x66 tomatoes, which are often in short supply, and improve the uniformity of the 5x6-sized tomatoes. The Committee unanimously recommended this change at a meeting held on September 8, 2000.

Based on an analysis of markets and demands of buyers, the Committee believes that the increase in the maximum diameter for size 6x66 tomatoes will improve the marketing of Florida tomatoes, provide handlers with additional flexibility in packing tomatoes, and help improve grower returns. Recent industry trends have been toward shipping larger tomatoes. In response to a strong consumer demand, new commercial tomato varieties have been planted to produce bigger tomatoes and have resulted in more large sized tomatoes being shipped. Because of this demand, production of larger tomatoes has been a popular method of improving returns among producers as it also increases total yields. Increasing the 6x66 maximum diameter provides handlers the option of shifting the smallest sized tomatoes in a 5x6 pack to a 6x66 pack. By making this shift, handlers will be

able to increase the average size in both the 6x66 and the 5x6 pack.

The  $\frac{3}{32}$  inch increase in the maximum diameter of the 6x66-size designation results in a  $\frac{1}{32}$  overlap in the maximum diameter of the 6x66 and the minimum size for the 5x6. Tomatoes at the bottom of the 5x6 size can either be packed as 5x6 tomatoes or as 6x66 tomatoes. According to the Committee, this will provide for greater distribution of tomato shipments throughout the two size designations, enabling handlers to make better decisions on which size of tomatoes to pack. Such packing decisions could depend on specific buyer or market demands, on general crop size, or on prices.

Shifting the smallest sizes from the 5x6 pack to the 6x66 pack would increase the average size in both the 6x66 and the 5x6 packs. It would move larger tomatoes into the 6x66 pack while providing space for additional larger tomatoes in the 5x6 pack. This would lower the count of tomatoes for each pack as well. In its discussions, the Committee recognized that buyers prefer larger tomatoes and a lower count per box. With buyer preferences trending toward larger sized tomatoes, the Committee believes that having this option could help grower returns.

This change also makes more tomatoes available to fill the 6x66 pack. In past years, there have been shortages of this pack due to tomato size. Committee members stated that during the past season there were periods when the tomatoes were sizing so well they were having trouble packing many 6x66 packs. The Committee recognized that there is a strong demand for the 6x66 pack and that it brings a favorable price, occasionally equal to or above the price for a 5x6 pack. Therefore, the Committee believes that it is important to continue to supply this market. With the option of shifting slightly larger tomatoes into the 6x66 pack, handlers have more flexibility to move tomatoes to meet market demand. This will be particularly beneficial when the majority to tomatoes are sizing well.

In addition, the Committee also believes that raising the maximum diameter for the 6x6 pack could improve the uniformity of tomatoes in the 5x6 pack. While increasing the maximum diameter of the 6x6 pack does increase the size range, the increase is only by  $\frac{2}{32}$  of an inch. Further, shifting the smaller sizes from a 5x6 pack to the 6x6 pack could improve the uniformity of the 5x6 pack, which is expected to be viewed as a benefit to buyers.

Because there is no upper limit on size for a 5x6 pack, there can be a considerable variation in size. With

newer tomato varieties producing larger fruit, the size variance in containers of 5x6 tomatoes has grown. This size variation is particularly evident with the smaller sizes in the pack. By having the opportunity to shift the smaller sizes to the 6x6 pack, handlers will be able to improve the uniformity of their 5x6 packs. This is particularly important because the 5x6 pack usually commands the best price in the market, faces the most competition, and is the most popular size.

During the 1999–2000 season, approximately 58 percent of the Florida tomatoes sold were 5x6 packs, and about 28 percent were sold as 6x6's. Increasing the maximum diameter size of the 6x6 by  $\frac{2}{32}$  inch will give handlers the flexibility to reduce the number of smaller sized tomatoes packed in the 5x6-size designation.

A study conducted by Dr. John J. VanSickle at the University of Florida indicates that increasing the maximum diameter could result in an increase in the prices received for Florida tomatoes. The study indicates that if 1 percent of the smallest 5x6 size tomatoes are shifted into the smaller size categories, then prices for 5x6 size tomatoes could increase by .25 percent. With regard to 6x6 size tomatoes, the study indicates that the prices could increase by .15 percent. The increase in price would occur because of the redistribution of larger sized tomatoes into the smaller size designations, which is a response to consumer demand for a more consistent pack and slightly larger tomatoes.

Committee members do not believe that this change will create any confusion on the part of buyers. Rather, they stated that this change allows handlers more opportunity to address the demands of their buyers.

Consumers and buyers are demanding a slightly larger tomato. Smaller tomatoes with a less uniform pack have poor consumer acceptance, especially in chain stores. This change provides handlers with some flexibility to adjust the size composition and uniformity of their packs to address the needs of their customers.

This change does not affect the current exemption provided to producer field packed tomatoes as long as the containers are designated as 6x6 and larger. Specifically, field packed tomatoes designated as size 6x6 and larger are not subject to the maximum diameter specified in the order's rules and regulations for 6x6 sized tomatoes (65 FR 8247, February 18, 2000).

Section 8e of the Act requires that whenever grade, size, quality, or maturity requirements are in effect for certain commodities under a domestic

marketing order, including tomatoes, imports of that commodity must meet the same or comparable requirements. However, the Act does not authorize the imposition of container requirements on imports, when such requirements are in effect under a domestic marketing order. Florida tomatoes must be packed in accordance with three specified size designations, and tomatoes falling into different size designations may not be commingled in a single container. These pack restrictions do not apply to imported tomatoes. Therefore, no change is necessary in the tomato import regulation as a result of this action.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this 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 the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 70 handlers of Florida tomatoes who are subject to regulation under the marketing order and approximately 130 tomato producers in the regulated area. Small agricultural service firms are defined by the Small Business Administration (SBA) as those having annual receipts of less than \$5,000,000, and small agricultural producers are defined as those having annual receipts of less than \$500,000 (13 CFR 121.201).

Committee data indicates that approximately 20 percent of the Florida tomato handlers handle 80 percent of the total volume. Based on the industry and Committee data, the average annual price for fresh Florida tomatoes during the 1999–2000 season was \$6.89 per 25-pound carton or equivalent, and total fresh shipments for the 1999–2000 season were 58,006,721 25-pound equivalent cartons of tomatoes. Based on this information, the majority of handlers would be classified as small entities as defined by the SBA. The majority of producers of Florida tomatoes may also be classified as small entities.

This rule continues in effect an increase in the maximum diameter requirement for size 6x6 tomatoes prescribed in the order's handling

regulations from 2<sup>27/32</sup> inches to 2<sup>29/32</sup> inches, and will allow handlers the option of packing slightly larger tomatoes in a 6x6 container. With this increased flexibility, handlers will be able to better meet consumer demand for larger tomatoes, while providing greater returns to growers. The Committee unanimously recommended this change. Authority for this action is provided in § 966.52.

If handlers take advantage of the increased packing flexibility, they would incur direct costs associated with the purchase of new sizing belts. Sizing belts convey and size fruit during the packing process. Depending on the amount of use, sizing belts can last a season or may need to be replaced two to three times a season. Estimated prices associated with these purchases could range from \$450.00 for a small handler to \$19,000 for very large handlers. While there are short-term costs associated with the maximum diameter of the 6x6 sizing designation, the benefits are expected to outweigh the costs. Moreover, changing sizing belts is a routine action since they have to be regularly replaced depending on use. These costs are expected to be minimal relative to the benefits expected, and in relation to normal operating costs and procedures.

A study conducted by Dr. John J. VanSickle at the University of Florida estimates that a shift of 1 percent of 5x6 tomatoes into the smaller size categories would increase the prices for 5x6-size tomatoes by .25 percent. For 6x6's, the price could increase by .15 percent. The increase in price would occur in response to consumer demand for packs with slightly larger tomatoes.

This change is designed to provide handlers with more flexibility as to how sizes are packed. Because of this, handlers can choose to continue to pack as they have without making any adjustments due to this rule change. Purchasing new equipment is not necessary to remain in compliance with order provisions. Therefore, this rule places the decision with the individual handler as to whether the costs are outweighed by the benefits.

Individual seasons and different periods during the same season can present a fair amount of variability in production and size. This change provides handlers with some additional flexibility when packing for size to allow handlers to make some adjustments in order to maximize returns and to service customer demand. This rule provides the opportunity for handlers to make adjustments based on market

conditions. This should have a positive effect on returns.

The Committee recommended these changes to improve the marketing of Florida tomatoes. The opportunities and benefits of this rule are expected to be equally available to all tomato handlers and growers regardless of their size of operation. This action will have a beneficial impact on producers and handlers since it will allow tomato handlers more flexibility in making tomatoes available to meet consumer needs consistent with crop and market conditions.

The Committee discussed alternatives to this recommendation, including leaving the regulations as currently issued. All Committee members agreed that this change would be helpful in improving pack appearance and in providing handlers some additional flexibility. Therefore, the Committee voted to make this change rather than leave the size designation for 6X6 unchanged.

This rule will not impose any additional reporting or recordkeeping requirements on either small or large tomato 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, as noted in the initial regulatory flexibility analysis, the Department has not identified any relevant Federal rules that duplicate, overlap or conflict with this rule.

Further, the Committee's meeting was widely publicized throughout the tomato industry and all interested persons were invited to attend the meeting and participate in Committee deliberations. Like all Committee meetings, the September 8, 2000, meeting was a public meeting and all entities, both large and small, were able to express their views on this issue.

Also, the Committee has a number of appointed subcommittees to review certain issues and make recommendations to the Committee. The Committee's Marketing Subcommittee met on August 21, 2000, and discussed this issue in detail. That meeting was also a public meeting and both large and small entities were able to participate and express their views.

An interim final rule concerning this action was published in the **Federal Register** on November 6, 2000. Copies of the rule were mailed by the Committee's staff to all Committee members and tomato handlers. In addition, the Office of the Federal Register made the rule available through the Internet. That rule provided for a 60-day comment period,

which ended January 5, 2001. No comments were 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/fv/moab.html>. Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant material presented, including the Committee's recommendation, and other information, it is found that finalizing the interim final rule, without change, as published in the **Federal Register** (65 FR 66492, November 6, 2000) will tend to effectuate the declared policy of the Act.

#### List of Subjects in 7 CFR Part 966

Marketing agreements, Reporting and recordkeeping requirements, Tomatoes.

#### PART 966—TOMATOES GROWN IN FLORIDA

Accordingly, the interim final rule amending 7 CFR part 966 which was published at 65 FR 66492 on November 6, 2000, is adopted as a final rule without change.

Dated: February 28, 2001.

**Kenneth C. Clayton,**

*Acting Administrator, Agricultural Marketing Service.*

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#### DEPARTMENT OF AGRICULTURE

##### Agricultural Marketing Service

#### 7 CFR Part 982

[Docket No. FV01-982-1 IFR]

#### Hazelnuts Grown in Oregon and Washington; Establishment of Interim and Final Free and Restricted Percentages for the 2000-2001 Marketing Year

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

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

**SUMMARY:** This rule establishes interim and final free and restricted percentages for domestic inshell hazelnuts for the 2000-2001 marketing year under the Federal marketing order for hazelnuts grown in Oregon and Washington. The percentages allocate the quantity of domestically produced hazelnuts which may be marketed in the domestic inshell market. The percentages are intended to